

**COMPETITION AND MERGER LAW  
AND PRACTICE IN IRELAND –  
1953 to 2002**

**PATRICK M. LYONS**

## CONTENTS

	<b>Page</b>
PREFACE	8
LEGISLATION	10
Primary Legislation	10
Implementing Orders and Regulations	11
<b>PRIMARY LEGISLATION: THE DEVELOPMENT OF COMPETITION LAW</b>	
FROM 1953 TO 2002	13
The Restrictive Trade Practices Act of 1953	13
The Amending Act of 1959	17
The Restrictive Practices Act, 1972	18
The Amending Act of 1987	22
Monopoly Control Provisions in the Mergers, Take-Overs and Monopolies (Control) Act, 1978	25
The Amending Act of 1987	27
The Competition Act, 1991	28
The Amending Act of 1996	36
The Competition Act, 2002	41
Competition (Amendment) Act 2006	46
<b>PRIMARY LEGISLATION: THE DEVELOPMENT OF THE LAW</b>	
<b>RELATING TO THE CONTROL OF MERGERS AND TAKEOVERS</b>	
FROM 1978 TO 2002	47
The Mergers, Take-Overs and Monopolies (Control) Act, 1978	47
The Amending Act of 1987	51
The Competition Act, 1991	52
The Amending Act of 1996	55
The Competition Act, 2002	56

THE FAIR TRADE COMMISSION/RESTRICTIVE PRACTICES	
COMMISSION, 1953 – 1991	62
Membership of the Commission	62
Annual Reports of the Commission	65
Fair Trading Rules	67
Reports of Enquiries, Orders Made and Reviews of Orders Under the 1953 Act	72
Reports of Enquiries	72
Restrictive Trade Practices Orders	74
Reports of Enquiries, and Orders Made, 1953 to 1972	75
Reports on the Operation of Orders	79
Reports of Enquiries, Reviews and Studies, and Orders Made, Under the 1972 Act, and Other Legislation	80
Groceries – Reports of Enquiries and Orders Made, 1956 to 1991	81
Groceries Enquiries	81
Groceries Orders	81
Groceries - Reports of Enquiries and Orders Made	82
Motor Spirit – Reports of Enquiries and Orders Made, 1956 to 1991	103
Motor Spirit Enquiries	103
Motor Spirit Orders	103
Motor Spirit – Reports of Enquiries, the Guiding Principles and Orders Made, 1956 to 1991	105
Reports of Other Enquiries and Studies and Subsequent Developments	123
Reports of Other Enquiries	123
Reports of Studies by the Commission	124
(a) General	124
(b) The Professions	125
Other Orders Made	126
Reports and Subsequent Developments	127
Trading Stamps	127
Cinema Films	129
Newspapers and Magazines	133
Restrictions on Conveyancing and Restrictions on Advertising by Solicitors	136

Statutory Restrictions on the Provision of Dental Prostheses	141
Tour Operators and Travel Agents	144
Building Societies – Insurance and Valuation Reports	149
Pyramid Selling	152
Studies into Industrial Concentration and Mergers	154
Legislation on Competition Policy	157
Roadside and Similar Types of Trading	158
Competition in the Licensed Drink Trade	165
Cable Television Systems in Dublin	170
Report on Alleged Differences in Retail Grocery Prices between the Republic of Ireland and the United Kingdom (including particularly Northern Ireland)	174
Study of Competition Law	176
National Lottery	179
Regulation of Taxi Services	180
Studies into the Rendering of Certain Professional and Analogous Services	181
The Commission’s General Approach to Competition in the Professions	182
Report of Study into Concerted Fixing of Fees and Restrictions on Advertising in the Accountancy Profession	185
Report of Study into the Concerted Fixing of Fees and Restrictions on Advertising in the Engineering Profession	188
Patent and Trade Mark Agents	191
Architects, Surveyors, Auctioneers and Valuers Professions	191
Study of Restrictive Practices in the Legal Profession	192
Amendments to the Solicitors Act and Regulations	202
Other Relevant Legislation	212
Other Developments Relating to Barristers	216
Joint Education	217
Other Work Undertaken by the Commission or Its Members	218
Reports	218
National Prices Commission	219
Organisation for Economic Cooperation and Development	219
Commission of the European Communities	220

Article in Journal	220
Complaints and Legal Proceedings	221
Investigation of Complaints	221
Legal Actions	221
Prosecution	222
THE EXAMINER OF RESTRICTIVE PRACTICES	223
Annual Reports of the Examiner of Restrictive Practices	224
Requests by the Examiner to the Commission	225
Reports by the Examiner to the Minister	227
Reports to the Minister Regarding Breaches of Orders	230
Other Investigations and Complaints	233
Legal Challenges	234
Other Work of the Examiner	235
Organisation for Economic Cooperation and Development	235
Commission of the European Communities	235
DIRECTOR OF CONSUMER AFFAIRS (AND FAIR TRADE)	236
Annual Reports of the Director of Consumer Affairs and Fair Trade	236
Annual Reports of the Director of Consumer Affairs	236
The Activities of the Director	237
The Groceries Order	237
Other Activities of the Director	240
Alcoholic Drinks Order	240
Building Materials Order	240
Motor Spirit Order	240
Other Investigations	241
EU Commission/OECD	243
THE COMPETITION AUTHORITY	244
Membership of the Competition Authority	244
Annual Reports of the Authority	246
Notifications to and Decisions by the Authority, 1991 –2002	247
(a) Notifications, 1991 – 2002	248

(b) Decisions, 1991 – 2002	249
(c) Notifications Withdrawn and Rejected, 1991 – 2002	250
(d) Decisions Taken by the Authority, 1991 – 2002	251
Competition Authority Notices	252
Category Licences and Certificates	255
Competition Authority Decisions, Nos. 1 to 596	256
Guideline Brochures	446
Information Booklets	449
Discussion Papers	451
Other Authority Publications	458
Some Other Work of the Authority	472
Conferences Organised	479
Visits from Foreign Competition Authorities	480
Training of Officials from Abroad	481
Miscellaneous	482
Enforcement Activities of the Authority, 1996 to 2002	484
Searches of Premises	486
Main Enforcement Proceedings	487
Other Enforcement Activities	490
Contact with Other Authorities and the Cartel Immunity Programme	492
European Union Competition Law	493
Organisation for Economic Cooperation and Development	494
<b>MERGER CONTROL FROM 1978 TO 2002</b>	495
Introduction	495
Annual Merger Reports by the Minister	496
Merger Notifications, 1978 to 2002	497
(a) Merger and Takeover Notifications, 1978 – 2002	498
(b) Mergers and Takeovers Analysed According to Nationality, 1985 – 2002	500
Merger Referrals and Reports Not Published, 1978 –1987	501
Merger Orders, 1978 – 1987	505
Mergers Referred to Commission and Reports Not Published, 1988 – 1991	507
Merger Orders, 1988 – 1991	513

Merger Reports Published, 1991 – 2002	516
Merger Orders, 1991 – 2002	524
Other Merger Matters	527
Mergers Under Section 4 of the 1991 Act	529
THE COMPETITION AND MERGERS REVIEW GROUP	532

## PREFACE

The year 2003 constituted an important milestone in the history of competition law in Ireland. It was fifty years since the first competition legislation was enacted – the Restrictive Trade Practices Act, 1953 – one of the first in the world. By an interesting coincidence, 2003 also marked the twenty-fifth anniversary of the introduction of merger control in Ireland under the Mergers, Take-Overs and Monopolies (Control) Act, 1978, again one of the world’s first examples of merger control.

To mark the double occasion, Pat Massey, Moore McDowell and Paddy Lyons presented a joint paper to the Dublin Economics Workshop Annual Economic Policy Conference in Kenmare on 11 October 2003 – “Boston v Berlin. Fifty Years of Irish Antitrust”. The paper described Irish experience of competition policy in three stages – 1953 to 1978, from 1978 to 1991, and the period after 1991, and it offered some suggestions about possible changes in policy.

The present author considered that it would also be desirable to undertake an in-depth study of competition law and its implementation in Ireland since 1953. This study aims to present a comprehensive archive of the legislation and the work done by the Fair Trade Commission and the Restrictive Practices Commission, by the Examiner of Restrictive Practices and the Director of Consumer Affairs (and Fair Trade), and, since 1991, by the Competition Authority.

The study starts by describing in detail the development of competition law in Ireland from 1953 to 2002, and the development of merger control law from 1978 to 2002. This is followed by a description of the work of the Fair Trade Commission and the Restrictive Practices Commission from 1953 to 1991, particularly in relation to reports of enquiries and the consequential Ministerial Orders, with especial reference to the grocery and motor spirit sectors. There is also included an account of studies by the Commission, and subsequent developments, including legislative changes, such as the Solicitors (Amendment) Act, 1994. The work of the Examiner of Restrictive Practices and that of the Director of Consumer Affairs (and Fair Trade), where relevant, is summarised as well.

There is then an extensive treatment of the work of the Competition Authority from 1991 to 2002, principally the treatment of agreements notified under the 1991 Act. A summary is given of all decisions by the Authority, and there is an outline of other activities of the Authority, including enforcement activity since 1996.

The final main section of the study examines merger control from 1978 to 2002, involving investigations and reports into notified mergers, and ensuing Ministerial Orders. Reports of merger investigations by the Examiner or the Director, between 1978 and 1987, were not published, nor were reports by the Commission between 1987 and 1991. Merger reports by the Competition Authority between 1991 and 2002, however, were published.

The period covered by the study ends with the coming into force of the Competition Act, 2002, which represented an important watershed in Irish competition law. The competition provisions commenced in mid-2002, and the merger provisions at the start of 2003. Mention is made, however, of some more important developments after 2002, such as the revocation of the Groceries Order in 2006.

The study is intended to be a factual archive of competition law and policy, rather than a critical examination of their relevance and effectiveness.

The author wishes to thank officials from the Department of Enterprise, Trade and Employment and from the Competition Authority, and other persons, for their assistance. Responsibility for any errors or omissions is that of the author alone.

**Patrick M. Lyons.**

**March 2007.**

## **LEGISLATION**

### **PRIMARY LEGISLATION**

Restrictive Trade Practices Act, 1953. (No. 14 of 1953).

Restrictive Trade Practices (Amendment) Act, 1959. (No. 37 of 1959).

Restrictive Practices Act, 1972. (No. 11 of 1972).

Restrictive Practices (Amendment) Act, 1987. (No. 31 of 1987).

Competition Act, 1991. (No. 24 of 1991).

Competition (Amendment) Act, 1996. (No. 19 of 1996).

Competition Act, 2002. (No. 14 of 2002).

Mergers, Take-Overs and Monopolies (Control) Act, 1978. (No. 17 of 1978).

With the coming into full effect of the Competition Act, 2002, all previous legislation was repealed, together with all Orders, Regulations, etc., made under that legislation, except for:

- (a) the Groceries Order, 1987;
- (b) merger prohibition orders under the 1978 Act; and
- (c) category licences for agreements granted under the 1991 Act.

Competition (Amendment) Act 2006. (No. 4 of 2006).

**IMPLEMENTING ORDERS AND REGULATIONS**

Restrictive Practices (Amendment) Act, 1987 (Commencement) Order, 1988. (S.I. No. 2 of 1988).

Competition Act, 1991 (Commencement) Order, 1991. (S.I. No. 249 of 1991).

Competition (Notification Fee) Regulations, 1991. (S.I. No. 250 of 1991).

Competition Act, 1991 (Notice of Licences and Certificates) Regulations, 1992. (S.I. No. 76 of 1992).

Competition Act, 1991 (Section 6(2)(b)) (Commencement) Order, 1992. (S.I. No. 299 of 1992).

Competition Act, 1991 (Notice of Licences and Certificates) Regulations, 1993. (S.I. No. 293 of 1993).

Competition (Notification Fee) Regulations, 1996. (S.I. No. 379 of 1996).

Competition Authority (Witness Summons) Regulations, 1999. (S.I. No. 137 of 1999).

Competition Act, 2002 (Commencement) Order, 2002. (S.I. No. 199 of 2002).

Mergers, Take-Overs and Monopolies (Newspapers) Order, 1979. (S.I. No. 17 of 1979).

Mergers, Take-Overs and Monopolies (Control) Act, 1978 (Section 2) Order, 1985. (S.I. No. 230 of 1985).

Mergers, Take-Overs and Monopolies (Control) Act, 1978 (Section 2) Order, 1993. (S.I. No. 135 of 1993).

Merger or Take-over (Notification Fee) Regulations, 1996. (S.I. No. 381 of 1996).

Competition Act 2002 (Section 18(5)) Order 2002. (S.I. No. 622 of 2002).

Competition Act 2002 (Notification Fee) Regulations 2002. (S.I. No. 623 of 2002).

**PRIMARY LEGISLATION: THE DEVELOPMENT OF COMPETITION  
LAW FROM 1953 TO 2002**

*Restrictive Trade Practices Act, 1953*

Following the introduction of the legislation in 1952, the first statutory provision dealing with restrictive practices – the Restrictive Trade Practices Act, 1953 (No. 14 of 1953) – came into operation in 1953. The Act did not prohibit any specific trade practice, though it was based on the principle that associations of traders should not arrogate to themselves the right to restrict entry to trade or to maintain prices. The legislation provided for a case by case approach in line with what is termed the “control of abuse” principle. The Act contained, for guidance, a list of unfair trade practices, which was not intended to be exhaustive. This list covered restrictive measures, rules, agreements and acts by a person acting alone or in combination with others. The Act was confined to the “supply and distribution” of goods, including ancillary services, so that manufacturing activities were outside its scope.

The 1953 Act established the Fair Trade Commission, which consisted of a Chairman and from two to four other members, appointed by the Minister for Industry and Commerce. The term of appointment was for five years, with the possibility of re-appointment. Besides these permanent members, the Minister could also appoint temporary members to the Commission.

The Act established two main procedures for eliminating restrictive practices: the making of Fair Trading Rules and the holding of Public Enquiries. The Commission also attempted to resolve complaints by way of informal discussion with the parties concerned, a procedure which increased in importance over time.

*Fair Trading Rules*

On its own initiative or at the request of a trade association, the Commission could make Fair Trading Rules. The Rules represented, in the opinion of the Commission, fair trading conditions in the supply and distribution of any kind of goods, including ancillary services. The Rules did not have the force of law but the Act provided that,

where the Rules were not being observed, the Commission could report this to the Minister, following which the Minister could make an order which, if confirmed by the Oireachtas, would have the force of law. (No order was ever made, however, on this basis). The Commission was required to publish notice of its intention to make Rules to allow interested parties to make representations about them. The Commission was also required to keep the operation of the Rules under review.

### *Public Enquiries*

A much more important procedure was the holding of a Public Enquiry. The Commission might, on its own initiative, and must, at the request of the Minister, hold a public enquiry into the conditions obtaining in respect of the supply and distribution of goods (including ancillary services). Provision was made for private sessions to avoid the disclosure of confidential information (e.g. accounts or costings). The Commission could summon witnesses to give evidence on oath at an enquiry and require the production of documents. The Act provided that, if a person refused to attend as a witness or to answer a question or to produce documents, the Commission could certify this as an offence to the High Court which, after proper enquiry, could punish the offender as if this were a contempt of court. (In 1971, an identical provision in another Act was found to be unconstitutional, thus necessitating amendment of this legislation).

The Commission was required to submit a report on every enquiry to the Minister. The report had to describe the conditions of supply and distribution of the relevant goods and of any ancillary services. It also had to state whether the conditions “prevent or restrict competition or restrain trade or involve resale price maintenance”, and whether any such interference with competition was unfair or operated against the public interest. The Commission had to give reasons for its conclusions. If the Commission considered that the Minister should make an order, it should indicate the form of order recommended. The Minister was obliged to publish each report, by laying it before the Houses of the Oireachtas, though confidential information could be omitted.

The Minister, having considered the report, might make an order, under section 9 of the Act, accepting some or all of the Commission's recommendations. The Minister could also, by order, revoke or amend an order. The order had to be confirmed by the Oireachtas before being afforded the force of law. The order could be accepted or rejected as a whole by the Oireachtas, but not amended. If the Minister decided not to make an order recommended by the Commission, he was required to lay before the Oireachtas a statement giving the reasons for his decision.

The Schedule of Unfair Trade Practices was as follows:

“Any measures, rules, agreements or acts whether put into effect or intended to be put into effect by a person alone or in combination or agreement, express or implied, with others or through a merger, trust, cartel, monopoly or other means or device whatsoever which –

- (a) have or are likely to have the effect of unreasonably limiting or restraining free and fair competition, or
- (b) are in unreasonable restraint of trade, or
- (c) have or are likely to have the effect of unjustly eliminating a trade competitor, or
- (d) unjustly enhance the price of goods or promote unfairly the advantage of suppliers or distributors of goods at the expense of the public, or
- (e) secure or are likely to secure a substantial or complete control of the supply or distribution of goods or any class of goods unfairly or contrary to the public interest, or
- (f) without just cause prohibit or restrict the supply of goods to any person or class of persons or give preference in regard to the provision of, or the placing of orders for the supply of, goods, or
- (g) restrict or are likely to restrict unjustly the exercise by any person of his freedom of choice as to what goods he will supply or distribute or the area in which he will supply or distribute his goods, or
- (h) impose unjust or unreasonable conditions in regard to the supply or distribution of goods, or
- (i) exclude or are likely to exclude without good reason new entrants to any trade or industry, or

- (j) secure or are likely to secure unjustly the territorial division of markets between particular persons or classes of persons to the exclusion of others, or
- (k) in any other respect operate against the public interest or are not in accordance with the principles of social justice.”

This list was added at the instance of the Opposition during the passage of the legislation. It was intended for the guidance of the Commission and was not to be taken as limiting the Commission in its deliberations. It will be noted that each subparagraph, except the last, is qualified by a word or phrase such as “unreasonably”, “unjustly” or “without just cause”.

#### *Other Features of the Act*

The Court was given jurisdiction to grant an injunction at the request of the Minister or of any other person to enforce compliance with the terms of an order. The Act stated that any person, including a body corporate, who contravened any provision of an order, whether by act or omission, was guilty of an offence. The penalties specified for the commission of an offence, either on summary conviction or on conviction on indictment, included a fine and/or imprisonment. Provision was also made for continuing offences. Summary proceedings could be brought and prosecuted by the Minister in the District Court, but the Commission had no powers of enforcement. The Act did not apply to anything done in the exercise of statutory duty.

Besides its powers to summon and examine witnesses, the Commission could also appoint “authorised officers” to enter premises, to examine documents and records, and to require the giving of information. Failure to comply was declared to be an offence. The Commission was required to keep under review the general effect on the public interest of restrictive practices and the operation of orders. It was also required to make an annual report of its proceedings to the Minister, who then had to publish it.

It is interesting that some of the provisions of the 1953 Act are contained *verbatim* in all subsequent legislation, including the Competition Act 2002.

### *The Amending Act of 1959*

Following consideration of the operation of the Act, the Commission concluded that certain modifications were desirable. Even if only one particular aspect of supply or distribution was of concern, for example, the Act required that the enquiry had to cover all aspects of supply and distribution.

The Restrictive Trade Practices (Amendment) Act, 1959 (No. 37 of 1959) provided for an enquiry to be held into the conditions which obtained in regard to one or more aspects of the supply and distribution of one or more kinds of goods, or into one or more aspects of the operation of an order. This amendment also permitted the Commission to examine a particular practice applying over an extensive range of products, but it was never used.

The Commission was empowered to hold a special review of the operation of an order as a whole or in respect of particular aspects.

The Commission was also enabled, at the request of the Minister, to hold an enquiry into the actual or alleged refusal by employers or employees to use particular materials or methods for manufacturing or construction purposes. While the Commission had to submit a report of such an enquiry, no provision was made for the making of orders. In the event, the Minister never requested the holding of an enquiry under this section of the amending Act.

### ***The Restrictive Practices Act, 1972***

The Acts of 1953 and 1959 were repealed and replaced by the Restrictive Practices Act, 1972 (No. 11 of 1972). The new Act continued to be based on the control of abuse principle, and it retained many of the main procedures of the earlier Acts, but it introduced some important changes.

Under the 1953 Act, the only services covered were those which were directly related to the distribution of goods. The National Industrial Economic Council, in its Report on Full Employment, published in January 1967 (Report No. 18, Pr 9188, page 77), expressed concern at the fact that restrictive practices in the professions were not subject to scrutiny. The 1972 Act extended the scope of the legislation to services, including professional services. Some important services were explicitly excluded from the Act – banking, electricity and transport, services provided under a contract of employment and services provided by a local authority. Otherwise, the Act continued to be restricted to the supply and distribution of goods, including ancillary services.

The second major change arose because of criticism from the Federation of Trade Associations arising from an enquiry into electrical goods in 1968. It objected to the fact that the Commission had the functions of both investigation and adjudication under the 1953 Act. The new Act separated these functions and created the statutory office of Examiner of Restrictive Practices. The term of office was set at a maximum of five years, but the Examiner could be re-appointed. The Examiner was given the sole responsibility for investigation, including the investigation of complaints. While the Examiner could act on his own initiative, he had to undertake an investigation when requested by the Minister. The Examiner was also made responsible for supervising the operation of Orders and Fair Trading Rules. Existing Orders were deemed to be operative under the 1972 Act. The powers of the Commission to appoint authorised officers with authority to enter premises, and to obtain information relevant to an investigation, were transferred to the Examiner (though power was given to the owner of a premises to apply to the High Court for a declaration that the powers of the Examiner should not be exercised).

The powers of the Commission, which was re-named the Restrictive Practices Commission, were essentially confined to adjudication. It was not empowered to undertake enquiries solely on its own initiative. Essentially, an enquiry could only be held when the Examiner, following investigation and report, required the Commission to hold an enquiry, or when required by the Minister, whose requirement had to be conveyed to the Commission in a report by the Examiner. The Minister could not bypass the Examiner in requesting the Commission to hold an enquiry. The only exception to this procedure was that, if the Examiner refused to ask the Commission to hold an enquiry at the request of any party, that party could appeal to the Commission, which could accede to the request. If a breach of an order was discovered by the Examiner, he had to report this to the Minister. He could request the Commission to undertake a special review of an order, and he had to do so if requested by the Minister. If the Examiner refused to ask the Commission to hold a special review at the request of any person, that person had the right of appeal to the Commission as described above. The powers of the Commission to obtain information in the course of enquiries remained the same as before.

As in the previous Acts, an enquiry could be general in scope or it could relate to particular aspects of the supply of goods or the provision of services. On announcing an enquiry, the Commission had to furnish a copy of the Examiner's report to any interested person. The Examiner's report was admissible in evidence at an enquiry, and the Examiner could give evidence and call and examine witnesses. The content of a report of an enquiry was expanded compared to the 1953 Act. The Commission was also asked to state whether, in its opinion, the conditions in a trade or service involved "practices (including arrangements, agreements or understandings) or methods of competition (whether or not relating to price) which are unfair or operate against the public interest".

The procedure for making and confirming, and revoking or amending, ministerial orders remained the same as in the previous Acts. It was provided that a court could grant an injunction on the motion of the Minister or of any other person to enforce compliance with the terms of an order. Summary proceedings for offences continued to be able to be brought only by the Minister (though breaches were seldom prosecuted). Contravention of an order was again declared to be an offence, and was

subject to penalties including fines and/or imprisonment. The constitutional difficulty referred to above was addressed by providing that any person who refused to attend an enquiry as a witness or to answer a question or to produce documents was guilty of an offence.

Where the Minister requested the Examiner to undertake an investigation, the Examiner had to report the facts to the Minister without expressing an opinion on them. Where an investigation referred to activities within the State conducted by a person outside the State, the Examiner could furnish his report to the Commission, and he had to do so if the investigation had been requested by the Minister. An enquiry did not follow in such a case, but the Commission had to furnish the Minister with its observations on the Examiner's report and could make recommendations for appropriate action.

The procedure for making Fair Trading Rules was retained under the title of Fair Practice Rules, and it could be initiated by the Examiner or by a trade association, but not by the Commission.

The Commission was given a wide responsibility to "study and analyse (and report to the Minister when requested by him) the effect on the common good of methods of competition, types of restrictive practice, monopolies, the structure of any markets, amalgamation of, or acquisition or control of, bodies corporate, the operation of multinational companies and relevant legislation", including developments outside the State. No powers were provided, however, to require the provision of information.

It was made an offence for any person to induce or threaten any other person not to give evidence at an enquiry, by ceasing to trade or restricting trading with, or discriminating against, that other person.

The 1972 Act required the Examiner to make an annual report of his proceedings to the Minister, which had to be published. The requirement on the Commission to make an annual report, which was a feature of the 1953 Act, was not included in the 1972 Act.

The Schedule of Unfair Trade Practices was continued largely unchanged in the 1972 Act, under the title of Unfair Practices, and it applied to both the Commission and the Examiner in the exercise of their functions under the Act. The main changes reflected the extension of the scope of the Act to cover services as well as goods. The Schedule referred to: “Any measures, ....., which –

- (a) have or are likely to have the effect of unreasonably limiting or restraining free and fair competition,
- (b) are in unreasonable restraint of trade,
- (c) have or are likely to have the effect of unjustly eliminating a competitor,
- (d) unjustly enhance prices of goods or charges for services or promote unfairly at the expense of the public the advantage of suppliers or distributors of goods or of persons providing services,
- (e) secure or are likely to secure, unfairly or contrary to the common good, a substantial or complete control of the supply or distribution of goods or any class of goods or the provision of services or any class of services,
- (f) without just cause prohibit or restrict the supply of goods or the provision of services to any person or class of persons or give preference in regard to the supply of goods or the provision of services,
- (g) restrict or are likely to restrict unjustly the exercise by any person of his freedom of choice as to what goods or services he will supply or as to the area in which he will supply or provide goods or services,
- (h) impose unjust or unreasonable conditions in regard to the supply or distribution of goods or the provision of services,
- (i) without good reason exclude or are likely to exclude new entrants to any trade, industry or business,
- (j) secure or are likely to secure unjustly the territorial division of markets between particular persons or classes of persons to the exclusion of others, or
- (k) in any other respect operate against the common good or are not in accordance with the principles of social justice.”

### *The Amending Act of 1987*

As early as 1975, the Commission stated that existing legislation, that is the 1972 Act, required re-appraisal. It was suggested that certain unfair practices should be prohibited outright, in accordance with the prohibition approach in EEC competition law, with possible provisions for exemptions, together with the registration of agreements and more effective enforcement procedures.

The Commission also gave its opinion on the 1972 Act itself and its operation. In 1979, it suggested a review of the exemption of certain sectors, such as energy, transport and banking, from the application of restrictive practices legislation, noting developments in these areas elsewhere. These views were repeated more strongly in subsequent years.

In 1981, the Commission produced a retrospect of the operation of the 1972 Act. It pointed out that it was almost five years from the passage of the Act before the first recommendation for an enquiry was received from the Examiner, except for two reviews of existing Orders. The Commission was so under-occupied with its proper duties that it was necessary to find its members extraneous work, as specially constituted Prices Advisory Bodies. Not all the matters referred by the Examiner subsequently could be considered to have been of major importance. The Commission stated that hopes that the new procedures might lead to some speeding up of enquiries had not been realised. The value of studies would be limited since the Commission had no special powers to require the giving of information. The fact that enforcing orders was divided between the Examiner and the Minister was unsatisfactory; if the Examiner was responsible for both functions, enforcement would be speedier and more effective. In 1982, the Commission argued that it seemed to be more appropriate to orientate the thrust of amending legislation towards the ultimate consumer, rather than towards the small trader, as being the more secure way by which a general equity could be achieved and maintained. In 1984, it suggested the rationalisation into one body of the Commission, the Examiner, the National Prices Commission and the Office of the Director of Consumer Affairs, to promote greater competition and efficiency in the economy. These views were also repeated over subsequent years.

Some of these views were taken into account in the amending legislation in 1987 – the Restrictive Practices (Amendment) Act, 1987 (No. 31 of 1987) – which came into operation on 25 January 1988, under the Commencement Order of 1988 (S.I. No. 2 of 1988). While the basic principles underlying the Act remained unchanged, the amendments were profound and far-reaching. The Act contained amendments to other legislation and other matters not relevant to competition and mergers which are not dealt with here.

The functions of the Examiner were transferred to the Director of Consumer Affairs, whose title was changed to the Director of Consumer Affairs and Fair Trade. (The Director had in fact been acting Examiner for some time before the Act came into operation). Thus the separate office of the Examiner was abolished. The Commission was re-named the Fair Trade Commission.

Powers of initiative were restored to the Commission. The Commission was empowered to make Fair Practice Rules in respect of goods or services on its own initiative, as well as on the recommendation of the Director or at the request of a trade association. The Commission was also empowered to hold an enquiry or a special review of an order on its own initiative, as well as on the recommendation of the Director or at the request of the Minister. Requests from the Minister no longer had to be transmitted through the Director. The Commission, as well as the Director, was allowed to appoint authorised officers to enter premises, to inspect documents and to require information. The Commission was enabled to request the Director to undertake an investigation, in addition to the Minister's powers to request, and the Director's powers to initiate, an investigation.

The definition of "service" was widened to include any service, except any service provided by a local authority within the meaning of section 2 of the Local Government Act, 1941. All other exemptions were dropped. It was provided, however, that a service provided under a contract of employment could not be the subject of rules, an enquiry or an investigation, except with the prior approval in writing of the Minister, given with the consent of the Minister for Labour.

A time limit of four months was set for the Minister to publish a report of an enquiry or a special review. Where the Minister did not make an order within 12 months of receiving a report from the Commission recommending an order, he was required to lay before the Oireachtas a statement giving the reasons why he had not made the order.

Power was conferred upon the Director, as well as the Minister or any other person, to seek an injunction to enforce compliance with an order. It was provided that summary proceedings for an offence could be prosecuted by the Director rather than by the Minister. The maximum fines for offences were increased, but not the maximum terms of imprisonment.

The Minister was given powers to make an order without any prior enquiry and report from the Commission, but he was required to consult with the Commission, the Director and any other Minister concerned. The Minister could revoke or amend any order made under this provision. Each order had to be confirmed by the Oireachtas.

Finally, the Commission was given powers to require the production of documents or the giving of information in connection with a study or analysis.

***Monopoly Control Provisions in the Mergers, Take-Overs and Monopolies (Control) Act, 1978***

Provisions to control monopolies were introduced as part of the Mergers, Take-Overs and Monopolies (Control) Act, 1978 (No. 17 of 1978). A monopoly was defined as “an enterprise or two or more enterprises under common control, which supply or provide, or to which is supplied or provided, not less than one-half of goods or services of a particular kind supplied or provided in the State in a particular year, according to the most recent information available on an annual basis, but does not include any enterprise at least 90 per cent of whose output is exported from the State or any enterprise at least 90 per cent of whose output comprises components for products which are exported from the State”.

An enterprise was defined as “a person or partnership engaged for profit in the supply or distribution of goods or the provision of services”, including a society registered under the Industrial and Provident Societies Acts, or under the Friendly Societies Acts or under the Building Societies Act, or a holding company under the Companies Act.

While service included any professional service, it excluded services such as banking, electricity and transport (CIE, air and ancillary services, and road transport); harbour and pilotage authorities; any service provided under a contract of employment; and any service provided by a local authority.

The Act was deemed to apply to a monopoly where in the most recent year the monopoly’s sales or purchases of the goods or services concerned exceeded £1.5 million. The Minister was enabled to increase the turnover figure by order. The turnover figure was increased to £6 million in the Mergers, Take-Overs and Monopolies (Control) Act, 1978 (Section 2) Order, 1985 (S.I. No. 230 of 1985).

The 1978 Act provided that the Minister, where he was of the opinion that an enquiry should be held into an apparent monopoly, could request the Restrictive Practices Commission, through the Examiner of Restrictive Practices, to hold such an enquiry, and the Commission was obliged to comply with the request. A request from the Minister could be accompanied by a report, if any, provided by the Minister. The

Examiner could also make available to the Commission any relevant information in his possession. The Examiner already had power, under the 1972 Act, to state in a report to the Commission that he was of the opinion that a monopoly existed which should be the subject of an enquiry by the Commission.

A report of an enquiry, which was to be held in public under the 1972 Act, had to state whether the Commission considered that a monopoly existed; and, if so, whether it did, or was likely to, prevent or restrict competition or endanger the continuity of supplies or services or restrain trade or the provision of any service; and if so, whether any such feature would be unfair or operate or would operate against the common good.

Having considered a monopoly report from the Commission and if he thought that the exigencies of the common good so warranted, after consulting with any other Minister apparently concerned, the Minister could by order:

- (a) prohibit the continuance of the monopoly except on conditions specified in the order, or
- (b) require the division, in a manner and within a period specified in the order, of the monopoly by a sale of assets or as otherwise so specified.

An order had to state the reasons for making the order. Before making an order the Minister had to have regard to any relevant international obligations of the State. The Minister was enabled to revoke an order and could, with the agreement of the enterprise or enterprises concerned, amend an order. Each order had to be confirmed by Act of the Oireachtas.

An order could be appealed on a point of law to the High Court within one month of the coming into effect of the order by any enterprise referred to in the order. If the High Court allowed such an appeal, the Minister had to amend or revoke the original order as soon as practicable. Where the Minister made an order following an appeal, this did not require confirmation by the Oireachtas. An appeal against a decision of the High Court to the Supreme Court was expressly not allowed.

The Act provided that a court of competent jurisdiction could grant an injunction on the motion of the Minister or of any other person to enforce compliance with the

terms of a monopoly order. Contravention of an order was declared to be an offence, punishable, on summary conviction or on conviction on indictment, to a fine and/or imprisonment. Summary proceedings in relation to an offence could be prosecuted by the Minister. There was no obligation on the Minister to publish an annual report in respect of monopolies (whereas one was required in the same Act in respect of mergers).

### *The Amending Act of 1987*

Certain changes were made to the monopoly control provisions in the Restrictive Practices (Amendment) Act, 1987 (No. 31 of 1987). The definition of “service” was widened to remove most of the exemptions, but it still did not include banking services, any service provided under a contract of employment, or any service provided by a local authority. It was provided that an injunction to enforce compliance with an order could be granted on the motion of the Director of Consumer Affairs and Fair Trade, as well as on the motion of the Minister or of any other person. In addition, summary proceedings in relation to an offence could be prosecuted by the Director, and no longer by the Minister. On the other hand, while the functions of the Examiner under the 1978 Act in relation to a merger were transferred to the Commission, this was not done in relation to the Examiner’s duties regarding an apparent monopoly.

The monopoly control provisions of the 1978 Act, as amended, continued until they were repealed under the Competition Act, 1991, and were replaced by provisions relating to the abuse of a dominant position. It is of interest to note that not a single enquiry was ever held into an apparent monopoly, and accordingly no order was made under these provisions.

### *The Competition Act, 1991*

The Commission considered the advisability of declaring particular restrictive business practices to be unlawful, and the notification of restrictive agreements, but it concluded that there was no need to change the Acts at that time. It did point out in 1966, however, that the Anglo-Irish Free Trade Area Agreement, which came into operation on 1 July 1966, contained a provision declaring that anti-competitive arrangements and taking advantage of a dominant position within the area were incompatible with the agreement.

In 1975, an interim statement was submitted to the Department setting out the views of the Commission on the need for re-appraisal of the existing legislation. In accordance with the “prohibition” approach, it was suggested that certain clearly defined unfair practices should be prohibited outright, with or without provisions for exemptions in defined circumstances. The registration of agreements and more effective enforcement procedures should also be examined.

In 1977, the Commission submitted a detailed report on the prohibition principle to the Minister, but this report was not published. In the following year, an article on this topic – “The Future of Irish Legislation on Competition” – written by Patrick Lyons, a member of the Commission, was published in the *Dublin University Law Journal*, 1978 (pages 24 – 30). The author recommended consideration of a competition law based on Articles 85 and 86 of the Treaty of Rome. This would contain a system of prohibitions of certain types of agreement, with the possibility of exemptions, with compulsory notification of restrictive agreements. Any abuse by a firm in a dominant position should also be prohibited.

The Commission repeated its support for legislation based on the prohibition principle rather than on control of abuse in subsequent years. It pointed out in 1982 that this would have the incidental effect of bringing Irish law on competition more closely into alignment with EEC law on competition, which was already directly applicable within the State. The Commission later welcomed the Programme for Government, published in 1989, which stated that the incoming Government would “introduce legislation to give effect in domestic law to provisions similar to Articles 85 and 86 of

the Treaty of Rome after the Fair Trade Commission has presented their report to Government”.

The Minister requested the Commission, in 1988, to undertake a detailed study of the respective merits and disadvantages of the prohibition and control of abuse systems for the regulation of competition. The result of the “Study of Competition Law”, which was submitted to the Minister in December 1989, was published in April 1991 (Pl 7080), at the same time as the Competition Bill. It supported the idea of the incorporation of the provisions of Articles 85 and 86 of the Treaty in domestic law, and it made detailed recommendations on how this might be accomplished.

The prohibition principle was adopted in the Competition Act, 1991 (No. 24 of 1991), which was enacted on 22 July and came into operation on 1 October 1991, under the Commencement Order (S.I. No. 249 of 1991). Its primary purpose, according to the Preamble to the Act, was to prohibit, by analogy with Articles 85 and 86 of the EEC Treaty (now Articles 81 and 82), and in the interests of the common good, the prevention, restriction or distortion of competition and the abuse of dominant positions in trade in the State. The Act also established a Competition Authority, and, *inter alia*, amended the existing provisions in respect of the control of mergers. The Act replaced the control of abuse principle under the 1972 and 1987 Acts.

The Competition Authority was established under the Act, and it replaced the Fair Trade Commission. The Chairman and Members of the Authority were appointed by the Minister. The permanent members were a chairman and between two and four other persons, for a term not exceeding five years, which could be renewed. Temporary members could also be appointed by the Minister.

#### *Anti-Competitive Arrangements*

Section 4 of the Act was based upon Article 85 of the EEC Treaty, and it prohibited and declared void anti-competitive arrangements, while providing that a notified agreement could be given a licence of exemption from the prohibition by the Authority. Section 4(1) was as follows:

“Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which –

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.”

The Act related to undertakings, an undertaking being defined as:

“a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.” There was included no definition, however, of terms such as “agreement”, “concerted practice” or “prevention, restriction or distortion of competition”, or indeed of the term “competition” itself.

Under section 4(2), the Authority was enabled to grant a licence of exemption from the prohibition in the case of:

- “(a) any agreement or category of agreements,
- (b) any decision or category of decisions,
- (c) any concerted practice or category of concerted practices,

which in the opinion of the Authority, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not –

- (i) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives;

- (ii) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.”

The Act stated that a licence permitted the doing of acts which would otherwise be prohibited and void. It also provided that a Court might sever terms of an arrangement which contravened the prohibition from those which did not. The Authority was also empowered to certify that an arrangement did not offend against section 4(1).

Where the parties to an arrangement wanted to obtain a licence or a certificate, the arrangement had to be notified to the Authority. In the case of arrangements which were in existence when the Act came into force, “old agreements”, these had to be notified within one year of its commencement. Each arrangement notified to the Authority had to be accompanied by a fee of £100, under the Competition (Notification Fee) Regulations, 1991 (S.I. No. 250 of 1991), and this was later increased. A licence could be made retrospective to the date of notification. In the case of old agreements which were duly notified, no right of action could be exercised until the Authority had decided whether or not to issue a certificate or licence.

The Act specified that a licence had to be granted for a specified period and might be subject to conditions. A licence could be extended, and revoked or amended, and a certificate could be revoked. Provision was made for an appeal to the High Court against the grant of a licence or certificate. Notice of the grant of a licence or certificate had to be given to every body to which it related, with the reasons for it, the notice had to be published in *Iris Oifigiúil*, and notice of the grant had to be published in one daily newspaper published in the State.

#### *Abuse of a Dominant Position*

Section 5 of the Act prohibited the abuse of a dominant position, and it corresponded to Article 86 of the EEC Treaty. The provisions were as follows:

“5(1). Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in a substantial part of the State is prohibited.

5(2). Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in –

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.”

Again, no definition was given of terms such as “dominant position” or “substantial part of the State”. The fact that the Authority had granted a certificate, a licence or a category licence did not render inapplicable the prohibition of the abuse of a dominant position.

Unlike section 4, the Authority was not given a primary role in the implementation of section 5. A suspected abuse of a dominant position could be referred to the Authority by the Minister for investigation. The Authority had to report to the Minister and to state whether it considered that a dominant position existed and, if so, whether it was being abused. Following the Authority’s report, which had to be published, the Minister could by order either:

- (a) prohibit the continuance of the dominant position except on conditions specified in the order, or
- (b) require the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or as otherwise specified by the Minister.

An order had to state the reasons for making it, and it had to be confirmed by a resolution of the Oireachtas. The Minister was permitted to revoke an order or, with the agreement of every enterprise concerned, to amend an order.

The provisions on the abuse of a dominant position replaced the provisions in respect of ‘monopoly’ in the 1978 Act. The sections in the 1978 Act regarding the

Commission's enquiry and report on an apparent monopoly and the order by the Minister relating to a monopoly were repealed. The provisions regarding an appeal to the High Court against a monopoly order made by the Minister in the 1978 Act were deemed to refer to an order regarding a dominant position under the 1991 Act. Oddly, the definition of "monopoly" in the 1978 Act was not deleted. Just like the monopoly provisions in the 1978 Act which were never utilised, no suspected abuse of a dominant position was referred to the Authority under the 1991 Act.

### *Enforcement*

The primary means of enforcing the provisions regarding anti-competitive arrangements and abuses of dominant positions was by way of action in the courts. In addition to the powers of the Authority to grant or to refuse to grant certificates and licences, aggrieved persons and the Minister were given a civil right of action in the High Court for relief against any undertaking which was or had been party to an anti-competitive arrangement. The Authority was given no right of action. The High Court, like the Authority, could decide whether an arrangement was caught by the prohibition in the Act, but only the Authority, and not the High Court, could grant a licence.

Aggrieved persons and the Minister were granted a right of action for relief against an abuse of a dominant position. Initially, such action had to be brought in the High Court, but the Act provided that an action could be brought in the Circuit Court. Actions in the Circuit Court were not allowed under the commencement order in 1991 (S.I. No. 249 of 1991), but they were introduced in the Competition Act, 1991 (Section 6(2)(b)) (Commencement) Order, 1992 (S.I. No. 299 of 1992).

Relief for an aggrieved person could be by way of injunction or declaration, or damages, including exemplary damages. Only an injunction or declaration, however, was available to the Minister.

It was indicated by the Minister in the Dail debates introducing the Competition Bill in 1991 that the emphasis would be on private enforcement rather than Ministerial action. No court actions were ever brought by the Minister.

*Other Provisions and Developments*

The Authority was required to submit an annual report of its activities to the Minister within four months of the end of each year, and the Minister had to publish the report within four months of receiving it.

The Authority was enabled, at the request of the Minister, to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services, including a study and analysis of any development outside the State. At the Minister's request, the results of any study or analysis were to be reported to the Minister.

The Minister and the Authority, with the Minister's consent, could appoint authorised officers. Authorised officers, on foot of a warrant issued by a Judge of the District Court, could enter and inspect premises and vehicles owned by undertakings, and could demand the production of books, documents or records, and could require the giving of information reasonably demanded. A person who obstructed or impeded an authorised officer was declared to be guilty of an offence, and was liable to a fine and/or imprisonment for up to 12 months. Under the previous legislation, there was no requirement for a warrant from the Circuit Court for an authorised officer to exercise his powers.

For the purpose of exercising its statutory functions, the Authority, like the Commission before it, was enabled to summon witnesses to attend before it, to examine such witnesses under oath, and to require such witnesses to produce any document in their power or control. Any refusal to attend, to take an oath, to produce any document, to answer any question, or to do any thing equivalent to a contempt of court, was declared to be an offence, and the person was liable to a fine and/or imprisonment for up to six months.

The 1991 Act was designed to replace completely the 1972 Act, as amended, and to repeal all Orders made under that Act. The Minister, however, decided to retain in operation the Groceries Order, 1987 (S.I. No. 142 of 1987). For this purpose, under the Competition Act, 1991 (Commencement) Order, 1991 (S.I. No. 249 of 1991), the

Groceries Order and a number of relevant sections of the 1972 Act were not repealed, though the Fair Trade Commission was abolished. Enforcement of the Groceries Order remained with the, re-titled, Director of Consumer Affairs.

The Minister made the Competition Act, 1991 (Notice of Licences and Certificates) Regulations, 1992 (S.I. No. 76 of 1992), which specified that notice of a certificate or licence should be sent by registered post to every body to which it related. This was revoked by the Competition Act (Notices of Licences and Certificates) Regulations, 1993 (S.I. No. 293 of 1993). These contained the requirement that notice of a licence or certificate be sent by registered post to every party to an arrangement seeking the licence or certificate. Where a licence or certificate covered a category of arrangements, publishing of the notice in *Iris Oifigiúil* was deemed to be sufficient notice to every person concerned. (Category certificates were not permitted, however, under the 1991 Act).

### *The Amending Act of 1996*

From 1992 onwards, the Authority made its views known on what it perceived to be deficiencies in the 1991 Act, particularly in respect of enforcement, and on the lack of resources available to the Authority.

In 1993, the Authority referred to the fact that there had been very few private actions under the Act, and no Ministerial actions. It considered that active enforcement was essential for the proper functioning of the Act and for securing a more competitive economy, and it noted that there had been widespread calls for more active enforcement by many observers. The Authority stressed that its limited role under the Act, in particular its lack of enforcement powers, had proved to be a significant impediment to the Authority in discharging its functions in a number of ways.

The Authority also stated in 1993 that the arrangements raised an important question with respect to the efficient use of resources. While a small number of seriously anti-competitive agreements had been notified to the Authority, the likelihood was that most such arrangements had not been notified. At the same time, a large proportion of the agreements notified to the Authority were not anti-competitive. From the perspective of the Government and the economy generally, the Authority's limited resources would probably be better employed in tackling even a small number of seriously anti-competitive agreements rather than issuing formal decisions approving innocuous agreements.

The Authority welcomed the announcement by the Minister early in 1994 that he proposed to amend the Act whereby power to enforce the Act would be conferred on the Authority, a suggestion repeated by the new Government in December 1994, but the Authority regretted the continuing delay in enacting the legislation. The Authority again welcomed the decision to give it powers of enforcement in 1995, but it regretted that it was not afforded an adequate opportunity to offer its views on such provisions in the revised Bill.

While the question of resources was not directly a legislative matter, the Authority expressed its views strongly on its lack of resources. It pointed out in 1992 that,

unlike competition authorities in other countries of comparable size to Ireland, the Authority was at a disadvantage, in dealing with its large volume of work, by virtue of having only a small staff and of not having available legal and economic advisers. It considered that active implementation of competition law was of considerable importance to the well-being of the Irish economy and was in the public interest. It believed that investment of State resources in this area would yield a high return, although the benefits, which were widespread, unlike the costs, were not readily measurable. Adequate resources were particularly important in the early years when the Authority had to try to cope with the vast backlog of old agreements, most of which had been notified on a single day.

The Authority noted that a practising barrister had been appointed as full-time legal adviser in April 1993, some 18 months after the Authority had been established. It pointed out, however, that the lack of a professional economist on the staff remained a problem, a view which was repeated in subsequent years. (No economist was appointed to the staff until after the Act was amended in 1996). The Authority pointed out that its limited resources put it at a disadvantage in dealing with the large volume of work it faced, much of which was of extreme complexity, and which might have to undergo scrutiny in the courts.

Besides pointing out in 1994 that its existing resources were inadequate to discharge its functions under the 1991 Act, it emphasised that conferring additional powers on the Authority, without providing it with the resources to discharge such duties, would be counterproductive. This opinion was repeated in subsequent years. In 1995, the Authority stated that its staffing and budgetary arrangements were a carry-over from its predecessor, the Fair Trade Commission, but the role and functions differed in a number of important ways from those of the Commission. Arrangements which were suitable for the operation of the Commission in the past were wholly inappropriate for the Authority, which was charged with dealing with large numbers of requests for certificates and licences under the Act, and would in the future have responsibility for investigating and prosecuting infringements of the Act.

In 1995 also, the Authority expressed its concern about the budgetary arrangements, in particular the lack of any separate budget provisions. The Authority was an

independent statutory body charged with discharging specific functions and needed to be funded accordingly. The arrangements were totally unsatisfactory and needed to be addressed as a matter of urgency so that the Authority could carry out its duties as efficiently and effectively as possible. Lack of autonomy in funding impacted on the obtaining of outside legal advice, providing staff training and development, the purchase of relevant journals and other publications, and the funding of travel. This made any attempts at planning virtually impossible.

The Competition (Amendment) Act, 1996 (No. 19 of 1996) introduced some major amendments to the 1991 Act, and a number of lesser changes. The most important changes were the creation of criminal offences of entering into or implementing an anti-competitive agreement or abusing a dominant position, and the public enforcement function conferred on the Authority of bringing both civil and criminal proceedings.

The basic principles of the 1991 Act remained, including the prohibition of anti-competitive arrangements and the abuse of a dominant position, the Competition Authority, provisions for the notification of arrangements, the grant of certificates, licences and category licences by the Authority, and civil rights of action for contravention of the prohibitions to aggrieved persons and the Minister.

The 1996 Act stated that breaches of the rules of competition – anti-competitive arrangements and abuse of dominance – were criminal offences, as was any contravention of a licence granted by the Authority. The Act attributed the acts of officers or employees to an undertaking for purposes of its criminal liability, where those acts were done for the purposes of, or in connection with, the business of the undertaking. Furthermore, it provided that, where an undertaking had committed any offence, then any director, manager or officer who had authorised or consented to the acts that constituted the offence, was also guilty of an offence. There was also a presumption that the human person consented to the offence until the contrary was proved.

The Act provided a number of “good defences” in proceedings for an offence. These included the existence of a certificate or licence, or an order relating to a dominant

position, or that the defendant did not know, nor, in all the circumstances of the case, could the defendant be reasonably expected to have known that the effect of an arrangement would have been anti-competitive, or that an act would constitute the abuse of a dominant position. A period of grace was permitted for a defendant to take steps to comply with conditions inserted in a licence, or to cease the offending behaviour when a certificate or licence had been revoked or a licence had been suspended.

The penalties provided were, on summary conviction, a fine of £1,500 (€1,904.61), or, in the case of an individual, imprisonment for up to six months, or both. On conviction on indictment, the penalties were £3 million (€3.81 million), or ten per cent of turnover, or, in the case of an individual, imprisonment for up to two years, or both a fine and imprisonment. Fines imposed by the courts were to be enforced by the Authority.

Summary proceedings could be prosecuted either by the Minister or by the Authority. The Authority was also given the right to take civil proceedings, as well as the Minister, with relief by way of injunction or declaration. It was also provided that civil action could be taken against any director, manager or officer who authorised or consented to an anti-competitive arrangement or abuse of dominance.

There were a number of other changes made to the 1991 Act. The Minister could appoint one member of the Authority as the “Director of Competition Enforcement”. Besides investigating suspected breaches of the Acts, the Director was empowered to advise the Authority regarding the institution of proceedings. Power was given to the Authority to issue category certificates. Provision was made for the opinion of an expert witness to be admissible in evidence in proceedings for an offence under the Act. It was provided that no relief could be granted in civil proceedings in respect of agreements notified prior to 30 September 1992, for the period from notification to the taking of a decision by the Authority. (30 September 1992 was the last date for the notification of “old” agreements). The Act provided that the Authority could undertake studies and analyses on its own initiative, as well as at the request of the Minister. The investigative powers of the Authority under the 1991 Act were extended to its functions under the 1996 Act. The definition of “records” in the 1991

Act, for which the Authority could search, was extended to include computer, audio and video records as well as written material. Provision was also made, for the avoidance of doubt, that notifications could be made, and could always have been made, unilaterally by one party to an arrangement, and that proposed agreements or decisions could also be notified.

Some amendments were also made to the 1978 Act, besides the merger provisions. The definition of “monopoly” was deleted (which should have been done in the 1991 Act). It was also provided that contravention of an order in relation to an undertaking in a dominant position was an offence, subject to the penalties, defences, liability of employees, etc., as described above.

The Minister made two further orders or regulations under the Act as follows:

- (a) the fee for the notification of an arrangement was increased from £100 to £250 (€126.97 to €317.43), from 1 January 1997, under the Competition (Notification Fee) Regulations, 1996 (S.I. No. 379 of 1996); and
- (b) regulations were prescribed to allow the Authority to summon witnesses, which came into effect on 27 May 1999, under the Competition Authority (Witness Summons) Regulations, 1999 (S.I. No. 137 of 1999).

### *The Competition Act, 2002*

Just as the 1996 Act was coming into force, on 30 September 1996, the Competition and Mergers Review Group was established by the Minister. The Review Group published four discussion documents – on mergers, newspaper mergers, competition law and the Groceries Order. Its Final Report was published in May 2000 (PN 8487). The Report contained forty detailed recommendations for the amendment of competition law and merger control law. These formed the basis of the new legislation which was enacted in 2002.

The Authority largely confined its views on the reform of competition law from 1996 to making submissions to the Review Group, and commenting on aspects of the proposed legislation. The Authority, however, frequently referred to the inadequate level of its resources, although these increased significantly from 2000 onwards. There were also a number of resignations from the Authority and its staff. In 2000, the Authority reported that the continuing trend of staff departures “left it barely operational”. The Director of Competition Enforcement resigned as Director in June 2000, while remaining a member of the Authority. None of the Authority members appointed in 1996 was still a member at the start of 2003.

In 1997, the Authority stated that the effectiveness of competition legislation was directly related to its coverage of the economy as a whole. Other legislation excluded or affected the application of the Competition Acts. The Authority also argued that it should have a wide competition advocacy role, in relation particularly to stating its views on the possible effects of proposed legislation and regulation on competition. In 1999, the Authority, while supporting a number of recommendations, was critical of the Review Group’s discussion paper on competition law, stating that it should have recognised the importance of competition law and its enforcement in a modern economy, rather than concentrating on issues such as the notification system which were of limited relevance. In 2000, the Authority repeated its view that the Groceries Order should be repealed. During 2001, the Authority spent a great deal of time examining and commenting on aspects of the proposed legislation – the Competition Bill, 2001 – which was published at the end of December 2001.

The Competition Act, 2002 (No.14 of 2002) was enacted in April 2002. Its purpose was to consolidate and modernise the existing enactments relating to competition (and mergers). It replaced the Competition Acts of 1991 and 1996, which were repealed (as well as the 1978 Mergers Act, as amended). The Act also introduced significant changes to Irish competition (and merger) law arrangements. It also took account of other developments, especially proposed changes in EU competition law. Most provisions of the Act commenced on 1 July 2002 (but the merger provisions commenced on 1 January 2003), under the Competition Act, 2002 (Commencement) Order, 2002 (S.I. No. 199 of 2002).

The 2002 Act retained the Competition Authority, and it repeated the general prohibition of anti-competitive agreements, decisions and concerted practices which were introduced under the 1991 Act. The previous system whereby arrangements could be notified to the Authority, which could then grant individual certificates or licences, is abolished. Instead, under the new Act, the four criteria, which have to be satisfied before a licence could be granted, become directly applicable. It is no longer necessary to notify an arrangement to benefit from exemption from the prohibition. There is a provision, however, for the Authority to grant licences for certain categories of agreements, referred to as declarations. There is a right of appeal to the High Court against a category declaration. The provisions of the 1991 Act which prohibited the abuse of a dominant position are retained unchanged in the 2002 Act. As before, there is no provision for the exemption of an abuse. The prohibitions on anti-competitive arrangements and abuse do not apply to mergers which come within the scope of the merger control provisions of the Act. Mergers which do not reach the turnover threshold can be notified voluntarily to allow the parties to seek immunity from the prohibitions. All certificates and individual licences under the 1991 Act are revoked, and all notifications cease to have effect. Any category licences, however, continue in force as if they were declarations under the 2002 Act.

The Act abolishes the “ignorance defence” provision under the 1996 Act in respect of the breaches of the prohibitions which constituted offences. It creates new offences of breaches of Articles 81(1) or 82 of the EU Treaty to facilitate the enforcement of EU competition law in Ireland. It is provided, however, that it is a defence to show that the four criteria for exemption are complied with, or that an arrangement falls within

an EU exemption. In relation to an alleged abuse, it is a defence to show that the act or acts in question was or were done pursuant to a determination made or direction given by a statutory body (that is, a sectoral regulator).

The Act provides that breaches of the prohibition on anti-competitive agreements or Article 81(1) of the Treaty are offences subject to criminal sanctions. It introduces a distinction between two types of breach of those provisions. The first type of breach consists of “hard-core” competition offences, that is arrangements between competing undertakings relating to price fixing, limiting output or sales, and market sharing, and a definition is given of “competing undertakings”. The second type of breach involves arrangements which are less seriously restrictive of competition. The court is obliged to presume, unless the contrary is proved, that the object or effect, in the case of the more serious offences, was anti-competitive. It is also provided that an act done by an officer or an employee shall be regarded as an act done by the undertaking. The Act also provides for the offence of breaching the prohibition on abuse of dominance or Article 82 of the Treaty.

The maximum penalty of imprisonment for conviction on indictment for an individual is increased from two to five years for the “hard-core” offences, and up to six months on summary conviction, but imprisonment is abolished for the less serious offences. Similar financial penalties are provided for the two categories of breach, that is a fine of up to €3,000 on summary conviction, and up to €4million, or 10 per cent of turnover, whichever is greater, on conviction on indictment. An individual may be subjected to both a fine and imprisonment. These fines also apply to the abuse of a dominant position, but imprisonment is abolished. (The provision for a five-year maximum penalty of imprisonment automatically allows for a power of arrest under the Criminal Justice Act, 1984). Fines may be imposed, but not imprisonment, for continuing offences. Fines are to be enforced by the Authority. Penalties may be imposed on a director, manager or other similar officer of an undertaking who has authorised or consented to an offence. Summary proceedings may be brought by the Authority, but not by the Minister any longer.

The 2002 Act provides that evidence from expert witnesses in respect of competition matters and economic principles may be used in both civil and criminal proceedings.

It is also provided that the judge in a trial on indictment may direct that certain documents be given to the jury. A person indicted for an offence shall be tried by the Central Criminal Court. The Act provides for certain presumptions to arise where documents are admitted as evidence in a civil or criminal action. "Document" includes electronic and other forms of text. There are also provisions regarding the admissibility of statements in certain documents.

The 2002 Act continues to provide for a right of civil action for breaches of the competition rules for any aggrieved person against an undertaking and/or any director, manager or other officer. The Authority is given a right of action in relation to the Act and the Treaty, but the Minister no longer has such a right. An action may be brought in the Circuit Court or the High Court. A plaintiff may get relief by way of injunction or declaration, and damages, including exemplary damages, but the Authority is limited to the grant of an injunction or declaration. The court is empowered to apply structural remedies such as requiring an undertaking which has abused its dominant position to sell off part of its assets.

The provisions of the 1991 Act (which derived from the monopoly provisions of the 1978 Act) whereby the Minister could refer a suspected abuse of dominance to the Authority, following whose report the Minister could, by order, seek to end the abuse, are terminated.

As before, the Authority consists of a chairperson and between two and four whole-time members, and there is provision for temporary and part-time members. Whole-time members must be selected by the Civil Service Commissioners (and by the Minister no longer), but this does not apply to the re-appointment of whole-time members, or to the appointment of temporary or part-time members. The Act introduces criteria to be taken into consideration by the Minister when appointing temporary or part-time members. The maximum term of office of a member is set at five years, and a member may be re-appointed. The Authority is allowed to determine, subject to Ministerial approval, its staffing requirements and the remuneration, terms and conditions of staff. The Authority is declared to be independent in the performance of its functions.

The Act confers additional specific functions on the Authority. These include studies and analyses of competition (solely on its own initiative); investigations of breaches of the Act; advising the Government and Ministers on the implications for competition of proposed legislation; publishing notices with practical guidance about compliance with the Act; advising public authorities generally on issues concerning competition; and informing the public about issues concerning competition.

Provisions regarding Authority investigations are continued, including the summoning of witnesses, examining witnesses on oath and requiring witnesses to produce documents. Penalties for default in meeting these requirements are a fine and/or imprisonment. The Authority continues to be able to appoint authorised officers. It provides for warrants to be issued by the District Court. Authorised officers may enter, if necessary by force (a new provision), and searching premises, vehicles and dwellings; they may seize and retain, or otherwise preserve, and copy, books, documents and records; they may require the production of these, and require employees to give information. There are penalties for obstructing or impeding an authorised officer (a fine and/or imprisonment). “Records” includes discs, tapes, sound tracks, films and photographs. There is provision for authorised officers to be accompanied by one or more members of the Garda Síochána.

The chairperson is given responsibility for managing and controlling the staff and business of the Authority, and is accountable to the Public Accounts Committee, and must attend before an Oireachtas committee if required. The Authority must prepare three-year strategic plans and annual work programmes, and there are provisions for the preparation of estimates, accounts and audits. There are provisions for grants and borrowing. The Authority is required to publish an annual report. (In the past the annual report was submitted to, and published by, the Minister).

Provision is also made for cooperation between the Authority and certain statutory bodies (the sectoral regulators, who are listed in the Act). The Authority may also enter into limited cooperation agreements with foreign competition bodies. The Minister may make orders and regulations under the Act, which must be laid before the Oireachtas.

There is special protection for a person who reports a breach of the Act (a “whistle-blower”). Such a person is not liable in damages, and shall not be penalised by his or her employer, provided that the person has acted reasonably and in good faith. A person who knowingly makes a false statement in this regard to the Authority is guilty of an offence, and may be fined and/or imprisoned.

Finally, the Act provides that the Minister may, by order, amend or revoke the Groceries Order of 1987.

### ***Competition (Amendment) Act 2006***

The principal purpose of the Competition (Amendment) Act 2006 (No. 4 of 2006) was to revoke the Restrictive Practices (Groceries) Order, 1987 (see below).

## **PRIMARY LEGISLATION: THE DEVELOPMENT OF LAW RELATING TO THE CONTROL OF MERGERS AND TAKEOVERS FROM 1978 TO 2002**

### *The Mergers, Take-Overs and Monopolies (Control) Act, 1978*

Legislation to control mergers in Ireland was suggested at the end of the 1960's. In 1974, the Minister requested the Commission to undertake studies into concentration and mergers. The Report of Studies into Industrial Concentration and Mergers in Ireland, which was undertaken by a member of the Commission, Patrick Lyons, was submitted to the Minister in September 1975. It was published in 1978 (Prl 5601), at the same time as the proposed merger control legislation.

The Mergers, Take-Overs and Monopolies (Control) Act, 1978 (No. 17 of 1978) came into effect on 3 July 1978. It continued in operation, with amendments, until the end of 2002. In brief, proposed mergers over a certain size had to be notified to the Minister, who could either allow the proposal to proceed or refer it for fuller investigation (originally to the Examiner, then the Commission and latterly the Authority). Following a report on the investigation, the Minister could allow the merger to proceed, or he could allow it subject to conditions or he could prohibit it outright.

The Act applied to mergers and take-overs (mergers in brief) between enterprises. An enterprise was defined as "a person or partnership engaged for profit in the supply or distribution of goods or the provision of services", including credit unions, friendly societies, building societies and holding companies. Service included any professional service, but excluded services such as banking; electricity and transport (CIE, air and ancillary services, and road transport); harbour and pilotage authorities; any service provided under a contract of employment; and any service provided by a local authority.

For the purposes of the Act, a merger was deemed to be proposed when an offer capable of acceptance was made. A merger was taken to exist when two or more enterprises, at least one of which carried on business in the State, came under common control. Enterprises were deemed to be under common control if the

decision as to how or by whom each should be managed could be made either by the same person, or by the same group of persons acting in concert. This included situations where one enterprise acquired the right to appoint or remove a majority of the board or committee of management of a second enterprise, or acquired more than 30 per cent of the voting rights in the second enterprise (except where it already held more than one-half of the voting rights).

The Act applied to a proposed merger if, in the most recent financial year, the value of the gross assets of each of two or more of the enterprises to be involved in the proposal was not less than £1,250,000 or the turnover of each enterprise was not less than £2,500,000. The Minister could, by order, increase these thresholds. The thresholds were increased to £5 million and £10 million respectively in July 1985 (S.I. No. 230 of 1985), and to £10 million and £20 million in May 1993 (S.I. No. 135 of 1993). The Minister could also, by order, declare that the Act applied to a proposed merger of a particular class specified in the order (that is a proposal below the thresholds). In January 1979 the Minister declared by order that the Act applied to proposed mergers involving enterprises at least one of which was engaged in the printing and/or publication of one or more than one newspaper (S.I. No. 17 of 1979). The Minister could amend or revoke any of the orders mentioned above, and each order was subject to a confirming resolution by the Oireachtas.

The central provision in the 1978 Act was that title to any shares or assets involved in a proposal could not pass until:

- (a) the Minister had stated in writing that he had decided not to make an order in relation to the proposal, or
  - (b) the Minister had stated in writing that he had made a conditional order, or
  - (c) the relevant period had elapsed without the Minister having made an order,
- whichever first occurred.

The “relevant period” was the period of three months beginning on the date on which the Minister first received a notification of the proposal or, where the Minister requested further information, the date of receipt by him of such information. Thus if the Minister had not made an order within three months of the relevant date, the proposed merger could proceed. Where the Minister stated that he proposed not to

make an order, this ceased to have effect if the proposal was not put into effect within 12 months of the date of the statement.

Every proposed merger had to be notified to the Minister by each of the enterprises involved in writing “as soon as may be”. Within one month of receiving a notification, the Minister could request further information. Failure to notify could result in a fine being imposed on the person in control of an enterprise.

After receiving a notification the Minister must, as soon as practicable, either inform the enterprises that he has decided not to make an order prohibiting the merger, or refer the notification to the Examiner for investigation in relation to the scheduled criteria and inform the enterprises of the reference. The Examiner was required to investigate the referred proposal and report to the Minister before a date, if any, specified by the Minister. A report of the Examiner had to state his opinion as to whether or not the proposed merger would operate against the common good in respect of the scheduled criteria. The Examiner was given power to appoint authorised officers to inspect premises and records for the purposes of the investigation.

The scheduled criteria were as follows:

- “(a) The extent to which the proposed merger or take-over would be likely to prevent or restrict competition or to restrain trade or the provision of any service.
- (b) The extent to which the proposed merger or take-over would be likely to endanger the continuity of supplies or services.
- (c) The extent to which the proposed merger or take-over would be likely to affect employment and would be compatible with national policy in relation to employment.
- (d) The extent to which the proposed merger or take-over is in accordance with national policy for regional development.
- (e) The extent to which the proposed merger or take-over is in harmony with the policy of the Government relating to the rationalisation, in the interests of greater efficiency, of operations in the industry or business concerned.
- (f) Any benefits likely to be derived from the proposed take-over or merger and

relating to research and development, technical efficiency, increased production, efficient distribution of products and access to markets.

- (g) The interests of shareholders and partners in the enterprises involved.
- (h) The interests of employees in the enterprises involved.
- (i) The interests of the consumer.”

Having considered a report of the Examiner, the Minister could, if he thought that the exigencies of the common good so warranted, after consultation with any other Minister concerned, by order prohibit a proposed merger either absolutely or except on specified conditions. An order had to state the reasons for making the order, and a conditional order could have retrospective effect. The Minister, in making an order, had to have regard to any relevant international obligations of the State. An order could be revoked by the Minister, or amended with the agreement of the enterprise or enterprises concerned. Every order had to be laid before the Oireachtas, and could be the subject of an annulling resolution within 21 days.

Provision was made for appeal against an order on a point of law to the High Court within one month of the coming into effect of the order by any enterprise referred to in the order. If the High Court allowed such an appeal, the Minister had to amend or revoke the original order as soon as practicable. Where the Minister made an order following an appeal, this did not require confirmation by the Oireachtas. An appeal against a decision of the High Court to the Supreme Court was expressly not allowed.

The Act provided that a court of competent jurisdiction could grant an injunction on the motion of the Minister or of any other person to enforce compliance with the terms of an order. Contravention of an order was declared to be an offence, punishable, on summary conviction or on conviction on indictment, to a fine and/or imprisonment. Summary proceedings in relation to an offence could be prosecuted by the Minister.

The Minister was required to furnish to the Oireachtas an annual report stating the number and the nature of investigations into proposed mergers. There was no obligation to publish a report of the Examiner into his investigation of a proposal, and no such report was ever published. The Minister could omit from the annual report

any information whose publication would in his opinion materially injure the legitimate interests of an enterprise, if the information was not essential to the full understanding of the investigation to which it related, and a statement indicating the general character of the information omitted had to be included in the report. (In fact, this confidentiality provision was interpreted in a very restrictive manner, so that not even the identity of the enterprises involved in a proposal referred for investigation was revealed, though the enterprises had to be named in any order which was made, after which their names were included in the annual report. It is questionable whether statements were included regarding the general character of the omitted information).

### *The Amending Act of 1987*

Certain changes were made to the merger provisions in the Restrictive Practices (Amendment) Act, 1987 (No. 31 of 1987). The definition of “service was widened to remove most of the exemptions, but it still did not include banking services, any service provided under a contract of employment, or any service provided by a local authority. The Commission was re-named the Fair Trade Commission, and the Director of Consumer Affairs took over many of the functions of the Examiner. The functions of the Examiner under the 1978 Act in relation to mergers, however, were transferred to the Commission. Thus the Minister could refer a proposed merger to the Commission for investigation, and the report of the Commission had to be furnished to the Minister. There was still no obligation to publish reports of the Commission. It was provided that an investigation and report could be undertaken by one or more members of the Commission. It was also provided that an injunction to enforce compliance with a merger order could be granted on the motion of the Director, as well as on the motion of the Minister or of any other person. In addition, summary proceedings in relation to an offence could be prosecuted by the Director, and no longer by the Minister.

### *The Competition Act, 1991*

In its 1989 Study of Competition Law (PI 7080), the Commission made a number of recommendations regarding the control of mergers, although merger law was not part of its terms of reference. It pointed out that a merger could constitute an anti-competitive arrangement or an abuse of a dominant position, but stated that it would be desirable to deal with mergers separately. It recommended that all proposals for mergers should be examined by the Commission, by way of a two-stage process, with the Minister retaining the power to prohibit a merger. The Commission recommended that all reports of the Commission regarding mergers should be published within two months. It pointed out that there had been difficulties in interpreting national policy in relation to employment, regional development and rationalisation. It recommended deletion of the reference to “national policy”. It also recommended that the Commission’s opinion as to whether the merger would operate against the common good or not should be confined to the area of competition, but it should also give its views on the effect of the proposed merger on other criteria. A first-stage decision should be taken within 30 days, and the second stage of further investigation and the Minister’s decision should occur within a further 60 days. The Commission also needed the same powers to obtain information as it had in conducting enquiries.

While the major purpose of the Competition Act, 1991 (No. 24 of 1991), which came into effect on 1 October 1991, was to replace the control of abuse principle by the prohibition principle in the rules of competition, several important changes were made to the provisions relating to merger control. The Competition Authority was established to replace the Commission, and the Authority’s powers in relation to merger investigations were the same as those regarding the rules of competition (appointing authorised officers to inspect premises and records, compelling the attendance and cooperation of witnesses, etc).

The definition of “service” was amended to provide that it did not include the owning and transfer of land where this was the sole activity of the target enterprise. The definition of “common control” was amended to cover a situation where one

enterprise acquired more than 25 per cent of the voting rights in the second enterprise (down from 30 per cent).

Each of the enterprises involved in a proposed merger was required to notify the Minister in writing of the proposal, and provide full details of it, within one month of the offer capable of acceptance having been made. The Minister could vary the period of one month. The Minister could, within one month of the notification date, request further information within a specified period. Non-compliance was declared to be an offence, and the person in control of the enterprise could be fined. The maximum fine, on summary conviction, was increased from £5,000 to £200,000, and daily fines were introduced for continued contravention. It was declared that a notification would not be valid if information or a statement was false or misleading.

The Minister had to inform the notifying enterprises as soon as practicable that he had decided not to prohibit the proposed merger, or refer the notification to the Authority for investigation within 30 days of the commencement of the relevant period, that is from the date of the notification or the date when all information requested had been supplied. If the proposed merger was referred, the Authority had to be given not less than 30 days after the reference to present its report to the Minister.

The scheduled criteria in the 1978 Act were deleted. Instead, a report of the Authority's investigation had, firstly, "to state its opinion as to whether or not the proposed merger or take-over concerned would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good." In addition, the Authority was required to "give its views on the likely effect of the proposed merger or take-over on the common good in respect of:

- (i) continuity of supplies or services,
- (ii) level of employment,
- (iii) regional development,
- (iv) rationalisation of operations in the interests of greater efficiency,
- (v) research and development,
- (vi) increased production,
- (vii) access to markets,

- (viii) shareholders and partners,
- (ix) employees,
- (x) consumers.”

Another important change was that the Minister was required to publish the report of the Authority within two months of receiving it, with due regard to commercial confidentiality.

In coming to a decision on the proposal in the light of the Authority’s report, the Minister’s consideration of the exigencies of the common good could include, but was not confined to, the new criteria listed above.

The time period between notification, or the submission of additional information, and the last date on which the Minister could make a prohibition order, remained at a maximum of three months. The Minister could only make a prohibition order following referral to, and a report by, the Authority. Therefore, if a proposed merger was not referred to the Authority within the 30 days specified, it could not then be prohibited, and was implicitly accepted well before the three month period had expired.

Provision was also made for the relationship between these merger provisions and the EU merger control regulation. Transmission to the Minister by the Commission of a copy of a notification made under Council Regulation (EEC) No. 4064/89, on the control of concentrations between undertakings, was declared to constitute a notification under the Irish Act. The relevant period, however, was deemed not to commence until the Commission had made a decision under the Regulation.

Finally, it should be noted that the Authority decided, in the case of Woodchester Bank Ltd and UDT Bank Ltd (Decision No. 10 of 4 August 1992), that mergers did not enjoy automatic exemption from the provisions of the competition rules in the 1991 Act, even if they had been approved by the Minister under the Mergers Act. Thus certain mergers might come within the scope of the prohibition on anti-competitive arrangements, and, by implication, also within the scope of the prohibition on the abuse of a dominant position. This would also open the possibility of court action against a merger by an aggrieved person or by the Minister.

***The Amending Act of 1996***

The only change to the merger control provisions in the Competition (Amendment) Act, 1996 (No.19 of 1996) was that a merger notification should be accompanied by a fee set by the Minister by regulations. A notification fee of £4,000 was set, from 1 January 1997, under the Merger or Take-Over (Notification Fee) Regulations, 1996 (S.I. No. 381 of 1996). (This was increased to €8000 from 1 January 2003 under the Competition Act 2002 (Notification Fee) Regulations 2002 (S. I. No. 623 of 2002)).

### ***The Competition Act, 2002***

The Final Report of the Competition and Mergers Review Group in 2002 (PN 8487) contained, *inter alia*, a number of recommendations in respect of merger control, and regarding newspaper mergers and the acquisition of control over newspapers by other means. In addition, in examining the proposal whereby Independent Newspapers plc would increase its shareholding in the Tribune Group in 1992 (PI 8795), members of the Authority interpreted the first of the criteria in the 1991 Act in different ways. One view was that the Authority should give its opinion on whether the proposal would affect competition and would therefore be likely to operate against the common good. The other view was that it should give its view about the possible effect on competition and separately give its view on whether the proposal would be likely to operate against the common good.

The Competition Act, 2002 (No. 14 of 2002), besides replacing the 1991 and 1996 Acts in relation to competition rules and their enforcement, also completely replaced the 1978 Act, as amended, regarding merger control, that Act being completely repealed. In brief, the Authority is given the primary responsibility for merger control. The involvement of the Minister is terminated, except in the case of media mergers. The emphasis in the Act is on whether a proposed merger would substantially lessen competition in the State. Merger control now applies to all sectors of the economy, including, for example, banking services, which were previously excluded from the Mergers Acts.

The term “undertaking” which was introduced in the 1991 Act in respect of competition, now also applies to the provisions relating to mergers, replacing the term “enterprise”. There is a new definition of “merger” or “acquisition” which essentially provides that a notifiable merger arises once control over an undertaking is acquired, regardless of how such control is acquired. Where control is merely transferred within a group of companies, however, notification is not required. “Full function” joint ventures are brought under merger control. A “full function” joint venture is one which performs, on an indefinite basis, all the functions of an autonomous economic entity. Acquisition of control, on a temporary basis, by an undertaking whose normal activities include dealings in securities, is not regarded as a merger.

Each of the undertakings involved in certain mergers which have been agreed, or which will occur if a public bid which is made is accepted, is required to notify the Authority (and not the Minister) for regulatory clearance. The worldwide turnover of each of two or more of the undertakings involved must not be less than €40 million, and the turnover in the State of any one of the undertakings involved must be not less than €40 million. Each of two or more of the undertakings involved must carry on business in any part of the island of Ireland. In the generality of situations, the vendor is not deemed to be involved in a merger. The gross assets criterion is abolished. The Act applies to agreed, rather than proposed, mergers. Mergers which do not reach the turnover threshold can be notified voluntarily, in order to allow the parties to seek immunity from attack under the prohibitions on anti-competitive arrangements and abuse of dominance. These general prohibitions do not apply to mergers above the threshold, nor to any directly related but necessary restrictions. The power of the Minister to specify, by order, which is subject to a confirming resolution of the Oireachtas, a class or classes of merger to which the minimum financial threshold will not apply is retained. A notification, whether the merger is above or below the threshold, must be accompanied by the prescribed fee. Fines and continuing fines are prescribed for persons who do not notify relevant mergers. Provision is also made for the operation of the EU regulation on the control of concentrations between undertakings, as in the 1991 Act.

The Act provides that a merger may not take effect until it has been notified to the Authority, and the Authority has been given the statutory time to examine it and reach a determination. A merger cleared by the Authority must be completed within 12 months of the Authority's decision. There is a definition of the "appropriate date" from which the statutory deadline for the Authority's procedure commences. The Authority, within one month of the date of the notification, may require further information from the notifying parties. The "appropriate date" is the date of notification or the date when further information required is submitted. Unless the Authority comes to a determination within four months, the merger may be put into effect.

Unless the Authority considers that it would not be in the public interest to do so, it must publish a notice of each notification, and it must consider all submissions made.

It must form a view as to whether the result of the merger would be to substantially lessen competition in the State, rather than consider the criteria laid down in the older Acts. The Authority may require further information. It may accept binding commitments from the undertakings that will remove potential anti-competitive effects of the merger.

The Authority undertakes an initial first phase examination. It must make a determination, within one month of the appropriate date, either to allow the merger to proceed, or to initiate a full second phase investigation of the transaction. The criterion on which the Authority makes its decision, in both the first and second phase examinations, is whether the merger will substantially lessen competition in markets for goods or services in the State. The Authority is obliged to publish a notice of its determination, with due regard for commercial confidentiality, within two months after making the determination not to proceed to a second phase investigation.

Once the Authority decides to proceed to a full or second phase investigation, it has a total of four months from the date of receipt of the notification (or the receipt of further information) to determine, and to inform the undertakings, that the merger:

- (a) may take effect;
- (b) may take effect but subject to conditions, or
- (c) may not take effect.

The Authority is obliged to publish its determination, including the reasons for making it, within one month after making the determination, with due regard for commercial confidentiality. The Authority is also required to have regard to any relevant international obligations of the State.

There are special provisions in the Act for mergers where at least one of the parties involved is a “media business”. The term media business is defined as the business of publishing newspapers or certain periodicals, broadcasting (both sound and audiovisual) but excluding a service provided over the Internet, or providing a broadcasting services platform (such as a cable or satellite company). The Authority must advise the parties, within five days of the notification, that it considers a transaction to be a media merger, and it must provide the Minister with a copy of the proposal.

The Authority will proceed to carry out an initial investigation. If the Authority determines that the merger would not substantially lessen competition, it must immediately inform the Minister, who may, despite this determination, direct the Authority to proceed to a full investigation. Following a full investigation, the Authority makes a determination, based on competition criteria, that the merger may take effect, with or without conditions, or may not take effect, and it must immediately inform the Minister.

The Minister then has the option of over-ruling the Authority's determination in certain circumstances. Where the Authority determines that the merger may be put into effect, with or without conditions, the Minister may make an order within a further 30 day period, to allow the merger, with or without conditions, or to prohibit it. (Where the Authority determines that the merger may not be put into effect, the Minister may take no further action).

The Minister, where allowed to take action, must have regard, not to competition criteria, but only to the relevant "public interest" criteria. These include the strength and competitiveness of media businesses indigenous to the State, the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings, the reflection of a diversity of views, and market shares. The Authority must form an opinion as to how the application of the relevant public interest criteria should affect the exercise of the Minister's powers in relation to a media merger, and inform the Minister of its opinion if requested. The Minister must publish a statement of the reasons for making any order within two weeks.

The Act provides a right of appeal to the High Court against a determination by the Authority for any of the parties which made the notification, where the determination prohibits the merger or where it attaches conditions. The appeal must be made within one month, or longer in the case of a media merger. The appeal may involve any issue of fact or law, and the court is obliged to determine the appeal within two months so far as is practicable. The High Court may annul the determination, confirm it or confirm it subject to modifications. An appeal may be made against a decision of the High Court to the Supreme Court, but only on a question of law. It appears that a prohibition order by the Minister in the case of a media merger may not be appealed.

The Minister must lay an order regarding a media merger before the Oireachtas, and it is subject to an annulling resolution within 21 days. If either House does annul the order, then the original determination of the Authority stands.

The Act provides for the enforcement of any commitments given to the Authority by the parties to a merger, or determinations of the Authority or orders of the Minister. The Authority, or any other person, may apply to the court for an injunction to enforce any of these. Further, there is provision for penalties where a commitment, determination or order is not complied with (a fine and/or imprisonment, and continuing fines).

The Minister may make an order, no more than once a year, increasing the threshold amounts for notifiable mergers, based on relevant economic data. An order requires a confirming order of the Oireachtas.

The Act also provides that all mergers which fall to be considered under the Act must be cleared in accordance with the provisions of the Act, notwithstanding the provisions of certain other Acts, which may require that a certain act or acts which comprise a merger require either to be sanctioned or to be the subject of any form of registration of a resolution passed by one or more undertakings.

While the Mergers Act was repealed, its provisions were retained so that a merger notified under that Act, before the commencement of the present Act (1 January 2003), will be dealt with under the 1978 Act. In addition, every merger prohibited, either absolutely or on specified conditions, under the 1978 Act will continue to be prohibited indefinitely, unless the Minister decides to the contrary.

The powers of the Authority in relation to merger investigations are the same as those regarding the rules of competition (appointing authorised officers to inspect premises and records, compelling the attendance and cooperation of witnesses, etc.). This applies also to the powers of the Minister to make regulations and orders. The requirement on the Authority to prepare and publish an annual report covers its activities in respect of merger control. The requirement on the Minister, under the 1978 Act, to publish an annual report on mergers is no longer applicable.

The Minister has made three orders in relation to mergers under the 2002 Act, as follows:

- (a) the commencement date for the merger provisions was appointed as 1 January 2003, under the Competition Act, 2002 (Commencement) Order, 2002 (S.I. No. 199 of 2002);
- (b) the merger provisions are applied to all mergers or acquisitions in which one or more of the undertakings involved carries on a media business in the State, regardless of the turnover of the undertakings involved, under the Competition Act, 2002 (Section 18(5)) Order 2002 (S.I. No. 622 of 2002); and
- (c) the fee for a merger notification is prescribed as €8,000, under the Competition Act 2002 (Notification Fee) Regulations 2002 (S.I. No. 623 of 2002).

**THE FAIR TRADE COMMISSION/RESTRICTIVE PRACTICES  
COMMISSION, 1953 – 1991**

**MEMBERSHIP OF THE COMMISSION**

The Fair Trade Commission was constituted with effect from 12 June 1953. It was re-named the Restrictive Practices Commission in 1972, and re-named again the Fair Trade Commission in 1987. The original members, appointed in 1953, all full-time permanent members, were:

J. C. B. McCarthy, Chairman; F. Vaughan Buckley and J. J. Walsh, Members.

The successive Chairmen, all full-time, were:

J. C. B. McCarthy, June 1953 to March 1955;

P. Ó Slattara, March 1955 to March 1965;

J. A. O'Dwyer, March 1965 to April 1970;

John J. Walsh, April 1970 to May 1978;

Nial MacLiam, May 1978 to October 1982;

Hugh McGloinn, October 1982 to January 1986;

Myles O'Reilly, February 1986 to April 1991;

Patrick Lyons, May 1991 to September 1991.

The permanent Members, part-time unless otherwise stated, were:

F. Vaughan Buckley (full-time), June 1953 to December 1968;

John J. Walsh (full-time), June 1953 to December 1959;

Fred Hall, January 1960 to March 1965;

David O'Mahony, April 1965 to April 1970;

John Coleman, March 1969 to May 1973;

Patrick Lyons, April 1970 (part-time) and October 1973 (full-time) to March 1991);

Charles McCarthy, May 1973 to October 1985;

Eamon Rohan (full-time), May 1986 to December 1988;

Pat Massey (full-time), November 1990 to September 1991;

Myles O'Reilly, May 1991 to August 1991;

Eamonn Carey (full-time), May 1991 to September 1991.

Temporary part-time members were:

Catherine Brock, 1968 (enquiry into bovine hides and skins);

Mary Byrne, 1970 (enquiry into grocery goods);

J. A. Geary, 1972 (enquiry into iron and steel scrap);

William Tormey, 1980 (enquiry into conveyancing and advertising by solicitors).

*Chairmen* (year of appointment)

J. C. B. McCarthy (1953), formerly Department of Industry and Commerce.

P. O Slattarra (1955), formerly Assistant Secretary, Department of Industry and Commerce.

J. A. O'Dwyer (1965), formerly Assistant Secretary, Department of Industry and Commerce.

John Walsh (1970), formerly Chairman of the Industrial Development Authority.

Nial MacLiam (1978), formerly Assistant Secretary in the Department of Industry, Commerce and Energy.

Hugh McGloinn (1982), formerly Assistant Secretary in the Department of Trade, Commerce and Tourism.

Myles O'Reilly (1986), an accountant and businessman.

Patrick Lyons (1991), a member of the Commission from 1970.

*Permanent Members* (year of appointment)

F. Vaughan Buckley (1953), a senior counsel.

John Walsh (1953), formerly a member of the Industrial Development Authority.

Fred Hall (1960), an accountant.

David O'Mahony (1965), professor in the Economics Department, University College, Cork.

John Coleman (1969), a barrister;

Patrick Lyons (1970), lecturer in Economics at Trinity College, Dublin.

Charles McCarthy (1973), a barrister and a lecturer (later professor) in the Department of Business Studies, Trinity College, Dublin.

Eamon Rohan (1986), formerly a Principal Officer in the Department of Industry and Commerce.

Pat Massey (1990), formerly a lecturer in economics, an economic consultant, and an employee of the New Zealand Treasury.

Eamonn Carey (1991), formerly a Principal Officer in the Department of Industry and Commerce.

Myles O'Reilly (1991), formerly Chairman of the Fair Trade Commission.

*Temporary Members (year of appointment)*

Catherine Brock (1968), a lecturer in economics at Trinity College, Dublin.

Mary Byrne (1970), Principal of the School of Commerce and Retail Distribution, Dublin.

J. A. Geary (1972), a solicitor.

William Tormey (1980), a judge of the District Court.

While the Chairman has always been a full-time appointee, on a number of other occasions the other one or two members have been part-time members, as were any temporary members appointed for particular enquiries. This arrangement inevitably tended to slow up procedures. At no time were there more than three permanent members of the Commission, including the Chairman, although up to four members and the Chairman were permitted under the 1953, 1972 and 1987 Acts. Indeed, there were times when the Commission consisted of only the Chairman and one member, particularly during 1989 and 1990.

## ANNUAL REPORTS OF THE COMMISSION

Under the 1953 Act, the Fair Trade Commission was, each year, required to make to the Minister for Industry and Commerce a report of its proceedings, and the Minister was required to lay the report before each House of the Oireachtas, that is the report was to be published. Accordingly, annual reports were published from 1953 to 1971, as follows:

1953	Pr 2282
1954	Pr 2886
1955	Pr 3346
1956	Pr 3944
1957	Pr 4450
1958	Pr 4923
1959	Pr 5385
1960	Pr 5857
1961	Pr 6456
1962	Pr 7025
1963	Pr 7628
1964	Pr 8194
1965	Pr 8910
1966	Pr 9542
1967	Prl 143
1968	Prl 850
1969	Prl 1298
1970	Prl 1878
1971	Prl 2509.

There was no provision in the 1972 Act for the Restrictive Practices Commission to produce an annual report, though the Examiner of Restrictive Practices was required to make an annual report to the Minister, and this was published. The Commission decided, however, that it would furnish a statement of its activities for inclusion in the Examiner's reports. Accordingly a statement of the principal activities of the Commission during 1972 was included as an Appendix to the first annual report of the Examiner, for 1972 – Prl 3585. No report from the Commission in respect of 1973

was published in the second annual report of the Examiner, nor was one apparently published elsewhere.

From 1974 onwards, however, an annual report was furnished by the Commission to the Minister, and these reports were published as follows:

1974 Prl 5005  
1975 Prl 5378  
1976 Prl 6380  
1977 Prl 7086  
1978 Prl 8066  
1979 Prl 8861  
1980 Prl 9936  
1981 Pl 734  
1982 Pl 1553  
1983 Pl 2464  
1984 Pl 3275  
1985 Pl 4188  
1986 Pl 4992  
1987 Pl 5877  
1988/89 ---\*  
1990 Pl 8303  
1991 Pl 8782.\*\*

\* Pressure of work made it necessary to submit one report for the two years 1988 and 1989. No Pl number appears to have been allocated.

\*\* The report of the Commission for the period from 1 January to 30 September 1991 was included as an Annex to the first annual report of the Competition Authority for 1991 – Pl 8782.

## FAIR TRADING RULES

The Commission could publish, on its own initiative or following representations from a trade association, Fair Trading Rules (later Fair Practice Rules) which, in the opinion of the Commission, represented fair trading conditions in respect of the supply and distribution of any kind of goods (including ancillary services). These Rules did not have the force of law, but the Act provided that, if the Rules were not being observed, the Commission had to report to the Minister who could make an Order which, if confirmed by the Oireachtas, would give legal effect to the Rules.

Given the number of complaints when the Commission took office, and the time needed to hold an enquiry and make an order, the procedure of Fair Trading Rules enabled the Commission to establish certain standards that discouraged undesirable restrictions over a fairly large number of products and trades in a relatively short time. The Rules also constituted a means of education by persuasion, and they were somewhat exploratory in character from the viewpoint of the Commission. Besides publishing draft Rules and inviting comments on them, the Commission sometimes held public sessions to hear submissions by interested parties. Some Rules were made after Orders were made, while others were followed by enquiries and Orders.

Each set of Rules was designed to cope with distributional features which were specific to a particular class of goods, and so they exhibited differing provisions. There were standard rules in a number of cases, some rules were slightly modified from the standard rules, and a few showed marked differences. The Rules contained a Preamble which, *inter alia*, defined the goods involved and stated that they represented, in the opinion of the Commission, fair trading conditions

Between 1953 and 1963, sets of Rules were made in respect of the supply and distribution of the following 22 commodities:

1. Ropes, Cordage and Twines (1953).
2. Nails and Screws (1953).
3. Tableware (Earthenware and China) (1954).
4. Cutlery, Spoons and Forks (1954).

5. Entry into the Retail Trade in Petrol (1954). (Revoked as from 25 July 1962).
6. Electric Light Bulbs (1954).
7. Sole Leather (1954).
8. Files and Hacksaw Blades (1954).
9. Dry Batteries (1954).
10. Carpets, Carpeting and Floor Rugs (1954). (Revoked as from 1 April 1958).
- 10a. Carpets, Carpeting and Floor Rugs (Revised, 1958). (Revoked as from 16 July 1958).
11. Household Textiles (Non-Woolen) (1955).
12. Coal (1955).
13. Aluminium Hollow-ware (1955).
14. Perambulators, Folding-Cars and Sun-Cars (1957).
15. Pedal Bicycles, Spare Parts and Accessories (1957).
16. Entry into and Trade in the Co-operative Wholesale Distribution of Grocery Goods and Provisions (1957). (Revoked as from 21 June 1960).
17. Supply of Alcoholic and Non-Alcoholic Apple Drinks, Juices and Concentrates to Wholesalers (1957).
18. Razor Blades (1958).
19. Cigarettes (Maintenance of Resale Prices by a Manufacturer) (1958).
20. Entry into and Trade in the Sale and/or Repair of Motor Vehicles (1959). (Revoked as from 1 March 1962).
- 20a. Entry into and Trade in the Sale and/or Repair of Motor Vehicles (1962).
21. Entry into the Wholesale Trade in Domestic Electrical Goods (1960).
22. Collective Restrictions affecting the Supply and Distribution for Resale of Proprietary Household Remedies, Infant and Invalid Foods, Non-Alcoholic Health Drinks and Toilet Preparations (1963).

There were standard rules in a number of cases, some rules were slightly modified, and a few showed marked differences. In general there was an outright prohibition of:.

- (a) unfair discrimination in the terms accorded to purchasers of the same class;
- (b) the withholding of goods because a supplier was not a member of, or approved by, a trade association;
- (c) unfair limitations on entry to trade;
- (d) resale price maintenance, both individual and collective;
- (e) collective price fixing;
- (f) tied sales and exclusive dealing arrangements; and
- (g) territorial division of markets.

The Rules generally provided for freedom of entry to the trade, and freedom to compete fairly. By and large, they provided that each supplier might prescribe terms and conditions, on which he was prepared to make supplies available, which were necessary in the interests of efficiency and economy in distribution. These terms and conditions had to allow a reasonable opportunity for persons to enter the trade, both wholesale and retail, and they had to be applied equitably. A supplier had to be able to act independently in deciding his channels and terms of supply without being constrained or influenced by any restrictions proposed by a trade association. On occasion, the Rules specified that certain information should be furnished to the Commission, on request, such as particulars when supplies were withheld, or a statement of the supplier's terms and conditions.

In the case of coal, the Rules (No. 12) included special arrangements for import prices, whereby an association of importers was permitted to engage in collective bargaining with a state organisation in a coal supplying country. The Rules regarding perambulators (No. 14) and bicycles (No. 15), were shorter than the standard, but they permitted the withholding of supplies from any trader advertising the supplier's suggested price in close conjunction with his own price, or selling an item at or below the purchase price.

The Rules for cigarettes (No. 19) permitted individual resale price maintenance by a manufacturer, who had requested the Rules during a period when his cigarettes were being used by some retailers as loss leaders and strong pressure was being exerted to get him to apply sanctions on the price-cutters. The Rules permitted the manufacturer to maintain his own resale prices, if necessary by withdrawal of supplies, but it did

not permit collective price maintenance. Later, the manufacturer was unable to enforce the conditions of sale, including the right to withhold supplies, and withdrew them. The Commission held to its view that collective resale price maintenance was not desirable, and it did not amend the Rules to allow this.

Following a review of the Motor Cars Order in 1958, the Commission made Rules to ensure certain minimum standards as a condition for the supply of motor vehicles (No. 20), otherwise supplies could be withheld. The Rules laid down a minimum size of premises and minimum levels of equipment, and they provided that at least one trained mechanic should be employed. They did not permit the specification of minimum standards for the supply of parts and accessories. These Rules were replaced after three years by another set of Rules (No. 20A), which did not make any major changes.

The first set of Rules in respect of carpets and rugs (No. 10) was made in 1954, and it followed the standard approach. When it became clear that one manufacturer was fixing his terms of supply at levels that effectively excluded new entrants to the wholesale trade, revised Rules (No. 10A) were made in 1958 revoking the previous Rules. The revised Rules prescribed quantity limits for purchases by wholesalers. Following further complaints about breaches of the Rules, rather than reporting the breach to the Minister to make an order enforcing the Rules, because of substantial legal doubts, a public enquiry into carpets was announced in October 1958.

Under the Act, the Commission was required to keep the operation of Rules under review. These reviews involved consideration of submissions in response to press advertisements, discussions with manufacturers and traders, and in some cases visits to traders by officers of the Commission to ascertain trading conditions. Generally speaking, the Commission found that the Rules were operating satisfactorily.

The last set of Fair Trading Rules was made in 1963. Despite the fact that Fair Practice Rules could be made by the Commission under the 1972 Act, on the recommendation of the Examiner or at the request of a trade association, but no longer on its own initiative, no such Rules were ever made. In the 1978 report of the Commission into Cinema Films (Prl 7260), no order was recommended, but Fair

Practice Rules were. At the request of the Examiner, draft Rules were published in October 1979. In May 1982, the Commission announced that it had decided not to make Rules, due to the lack of consensus in the trade. No Order was made to give legal effect to any of these Rules, though some were replaced by an Order following an enquiry by the Commission. All Rules were repealed by the 1991 Act.

## **REPORTS OF ENQUIRIES, ORDERS MADE AND REVIEWS OF ORDERS UNDER THE 1953 ACT**

Under the 1953 Act, as amended, the Commission was empowered to hold public enquiries into the supply and distribution of any kind of goods (including ancillary services) and to furnish a report of its findings, with recommendations, to the Minister, who might make an Order giving effect to the recommendations. While enquiries were held in public, private sessions could be held to avoid the disclosure of information which might injure legitimate business interests. Private sessions dealt with, in particular, the accounts of the parties involved. The operation of Orders had to be kept under review by the Commission, and, under the 1959 amending Act, special reviews could be held into the operation of existing Orders. All reports were published.

### ***Reports of Enquiries***

Enquiry into the conditions which obtain in regard to the supply and distribution of RADIO SETS AND ACCESSORIES. 1954. (Pr 2660).

Enquiry in relation to the supply and distribution of BUILDING MATERIALS AND COMPONENTS. 1954. (Pr 2841).

Enquiry into the conditions which obtain in regard to the supply and distribution of MOTOR VEHICLES, TYRES, OTHER SPARE PARTS AND ACCESSORIES. 1956. (Pr 3034).

Enquiry into the conditions which obtain in regard to the supply and distribution of GROCERY GOODS AND PROVISIONS. 1956. (Pr 3722).

Enquiry into the conditions which obtain in regard to the supply and distribution of PROPRIETARY AND PATENT MEDICINES AND INFANT FOODS AND MEDICAL AND TOILET PREPARATIONS. 1956. (Pr 3926).

Enquiry into the conditions which obtain in regard to the supply and distribution of CARPETS, CARPETING AND FLOOR RUGS. 1959. (Pr 5175).

Enquiry into the conditions which obtain in regard to the supply and distribution of MOTOR SPIRIT AND MOTOR VEHICLE LUBRICATING OIL with special reference to exclusive dealing arrangements for the retailing of these products. 1961. (Pr 6000).

Enquiry into the operation of resale price maintenance in the supply and distribution of COOKERS AND RANGES. 1961. (Pr 6293).

Enquiry into the operation of resale price maintenance in the supply and distribution of WOMEN'S NYLON STOCKINGS AND HAND KNITTING YARNS. 1962. (Pr 6679).

Enquiry into restrictive trade practices affecting supply and distribution and involving, inter alia, arrangements, agreements or understandings between retailers, made at the instance of retail trade associations, which affect or are capable of affecting the retail prices of INTOXICATING LIQUOR AND SOFT DRINKS. 1965. (Pr 8591).

Enquiry into the conditions which obtain in regard to the supply and distribution to retailers of JEWELLERY, WATCHES AND CLOCKS. 1967. (Pr 9820).

Enquiry into conditions which obtain in regard to the supply and distribution of BOVINE HIDES AND SKINS. 1969. (Pr 1050).

Enquiry into conditions which obtain in regard to the supply and distribution of CERTAIN ELECTRICAL APPLIANCES AND EQUIPMENT. 1970. (Pr 1150).

Enquiry into the conditions which obtain in regard to the supply and distribution of MOTOR SPIRIT insofar as they affect the nature and growth in numbers of motor spirit retail outlets. 1971. (Pr 1931).

Enquiry into the conditions which obtain in regard to the supply and distribution of GROCERY GOODS FOR HUMAN CONSUMPTION excluding fresh fruit, fresh vegetables, fresh and frozen fish, fresh milk, fresh cream, ice cream, intoxicating liquor and soft drinks. 1972. (Prl 2517).

Enquiry into the conditions which obtain in relation to the supply and distribution of IRON AND STEEL SCRAP. 1972. (Prl 2785).

### ***Restrictive Trade Practices Orders***

Following the enquiries and reports by the Commission under the 1953 Act, the Minister made Orders in all but three of the cases – Medicines, Bovine Hides and Skins, and Iron and Steel Scrap. Some Orders were later amended. The Orders were as follows:

Restrictive Trade Practices (Radios) Order, 1955. (S.I. No. 102 of 1955).

Restrictive Trade Practices (Building Materials) Order, 1955. (S.I. No. 187 of 1955).

Restrictive Trade Practices (Motor Cars) Order, 1956. (S.I. No. 86 of 1956).

Restrictive Trade Practices (Groceries) Order, 1956. (S.I. No. 332 of 1956).

Restrictive Trade Practices (Groceries) Order, 1956 (Amendment) Order, 1958. (S.I. No. 163 of 1958).

Restrictive Trade Practices (Carpets) Order, 1960. (S.I. No. 59 of 1960).

Restrictive Trade Practices (Motor Spirit and Motor Vehicle Lubricating Oil) Order, 1961. (S.I. No. 294 of 1961).

Restrictive Trade Practices (Motor Spirit and Motor Vehicle Lubricating Oil) Order, 1961 (Amendment) Order, 1962. (S.I. No. 62 of 1962).

Restrictive Trade Practices (Cookers and Ranges) Order, 1962. (S.I. No. 117 of 1962).

Restrictive Trade Practices (Hand Knitting Yarns) Order, 1962. (S.I. No. 197 of 1962).

Restrictive Trade Practices (Intoxicating Liquor and Non-Alcoholic Beverages) Order, 1965. (S.I. No. 232 of 1965).

Restrictive Trade Practices (Jewellery, Watches and Clocks) Order, 1968. (S.I. No. 80 of 1968).

Restrictive Trade Practices (Electrical Appliances and Equipment) Order, 1971. (S.I. No. 151 of 1971).

Restrictive Trade Practices (Electrical Appliances and Equipment) (Amendment) Order, 1971. (S.I. No. 313 of 1971).

Restrictive Trade Practices (Motor Spirit) Order, 1972. (S.I. No. 150 of 1972).

While there was an enquiry in 1972 into certain grocery goods under the 1953 Act, the ensuing Order was made under the 1972 Act (see below).

### ***Reports of Enquiries, and Orders Made, 1953 to 1972***

Following an introduction, the reports of enquiries described the conditions in the trade, including its structure and trade associations involved, and described the complaints made, for example, concerning an approved list system of traders and resale price maintenance. The Commission then presented its conclusions and recommendations, and, generally, recommended the form of Order to be made by the Minister. The Appendices contained a list of witnesses, copies of any submissions made, and other information, such as statistical data in relation to the trade. The later reports also contained a list of appearances by legal representatives.

The Commission usually concluded that a trade association had tried to limit the admission of newcomers to the trade so as to confine the distribution of products to limited channels in order to lessen competition, and that most forms of price maintenance and price fixing were contrary to the public interest. The form of Order recommended by the Commission, with some variations, contained prohibitions on horizontal price fixing, collective and individual resale price maintenance, blacklists and boycotts, the withholding of goods by suppliers, discrimination in terms of supply, restricting entry to the trade, and on the preparation by an association of lists of approved or non-approved traders.

Two reports were concerned solely with the question of resale price maintenance (cookers and ranges (1961) and nylon stockings and hand knitting yarns (1962)). There were two reports into grocery goods (1956 and 1972), and two also into motor spirit (1961 and 1971).

In the case of medicines and infant foods (1956), the Minister considered that the circumstances of the trade in chemists' goods did not warrant the making of an Order. At an early stage in this enquiry, the right of the Commission to enquire into what was claimed to be a profession was challenged in the courts, which decided that the Commission was entitled to enquire into the business activities of the professions, but it could not investigate entry to trade, which was controlled by the profession. (Six years later, in 1963, the Commission made Fair Trading Rules (No. 22) relating to toilet preparations, proprietary household medicines, and infant and invalid foods, prohibiting collective action to enforce limitations of supply and the maintenance of prices).

In the case of bovine hides and skins (1969), the Minister decided that the public interest did not require that he should make an Order.

The enquiry into the supply and distribution of iron and steel scrap (1972) differed somewhat from the other enquiries. The enquiry arose from complaints from a supplier of scrap iron and steel in Northern Ireland about the activities of Irish Steel Holdings Ltd. ISH was a State-owned company and operated the only steel company in the State. The market was protected and exports were strictly controlled, so that

ISH was essentially the only purchaser of ferrous scrap. There was effectively only one merchant supplier of scrap in the State. The Commission concluded that the price structure of ISH for purchasing scrap represented a formidable and unnecessary barrier to entry into the scrap trade, had fostered a monopoly in merchant scrap sales to the company and had served to create a situation which had seriously impeded free and fair competition.

The Commission recommended that the graduated price scale of ISH should be terminated, and made detailed proposals for an alternative structure which should assist smaller scrap merchants. It also recommended termination of the appointment to the Board of ISH of the Chairman of the main merchant supplier of scrap. The Commission, however, did not recommend the making of an Order, since the recommendations related to the policies and practices of a State-owned company, and it did not feel that an Order would be necessary to secure the compliance of ISH with the recommendations if the Minister accepted them. ISH indicated that it had accepted the recommendations in relation to the supply of scrap.

Thus there were 16 reports of enquiries by the Commission, and 13 Orders were made by the Minister. One of these, the 1973 Groceries Order, was made under the 1972 Act, and there was also a Groceries Order made in 1956. There were also two Orders made in respect of Motor Spirit (1961 and 1972). In some cases, an amending Order was made to the original Order – Groceries (1958), Motor Spirit and Lubricating Oil (1961) and Electrical Appliances and Equipment (1971).

The most important prohibitions in the Orders from 1955 to 1972 were:

- (a) discrimination (or unfair discrimination), including price discrimination, as to the terms and conditions of supply to purchasers in the trades concerned, unless such discrimination was necessary in the interests of efficiency and economy in production and distribution or was necessary in the legitimate interests of the supplier's business, and provided that such terms and conditions were applied in an equitable manner to all persons seeking supplies;
- (b) resale price maintenance by an individual supplier;

- (c) collective resale price maintenance and collective fixing of suppliers' selling prices;
- (d) collective coercion of suppliers to withhold supplies (boycotts) or to discriminate in terms of supply;
- (e) agreements, arrangements or understandings for the purpose of restricting entry to a trade;
- (f) lists of approved traders prepared by associations, organisations or other combinations;
- (g) agreements by two or more retailers not to purchase goods from a supplier because the supplier sold goods to a particular retailer or class of retailer.

Some orders solely prohibited individual and/or collective resale price maintenance.

Several Orders did, however, permit an individual supplier to withhold goods from a person who resold goods at a price greater than the maximum resale price specified by the supplier. They also permitted the withholding of goods which were resold at or below the purchase price, or at a price so little above the purchase price as materially to injure the supplier's legitimate business interests. In the latter case, the supplier had to notify the Commission, which could then investigate the withholding of goods.

In the case of groceries, the supplier was required to provide a copy of his terms and conditions to any person engaged in or proposing to engage in the trade. The Commission was enabled to obtain a copy of the terms and conditions, which it could investigate, and it could require alteration of these. The Motor Spirit Orders contained provisions unique to the motor spirit and lubricating oil trades, including provisions relating to solus retailers who sold only one brand of motor fuel and to mixed brand retailers. There were also provisions regarding the acquisition or construction of oil company owned motor spirit stations. The Motor Spirit Order of 1972 prohibited the operation of further company-owned stations for a three-year period. The Grocery and Motor Spirit Orders are described at greater length below.

***Reports on the Operation of Orders***

Under the 1953 Act, the Commission kept under review the operation of Orders, and it issued four reports of formal reviews, which were published as follows:

Report on the operation of the Restrictive Trade Practices (Motor Cars) Order, 1956. 1958. (Pr 4672).

Report on the operation of the Restrictive Trade Practices (Radios) Order, 1955. 1959. (Pr 4915).

Report on the operation of the Restrictive Trade Practices (Building Materials) Order, 1955. 1959. (Pr 5336).

Report of a Review of the operation of Orders relating to the supply and distribution of Groceries. 1966. (Pr 8896).

The reviews were undertaken in private, and the views were sought of trade associations and individual retailers and other persons in the trade (wholesalers and suppliers). Written submissions from interested parties were published as an Appendix to the reviews, and these submissions were discussed by the Commission, which also gave its observations on the issues raised. In each case, the Commission concluded that amendment of the relevant Order would not be justified at that time. In the case of the Groceries Order, in particular, it was stated that the grocery trade was undergoing important changes and sufficiently clear trends had not then emerged which would indicate the nature of the amendments, if any, which would be required.

## **REPORTS OF ENQUIRIES, REVIEWS AND STUDIES, AND ORDERS MADE, UNDER THE 1972 ACT, AND OTHER LEGISLATION**

A feature of the implementation of the 1972 Act was that there were several Orders and amendments to Orders relating to Grocery Goods and to Motor Spirit, but only one Order was made following an enquiry into other goods and services, and this was not confirmed. An Order could not be made as a result of a study by the Commission under the Act. Following enquiries and studies in other areas, however, legislation was enacted, sometimes by Ministers other than the Minister for Industry and Commerce, and non-legislative developments occurred on occasion. The Minister was enabled, under the 1987 amending Act, to make an Order without a preceding enquiry by the Commission, and this was done in one case, but was not confirmed.

Another feature of the period from 1972 to 1987 was the involvement of the Examiner of Restrictive Practices in implementing the Act. In particular, the Commission generally could not hold an enquiry except at the request of the Examiner or at the request of the Minister transmitted through the Examiner. Studies and analyses could be undertaken on the initiative of the Commission, though the Minister could request a report of such studies and analyses directly from the Commission.

Because there were several enquiries into the two areas mentioned above, grocery goods and motor spirit, it is convenient to group these together for the period before and after 1972, and then to list the other enquiries and studies undertaken by the Commission, and subsequent legislation.

**GROCERIES – REPORTS OF ENQUIRIES AND ORDERS MADE,  
1956 TO 1991**

*Groceries Enquiries*

Enquiries had been held into the grocery trade in 1956 and 1972, and there was a review of the Groceries Order in 1966. The subsequent enquiries into grocery goods were as follows:

Special Review by means of public enquiry of the operation of Articles 2 and 3 of the Restrictive Practices (Groceries ) Order, 1973, as amended by the Restrictive Practices (Groceries) (Amendment) Order, 1973. 1975. (PrI 5274).

Enquiry into the Retail Sale of Grocery Goods Below Cost. 1980. (PrI 9428).

Report of Review of Restrictive Practices (Groceries) Order, 1981. 1987. (PI 4678).

Report of the Review of the Restrictive Practices (Groceries) Order, 1987. 1991. (PI 8304).

*Groceries Orders*

Following enquiries, Groceries Orders were made in 1956 and 1958. Subsequent Orders were as follows:

Restrictive Practices (Groceries) Order, 1973. (S.I. No. 49 of 1973).

Restrictive Practices (Groceries) (Amendment) Order, 1973. (S.I. No. 287 of 1973).

Restrictive Practices (Groceries) (Amendment) Order, 1978. (S.I. No. 82 of 1978).

Restrictive Practices (Groceries) (Amendment) (No. 2) Order, 1978. (S. I. No. 336 of 1978).

Restrictive Practices (Groceries) Order, 1981. (S.I. No. 69 of 1981).

Restrictive Practices (Groceries) Order, 1981 (Amendment) Order, 1986. (S. I. No. 329 of 1986).

Restrictive Practices (Groceries) Order, 1987. (S.I. No. 142 of 1987).

### ***Groceries - Reports of Enquiries and Orders Made***

#### *The 1956 Enquiry*

The report of the first enquiry into grocery goods and provisions was published in 1956. The main areas considered by the Commission were resale price maintenance, both individual and collective, stamp trading, trade terms including quantity discounts, control of entry into the trade, van trading (travelling shops), and collective fixing of prices and discounts, and it outlined the form of Order which it recommended.

#### *The 1956 and 1958 Orders*

The main Order was made in 1956, and some provisions were amended in 1958, and both Orders came into operation in 1958. The Orders applied to grocery goods and provisions, that is foodstuffs, with some exceptions, and household necessities which were ordinarily sold in grocery and provision shops, and it covered suppliers, wholesalers and retailers. The exceptions were flour, wheatenmeal, bread, flour confectionery (other than biscuits), mineral waters, fresh fruit, fresh vegetables, fresh milk and cream.

The Orders prohibited individual and collective resale price maintenance, but provision was made whereby a supplier might withhold supplies of his branded products from a retailer who sold, or offered for resale, the goods at a price equal to or less than a wholesale price notified by the supplier, and failed to give to the supplier an acceptable undertaking to discontinue doing so. In addition, a supplier could

withhold supplies from a retailer who advertised or displayed the supplier's indicated or recommended price in close conjunction with that retailer's own price.

The 1956 Order provided that an individual supplier could decide his own terms and conditions, including the size and frequency of orders, based on the interests of efficiency and economy or which were necessary, provided that these were applied equitably. A statement of terms and conditions had to be supplied on request to a trader or to the Commission.

In addition, the Orders prohibited the collective fixing of suppliers' and wholesalers' selling prices, and it stated that a supplier's recommended price was not binding as a minimum price. They prohibited the withholding of goods from persons not approved by a trade association, and the coercing of a supplier or wholesaler to withhold supplies. There were also prohibitions on unfair discrimination by a supplier or wholesaler (except on the grounds of creditworthiness), on restricting entry to the trade, on lists of approved traders, and on preventing cooperative societies from engaging in the supply and distribution of goods. (As a result of the last provision, the Fair Trading Rules relating to cooperative wholesale societies were revoked in 1960).

The amending Order in 1958 made a substantial alteration to the provisions allowing an individual trader to decide his terms and conditions of supply. The supplier was permitted to divide wholesalers and/or retailers into separate classes, provided that the division was fair and was applied without unfair discrimination. The terms and conditions had to be provided on request to a trader and/or the Commission. The Order also provided that, where the Commission considered that the division or the rates of discount were unfair, the supplier had to make whatever alterations were required by the Commission. As a consequence, the prohibition of unfair discrimination was revoked. In addition, the provision on the prohibition of lists of approved traders was replaced by a provision prohibiting lists designed to boycott any person or to adversely affect the terms of supply to any person.

*Review of the Orders*

The Commission kept the operation of the Orders under review. In the 1961 Annual Report, for example, it noted the revolution in distributive methods, which had spread to Ireland from America and Europe, especially in relation to the grocery trade. It also mentioned the formation of a “voluntary group” of independent retail grocers with a wholesaler. In the 1962 Annual Report, it referred to representations made about widespread sales of butter at less than cost. The Commission considered that legislation to prohibit this practice would not prevent traders from adopting other forms of sales promotion which would have similar effects. It also stated that, apart from the administrative difficulties involved in such legislation, the imposition of mandatory minimum prices would mean an interference with free enterprise and competition which would tend to reduce incentives to efficient distribution.

The Commission undertook a formal Review of the operation of the Groceries Order in 1966. Having examined the Orders in detail, the Commission did not consider that termination of any of their provisions was justified. Nor could it usefully recommend any amendment of the Orders at that time, because the grocery trade was undergoing important changes, and sufficiently clear trends had not emerged which would indicate the nature of the amendments, if any, which would need to be made in the Orders.

*The 1972 Enquiry*

In December 1970, the Commission announced its intention to hold a Public Enquiry into the conditions which obtained in regard to the supply and distribution of grocery goods for human consumption, not including fresh fruit, fresh vegetables, fresh and frozen fish, fresh milk, fresh cream, ice cream, intoxicating liquor and soft drinks. Thus the Enquiry was limited to foodstuffs, and it did not deal with a number of household necessities covered by the existing Groceries Orders. One reason for this was that the vast majority of the representations made to the Commission about the conduct of the grocery trade related to foodstuffs. Secondly, the definition of “household necessities” in the context of the trade, as it had developed in the previous ten years, would have presented difficulties, and would have led to a

considerable extension of the range of the Enquiry without, in the view of the Commission, adding significantly to the illumination of the issues likely to be under consideration.

Public sittings commenced in January 1971, and the Commission's report was presented to the Minister in May 1972. The Enquiry was held by two permanent members of the Commission and one temporary member. The report was concerned mainly with the question of terms and conditions of supply, but it also dealt with several retailing practices, such as sales below purchase price, trading stamps, private label brands, claims of "no turnover tax charged", redeemable vouchers, registration of shops and consumer protection. The Commission concluded that, with the shift in the balance of power from manufacturers to large buyers, there was a need for Government intervention to provide against unfair discrimination and to help correct competitive distortion without, however, stifling new initiatives beneficial to consumers.

The Commission recommended the making of an Order, the main provisions of which were as follows:

- (a) Suppliers should be allowed to distribute their products through whatever channels they found most satisfactory, that is through wholesalers or direct to retailers, or both. They should be able to grant discounts relating to function, such as a wholesaler differential, or discounts relating solely to the quantity or value of purchases. There should be a prohibition on the aggregated discount system, under which suppliers calculated discounts on the basis of a customer's total purchases from members of a trade association.
- (b) Every supplier should have written terms and conditions of supply, and all sales of goods should be made in accordance with these. These should include standard terms of supply, available to all trade customers, and also details of any supplementary terms and credit facilities. Supplementary terms included items such as long term agreements, advertising and promotional allowances, special and bonus offers, etc. Suppliers should grant the same standard terms to all customers. Quantity terms, if any, should be at realistic levels consistent with the encouragement of efficiency and economy in distribution. Volume discounts, if any, should be related not only to total

purchases in a given period but to the number of points to which delivery had to be made and to the frequency of such deliveries.

- (c) A supplier who had supplementary terms should indicate the range of the allowances and the conditions on which they were available. All customers meeting these conditions should qualify for the supplementary allowance, though not necessarily at the same time. Supplementary terms should be based on objective criteria, and should not be of such a magnitude as to alter substantially the standard terms available and should not be set at unreasonable levels, with the effect of discriminating against any group of traders. Advertising allowances should be given on the basis of advertising done, and should not be used for any purpose other than advertising.
- (d) The extent of credit should be specified where this was allowed, as well as any minimum purchasing requirements which had to be met to qualify for credit. Credit terms should be the same for all customers except where the question of creditworthiness arose.
- (e) Every supplier should be required to deposit a copy of his terms and conditions of supply with the Commission and inform it of any changes made subsequently. Where the Commission considered that a supplier's terms and conditions were unfairly discriminatory towards any section of the trade, the supplier would have to modify his terms and conditions as required. A supplier should, if requested, furnish a copy of his terms and conditions to any person engaged in or proposing to engage in the trade, to any organisation representing consumers and to trade associations.
- (f) Traders should be prohibited from attempting to coerce suppliers into treating them more favourably than on their published terms. Traders should be allowed, however, to request suppliers to change their terms and conditions.
- (g) A supplier should not advertise a product being sold at a price less than the net purchase price in any medium outside his own premises. Net purchase price should include all taxes and had to be adjusted upwards to make allowance for any other promotional devices used by the retailer, which had the effect of directly or indirectly reducing his selling prices. Thus a retailer who provided trading stamps, or did not charge turnover tax, should include the cost of these to himself when reckoning net purchase price. Instances of products advertised at prices apparently below net purchase price would be investigated

by the Commission on request, to determine whether there had been any unfair discrimination or breach of terms on the part of the supplier of the goods. A supplier should be permitted to withhold supplies or to request a wholesaler to withhold supplies from a retailer who resold or offered goods for resale at a price exceeding a maximum retail price specified by the supplier.

Under the 1972 Act, functions in connection with the implementation and enforcement of any Order, under (e) and (g) above, were transferred to the Examiner from the Commission.

The Commission also commented unfavourably on two forms of promotion, the use of trading stamps and the advertising of “no turnover tax charged” where no separate additional charge was made in respect of turnover tax. It made no formal recommendations on these, as it regarded them as matters that could more suitably be dealt with by consumer protection legislation.

Trading stamps were dealt with in subsequent legislation – the Trading Stamps Act, 1980 (No. 23 of 1980) – see below. Turnover tax was replaced by value added tax in November 1972. The Minister made an Order in January 1973 entitled the Prices and Charges (Tax-inclusive Statements) Order, 1973 (S.I. No. 9 of 1973). This Order required that all retail prices marked on goods or prices displayed or quoted at the retail level and all charges for services displayed or quoted should be tax-inclusive.

A suggestion that a system of licensing new outlets should be introduced was rejected by the Commission which felt that this would not be in the public interest. The Commission made no proposals in respect of matters such as shelf-loading by suppliers, private label brands and redeemable vouchers. The Commission finally recommended that most of the provisions of the 1956 and 1958 Orders, subject to changes recommended in this report, should continue to operate in relation to the goods covered by their enquiry.

*The 1973 Orders*

The 1973 Groceries Order gave effect to the recommendations of the Commission, and it was made in February 1973. It related to grocery goods for human consumption, excluding fresh fruit, fresh vegetables, fresh and frozen fish, fresh milk, fresh cream, ice cream, intoxicating liquors, mineral waters and non-alcoholic fruit drinks.

The Order provided that the supplier must prepare and maintain a statement in writing of the terms and conditions of sale of grocery goods, including supplementary and credit terms, if any, and must effect a sale of goods subject to those terms and conditions. Only a general indication of the nature and extent of supplementary terms was required. Discounts could be related to the different functions performed by purchasers or to the quantity or value of the goods. Discounts relating to the quantity or value of single deliveries should take reasonable account of the costs of such deliveries and of the different costs of different deliveries, and, where relevant, the number of places to which deliveries were made and the frequency of deliveries. Aggregated rebates relating to a number of suppliers were not permitted.

The terms and conditions should be reasonable, and should not unfairly or unjustly cause the cessation of business of a wholesaler or retailer, or prevent entry to the trade or involve discrimination. Supplementary terms should not involve discounts which were substantially larger than the standard terms and they should be determined by reference to objective criteria, related to percentage increases in purchases, where possible. They could be made available to different purchasers at different times. Details of supplementary terms must be furnished to the Examiner on request.

A supplier was required to furnish a copy of the written terms and conditions to the Examiner, and of later amendments, as well as to any existing or prospective wholesaler or retailer on request. If the Examiner considered that the terms and conditions constituted unfair discrimination, the supplier was required to make such amendments as the Examiner specified.

The Order prohibited a retailer from advertising grocery goods at a price less than the purchase price, after taking account of discounts on resale and purchase, but this did not apply to advertising where the goods were on sale.

A wholesaler or retailer was prohibited from inducing a supplier to sell grocery goods on terms and conditions different from those in the written statement, but a purchaser could request a supplier to alter the terms or conditions.

A wholesaler or retailer who imported goods into the State had also to furnish to the Examiner a statement of the terms and conditions of purchase.

Advertising allowances to wholesalers or retailers were prohibited.

Where the Examiner suspected that goods were being sold at less than the purchase price, he could investigate the terms and conditions on which they were purchased by the retailer .

Goods could be withheld from a retailer who sold them above a maximum price specified by the supplier, until the retailer undertook not to exceed the maximum price.

The 1956 and 1958 Orders were extended to apply to grocery goods to which they did not previously apply, e.g. flour and bread. A number of the provisions of the earlier Orders were declared not to apply to grocery goods. Thus the 1956 and 1958 Orders applied in total to household necessities, but these were outside the scope of the 1973 Order. Many provisions of the earlier Orders still applied to foodstuffs, as did the whole of the 1973 Order.

Finally, there was an amending Order in October 1973, which amended part of an Article in the 1973 Order relating to the equitable application of any quantity or volume discounts allowed by suppliers in the case of the sizes and numbers of deliveries of goods.

*The 1975 Report*

The Examiner forwarded a report of his investigation into the operation of the Order to the Commission in November 1974 and he recommended that the Commission hold a Special Review of Articles 2 and 3 of the Order. Article 2 defined the various terms in the Order, including the “grocery goods” covered by it, and Article 3 related to suppliers’ terms and conditions. The Examiner concluded that Article 3 could not achieve the main purpose for which it was designed, which, in his view, was to increase the drop size of deliveries. He stated that enforcement had been impeded by powerful purchasers.

The Review was carried out by means of a public enquiry during 1975, and the Commission’s report was sent to the Minister in December 1975. The report of the Examiner was included as an Appendix.

The Commission recommended an amendment of Article 2 to exclude fresh and frozen meat from the scope of the Order. It concluded that proprietary medicines did not come under the definition “grocery goods for human consumption”. It determined that other products should not be excluded from the Order, that is pigmeat products, fresh and frozen poultry, yogurt, bread and own label products. Suppliers should not, however, be required to publish terms and conditions of supply for own label products, though these should be furnished to the Examiner on request.

In respect of terms and conditions, the Commission considered the aim of ensuring that quantity or volume discounts should be set at realistic levels consistent with the encouragement of efficiency and economy in distribution, so as to avoid unfair discrimination. It took into account also that not all foodstuffs were suitable for the use of quantity terms, and that changes in terms and conditions could be resisted by sectors of the trade, especially by those whose buying power was growing more powerful, such as multiple supermarkets and group wholesalers.

The Commission recommended the amendment of Article 3 to provide greater latitude to the supplier in formulating distribution arrangements best suited to his marketing strategy and consistent with equity in their application. The Commission

also recommended the strengthening of the provision in Article 7, which imposed an obligation on purchasers to adhere to a supplier's terms and conditions. The effect of the recommendation was to prohibit a purchaser from unreasonably or unfairly taking credit in excess of that provided in a supplier's terms and conditions.

The Commission recognised the difficulties caused by the requirement in Article 4 on suppliers to lodge their terms and conditions with the Examiner. It recommended that a supplier should be required to lodge a statement of terms and conditions on the request of the Examiner. It rejected the suggestion, however, that there should be a compulsory functional differential for wholesalers.

#### *The First Amending Order of 1978*

The recommendations of the Commission were included in the amending Order which was made in March 1978. Fresh and frozen meat was added to the list of exemptions from the definition of grocery goods. Article 3 of the 1973 Order was amended in several ways:

- (a) The supplier was not required to prepare a statement of terms and conditions for own label goods.
- (b) It was provided that the terms and conditions could provide for discounts or rebates in relation to the function of the purchaser and the quantity or value of the goods, as before, but also related to other objective criteria which were designed to promote efficiency in supply or distribution and which were necessary in the legitimate interests of the supplier's business.
- (c) Reference to the quantity or value of single deliveries to purchasers was omitted, as was reference to the number and frequency of deliveries. Terms and conditions should not discriminate unfairly against purchasers, and should take reasonable account of the economies of supply and distribution to different purchasers.
- (d) Some provisions regarding supplementary terms were deleted.
- (e) Suppliers were required to submit a copy of their standard terms, any supplementary terms and any terms for own label goods to the Examiner on request.

- (f) It was provided that a purchaser should comply with credit terms in the written statement, but that it should be a defence for a person who did not do so that the failure was due to his inability to pay for the goods in accordance with the credit terms.

### *The Second Amending Order of 1978*

From early 1978, an alliance of wholesalers and the main retailers' association had been pressing suppliers to end under cost selling of their products by supermarkets and for a "wholesalers' discount" to enable the independent retailers to compete with the supermarkets. As part of the campaign, a boycott of one major supplier was organised. In September 1978, the Minister requested the Commission to intervene in the matter, and informal meetings were held with all the interests involved in the dispute.

In November 1978, the Commission recommended that the Groceries Orders be amended to permit the withholding by suppliers of all goods from an outlet which sold any of that supplier's goods at a price which was less than the net invoice price of the goods payable to the supplier. The Commission also recommended the extension to all food and non-food grocery goods of the provision in the 1973 Order prohibiting the advertising of foodstuffs below cost.

The Minister made a second amending Order, in December 1978, which gave effect to the Commission's recommendations, as follows:

- (a) The goods to which the Order applied were grocery goods for human consumption (except those specified in the first 1978 Order) and household necessities, other than foodstuffs, as were ordinarily sold in grocery and provision shops.
- (b) The Order provided that, where a wholesaler or retailer sold goods at a price less than the net invoice price payable to the supplier (including any value added tax payable by the reseller), the supplier was permitted to withhold from the reseller supplies of any goods to which the Order applied.
- (c) Where goods were withheld on these grounds, the Examiner had to be notified of this by the supplier, and the Examiner could investigate the matter. If the

Examiner informed the supplier that the circumstances did not justify the continued withholding of the goods, such withholding was no longer permitted.

- (d) A retailer was prohibited from publishing or displaying an advertisement for goods at a price that (after the deduction of the cost to the retailer of any discount or other benefit given on a sale of the goods) was less than the net invoice price of the goods (including any value added tax payable by the retailer) to the retailer. This did not apply to an advertisement at the place where the goods were on sale. A wide definition of “advertisement” was included.
- (e) As a consequence, certain Articles of the 1956 and 1973 Orders were revoked.

### *The 1980 Report*

In July 1979, the Minister transmitted through the Examiner a request to the Commission to hold a public enquiry into the retail sale of grocery goods below cost. Public hearings were held in November and December 1979. The Commission’s report was submitted to the Minister in November 1980, and was published in March 1981.

The Commission considered that the use of below cost selling (other than in response to a competitor who had initiated it, or in special cases such as the need to sell off perishables) was an undesirable practice involving a distinct element of unfairness and, on occasion, presenting some of the features of predatory pricing. Nevertheless, it did not consider that the prohibition of below cost selling would be to the advantage of manufacturers, distributors or consumers to an extent which would justify so serious an interference with freedom to trade. There were constraints in existence (i.e. power to withhold supplies and a ban on below cost advertising) which, if strengthened, would diminish the extent of below cost selling. This conclusion that the prohibition of sales below cost would not be justified was strongly reinforced by the numerous practical points of difficulty which prohibition would entail. The Commission did add, however, that, if concentration in the grocery trade were to advance in the future to a stage where competition between the multiples might tend to fade, or where the independent sector began to cease to be economic, then all

factors which might increase the degree of concentration, including the practice of below cost selling, would have to be seriously reconsidered.

The Commission recommended that the existing provision which empowered a supplier to withhold goods from a trader who sold goods supplied by him below net invoice price including VAT should be retained, but with an amendment to provide that the net invoice price should be ascertained from the latest invoice for goods of like kind, and with provision for a four-week rule for the treatment of retailers' stocks at the time of a change in wholesale price. In the latter case, where goods were sold after four weeks from the date on which a supplier's list price for the goods had been altered, and no like goods had been bought in the meantime, the cost price of the goods should be determined by the current "best list price" and not the net invoice price including VAT of the goods. The right to withhold should apply to own label goods. The provisions requiring the circumstances to be reported to the Examiner and charging the Examiner with special functions should be revoked. The withholding of goods by a supplier should not be mandatory.

The Commission also recommended that the existing provision which prohibited below cost advertising should be retained, but amended. The "net invoice price" should be calculated from the latest invoice relating to the delivery of like goods (subject to the four-week rule described above), and with no account being taken of discounts, rebates or other deductions which were not entered on the invoice. Where the purchaser had to pay additional charges in respect of carriage, insurance, etc, of the goods, the net invoice price should be increased by the amount of such charges. In the case of goods purchased in a foreign currency, the net invoice price should be converted to Irish currency at the official mid-closing exchange rate on the date of the invoice and this should be the basis on which VAT was calculated for the purposes of the Order. The advertising of special offers which had the effect of reducing the average price of goods below the level of net invoice price including VAT should be prohibited, even though the prices of individual items might not be below that level. There should be no exception to the prohibition on below cost advertising in favour of perishable or seasonal goods. In the case of items subject to price control, it should be permissible to advertise a commodity at the maximum price fixed by Order whether or not such a maximum was below the net invoice price including VAT.

Finally, the Commission recommended that the six existing Groceries Orders should be consolidated in a single measure, which should apply to both foodstuffs and non-food products. Processed fish, fresh milk, fresh cream, ice cream, mineral waters and non-alcoholic fruit drinks should be removed from the list of excluded foodstuffs and brought within the ambit of the Order.

### *The 1981 Order*

The recommendations were given effect in the 1981 Order. The Order defined “grocery goods” as grocery goods for human consumption (excluding fresh fruit, fresh vegetables, fresh and frozen meat, fresh fish, frozen fish which had undergone no processing other than freezing with or without the addition of preservatives, and intoxicating liquors) and such household necessities (other than foodstuffs) as are ordinarily sold in grocery and provision shops. Definitions were also provided of terms such as “best list price”, “like goods”, “supplementary term”, “supplier” and “net invoice price”. The existing Orders were revoked, and were consolidated in this Order, which contained many provisions of those Orders.

There was a prohibition on various forms of resale price maintenance, both individual and collective. A supplier was allowed to specify a maximum resale price for goods. He could withhold goods if a wholesaler or retailer sold goods above the minimum price or below the net invoice price. The four-week rule was introduced in the Order. A recommended resale price was not binding as a minimum resale price. There was a prohibition on collusion between suppliers or between wholesalers regarding prices, discounts or mark-ups. Goods could not be withheld from, or discrimination applied to, any person because of membership or not of a trade association. Coercion to withhold supplies was prohibited, as were action to limit or restrict entry to trade and boycotts of suppliers, wholesalers or retailers.

Advertising of goods below net invoice price (subject to the four-week rule) was prohibited, whether or not the price of goods was indicated in the advertisement, except solely at the premises where they were on sale. There was a saver for broadcasting authorities and publishers of newspapers and magazines. Provision was made for imported goods.

As before, a supplier had to prepare a written statement of terms and conditions, including supplementary and credit terms, but not for own label goods, and had to sell on those terms. Terms could be based on function, or quantity or value or other objective criteria, but should not discriminate unfairly against purchasers. The written statement had to be furnished to the Examiner, and to any existing or prospective purchaser, on request. The Examiner could require specific changes to terms if he considered they constituted unfair discrimination. A wholesaler or retailer was prohibited from coercing a supplier to change his terms, but could request changes in them. A wholesaler or retailer was required to comply with a supplier's credit terms, failure to do so being an offence, but a defence was inability to pay for the goods. Importers were required to lodge with the Examiner a statement of the terms and conditions on which the goods were purchased. Suppliers were prohibited from making payments to wholesalers or retailers for advertising.

#### *The 1986 Order*

Following a Court judgment, in relation to under cost advertising, it was considered necessary to amend part of the 1981 Order in September 1986. The effect of the amendment was that there should be no need for an advertisement to contain an indication that the advertised price of a grocery good was below the net invoice price of the good for the advertisement to be in breach of the Order.

#### *The 1986 Report*

The Commission was asked by the Minister in July 1986 to review the existing Groceries Order with particular reference to the issue of below cost selling and the general question of relationships between manufacturers/suppliers and retailers/wholesalers. The Commission submitted its recommendations in November 1986. The Report was submitted in January 1987, and was published in February 1987.

The Commission stated that there had been a significant increase in the market share of the major multiple companies and a consequent reduction in the market share of the independent retail sector since the 1980 Report, and that there had been a rapid

growth of own brand and generic products. It noted that the Commission in the past had considered that below cost selling was an undesirable and unfair practice, with some of the features of predatory pricing. It concluded that, for a number of reasons, including weak enforcement, the prohibition on advertising below cost had not diminished the extent or reduced the effectiveness of below cost selling. The Commission considered at length the possible effects of a prohibition on below cost selling on consumers, independents and wholesalers, suppliers, multiples, imports and excluded products. It also discussed the concept of net invoice price, own brand products, inability to match a competitor's price, allowances for not selling below cost and stocking of goods prior to sale below cost. It also dealt with practical points of difficulty and other possible methods of preventing below cost selling.

The Commission concluded by stating that, in order to eliminate the practice of below cost selling, it had at that stage to recommend the prohibition of the practice by Order. It recommended that selling below net invoice price plus VAT should be prohibited with no exceptions apart from products excluded from the scope of the Order. It accepted the definition of cost as being net invoice price because the meaning attached to net invoice price had been established by the High Court in 1979, and because it was the easiest way for the Examiner to compare cost with the selling price. The Commission recognised that additional allowances and rebates were given by suppliers which were not shown on the invoice. A prohibition on selling below net invoice price would, as the 1980 Report feared would happen, be allowing the manufacturer to fix a price below which his products could not be sold but which was not the true cost, and this would be a form of resale price maintenance. The Commission stated that there was no valid reason why all or almost all rebates, discounts or allowances could not be shown on the invoice. The recommendation on prohibiting selling below net invoice price must be seen in the context that the net invoice price would in future be the true cost of the goods, though it did not recommend that this be made mandatory. The Authority merely recommended to suppliers and purchasers that all allowances, etc., should be shown on the invoice.

The Commission also recommended that a statement should be included in the Order to remove any doubt about the applicability of the Order to own label or generic products. It also recommended that intoxicating liquors not for consumption on the

premises should no longer be excluded from the Order and should therefore be subject to all the provisions of the Order, including the prohibition on below cost selling.

The Commission also considered terms and conditions in the trade. It found that the payment of “hello money” (to ensure shelf space for products in a multiple outlet in certain circumstances) was unfair and discriminatory, and it recommended a prohibition on payment or receipt of such allowances. It also recommended that, each month, grocery retailers with more than five outlets, and wholesalers requested to do so by the Examiner, should forward to the Examiner details of supplementary terms negotiated with suppliers in the previous month, and that suppliers should maintain a register of supplementary terms. It recommended that it should no longer be necessary for an importer to furnish a statement of terms and conditions of import, unless requested to do so by the Examiner. It recommended changes in the proving of invoices, documents or records to facilitate the prosecution process.

In addition, the Commission stated that the Order, and the prohibition on below cost selling, should be effectively enforced, and it welcomed the proposal in the 1986 Bill to amend the Act, including transferring responsibility for enforcement of the Order to the Examiner from the Minister. It recommended that every merger or take-over in the grocery area which required the approval of the Minister should be referred to the Examiner or the Commission for consideration in relation to its concentration and competition aspects. Finally the Commission recommended that another review should be held, about one year after the recommendations in the report had been implemented, particularly into terms and conditions of supply, including supplementary terms.

### *The 1987 Order*

The Order was made in May 1987, and it came into force in December 1987. The Order gave effect to almost all of the recommendations of the Commission. While the prohibition on sales below cost was introduced, and the ban on advertising below cost was retained, certain seasonal goods were excluded from these prohibitions, i.e. Christmas cakes, Easter eggs and Halloween bracks, and the prohibition on sales did not apply to goods after their ‘best before’ date had expired. Such exceptions had not

been recommended by the Commission. The requirement that importers should submit their terms and conditions to the Director (formerly the Examiner) was retained, though its deletion had been recommended by the Commission. Much of the 1981 Order was retained in the 1987 Order, and the 1981 Order was revoked.

The Order covered foodstuffs, with the exceptions as in the 1981 Order, and household necessities, with the addition of intoxicating liquors not for consumption on the premises. The Order prohibited individual and collective resale price maintenance, but allowed suppliers to recommend resale prices. A supplier could withhold supplies in certain defined circumstances or ask a wholesaler distributing his products to do so. Agreements between suppliers as to discounts or mark-ups were prohibited. Goods could not be withheld from retailers nor could retailers be discriminated against because they were or were not members of a trade association. Restriction of entry to the trade and collective boycotts were prohibited. Advertising or sale by retailers of goods below cost (essentially meaning net invoice price plus VAT) were prohibited, except for foodstuffs exempted from the Order, and with special provisions for seasonal goods and goods whose date of minimum durability (best before date) had expired.

Suppliers were obliged to prepare and maintain a statement of their terms and conditions of supply and to effect sales in accordance with these. If supplementary terms were available, this had to be indicated, without it being necessary to specify the details. Suppliers, retailers and wholesalers were required to furnish on request to the Director details of terms and conditions, including supplementary terms, and suppliers were required to maintain a register of supplementary terms. The Director could require suppliers to adjust terms considered to be unfairly discriminatory. Wholesalers and retailers were forbidden from seeking, by the use of threats, inducements or otherwise, to obtain supplies other than on the supplier's terms and conditions of supply. Wholesalers and retailers were obliged to comply with any terms or conditions of suppliers as to credit. Purchasers of goods from outside the State were required to furnish to the Director, within 14 days, a statement of the terms and conditions upon which they were bought.

Payment of an advertising allowance or certain types of “hello money” by a supplier to a wholesaler or retailer, or receipt of such payments by a wholesaler or retailer, were prohibited. It was also provided that, in any proceedings, invoices, documents or records obtained from a wholesaler or retailer, which indicated or appeared to indicate the net invoice price of any goods, or anything shown to be a true copy or extract, would be sufficient evidence as to the net invoice price of the goods, unless the contrary was shown.

The Minister indicated that the Order would be reviewed after twelve months in operation.

### *The 1991 Report*

In December 1988, the Minister requested the Commission to undertake a review of the Order. He asked the Commission to consider representations about below cost selling of products excluded from the scope of the Order, particularly fresh fruit and vegetables and poultry products. Because of pressure of other work, the commission was only in a position to begin the review in January 1991. The Commission’s Report was submitted to the Minister in August 1991 and was published in December 1991. The Commission took into account the Competition Bill, 1991, which was enacted in July 1991.

In the light of the coming into force of the Competition Act, 1991, and taking into consideration the effects of the Order and other developments in the grocery trade, two members, Mr. Lyons and Mr. Massey, recommended the repeal of the Order in its entirety. The two members considered in particular that below cost selling was often pro-competitive in nature, but they believed that the ban on below cost selling had reduced the scope for price competition, and had been used, on occasion, as a means of resale price maintenance, to the detriment of consumers. They recommended revocation of the ban on below cost selling.

The third member, Mr. O’Reilly, while accepting that many of the provisions of the Groceries Order would no longer be required when the Competition Act came into operation, believed that, in addition to the requirements of the Competition Act, there

was a need to provide for fair trade laws in the grocery trade. He recommended the enactment of a Fair Trade (Groceries) Bill. The proposed Bill contained provisions in relation to below cost selling and terms and conditions including credit, entry money and other provisions. The proposals on below cost selling contained significant changes from the provisions in the Order, including an extension of the ban to additional grocery products and defining cost to include all discounts, whether shown on the invoice or not.

The two other members were opposed to Mr. O'Reilly's recommendations concerning separate legislation for the grocery trade, relating to 'fair trade'.

### *Subsequent Developments*

When the Competition Act came into force on 1 October 1991, the Groceries Order was not repealed, nor was it amended, and appropriate provisions of the Restrictive Practices Acts required to operate and enforce the Order were retained. Following publication of the Report of the Commission, the Minister announced that he had decided to keep the retention of the Order under review in view of the fact that the Competition Act had only recently come into force and in order to give interested parties an opportunity to study the report. Enforcement of the Order continued to be the responsibility of the Director of Consumer Affairs.

The Competition Authority, and various members, along with others, continued to argue for repeal of the Order and especially of the ban on below cost selling. It made submissions to this effect to the Competition and Mergers Review Group. The Review Group considered the Order at length. It made an interim recommendation in a discussion paper published in December 1999, and it invited submissions on a proposal that:

- (a) the Groceries Order would be repealed;
- (b) any legislation or regulation introduced in relation to the grocery trade would not include a ban on below cost selling;
- (c) some form of regulation would be introduced in relation to the grocery trade which would in particular require retailers to honour the credit terms on which suppliers were to trade with them, would ban "hello money", and would

require retailers not to discriminate between classes of customer in respect of the products they sold.

The Final Report of the Review Group, in March 2000, stated that its members remained deeply divided on the issue of the Groceries Order. The majority recommendation of the Group was identical to the proposal in the discussion paper described above.

Subsequently, the Competition Act, 2002, repealed the 1991 Act, under which the Order had been made retaining the Groceries Order and relevant sections of the previous Acts. It was provided, however, in section 49, that the Minister might, by order, amend or revoke the 1987 Groceries Order, which remained in force.

#### *Competition (Amendment) Act 2006*

Finally, the Groceries Order was revoked by the Competition (Amendment) Act 2006, along with all existing relevant legislation and orders. This Act also prohibited the imposition of resale price maintenance in regard to the supply of grocery goods, “grocery goods” being defined as food and drink for human consumption, including intoxicating liquor sold for consumption off the premises. In addition, the Act prohibited unfair discrimination in regard to the supply of grocery goods, it prohibited retailers or wholesalers of grocery goods from compelling or coercing suppliers into payment of advertising allowances, and it prohibited retailers from compelling suppliers of grocery goods into payment of “hello money”. These provisions would be enforced by the Competition Authority, whereas the Groceries Order had been enforced by the Director of Consumer Affairs.

**MOTOR SPIRIT – REPORTS OF ENQUIRIES AND ORDERS MADE,  
1956 TO 1991**

***Motor Spirit Enquiries***

Enquiries had been held into the supply and distribution of motor spirit and motor vehicle lubricating oil in 1961 and motor spirit in 1971. The subsequent enquiries into motor spirit were as follows:

Report of Special Review of the operation of Article 3 of the Restrictive Trade Practices (Motor Spirit) Order, 1972. 1975. (Prl 4526).

Motor Spirit Enquiry Report, 1980. 1980. (Prl 9044).

Report of Enquiry into the Supply and Distribution of Motor Fuels. 1990. (Pl 7951).

In addition, an Interim Report on the Price Control Formula, in relation to petrol and autodiesel, was submitted to the Minister by the Commission in 1989. (Pl 6783).

The Chairman (Mr. O'Reilly) was requested by the Minister to undertake a study of trends in international oil prices, which was submitted in April 1989. Not published.

***Motor Spirit Orders***

Following enquiries, Motor Spirit Orders were made in 1961, 1962 and 1972.

Subsequent Orders were as follows:

Restrictive Practices (Motor Spirit) Order, 1975. (S.I. No. 121 of 1975).

Restrictive Practices (Motor Spirit) Order, 1978. (S.I. No. 153 of 1978).

Restrictive Practices (Motor Spirit) Order, 1979. (S.I. No. 202 of 1979).

Restrictive Practices (Motor Spirit) Order, 1980. (S.I. No. 156 of 1980).

Restrictive Practices (Motor Spirit) (No. 2) Order, 1980. (S.I. No. 376 of 1980).

Restrictive Practices (Motor Spirits and Motor Vehicle Lubricating Oil) Order, 1981.  
(S.I. No.70 of 1981).

***Reports of Enquiries, the Guiding Principles and Orders Made****The 1961 Report*

In 1961, the Commission submitted a report to the Minister of the enquiry, held in 1959 and 1960, into the supply and distribution of motor spirit and motor vehicle lubricating oil, with special reference to exclusive or principal dealing arrangements in the retailing of these products – the “solus” system. The report was published in December 1961. The report provided a general description of the trade and market for motor spirit and lubricating oil, and discussed the solus system for these products. It analysed the retail market and the extent of competition, including the growth of retail outlets and company owned stations, and it also examined distribution costs and pricing arrangements. The Commission presented its conclusions and recommendations in relation to the solus system and pricing arrangements.

In respect of motor spirit (petrol), the Commission concluded that, on balance, the solus system had considerable merit in facilitating the rationalisation of distribution, but that it entailed the risk of the growth of an excessive number of outlets. It noted that the doubling of the number of retail motor spirit outlets between 1950 and 1959 was a phenomenon for which it would be difficult to find a counterpart in any other trade, and it concluded that it had to be attributed in some measure to inducements given by the distributing companies to new entrants. There was no longer any economic justification for the continuance of incentives which would be likely to stimulate further entry to the trade. While the solus system was not contrary to the public interest, the Commission concluded that the operation of the system had revealed that it had certain inherent defects which adversely affected the interests of the retail trade, and which tended to create an undesirable rigidity in the trade as a whole.

The Commission made recommendations which aimed at eliminating the unsatisfactory aspects of the system without impairing its efficiency as a method of distributing motor spirit. In brief these recommendations were:

- (1) the advance payment of solus rebates and the giving of loans at low interest rates to new entrants to the trade, which tended to stimulate the growth of outlets, should be discontinued;
- (2) the petrol companies should be required to furnish to the Commission particulars of their plans for the acquisition or building of company-owned retail stations and of the operation of such stations generally so that the growth of such stations and their effect on the trade could be kept under review;
- (3) in future any agreements providing for solus or exclusive dealing in motor spirit should not exceed five years so as to ease the rigidity caused by long-term contracts and the restrictions on a dealer's right to assign his premises;
- (4) existing retailers trading on a mixed brand basis should have a right to continue trading on that basis; solus retailers to whom it may not have been made clear in the early years of the solus system that they could revert to mixed trading should be given a limited right to revert to that form of trading;
- (5) the terms and conditions of supply of mixed brand retailers should not be less advantageous than those of solus retailers except for a reasonable differentiation in favour of solus retailers by way of special rebate, service or facility having regard to the functions solus retailers might be required to perform in the sale of petrol.

The Commission considered that arrangements which aimed at exclusive or principal dealing in the retailing of lubricating oil were contrary to the public interest and it recommended that a supplier should be prohibited from:

- (1) requiring or inducing by way of rebate, or similar concession, a retailer (other than a company station retailer) to purchase lubricating oil exclusively or principally from the supplier or to restrict the sale, display or advertising of competitive oils;
- (2) requiring a retailer (other than a company station retailer) to purchase lubricating oil as a condition of supply of motor spirit, or to purchase motor spirit as a condition of supply of lubricating oil;
- (3) differentiating between retailers in regard to the terms and conditions on which he supplied lubricating oil of like quality or quantity.

The Commission also recommended that the supply of lubricating oil and motor spirit should be the subject of separate, unrelated arrangements.

In regard to the general conditions of supply of petrol and lubricating oil, the Commission recommended that:

- (1) the collective regulation of wholesale and retail prices be prohibited;
- (2) concerted action by wholesalers to restrict entry to the wholesale trade in these products or to unfairly eliminate a competitor from the trade be prohibited;
- (3) the refusal of supplies by a wholesaler to a retailer because he was or was not a member of a trade association be prohibited; and
- (4) wholesalers be required to furnish to the Commission statements of their terms and conditions of supply.

The Commission recommended that the Minister should make an Order, and it indicated the form of Order recommended. It also stated that, in view of the changed circumstances in regard to entry into the retail trade in motor spirit, it considered that the existing Fair Trading Rules were no longer necessary and it proposed to rescind them.

#### *The 1961 Order*

The recommendations of the Commission were given effect in the 1961 Order, which was made in December 1961, and came into effect in July 1962.

After defining certain terms, the Order first required that a wholesaler should not differentiate between retailers in respect of the price of motor spirit, except that a lower price could be offered to solus retailers. Such a “solus rebate” should be reasonable and justifiable. Mixed brand retailers, and certain solus retailers who wished to become mixed brand retailers, could not be refused supplies by wholesalers who had supplied them in the past. Nor could a wholesaler who had supplied dispensing equipment for motor spirit to such a retailer require the retailer to purchase exclusively from that wholesaler or limit the amount purchased from another wholesaler or restrict or prevent advertising of competing motor spirit. A wholesaler

was permitted to impose terms and conditions of supply for mixed brand retailers, including the quantity ordered and regularity of orders and payment, but these should not be less advantageous than those to solus retailers. If a wholesaler made available free training, loans for the station or similar services or facilities to solus retailers, these need not be made available to mixed brand retailers. Solus agreements were limited to a maximum period of five years, even if a loan agreement was of longer duration. An agreement to supply motor spirit could not contain a requirement for the retailer (other than a company station retailer) to purchase motor vehicle lubricating oil from the wholesaler.

A wholesaler was required to furnish to the Commission, on request, details of proposals to acquire or construct motor spirit stations, and information reasonably required by the Commission in respect of company owned stations.

A wholesaler could not impose any requirement on, or offer any inducements to, a motor spirit retailer, in relation to exclusive purchase or minimum purchases of lubricating oil, or a requirement to purchase motor spirit if lubricating oil was purchased. There should be no differentiation between retailers for the purchase of lubricating oil. A wholesaler was not obliged to supply lubricating oil to a retailer who did not comply with terms and conditions which were not inconsistent with the provisions of the Order.

Wholesalers were prohibited from fixing prices or discounts in common for motor spirit or lubricating oil, and from informing each other in advance of price or discount changes. Wholesalers were not permitted, nor were retailers, to agree on fixed or minimum resale prices.

Wholesalers were not allowed to act in concert to prevent the entry of a new wholesaler to the trade, nor to unfairly or unjustly eliminate another wholesaler. A wholesaler was prohibited from refusing to supply a retailer, or a prospective retailer, or imposing less advantageous terms, depending on whether the person was or was not a member of or approved by a trade association.

A wholesaler was permitted to differentiate between retailers on *bona fide* considerations of creditworthiness. Wholesalers were required, on request, to furnish to the Commission a statement of their terms and conditions of supply for motor spirit, lubricating oil and dispensing equipment, and of any changes in the terms or conditions.

The Minister made an Amendment Order in April 1962 of a purely definitional character, which also became law in July 1962. The Commission, as it had indicated in the report, revoked the Fair Trading Rules relating to Entry into the Retail Trade in Petrol (No. 5), which provided that a wholesaler should not, without just cause, refuse to supply any person wishing to engage in the retailing of petrol who was willing to fulfil the wholesaler's normal terms and conditions.

### *The Guiding Principles*

As noted above, the Commission had expressed concern in its report about the increase in the number of motor spirit outlets in the 1950's. In the 1962 Annual Report, the Commission stated that, following discussions with the individual petrol companies and the lubricating oil companies, all of which had agreed, in the case of new sites, to discontinue completely the following incentives:

- (a) the payment of advance rebates in respect of petroleum products;
- (b) the giving of loans, whether directly or indirectly, for the development of a station, including the provision of a lubrication bay and/or facilities, on easier or more favourable terms than those obtainable from finance houses;
- (c) the provision of dispensing equipment for petroleum products on easier or more favourable terms than the following: maximum term of five years and minimum deposit of 20 per cent.

This arrangement did not apply to specific cases where the companies had entered into firm commitments prior to the discussions with the Commission.

The 1962 Report contained statistics for the number of petrol stations, the number of motor vehicles, sales of motor spirit and motor diesel through retailers, and average throughput (volume of sales), and index numbers for most of these. It was stated that

the Commission had had detailed discussions with the petrol companies with a view to devising a set of basic principles in regard to the supply of new sites, to which all companies would subscribe. These were designed to ensure that the companies exercised restraint in supplying new sites and in opening new company-owned stations. Statistics were also provided concerning the number of new company stations, both acquired and constructed each year, and total sales through company stations, and these sales as a percentage of total petrol sales through retailers. Statistics on all these matters were included in each subsequent Annual Report from 1963 to 1968. The basic principles were referred to as “Guiding Principles” for the first time in the 1965 Report. In that Report, figures were given of the average throughput and the average rate of return on investment for company stations which had been in operation for one year or more.

### *The 1971 Report*

In 1968, the Minister requested the Commission to hold a public enquiry into the conditions which obtained in regard to the growth in the number of motor spirit retail outlets and in regard to any other aspects of the supply and distribution of motor spirit which affected that growth. Public sittings commenced in June 1970, the report was submitted to the Minister in June 1971 and it was published in April 1972.

The report described the first enquiry into motor spirit, the supply and distribution of motor spirit and relevant legislation. It then considered the nature of and growth in motor spirit retail outlets, and the growth in the private motor car population and in motor spirit consumption. There was an analysis of company-owned outlets, and a statement of previous comments by the Commission on the operation of the Guiding Principles. The Commission then gave its conclusions and recommendations.

The Commission concluded that, while the growth in the number of motor spirit retail outlets had been arrested, this had been achieved at the expense of the independent operator, as the number of company-owned stations had continued to show sharp increases from year to year. The increasing control of retailing of motor spirit by a small number of large-scale distributors was not regarded by the Commission as being in the public interest. The Commission considered that the number of company-

owned outlets had grown at a rate that was not reconcilable with the Guiding Principles and it could not foresee any slackening in this growth. It also felt that the control of retail distribution by the companies would introduce a degree of rigidity into the market which would have the effect of restricting new entrants to the trade and that there would be the danger of the growth of restrictive or discriminatory practices.

The Commission considered the suggestion of a licensing system for new outlets, but it recommended against the introduction of such a system, although one member (Mr. Coleman) argued in favour of licensing, after the expiry of the period of the pause on new company outlets, in an Addendum to the Report. The Commission concluded also that the situation in relation to company control of motor spirit retailing was becoming too critical to be left to voluntary Guiding Principles.

With the object of moderating these developments, the Commission recommended that the companies should be invited to observe a voluntary pause for a minimum period of two years in the acquisition and construction of new outlets. In the event that any of the companies refused to give the undertaking, or having given it did not observe the undertaking, then it was recommended that the pause should be a legally binding one and should be of three years' duration instead of two. The situation would be reviewed before the end of the period of restraint.

The Commission also considered that it would in time be beneficial to the trade if certain factors inhibiting the provision of assistance by the petrol companies to private dealers were moderated or removed. The Commission recommended that the maximum term of a solus agreement should be increased from five years to ten years.

The Commission also recommended that, in case petrol companies might feel tempted to favour their own retail outlets unduly through subsidisation or the provision of other facilities not available on the same scale to private dealers, any differentiation in the terms and conditions of supply to retailers of motor spirit of like grade and quality should be legally prohibited, with certain exceptions such as the solus rebate and a surcharge for smaller deliveries.

The Commission recommended a form of Order, and stated that it had decided to terminate the Guiding Principles.

*The 1972 Order*

The Minister accepted the Commission's recommendations. Following discussions between the Minister and the petrol companies, the companies declined to give a voluntary undertaking not to acquire or construct any new outlets for a period of two years. The Minister accordingly made the pause legally binding for a period of three years.

The prohibition on opening a new station did not apply when the whole of a station at and below ground level had been completed not later than four weeks after the date of making the Order. In limited circumstances, a company was allowed to close one company station and replace it by another one within a one-mile radius. The same applied where a company station was compulsorily acquired by a local authority. The 1962 Order was amended to provide an expanded definition of "company station" to cover subsidiary and holding companies of a supplier. A supplier was defined as a wholesaler or importer of motor spirit or lubricating oil.

Provision was made for non-differentiation in the terms and conditions of supply to retailers, although the price of single deliveries of motor spirit below a specified quantity could be increased by an amount which was reasonable and justifiable on grounds of cost. The maximum period for a solus agreement was increased from five to ten years. There was a minor amendment in relation to the requirement on wholesalers to supply information to the Commission in connection with a review of the operation or proposed operation of company stations or the concessions and facilities offered or given to company station retailers and other retailers.

With these amendments, the 1961 and 1962 Orders continued in operation.

*The 1975 Report*

Because of the 1972 Act, responsibility for implementation of the Order was transferred to the Examiner. Following an investigation, the Examiner concluded that increases in sales and average throughput were greater for company outlets than for dealer outlets between 1971 and 1973. In November 1974 the Examiner forwarded the report of his investigation to the Commission, and he recommended that the Commission hold a special review of Article 3 of the 1972 Order which related to the three-year statutory pause on the opening of new company stations. There was no request to hold a public enquiry, and the review took the form of private hearings.

The Report of the Special Review was presented by the Commission to the Minister in April 1975, and was subsequently published. The Commission concluded that Article 3 had had the desired effect of curtailing the growth in the number of company stations. It recommended that the pause on new company stations should continue for a further three years. It also recommended that the radius of one mile for the replacement, in certain circumstances, of closed company stations should be extended to three miles. As a number of issues which were raised in the course of the review, but which were not within the terms of reference, justified more extensive investigation, it recommended that, at an appropriate time before the expiry of the recommended extension, the operation of the Motor Spirit Orders as a whole should be reviewed. In the meantime, the Examiner should publish, in his Annual Report, statistics relating to the sales of motor spirit and to the number and categories of filling stations showing the number of stations in each category and the relevant volume of sales.

*The 1975 Order, and Some Later Orders*

The Minister accepted the Commission's recommendations and amended the Order accordingly in 1975. The prohibition on the operation of additional company stations was extended by three years, and the one mile radius for the replacement of a company station in specified circumstances was increased to a radius of three miles.

In order to allow time for the holding of the next review of the Orders, and for a new Order to be made, the period of the limitation on new company stations was extended by Order as follows:

- (a) the 1978 Order, extension by a further year;
- (b) the 1979 Order, extension by a further year;
- (c) the 1980 Order, extension by a further six months; and
- (d) the 1980 (No. 2) Order, extension by a further two months.

Thus the period of limitation lasted for a total period of eight years and eight months from the commencement date of the 1972 Order.

### *The 1980 Report*

In November 1977, the Commission announced its intention to hold a special review by means of a public enquiry into the operation of Article 3 of the 1972 Order. The enquiry was recommended by the Examiner in the report of his investigation into the operation of the Article.

In March 1978, the Minister transmitted through the Examiner a request to the Commission to hold a public enquiry into the operation of the Orders, 1961 to 1975, into any other matters germane to these Orders, and into conditions which obtained in regard to the agreements under which stations which were company-owned but which were not company run were operated. The enquiry was requested in place of the special review of Article 3. The Examiner withdrew his recommendation regarding the special review, and he furnished to the Minister a report of investigations carried out by him. A copy of this report was furnished to the Commission. Public hearings were held between January and April 1979. Due to certain developments in the trade, public hearings were re-opened in March 1980. The report of the enquiry was submitted to the Minister in June 1980. The report was published by the Minister in March 1981.

The main recommendations of the Commission were as follows:

- (a) the long-standing prohibition on the opening of new wholesaler-owned petrol stations should be continued indefinitely;

- (b) to facilitate the entry of new wholesalers to the market, however, every wholesaler existing or prospective, should be free to own up to 20 retail outlets;
- (c) wholesalers already owning in excess of 20 stations should be permitted to retain them;
- (d) in order to restore some degree of flexibility, each wholesaler should be free to open up to two new stations each year provided it disposed of the same number in the same year, subject to prior notification to the Examiner;
- (e) an alternative recommendation, which was not accepted by the Minister, would have allowed a wholesaler to open stations without limit as to number, provided they were leased to long-term tenants who were under no obligation to buy their supplies from that wholesaler other than under a normal 10-year solus agreement which the retailer was not obliged to renew;
- (f) where a wholesaler insisted that retailers take a minimum delivery, the minimum should not exceed 4,000 litres if one grade only was being delivered, or 5,000 litres if more than one grade was being delivered;
- (g) company station operators should be free to display and sell lubricating oil supplied by competing wholesalers;
- (h) companies should be permitted to require retailers not to dispense competing oils through equipment which was owned by the companies;
- (i) through the device of three-year licences renewable at the licensee's option, operators of wholesaler-owned stations not already on long-term leases should be given security of tenure in their positions, but without the right of assignment which a long-term lease would have given;
- (j) licences should be discontinued only for stated reasons, and there should be provisions for compensation for licensees;
- (k) both licensees and long-term lessees should have the right to go to arbitration in relation to certain matters, such as rent or hours of opening, proposed to be fixed by the wholesaler; and
- (l) existing Orders relating to motor spirit should be consolidated.

A detailed form of Order was provided by the Commission.

*The 1981 Order*

The Minister made an Order in March 1981 in accordance with the recommendations of the Commission, except for the alternative recommendation described in (e) above. The Order consolidated the existing Orders and these, of 1961 to 1980, were revoked, and the Order entered into force on 15 April 1981. Most provisions of the former Orders were retained. The main amendments related to restrictions on the opening of additional company-owned stations, repayment of loans by companies to retailers, trading hours, conditions attached to licences, the tenure of short-term lessees of company-owned stations, compensation for retailers in certain circumstances and arbitration in case of disputes.

The lengthy order commenced with a number of definitions. It provided that a wholesaler should not differentiate in terms and conditions between retailers, except that a lower price could be charged to solus retailers, provided that the difference was reasonable and justifiable and did not discriminate between solus retailers. Such a solus rebate was not mandatory. A higher price could be charged for single deliveries of motor spirit below a specified quantity. Minimum deliveries for solus and company station retailers could be laid down, and these could differ from one retailer to another.

Mixed brand retailers, and certain solus retailers who wished to become mixed brand retailers, could not be refused supplies by wholesalers who had supplied them in the past. Nor could a wholesaler who had supplied dispensing equipment for motor spirit to such a retailer require the retailer to purchase exclusively from that wholesaler or limit the amount purchased from another wholesaler or restrict or prevent advertising of competing motor spirit.

A wholesaler was permitted to impose terms and conditions of supply for mixed brand retailers, including the quantity ordered and regularity of orders and payment, but these should not be less advantageous than those to solus retailers. If a wholesaler made available free training, loans for the station or similar services or facilities to solus retailers, these need not be made available to mixed brand retailers.

Solus agreements were limited to a maximum period of ten years, even if a loan agreement was of longer duration. An agreement to supply motor spirit could not contain a requirement for the retailer to purchase motor vehicle lubricating oil from the wholesaler. A wholesaler could not impose any requirement on, or offer any inducements to, a motor spirit retailer, in relation to exclusive purchase or minimum purchases of lubricating oil, or a requirement to purchase motor spirit if lubricating oil was purchased, or to refrain from advertising competing lubricating oil. A wholesaler could, however, prevent or penalise the operator of a station who used equipment owned by the wholesaler to dispense competing lubricating oil. There should be no differentiation between retailers for the purchase of lubricating oil. A wholesaler was not allowed to supply lubricating oil to a retailer who did not comply with terms and conditions which were not inconsistent with the provisions of the Order.

A wholesaler was obliged to furnish to the Examiner on request information reasonably required concerning the operation or proposed operation of company stations, or of the concessions and facilities, financial or otherwise, offered by wholesalers to retailers at company stations and to other retailers.

Wholesalers were prohibited from fixing prices or discounts in common for motor spirit or lubricating oil, and from informing each other in advance of price or discount changes. Wholesalers were not permitted, nor were retailers, to agree on fixed or minimum resale prices.

Wholesalers were not allowed to act in concert to prevent the entry of a new wholesaler to the trade, nor to unfairly or unjustly eliminate another wholesaler. A wholesaler was prohibited from refusing to supply a retailer or a prospective retailer, or imposing less advantageous terms, depending on whether the person was or was not a member of or approved by a trade association.

A wholesaler was permitted to differentiate between retailers on *bona fide* considerations of creditworthiness. Wholesalers were required, on request, to furnish to the Examiner a statement of their terms and conditions of supply for motor spirit, lubricating oil and dispensing equipment, and of any changes in the terms or conditions.

The Order provided that a motor spirit station could not be operated as a company station unless it had been operated as a company station immediately before 15 June 1972, with some exceptions. Firstly, this did not apply if the whole of the station at and below ground level had been completed not later than 13 July 1972. A supplier could operate company stations up to a maximum of 20 stations. Provision was made for a supplier to close up to two company stations each year and replace each by a new company station. The supplier in these cases must not be connected with any other wholesaler in the State and must not supply motor spirit of the same brand as another wholesaler. The supplier was required to notify the Examiner in advance about a new company station, with details about its location, storage capacity, the number of pumps, and whether the operator was to be an employee, tenant, lessee or licensee. Where relevant, details had also to be provided about a company station which was being closed. Such a station could not afterwards be operated as a company station unless it replaced another company station which was being closed.

Where a wholesaler specified a minimum amount for a single delivery to a mixed brand retailer, this minimum should not exceed 4,000 litres if one grade only was being delivered, or 5,000 litres if more than one grade was involved. A wholesaler who intended to cease supplying an outlet was required to inform the Examiner of his reasons in advance.

Provision was made for the early repayment of a loan made by a wholesaler to a retailer, whether the repayment was to be by way of a single payment or by instalments.

A solus agreement or a long-term lease should not require the retailer to open at specified times, although it could include a term requiring opening at a time or times at which it was reasonable that motor spirit should be available to the public.

A wholesaler was not permitted to prevent a retailer from indicating the brand of motor spirit being dispensed by a pump.

It was provided that a company station must be operated either by an employee, a long-term lessee, a short-term lessee, a tenant, a sub-lessee, a sub-tenant or a licensee.

A lessee or tenant under a short-term lease was given the right, within a specified period, to obtain a licence from the supplier instead of the lease, or to continue as a lessee or tenant. The supplier was obliged in the former case to grant a licence in conformity with the Order. Where the retailer did not exercise the option, he had to be granted a licence.

The Order specified certain requirements for a company station licence. It had to be for a term of three years and the terms should be fair and reasonable, and a further licence had to be granted on its expiry. Provision was made for termination of the licence in specified circumstances, during the currency of the licence or upon its expiry. A period shorter than three years could be employed if the licensee was within three years of the maximum age (not less than 65 years) permitted by the supplier for a licensee. The possible reasons for termination or non-renewal had to be included in the licence. Existing licences were deemed to be licences under the Order, with a three-year term from commencement of the Order. Provision was made for the grant of a one-year licence to a person who had not previously operated a station for the supplier, without a right to a subsequent licence.

It was provided that a supplier could not terminate a licence during its currency, unless the licensee requested termination or for specific reasons. These included failure to carry out statutory obligations, to make payments for goods, to comply with a term or condition of the licence after a written request to do so, or to observe the required standards of operation, or if the licensee was unfit to operate the station or ceased trading for more than seven consecutive days. The licence could also be terminated if the station ceased to carry on business for reasons outside the control of the supplier and the licensee, and the closure was likely to be permanent. In this case, compensation had to be paid to the licensee. Provision was made for the licensee to refer to arbitration the question whether the supplier was entitled to terminate the licence for certain reasons. The supplier was obliged to give the licensee at least one month's notice of termination, unless the licensee was likely to cause injury or damage to persons or property. The notice of termination had to include, where relevant, a statement of the right to compensation or to arbitration.

When a licence expired, the supplier was obliged to grant the licensee another licence in respect of the company station, unless the licensee declined the licence or for specific reasons. These reasons were essentially those described above in the case of termination, with the omission of the provision relating to a station ceasing to carry on business permanently. It was added that a licence need not be renewed if the licensee exceeded the maximum age for an operator (not less than 65 years), if the supplier required vacant possession of the station for re-development or disposal, or operating the station through an employee, or if the supplier proposed to terminate the operation of the station by a person other than an employee for not less than 12 months. There were provisions for compensation, arbitration and prior notice of non-renewal, as in the case of termination.

Where a licensee was, or was entitled to be, granted a new licence, he was entitled to refer to arbitration a dispute concerning the amount of payments to be made, opening times, other activities allowed or not allowed at the station, or restrictions on operating another station. The inclusion of certain provisions in a licence was not allowed, such as prohibiting a licensee from operating another station after expiry, requiring the licensee to make available to the supplier accounts and records, requiring the licensee to pay for any capital expenditure, or requiring the licensee to contribute to any schemes for promoting the sale of the products. Detailed provisions were made in the Order for the calculation of compensation payments relating to the net pre-tax income from the operation of the station. Any dispute about compensation could also be referred to arbitration.

#### *The Reports of 1989 and 1990*

In October 1988, the Minister requested the Commission to hold a public enquiry into the supply and distribution of petrol and autodiesel, including the operation of the 1981 Order. In March 1989, the Minister requested the Commission to commence immediately the public enquiry, with the following terms of reference:

“To hold an enquiry into the conditions which obtain in regard to the supply and distribution of petrol and autodiesel in the State, including:

- the implications for prices of gifts and promotional schemes;

- the effect on prices of the operation of the Irish National Petroleum Corporation;
- the operation of the Restrictive Practices (Motor Spirit and Motor Vehicle Lubricating Oil) Order, 1981;

and to make recommendations to the Minister as a matter of urgency based on their enquiry.”

### The Interim Report

The Commission decided to present an interim report dealing with the price related aspects of the enquiry, and this was presented to the Minister in July 1989, and was published in September 1989. The Commission indicated that it would, in the full report, recommend that price control on petrol and motor diesel be removed completely. The Chairman, Mr. O'Reilly, stated that he would make this subject to the enactment of a new Order and the implementation of measures to enhance the possibility of price competition. Separate recommendations concerning the price control formula were made by the Chairman and by the other member, Mr. Lyons. They agreed that, if price control were to be continued, a Prices Advisory Body should be established, to bring about a fair and reasonable system of control. The Minister accepted some of the recommendations made, and these were incorporated in price increases on petrol and diesel in September 1989. Subsequently, in November, increases were granted in the wholesaler's and retailer's premium petrol margins. When the Competition Act, 1991 commenced on 1 October 1991, price control on petroleum products was terminated.

### The Full Report

The full report was submitted to the Minister in January 1991 and was published in May 1991. A comparison with statistics for other EC Member States revealed that in 1988 the throughput of Irish retail petrol outlets was about 25% of the EC average, and that Irish tax-exclusive prices were between 12% and 28% higher than prices in other north west Europe countries.

The Commission took the view that provisions in the Order, prohibiting differentiation in terms and conditions for the sale of motor fuels, were anti-competitive. It concluded that the limitations on the number of company-owned stations were no longer necessary or desirable, and it recommended that all the restrictions be removed. The Commission also considered that, because of the existence of EEC Regulation 1984/83, which contained special provisions for service-station agreements, articles in the Order dealing with solus agreements and lubricating oil were unnecessary. The Commission concluded that the enactment of the Competition Bill would make a revised Restrictive Practices Order on motor fuels unnecessary.

The Commission also concluded that conditions in the trade at the time of the enquiry did not warrant the imposition of price control under the Prices Act, 1958. If price control were to continue at any level, however, the Commission again stressed that an independent Prices Advisory Body should be established. Similarly, if price control were to be re-introduced in the future after having been discontinued for a time, it should only be on the basis of recommendations from a Prices Advisory Body. The Commission recommended that the provisions on licences and leases, with some amendments, should take the form of undertakings to the Minister. The Chairman believed that gift and promotion schemes should be prohibited, but the other member considered that there should be no prohibition under the Act on such schemes. The members also gave their differing views on the implications for prices of the operation of the Irish National Petroleum Corporation.

When the Competition Act, 1991 commenced, on 1 October 1991, the 1981 Order was repealed and, as stated above, price control on motor fuels was terminated.

**REPORTS OF OTHER ENQUIRIES AND STUDIES, AND SUBSEQUENT DEVELOPMENTS***Reports of Other Enquiries*

Enquiry into the supply and distribution of Cinema Films. 1978. (Pr1 7260).

Enquiry into the supply and distribution of Daily and Sunday Newspapers published in Ireland and of Newspapers, Periodicals and Magazines Distributed by Wholesalers. 1979, published in 1983. (Pr1 8380).

Enquiry into the effects on competition of the Restrictions on Conveyancing and the Restrictions on Advertising by Solicitors. 1982. (Pl 902).

Enquiry into the Statutory Restrictions on the Provision of Dental Prostheses. 1982. (Pl 1203).

Enquiry into the provision of Tour Operator and Travel Agency Services insofar as they are affected by the activities of Associations in the Travel Trade. 1984. (Pl 2601).

Enquiry into the Policies of Building Societies in regard to Insurance Related to Mortgaged Properties and Valuation Reports on Properties. 1985. (Pl 3505).

***Reports of Studies by the Commission****(a) General*

Study into Pyramid Selling. 1974. Not published.

Studies into Industrial Concentration and Mergers in Ireland. 1975. (PrI 5601).

Study into Industrial Concentration in Ireland in 1975. Published in the Annual Report of the Commission for 1982. (PI 1553).

Study into the Legislation on Competition Policy in Ireland. Interim Report, 1975; Final Report, 1977. Neither report was published.

Study into Roadside and Street Trading and Sales from Temporary Retail Outlets. 1976. (PrI 5735).

Study into competition in the Licensed Drink Trade. 1977. (PrI 6465).

Study into Cable Television Systems in the Greater Dublin Area. 1986. (PI 4295).

Report on Alleged Differences in Retail Grocery Prices between the Republic of Ireland and the United Kingdom (including particularly Northern Ireland). 1987. PI 5236).

Study of Competition Law. (Study into the respective merits and disadvantages of the Prohibition and Control of Abuse systems for regulating Competition). 1991. (PI 7080).

Submission to the Inter-Departmental Committee to examine legislation applying to small public service vehicles (taxis). 1991. (A summary of the submission was published in the Annual Report for 1991).

*(b) The Professions*

Study into concerted fixing of fees and restrictions on advertising in the Accountancy Profession. 1987. (PI 4862).

Study into concerted fixing of fees and restrictions on advertising in the Engineering Profession. 1987. (PI 4993).

Study into concerted fixing of fees and restrictions on advertising in the Patent and Trade Mark Agents Profession. 1989. Not published.

Study into concerted fixing of fees and restrictions on advertising in the Architects, Surveyors, Auctioneers and Valuers Professions. 1990. Not published.

Study into Restrictive Practices in the Legal Profession. 1990. (PI 7301).

*Other Orders Made*

Restrictive Practices (Cinema Films) Order 1985. (S.I. No. 367 of 1985).

Restrictive Practices (National Lottery) Order, 1990. (S.I. No. 130 of 1990).

This was the first, and only, Order made by the Minister, under the 1987 Act, without a prior enquiry by the Commission.

Neither of these Orders was confirmed by Act of the Oireachtas. It is understood that, following a meeting between the film distributors and the Minister, certain measures were taken which obviated the need to proceed with legislation. The Minister did not proceed with confirmatory legislation in respect of the other Order, because the offending rule on the exclusive sale of National Lottery tickets was abolished by the National Lottery.

## ***Reports and Subsequent Developments***

### *Trading Stamps*

The Commission commented unfavourably on the use of trading stamps as a form of promotion in its 1972 Report into certain grocery goods. It considered that trading stamps were restrictive in nature and the principal trading stamp company held a near monopoly position. As a means of providing a price reduction to consumers, stamp trading was relatively inefficient. While stamps provided a strong attraction for consumers, the use of the term “gift” might be deemed to be misleading, and there was no clear and explicit information on the cash values of the goods supplied in exchange for stamps. In view of its use in other fields of retailing and the implications for consumer protection, the Commission made no formal recommendation on stamp trading since it regarded it as a matter that could more suitably be dealt with by consumer protection legislation rather than by an Order under the Act.

Provision was made to regulate trading stamps in the Trading Stamps Act, 1980 (No. 23 of 1980). Only a company which had a place of business in the State was permitted to carry on business as the promoter of a trading stamp scheme. It was declared to be an unfair practice under the 1972 Act for the promoter of a trading stamp scheme to withhold unreasonably a supply of trading stamps from anyone wishing to participate in the scheme. Every trading stamp had to bear on its face a monetary value, and the Minister could specify this value by Order.

A holder of trading stamps with an aggregate cash value of not less than £1 was given the option of redeeming them from the promoter at not less than the aggregate cash value. The promoter was required to publish a catalogue listing the goods or services which were offered in exchange for trading stamps, and the number of stamps required for each item. A copy of the catalogue had to be lodged with the Minister, and a copy supplied to every outlet which offered stamps. The catalogue had to be kept available by each such outlet for inspection by the public. A notice was required stating the number of stamps offered for every £1 worth of purchases in the shop, and the cash redemption value of the stamps. There were restrictions on advertisements

referring to the value of the stamps. Infringements of the Act were declared to be offences, punishable by a fine, and offences committed by a body corporate could be attributed to its directors or officers. Summary proceedings could be prosecuted by the Minister for Industry, Commerce and Tourism.

*Cinema Films*

Following a number of complaints to the Commission in the 1960's about practices in the supply and distribution of cinema films, a Cinema Trade Complaints Committee was established in May 1970. The Committee was established by the trade and consisted of a representative of a film renters' organisation and representatives from two cinema owners' associations. The working of the Committee was reviewed by the Commission, and later by the Examiner.

The Committee appeared to be functioning satisfactorily until April 1976, when some exhibitors complained to the Examiner that they were not getting a fair share of the films which the public wanted to see. The Examiner held meetings with the major film distributors during 1976, and put forward proposals for the distribution of films. The distributors implemented their proposals for an improved distribution system for Dublin suburban cinemas and for cinemas in other cities and large towns, but they were not prepared to make any changes regarding cinemas in the Dublin city centre area or in small towns throughout the country. The Examiner requested the Commission in March 1977 to hold a public enquiry, and submitted the report of his investigation to the Commission.

The Commission held its enquiry in late 1977 and submitted its report to the Minister in April 1978. The report was published in October 1978. The proposals of the Examiner were included in the report. The Commission stated that it accepted the statements made by witnesses for certain major exhibitors, and for the renters, that they were not parties to any binding agreements, either tacit or otherwise, which were designed to create, or had the effect of creating, monopolies in Dublin city centre. Nevertheless, it considered that these companies enjoyed dominant positions in the exhibition of first-run films in Dublin and that these positions were enhanced through advantages derived from arrangements adopted by their parent companies in the UK. It also stated that no evidence was found for the contention that an agreement of any kind existed between the renters and the only major cinema circuit operating throughout the country and that no evidence was elicited to show that there was discrimination in rental terms. The Commission was satisfied that a strong cinema circuit was to the advantage of the public in ensuring investment in facilities and in

providing a degree of countervailing power to the renters in what had become a sellers' market, and that it would be desirable from the standpoint of enhanced competition to have more than one national circuit, but it doubted whether demand would be sufficient to sustain a second circuit.

In view of the dominant positions of the two major exhibitors in Dublin city and of the fact that, in a number of major provincial centres, the only national circuit operating had an outright monopoly or was in a strong dominant position, the Commission considered it necessary to have a procedure to ensure equity to independent cinemas and to avoid possible abuses. The Commission rejected the Examiner's contention that the system of distribution was inherently unfair and discriminatory, it considered that his proposals would introduce too rigid a system of regulation, but it considered that in some respects a more equitable and speedy system could be achieved.

The Commission considered that, subject to certain adjustments, the Allocation of Product Scheme for Irish Provincial Cinemas (i.e. a Trade Disputes Committee and an Appeal Tribunal for the hearing of applications for allocation of product which applied to all cinemas with the exception of cinemas in Dublin city centre and suburbs) and the scheme for Dublin suburban cinemas, already adopted by the Irish Advisory Committee established by the UK Kinematograph Renters Society, were the most appropriate arrangements that could be devised in the circumstances of the trade and it recommended that they should be continued. The main adjustments recommended by the Commission to the scheme for provincial cinemas were that it should not be mandatory for a complaining exhibitor to engage in prior negotiations with his competitors and that the Independent Chairman of the Appeal Board would be acceptable to both the renters and the exhibitors represented on the Committee. The scheme for Dublin suburban cinemas provided that films were released to them not later than the beginning of the thirteenth week after opening.

Other recommendations were that:

- (a) to eliminate the possibility of unfairness to city centre independent cinemas in view of the dominant positions of the two major companies there, the independents should have access to the Allocation of Product Committee and

Tribunal which in their case would be directed to the resolution of disputes rather than to systematic allocation;

- (b) the Irish Advisory Committee should encourage renters to experiment with concurrencies and should accord city centre independent cinemas second-run status at least on a par with suburban cinemas, if so requested by the exhibitor; and

- (c) the possibilities of getting extra copies of films should be explored.

The Commission did not find that rental terms were unfairly discriminatory.

The Commission considered that Fair Practice Rules would be an appropriate instrument for formalising its recommendations and would act as a guideline for exhibitors and renters. It also considered that such Rules, when made, should be formally reviewed within two years. The recommendations in the report were accepted by the Minister.

In April 1979, the Examiner formally asked the Commission to make Fair Practice Rules. An observer from the Examiner's office began attending meetings of the Product Allocation Committee. The Commission prepared a draft of the Rules, which was made available to interested parties, and submissions made were examined by the Commission. Discussions were held with the various interests in the cinema trade. From these discussions, it became apparent that the earlier interventions of the Examiner and the Commission had led to the removal of most of the difficulties that at one time existed. A small number of Dublin city centre independent exhibitors, however, continued to be dissatisfied. Because of the extremely variable box office value of films, it was not possible to devise a fixed system for determining the allocation of films to these cinemas and, in the absence of any degree of consensus among distributors and exhibitors, the Commission concluded that there was no basis on which it could usefully frame Rules. It announced in May 1982 that it had decided not to make Rules.

In 1984, the Examiner received complaints from two independent cinemas in Dublin city centre that they were not being accorded parity with Dublin suburban cinemas, with the result that their cinemas were in danger of closure. The film distributors stated that it was not possible or feasible to accede to the independents' demands.

The Examiner furnished a report of his investigation to the Minister expressing the view that the distributors were not complying with the Minister's wishes, as signified by his acceptance of the Commission's recommendations.

In November 1985, the Minister made an Order – the Restrictive Practices (Cinema Films) Order, 1985 (S.I. No. 367 of 1985). The purpose of the Order was to regulate the distribution of cinema films in Dublin city centre. It provided that a distributor or supplier of cinema films should not accord less favourable terms to a “designated” exhibitor, at any cinema within a radius of one mile of the General Post Office in Dublin, than the most favourable terms relating to timing accorded by him to an exhibitor outside this radius, but within the county borough of Dublin or the county of Dublin. The Order was not confirmed by Act of the Oireachtas, however, since, following a meeting between the distributors and the Minister, certain measures were taken which obviated the need to proceed with legislation.

*Newspapers and Magazines*

In July 1977, the Examiner furnished to the Commission a report of his investigation into the supply and distribution of daily and Sunday newspapers published in the Republic of Ireland and of newspapers, periodicals and magazines distributed by wholesalers, with a recommendation that the Commission should hold a public enquiry. The Commission, and later the Examiner, had received complaints for some time from retailers about their inability to obtain supplies, particularly of newspapers. The Examiner contended that shopkeepers who could not get supplies of newspapers and periodicals were placed at a competitive disadvantage in the sale of other products, and that a newsagents' association had put pressure on publishers and wholesalers to stop the opening of new retail outlets. He maintained that the newspaper proprietors and two of the wholesalers occupied dominant positions in the trade. The Examiner made detailed proposals to deal with these problems.

The Commission held a public enquiry in mid-1978, and it submitted its report to the Minister in May 1979. The Minister published the report in January 1983. The Commission recognised the special position of newspapers in a democratic society, and that the national press should be not only free but diversified as well. It considered that it would be contrary to the public interest to recommend any system of distribution which could have serious repercussions on a newspaper's economic viability and threaten its continuance. The Commission discussed the power of suppliers to give or withhold supplies; the Examiner's proposals; the confinement of sales to authorised outlets; and pressure by retailers.

The main recommendation of the Commission was that national newspapers should agree to set up a voluntary appeals board which would receive and decide upon appeals from retailers against the refusal of supplies by individual newspapers and against discontinuance of supplies to outlets formerly serviced. One member of the board, whose duty it would be to ensure that the viewpoints of appellants were given due weight, would be nominated by the Minister. The nominated member and the newspaper representatives would jointly agree on an independent chairman to preside at meetings. Where a representative of a newspaper and the nominated member were in agreement (either to supply or not to supply) the appeal should be so decided, but

where they disagreed, the decision would rest with the chairman. A fixed fee should be charged to discourage frivolous appeals, and this would be used to help defray the expenses of the appeals system.

Consideration had been given to recommending the making of an Order under the 1972 Act, prohibiting the continuance of the banning of onward sales, i.e. the sale by retailers of papers in bulk to other retailers for resale by the latter. As the newspapers insisted that this would seriously increase their costs it was decided, on balance but with divided feelings, not to recommend that an Order be made at that stage. It was recommended, however, that newspapers should relax their rule prohibiting onward sales by granting permission in individual cases which would be subject to special rules as to returns of unsold papers.

The Commission considered that the existence of an appeals board should largely put an end to any temptation that might exist to bring pressure to bear in order to prevent supplies being made to an applicant. The Commission recommended, however, that, if an Order were to be made in relation to newspapers and magazines, it should include a provision making it unlawful for any association or combination of persons to coerce or induce, or attempt to coerce or induce, a supplier to withhold supplies from any person or class of persons, or to discriminate against any person or class of persons as to terms of supply. The position of wholesalers who distributed newspapers, periodicals and magazines was found to be different from that of the publishers of the national newspapers as they had, to a much greater extent, an interest in promoting the sale of a wide range of publications. The Commission recommended, however, that wholesalers should experiment with the relaxing of the prohibition of onward sales.

It is understood that discussions were held between representatives of the Minister and the Dublin Newspaper Managers Committee regarding the establishment of a voluntary Appeals Board to deal with disputes between publishers and retailers. Agreement could not be reached about the funding of such a Board, and it was not established, and the rules on onward sales were not relaxed. No Order was made in respect of the supply and distribution of newspapers and magazines.

In the years after publication of the report, the Examiner, and later the Director, received complaints from retailers concerning their failure to obtain supplies of newspapers and magazines. These complaints were taken up with the suppliers. This continued until the 1991 Competition Act came into operation. As a result of this legislation, and significant changes in the retail marketplace, there was a gradual development of an open policy on both the appointment of newsagents and the selling-on of newspapers. Newspapers are now available in many retail outlets in addition to traditional newsagents.

*Restrictions on Conveyancing and Restrictions on Advertising by Solicitors*

In 1980, the Minister, through the Examiner, requested the Commission to hold a public enquiry into:

- (a) the nature and extent of competition in the carrying out of conveyancing for gain with particular reference to the effects on competition of legal requirements restricting the provision of this service; and
- (b) how the prohibition on advertising affects competition by solicitors.

At the request of the Commission, the Minister appointed a temporary member, Mr. Justice William Tormey, to assist the Commission. Hearings commenced in November 1980. The Commission's report was submitted to the Minister in March 1982, but was not published until February 1985.

The report included an account of the procedures for the registration of title in the Registry of Deeds and the Land Registry, and it traced in detail the steps to be taken in a conveyance of a property. It also described the profession of solicitor, including entry and training and the disciplinary machinery. In addition, consideration was given to the so-called "solicitors' monopoly of conveyancing", the operation of the system of fee scales, and the regulations which prohibited solicitors' advertising in general and forbade a solicitor to hold himself out as prepared to provide services at less than the scale fee.

The main recommendation, a majority one, was that vendors should be allowed to employ non-solicitors to act on their behalf in carrying out a conveyance. It was considered, however, that, in the public interest, a purchaser should not be allowed the same choice. A note of dissent, by the temporary member, Justice Tormey, stated that it had not been established that the common good or the public interest would be served by a change in the existing situation or that there was any real public demand for a change.

The relaxation of the rules of the Incorporated Law Society in regard to advertising was recommended by the Commission subject to the proviso, by a majority, that the Society should be free to make regulations withholding from a solicitor the right to

advertise his charges. The minority recommendation, by Mr. Lyons, was that advertising of charges by solicitors should be permitted.

The Commission also recommended that:

- (a) the Disciplinary Committee of the Society should have the power it once held of imposing lesser penalties (than removal from the roll of solicitors) restored to it – for example, the imposition of fines or the requirement to pay damages – and that there should be lay representation on the Council and on disciplinary bodies;
- (b) a solicitor should not be allowed to undertake conveyancing unless he had suitable professional indemnity insurance;
- (c) it should be made unlawful for a lending institution to refuse to advance money for the purchase of a property if representation by a solicitor was not made or that solicitors should refuse to deal with persons not legally represented;
- (d) non-practising barristers should be allowed to conduct conveyances for their employers;
- (e) the existing requirement that registrations of transfers should only be effected by a solicitor should be dropped;
- (f) fees of solicitors employed by lending institutions should be borne by institutions as a general charge, and not recouped from individual borrowers; and
- (g) it should be unlawful to induce or attempt to induce a solicitor not to charge less than the prescribed scale fees.

The report contained the form of Order recommended by the Commission, and proposed amendments to the Solicitors Acts, 1954 and 1960.

In publishing the report, the Minister said that the Government would consider legislative amendments to facilitate the implementation of those recommendations which were not affected by the Solicitors Acts. The Minister for Justice would also be promoting amendments to the Solicitors Acts in the light of the Commission's other recommendations.

No Restrictive Practices Order was made by the Minister. One recommendation was included in Regulations made by the Minister for the Environment in 1987. These were the Building Societies Regulations, 1987 (S.I. No. 27 of 1987) and the Building Societies Regulations (Amendment) Regulations, 1987 (S.I. No. 339 of 1987).

Among other matters, these Regulations prescribed that the costs of the legal investigation of title to any property offered as security by a member should be paid by the building society, and should not be recovered from the member. In addition, it was provided in the Building Societies Act, 1989, section 31(1), that the Minister for Justice, after consultation with the Minister for the Environment and the Central Bank, might make regulations authorising building societies to provide conveyancing services. No such regulations have been made.

The Incorporated Law Society of Ireland made regulations in respect of advertising by solicitors in December 1988 – the Solicitors (Advertising) Regulations, 1988 (S.I. No. 344 of 1988). These Regulations revoked previous Regulations made in 1955 and 1971. They essentially permitted a solicitor to advertise his services, but they contained restrictions on the content of advertisements. Solicitors were not permitted to do anything which could reasonably be regarded as touting or as calculated to attract business unfairly. “Touting” was defined as a direct approach by or on behalf of a solicitor to a person, who was not an established client, with the intention of soliciting business.

A solicitor was allowed to advertise in any way he thought fit, including by means of general circulation of printed material, and in any medium, such as radio, television, newspapers, directories and posters. A solicitor was also permitted to appear on radio and television and at any public function, and to write articles for publication.

An advertisement by a solicitor, however, should not:

- (a) claim superiority for the quality of his practice or services over those of, or offered by, other solicitors; or
- (b) claim specialised knowledge of any particular area of law or practice; or
- (c) contain a criticism of other solicitors; or
- (d) compare his fees with those of other solicitors; or
- (e) specify a fee for any services he is willing to provide; or

- (f) make reference in relation to any practice to –
  - (1) volume of business or fee income;
  - (2) the identity of any client except where this is appropriate in any matter which, in the normal course of his practice, the solicitor is instructed by that client to advertise; or
  - (3) any item of business except that which, in the normal course of his practice, he is instructed by a client to advertise; or
  - (4) the outcome of any business carried out for clients; or
- (g) contain any inaccuracy or false or misleading statements; or
- (h) be by such means or of such a character or in such bad taste as may reasonably be regarded as bringing the profession of solicitors into disrepute.

While the solicitor was not allowed to advertise his fees, he was permitted to state in any advertisement that a written statement of proposed fees and/or a free first professional consultation would be provided to any person upon request. While a solicitor was not allowed to claim superiority over another solicitor, he could claim superiority for the quality of his practice or services over those of other persons who were not solicitors.

The Regulations provided that the Council of the Incorporated Law Society could, by written notice, require a solicitor to withdraw, terminate or cancel an advertisement which the Council deemed to contravene any of the regulations. Failure of a solicitor to comply with the terms of a notice, after any of his representations had been considered by the Council, could be deemed by the Disciplinary Committee to be misconduct within the meaning of the Solicitors (Amendment) Act, 1960.

The 1988 Regulations were revoked and replaced by the Solicitors (Advertising) Regulations 1996 (S.I. No. 351 of 1996), following the Commission's report on the Legal Profession in 1990, and they are described in more detail below in connection with that report. In brief, these Regulations removed the restrictions on fee advertising, although they did provide that, in certain circumstances, the advertising of legal services which used the words "free" or "no foal no fee" would be a breach of the Regulations. Any breach of any Regulation could still be found to be misconduct by the Disciplinary Tribunal. Provisions dealing with places where advertisements

could appear, and the procedures involving a possible breach of the Regulations, were omitted.

The 1996 Regulations were in turn revoked and replaced by the Solicitors (Advertising) Regulations, 2002 (S.I. No. 518 of 2002), which are very lengthy, and they are described in detail in connection with the Commission's 1990 Report. In summary, however, the 2002 Regulations continue to allow a solicitor to advertise, including fee advertising, subject to restrictions on content. A main feature, however, is the inclusion of restrictions on the encouragement of claims for damages for personal injuries, popularly known as "ambulance chasing". Regulations regarding the location of advertisements and procedures following a possible breach are again included. Any breach, as before, can be deemed to be misconduct after inquiry by the Disciplinary Tribunal.

Many of the other recommendations made were reflected in the Commission's 1990 Report and in the Solicitors (Amendment) Act, 1994 (No. 27 of 1994), and they are described in detail below. In brief, however, the Act covered the following matters:

- (a) the Law Society can impose sanctions on a solicitor in certain circumstances;
- (b) there is lay representation on the Registrar's Committee;
- (c) there is mandatory professional indemnity insurance;
- (d) non-practising barristers can do conveyancing for their employers; and
- (e) the Society may not prohibit the advertising of fees or charges by solicitors, except in specific circumstances.

*Statutory Restrictions on the Provision of Dental Prostheses*

In 1980, an association representing dental technicians requested the Examiner to investigate “the restrictive practices currently protecting the monopolistic position of the dental profession in this country”. The association had in mind particularly the restrictions mentioned in sections 45 and 46 of the Dentists Act, 1928. In brief, these sections stated that it was unlawful for any person to practise dentistry or dental surgery unless he was a registered dentist, with some exceptions, or for any body corporate to engage in dentistry or dental surgery, again with some exceptions. Dentistry or dental surgery under the Act covered the fitting, insertion or fixing of artificial teeth. The Examiner came to the conclusion that these sections of the Act restricted competition in the provision of dental services, e.g. qualified dental technicians were prevented by law from offering their services direct to the public in respect of supplying artificial teeth. In October 1981, he requested the Commission to hold a public enquiry into the matter.

The Commission held the enquiry in 1982, and submitted its report to the Minister in October 1982. The report was published in May 1983. The Commission considered the statutory position, the current practice of supplying artificial teeth (dentures), evidence regarding the dental mechanics’ claims and the position in some other countries.

The Commission confined its conclusion to the supply of full and partial dentures only. It accepted that the authorities concerned with the administration of health care or the social welfare code had a right to take the view that work done by mechanics was not of a standard suitable for recognition under their schemes. The Commission considered that the denial to mechanics of the right to provide dentures to the public was by its nature a restrictive practice, and it was objectionable unless it could be shown that it offered advantages which outweighed its disadvantages. Three reasons were given for insisting that dentures should be provided only by a dentist. The Commission rejected the first of these, the supposed need to have a preliminary examination by a dentist before obtaining dentures. The Commission then went on to weigh up whether the dangers which might result from the faulty quality of dentures

or from carelessness in hygiene procedures were sufficient to justify the prohibition. Two alternative views were considered at length.

In the first point of view, the ailments which might arise from faulty dentures or careless hygiene were usually minor, and were not sufficiently serious to justify treating the practice as an act of wrong-doing for which a penalty should be exacted. A majority of the Commission accepted this view, and recommended that section 45 of the Dentists Act, 1928 should be amended so as to provide that the general prohibition on the carrying on of dentistry by a non-dentist did not apply to the provision of dentures to a person of eighteen years or over provided it did not involve work being done on living tissue.

The alternative view was that it was legitimate to make it an offence for unqualified persons to provide dentures if the authorities considered that the practice was dangerous and that this was the best way of preventing it, but that the section was unnecessarily restrictive in not recognising the possibility that persons other than dentists could become qualified. The alternative recommendation was that the Act should be amended so as to provide that the general prohibition on the carrying on of dentistry by a non-dentist should not apply to the provision of dentures by a denturist to a person of eighteen years or over provided it did not involve work done on living tissue, a denturist for this purpose being the holder of qualifications recognised by regulations made by the Minister for Health. This was not a recommendation that steps should be taken to create a grade of denturists.

The Commission concluded that the restriction on dentists practising as a corporate entity, under section 46, was not restrictive, and it did not recommend any change in this section of the Act.

The Dentists Act, 1985 (No. 9 of 1985), which repealed the 1928 Act, provided for the establishment of the Dental Council which was given the responsibility for the registration and control of persons engaged in the practice of dentistry and for other matters relating to the practice of dentistry and the persons engaged in such practice. As before, the “practice of dentistry” included the fitting, insertion or fixing of

artificial teeth, and it remained unlawful for anyone other than a registered dentist to practise dentistry, with some exceptions.

The Dental Council, however, was given the power, with the consent of the Minister for Health, to make a scheme for establishing classes of auxiliary dental workers who would be entitled to undertake specified classes of dental work which would otherwise be unlawful. It was specified that dental work carried out by an auxiliary dental worker had to be carried out under the supervision of a registered dentist. This restriction, however, would not apply to the fitting, insertion or fixing of artificial teeth for persons of eighteen years or over, or the giving of advice to, or attendance on, such persons by the auxiliary dental worker, provided that such work did not include any work on natural teeth or on living tissue. The Act also gave the Minister for Health the power to direct the Council to exercise the powers to make a scheme, where he considered that the establishment of a particular class of auxiliary dental worker was desirable.

Despite these provisions of the 1985 Act, no scheme has been made, over a period of some twenty years, to provide for the creation of a class of denturists, who could supply artificial teeth directly to the public without the involvement of a dentist. While schemes have been proposed, there has been no agreement between the Council and the Minister for Health, and each party has an effective veto on any proposed scheme.

*Tour Operators and Travel Agents*

In 1977, the Examiner received complaints from two travel agents that a travel agents' association prohibited association members from dealing with non-members, and that they were not admitted to membership of the association. Since practically all travel agents and tour operators were members of the association, the complainants were unable to book package tours for clients. The Examiner asked the association to remove certain restrictive provisions from its constitution. In 1978, officers authorised by the Examiner were refused access to minutes of meetings and to correspondence files at the association's offices. In November 1988, the Examiner furnished his report of an investigation to the Commission and requested it to hold an enquiry into the provision of travel agency services insofar as they were affected by the activities of the association.

The Commission was not in a position to hold the enquiry until early 1982. As the final arrangements were being made, the Examiner withdrew his request for an enquiry in the light of the enactment of the Transport (Tour Operators and Travel Agents) Act, 1982 (No. 3 of 1982). This Act provided that a person could not operate as a tour operator or a travel agent unless he held a licence granted by the Minister for Transport. The Minister was given power to make regulations in relation to licences. A tour operator or travel agent had to possess a bond for the protection of persons in relation to overseas travel, and they had to make payments to a Travellers' Protection Fund established by the Minister for the payment of compensation of such persons in certain circumstances. Operating without a licence was declared to be an offence, with a possible fine not exceeding £100,000, or imprisonment for not more than five years, or to both the fine and imprisonment.

Subsequently, one of the original complainant travel agents renewed his request to the Examiner that the enquiry should be proceeded with, because he considered that his difficulties would not be alleviated by the new legislation. When this request was rejected, he made application to the Commission to have an enquiry held. In considering this application, the Commission also had available to it the Examiner's report and many submissions received from interested parties since the first announcement was made of an enquiry. These indicated *prima facie* the existence of

restrictive practices sufficient to cause the Commission to decide to hold an enquiry. Public sessions commenced in 1983. The report was submitted to the Minister in July 1984, and was published in June 1985.

The enquiry was into the provision of tour operator and travel agency services insofar as they were affected by the activities of associations in the travel trade. The report described in detail the operation of the travel trade (including air travel, tour operators and travel agents), associations in the travel trade (the Irish Travel Agents Association (ITAA) and the International Air Transport Association), and licensing and bonding arrangements. It discussed complaints made against associations in the travel trade, including restrictions on entry imposed by the ITAA, rules governing existing members of the ITAA, price maintenance, and discipline, penalties and appeals.

There was some dispute about the competence of the Commission to enquire into activities connected with travel on scheduled air services, since the 1972 Act did not apply to “any air service or service ancillary thereto”. The Commission regarded the sale of tickets on scheduled services as being ancillary to an air service and therefore outside the scope of the enquiry. It took the same view in respect of the pricing practices relating to scheduled services as exercised by carriers, or an association of carriers. It took the view, however, that the activities of an association of tour operators and/or travel agents should not be regarded as ancillary to an air service, and was within the scope of the Act and the enquiry.

The main issues considered by the Commission were discrimination in trading – the “member to member” rule that a member of the ITAA should only deal with another member – and price maintenance – the ITAA prohibition on the sale of inclusive tours below the advertised rates. The Commission concluded that discrimination in trading and price maintenance were objectionable from the competition point of view and did not result in any significant benefit for the consumer, and that rules of the ITAA relating to these matters should be prohibited.

In addition, it considered that the future role of the ITAA as a representative body was likely to be important, and that membership might be of substantial assistance, or even essential, to travel agents. It concluded that the existence of discriminatory rules

regarding applicants for membership militated against the application of the principles of natural justice, and should be prohibited.

The main recommendations in the report, for prohibitions by Order, were as follows:

- (a) that discrimination in trading, arising principally from the operation of the “member to member” rule of the existing association, by tour operators or travel agents either collectively or individually or on the insistence of associations in the travel trade should be prohibited;
- (b) that discrimination by such associations against applicants for membership should be prohibited, especially in relation to:
  - (1) the minimum paid-up capital requirement including provision for running expenses;
  - (2) the bonding requirement;
  - (3) the requirement to submit accounts;
  - (4) the requirements governing minimum age for managers of applicant firms and minimum number of experienced staff; and
  - (5) specific requirements governing premises;
- (c) that the practice of price maintenance by a tour operator or travel agent acting individually or collectively, or any action by an association which had the effect of price maintenance should be prohibited;
- (d) that the inclusion of bye-laws governing feasibility studies, ethics and standards of the trade, and the enticement of employees in the rules of travel trade associations should be prohibited.

The Commission recommended a form of Order to deal with these matters.

In addition, the Commission considered that, in the interests of both the travel trade generally and the travelling public, the following procedures should be voluntarily included in the rules of the ITAA or any other association representative of the travel trade:

- (a) applicants should be notified in writing of the reasons for refusal of an application;
- (b) a list of members published by the Association should indicate that members only were listed and that a complete list of travel firms licensed under the

1982 Transport (Tour Operators and Travel Agents) Act was available from the Department of Communications; and

- (c) an appeals board should be set up to deal both with appeals against refusal or deferral of applications for entry to the Association and appeals by members against penalties imposed for breaches of rules.

In publishing the report, the Minister indicated that a decision had been taken to publish in order to facilitate public discussion of the recommendations of the Commission. He stated that he and the Minister for Communications would further consider the report in the light of this public discussion and the steps which were being taken by the travel trade to comply voluntarily with the recommendations in the report. He also said that some prior legislative amendments would be necessary to give effect to some of the Commission's recommendations.

No Restrictive Practices Order was made following the Commission's report.

Shortly before the Commission's report was submitted to the Minister, however, the Air Transport Bill, 1984 was initiated by the Minister for Communications in June 1984. The main intention was to make further provision in relation to the control of rates and fares charged on air services to, from and within the State. The Bill provided that the Minister could issue a notice to an air carrier requiring the submission of particulars of proposed airline tariffs. The Minister was enabled to approve such tariffs, with or without modification, or refuse to approve them. It was provided, *inter alia*, that a person who charged a fare or rate which was not contained in an airline tariff which had been submitted to the Minister would be guilty of an offence. The penalties laid down for such an offence were, on summary conviction, a fine not exceeding £1,000 or imprisonment for a term not exceeding 12 months, or both, and, on conviction on indictment, a fine not exceeding £100,000, or imprisonment for a term not exceeding two years, or both. Besides an airline, it would appear that an offence could be committed by a person such as a tour operator or a travel agent. In addition, it would seem that the charging of any fare or rate which was not contained in an airline tariff submitted would be an offence, whether the fare was above or below that in the tariff. In particular, the selling of an airline

ticket by a travel agent below the fare in the tariff would be an offence, and possibly subject to heavy penalties.

Furthermore, the advertising of fares and rates below those in the airline tariff, whether by the operator of an air service or by an intermediary, would also be an offence. The definition of an “intermediary” would appear to have included a tour operator and a travel agent. The penalty for committing an offence was a fine not exceeding £1,000, on summary conviction.

Finally, the power of the Minister to revoke or vary licences under the Transport (Tour Operators and Travel Agents) Act, 1982 was extended. In considering whether a person was a fit and proper person to carry on business as a tour operator or travel agent, the Minister was empowered to take into account the commission of an offence described above by the holder of a licence under the 1982 Act.

There was considerable opposition to the provisions of the 1984 Bill, and there were modifications to the eventual Act – the Air Transport Act, 1986 (No. 4 of 1986). As in the initial Bill, the Minister could issue a notice to an air carrier requiring the submission of particulars of proposed airline tariffs, which the Minister could accept, modify or reject. A new subsection provided that, in considering an airline tariff, in addition to having regard to the interests of that air carrier, the Minister should have regard to the reasonable interests of other air carriers and airline customers, the needs of the tourist industry, the maintenance of adequate air services, representations or objections regarding the airline tariff, and international agreements. The charging of fares other than those on the airline tariff was still deemed to be an offence, but the penalties were set at a fine not exceeding £1,000 on summary conviction, and a fine not exceeding £50,000 on conviction on indictment. Penalties of imprisonment were dropped from the Act.

The provisions regarding the advertising of fares and rates by the operator of an airline service or an intermediary were the same as in the Bill, including the maximum fine of £1,000. The provision whereby the Minister could take into account an offence under this Act, when determining whether to grant a tour operator’s or travel agent’s licence under the 1982 Act was excluded from the Act.

*Building Societies – Insurance and Valuation Reports*

In 1981, the Examiner commenced an investigation into certain policies followed by building societies in their dealings with persons seeking loans on mortgaged properties. These policies were:

- (a) the practice of building societies in insisting that fire and natural hazard insurance cover for mortgaged property be placed with a particular company or with one of a number of named companies; and
- (b) the practice of building societies in charging the fees for valuer's or surveyor's reports on all properties mortgaged to them to their clients, but not allowing the clients to have possession or even sight of such reports.

In 1983, the Examiner recommended that the Commission hold a public enquiry into these matters.

The Commission commenced public hearings of the enquiry in May 1984. Its report was submitted to the Minister in September 1985 and was published in May 1986.

The Commission described in the report housing and home ownership, the development of building societies, different methods of house purchase, valuation reports and house insurance, and it summarised the evidence given.

The Commission found that the insurance system operated by the major building societies was effective in protecting the interests of the societies themselves. Most building societies had arrangements with one or more insurance companies and they insisted that insurance was effected only with those companies and only through the society's agency. The Commission concluded that these restrictions were not justified by the benefits arising from the system. The main recommendation in relation to insurance, which was regarded as the more important issue, was that an applicant for a loan from a building society for the purchase of a property should not be precluded from having the property insured with an insurer of an intermediary of his choice, under the terms of an agreement with the society for the provision of a loan. It was further recommended that:

- (a) during the term of a mortgage agreement, a borrower should not be prohibited from transferring the insurance on the property to another insurer or intermediary of his choice;

- (b) a building society should be required to offer an applicant for a loan a choice of at least three insurance companies and that this choice be available to an existing borrower who wished to transfer the insurance on his property;
- (c) where the insurance on a property was arranged by the society, a summary of the policy should be given to the borrower, and a copy of the policy should be given if the borrower so requested;
- (d) where an applicant for a loan, or a borrower, proposed to effect insurance with a company of his choice, the society should be prohibited from refusing to accept the insurance cover except for objectively valid reasons; and
- (e) where an applicant for a loan, or a borrower, effected insurance with a company of his choice, the society should be prohibited from imposing a charge in respect of extra administration expenses.

With regard to valuation reports on properties, the Commission concluded that the system operated by building societies involved a restrictive practice and was unfair. It recommended that a building society be prohibited, as a condition of giving a loan to an applicant for the purchase of a property, from requiring that the society should arrange for the carrying out of a valuation of the property and that the applicant would pay, either directly or indirectly, the cost in whole or in part, whether or not he was given sight of the report. It was also recommended that, where an applicant wished to obtain a copy of the report on valuation, and the building society was willing to make it available, the society could require that the applicant pay half the cost of obtaining it.

The Commission recommended that an Order be made to give effect to its proposals, and it indicated the form of Order to be made. In the event, no such Order was made.

In December 1986, however, the Building Societies (Amendment) Act, 1986 was passed by the Oireachtas and became law (No. 36 of 1986). Under this Act the Minister for the Environment was empowered to prescribe rules for building societies, by Order, which could give effect, *inter alia*, to the recommendations of the Commission.

In January 1987, that Minister made the Building Societies Regulations, 1987 (S.I. No. 27 of 1987). These were amended in December 1987 by the Building Societies Regulations (Amendment) Regulations, 1987 (S.I. No. 339 of 1987). These Regulations included the following provisions:

- (a) Valuation Reports. Where a society gave approval to the making of a loan, the member must be furnished with a copy of the valuation report relating to the value of the security for the loan.
- (b) Insurance of Mortgaged Property. Any insurance required of a member by a society on a mortgaged property could be effected with any insurer and through any agency or any intermediary. The society was not allowed to discriminate between members who effected insurance through the agency of the society and members who effected insurance otherwise.

The Regulations also prescribed that the costs of the legal investigation of title to any property offered as security by a member should be paid by the society, and should not be recovered from the member. This was one of the main recommendations in the 1982 report by the Commission on the Restrictions on Conveyancing and the Restrictions on Advertising by Solicitors. The Regulations further provided that a society should arrange mortgage protection insurance in respect of each mortgage loan, with some exceptions, through an insurer or an intermediary nominated by the society.

Under the Building Societies Act, 1989 (No. 17 of 1989), the Central Bank was given the power by regulation to prescribe rules for building societies in respect of valuation reports, insurance on mortgaged property, etc. The 1986 Act was repealed, including the power of the Minister to make regulations in respect of these matters. The 1989 Act, however, provided that the existing regulations would continue in force as if made by the Central Bank. Following enactment of the Central Bank and Financial Services Authority of Ireland Act, 2003 (No. 12 of 2003), the Irish Financial Services Regulatory Authority was vested with the power to make such regulations. No regulations have been made in this respect, and the original regulations are still operative.

*Pyramid Selling*

In June 1973, the Minister requested the Examiner to investigate the operation of pyramid selling, a system under which people paid large sums in order to be accepted by a company as distributors, at different levels, of products which were ultimately sold to consumers in their own homes. The Examiner's report was furnished to the Minister in August 1973, but was not published.

In September 1973, the Commission was furnished with copies of the Examiner's report, and was asked for its views. Following legal advice, the Commission sought additional information on certain matters relevant to, but not covered by, the report, including official action in other countries.

The Commission sent its observations and recommendations on the report to the Minister in February 1974, but these were not published either. The Commission stated in its 1974 Annual Report, however, that it agreed with the Examiner that the practices listed in his report were unfair and operated against the common good. It analysed the principal objectionable features of pyramid selling, and discussed briefly the position in several other countries. It also considered alternative approaches to the practice as it had operated in this country. The Commission recommended legislation on the lines of the UK legislation, suitably adjusted to meet the Irish situation.

Subsequently, the Minister introduced what became the Pyramid Selling Act, 1980 (No. 27 of 1980). Its main purpose was to prevent the inducing of persons to participate in pyramid selling schemes. This was a trading scheme with certain defined elements. Goods and/or services were to be provided by one or more promoters to participants for sale to other persons. Its essential feature was that the prospect was held out to participants of receiving payments or other benefits in respect of persons who became participants in the scheme. The Act provided that a promoter or participant in a scheme should not induce or attempt to induce a person to become a participant, contravention of this prohibition being an offence. The receipt of payments by a promoter from a participant, because the participant was offered the prospect of receiving payments for the introduction of new participants, was created an offence. A person guilty of an offence was liable, on indictment, to a fine not

exceeding £10,000, or to imprisonment for up to two years, or both a fine and imprisonment. Provision was also made for the return to participants of payments for goods in certain cases. An officer or employee of a body corporate which had committed an offence was deemed also to have committed the offence in certain circumstances. The Act came into operation on 1 December 1980.

*Studies into Industrial Concentration and Mergers*

In 1974, the Minister requested the Commission to undertake studies into concentration in Irish industry and mergers in Ireland. The Report of the study, which was undertaken by Mr. Lyons, was presented to the Minister in September 1975. It was published in 1978, at the same time as the Bill to control mergers, take-overs and monopolies. The Bill was enacted as the Mergers, Take-Overs and Monopolies (Control) Act, 1978 (No. 17 of 1978).

The report commenced with a discussion of the consequences and causes of industrial concentration, including the economic problems caused. It was followed by an analysis of the available statistical data, basically the Census of Industrial Production, and a description of the alternative statistical measures of concentration, especially the concentration ratio, i.e. the share of total output or employment of the largest firms in an industrial sector. The report contained a detailed analysis of changes in concentration in employment at the establishment level in each Irish industry between 1958 and 1968.

The study on mergers involved the compilation of a list of significant mergers, in all sectors of the Irish economy, which were known or suspected to have occurred in the period from 1958 to 1972. Since this information was obtained largely from newspapers and the periodical press, it was explained that there was no certainty that the list of mergers was fully comprehensive.

The detailed analysis of concentration and changes in concentration, together with details of industrial mergers, was contained in an Appendix and a summary of the analysis was included in the body of the report, together with some tentative conclusions.

There were several difficulties arising from deficiencies in the available statistical data. Statistics were published on an establishment basis rather than on an enterprise basis, that is each factory rather than all factories under the same ownership, and this tended to under-estimate the degree of concentration. For reasons of confidentiality, outside researchers were not given access to the material collected by the Central

Statistics Office in the Census. It was suggested that consideration might be given to the formation of a special research section within the CSO to undertake fundamental and essential studies, such as that on industrial concentration among enterprises.

The Study showed that, even at the establishment level, concentration was high or rising in many Irish industries, especially in more narrowly defined industries. By international standards, the scale of Irish industry was relatively small, and in some sectors rationalisation, by merger or otherwise, could have beneficial effects. There remained a need, however, to monitor concentration in a number of sectors where oligopoly, with its attendant risks to competition, was predominant.

Bearing in mind the proposed legislation to control mergers and monopolies, there was a need to study closely those sectors of Irish industry where concentration was already high or rising rapidly, especially where this was the result of merger activity. Adequate powers had to be given to the appropriate authorities to obtain the necessary information to assist their investigations. It would be desirable, in particular, that the Commission, in undertaking studies under the 1972 Act, should be empowered to require firms to furnish relevant information where it was available, subject to the non-publication of confidential information.

Data later became available in respect of 1975, and a further study on industrial concentration was undertaken by Mr. Lyons. The full study was published as an Appendix to the Commission's Annual Report for 1982, and a summary was included in the main report.

The estimated four-firm concentration ratio ranged from 7.5% to 98.1%. One third of the industries were considered to be highly concentrated, with a ratio of 50% or more, while one-fifth had low concentration of under 25%. Because of significant re-classification of the source data, comparison of the 1975 figures with those for earlier years was severely limited. Most of the industries which could be compared showed an increase in concentration, sometimes considerable, between 1958 and 1975.

The results, in common with the earlier studies and work by other researchers, tended to indicate that concentration was at a high level in many industries, and was

increasing in many as well. The study underlined the relevance of information of this nature in the administration of competition and merger policy. The structure of an industry revealed by concentration data had to be considered in deciding whether to investigate a purported monopoly or to allow a proposed merger to proceed. The Commission considered that it would be extremely useful if the CSO were to produce exact four-firm concentration ratios for each industry, both on the basis of employment and net output, rather than the estimated ratios in these studies.

*Legislation on Competition Policy*

In 1974, the Minister requested the Commission to study and analyse Irish legislation on competition policy in the light of economic and social changes taking place in the economy. An interim statement based on a preliminary study done on the operation of restrictive practices legislation in certain other countries was submitted in 1975, setting out the views of the Commission on the need for the re-appraisal of existing legislation. This statement was not published.

It was suggested that the time might be ripe for a departure from the existing piecemeal approach of the prohibition of certain practices in each sector, such as collective price fixing, resale price maintenance, and restriction on entry into trade and services, under the control of abuse principle, and for the adoption of legislation based mainly on the prohibition principle as operated in many other countries. In accordance with this approach, certain clearly defined unfair practices would be prohibited outright, with or without provisions for exemptions in defined circumstances. The Commission considered that the question of the registration of agreements and more effective enforcement procedures were other matters which should be examined.

A more comprehensive report was submitted by the Commission to the Minister in 1977, but it also was not published. The Commission, however, recommended that a prohibition system, with the possibility of exemption, should be introduced, which would be very similar to (the then) Articles 85 and 86 of the Treaty of Rome. In addition, the Commission recommended that the Minister might prescribe additional prohibitions if such agreements or practices were likely to have as their effect the prevention, restriction or distortion of competition within the State.

*Roadside and Similar Types of Trading*

In December 1975, the Minister initiated an investigation by the Commission into the nature and extent of:

- (a) roadside trading in rural areas;
- (b) similar type trading carried out in towns to which the Street Trading Act, 1926 did not apply, and in towns where the existence of special charters prohibited the operation of that Act; and
- (c) sales from temporary retail outlets, such as hotels, dance halls and temporary shops.

The study was to be concerned particularly with the effect of these types of trading on competition and fair trading and whether they operated against the common good or were not in accordance with the principles of social justice.

In July 1976, the Commission presented to the Minister its report of the study of roadside and street trading and sales from temporary retail outlets. The report was published in November 1976. The report gave details of submissions made in respect of the three types of trading, it described the relevant legislation and considered problems of enforcement and the situation in other countries.

Complaints made against these forms of trading concerned the nature and origin of the goods sold, alleged tax evasion, absence or non-payment of overheads, the creation of health and traffic hazards, and the abuse of amenities. In favour of street and roadside trading, it was said that it was a genuine means of livelihood of the people concerned, and that it made low price goods available to the consumer.

The Commission concluded that outdoor trading did not operate against the common good, and that an outright ban on roadside and street trading would not be in accordance with the principles of distributive justice and would deprive many families of a legitimate means of support. The Commission, however, recommended the introduction of certain controls aimed at ensuring that outdoor trading was fair. It did not propose a Restrictive Practices Order.

It recommended that all outdoor traders should be required to have a National Outdoor Trader's Licence, issued by the Garda, the fee payable being at least £50, with provision for a nominal fee in the case of some categories of traders; that local authorities should be empowered to designate locations where roadside trading might be carried on and to prohibit it elsewhere; that local authorities should also be empowered to require that all street traders hold, in addition to the Outdoor Trader's Licence, a street trader's licence, the fee payable being higher than that payable at the time under the Street Trading Act, 1926. The Commission felt that such a higher fee, coupled with the proposed fee for an Outdoor Trader's Licence, would help to ensure greater equity in comparison with traders who traded in premises. It recommended repeal of the Hawkers Act and the Pedlars Act. The Commission assumed that, in the normal course, information on licences issued would be furnished to the Revenue Commissioners. In the case of sales from temporary retail outlets, the Commission recommended that the organiser should require a permit from the local authority in respect of each day of trading. Finally, the Commission considered that, because many of the problems associated with outdoor trading were related to traffic, the environment and sanitary requirements, for which local authorities were responsible, it would be beneficial if the administration dealing with outdoor trading were to be the responsibility of the Minister for Local Government.

Interested parties were given the opportunity to consider the report and to comment on it, following which the Minister would take decisions on the Commission's recommendations. Two pieces of legislation were later adopted – the Occasional Trading Act, 1979 and the Casual Trading Act, 1980.

Under the Occasional Trading Act (No. 35 of 1979), occasional trading was defined as "selling goods by retail at a premises or place (not being a public road or other place to which the public have access as of right) of which the person so selling has been in occupation for a continuous period of less than three months ending on the date of such selling". There were a large number of exceptions specified, including selling by auction, except a Dutch auction; selling of agricultural or horticultural produce (including livestock) by or on behalf of the producer; selling of ice cream, sweets and some cooked foods from a tray, basket or barrow at public events; selling

of ice cream, publications or religious objects; selling of fish; selling of hand-crafted goods by the maker; and selling for charity.

The Act prohibited occasional trading unless the trader held an occasional trading permit valid at the time. The permit was available from the Minister for Industry, Commerce and Energy on payment of a fee of £50, together with a further fee of £25 for each full or part day of trading. The Minister was entitled to refuse or revoke a permit, and was obliged not to grant a permit to a person who had been convicted more than once of an offence under the Act. The trader was obliged to display the permit where he was trading in a visible and legible manner. An advertisement about casual trading had to include the number of the permit and the name and address of the permit holder. Authorised officers, appointed by the Minister, were given powers, *inter alia*, to investigate places where occasional trading was believed to occur and to require production of the permit or the identity of the trader, and they could be accompanied by Garda officers. Offences could be prosecuted either on indictment or summarily, and the penalty could be imprisonment and/or a fine.

The Act came into operation on 19 December 1979 under the Occasional Trading Act (Commencement) Order, 1979 (S.I. No. 404 of 1979). In 1981, the selling of coins, medals, bank notes or tokens for coins was excluded from the Act, under the Occasional Trading Act (Section 2(2)) (Amendment) Regulations, 1981 (S.I. No. 19 of 1981).

The Casual Trading Act (No. 43 of 1980) defined casual trading as “selling goods by retail at a place (including a public road) to which the public have access as of right or at any other place that is a casual trading area”. A “casual trading area” was defined as land designated under the Act by a local authority as an area where casual trading might take place. There were a large number of exceptions specified, many of them similar to those in the Occasional Trading Act. These exceptions included: selling by auction, except a Dutch Auction; selling of agricultural or horticultural produce (including livestock) by or on behalf of the producer; selling of ice cream, etc., at public events; selling of ice cream, periodicals or religious objects; selling fish by a person by whom, or a member of the crew of the boat from which, they were caught;

selling for charity provided there was no gain to the seller; and selling at a market or fair held in pursuance of a market right.

The Act prohibited casual trading in a casual trading area unless the trader held both a casual trading licence and a casual trading permit valid at the time. It prohibited casual trading in any other area, unless the person held a casual trading licence. A person was not allowed to engage in casual trading in the functional area of a local authority outside a casual trading area, where one had been designated. The licence was available from the Minister for Industry, Commerce and Tourism, on payment of a fee of £100. The Minister could refuse or revoke a licence, and he was obliged not to grant a licence to a person who had been convicted of two or more offences under the Act. The licence continued in force for 12 months, and then it expired. The licence fee was set at £5 where it was for the purpose only of selling fish, horticultural or agricultural produce (other than meat), or articles made by the person who held the licence or his spouse or children. Where a casual trading area had been designated, a casual trading permit could be obtained from the local authority, by a person already possessing a licence, on payment of a fee of £20. The permit could contain conditions, it could be refused or revoked, and it continued in force for 12 months and then expired. The licences and permits had to be clearly and legibly displayed.

Power was granted to a local authority to designate land as a casual trading area, having regard to the proper planning and development of its functional area, the development plan and traffic likely to be generated. Designation of an area was made a reserved function. Proposals to designate had to be published, and there was the possibility of appeal to the Circuit Court. The local authority could make bye-laws in relation to casual trading areas. Power was also given to a local authority to acquire any market right in its functional area by agreement or compulsorily, and to manage or extinguish a market right owned by the authority. Alternative facilities had to be provided where a market right was extinguished, and any proposal to extinguish could be appealed to the Circuit Court.

Authorised officers, appointed by the Minister or the local authority, were given similar powers of investigation as under the Occasional Trading Act, and they could be assisted by Gardai. A Garda was given power to arrest a person believed to be

contravening the Act, and could seize and remove goods being sold. Such seized goods could be resold by the Garda Commissioner very quickly.

The Minister was required to maintain a Register of Casual Trading Licences, and a local authority was obliged to keep a Register of Casual Trading Permits. Offences could be prosecuted either on indictment or summarily, and the penalty could be imprisonment and/or a fine.

Wording of a subsection of the Occasional Trading Act, relating to the exemption of selling for charity, was amended to repeat the wording in this Act. The Pedlars Act, 1871, the Hawkers Act, 1888, and the Street Trading Act, 1926 were repealed insofar as they applied to casual trading and occasional trading. Persons who held certificates or licences under these Acts were excused the need to obtain licences or permits under the new Acts for a specified period.

Under the Casual Trading Act, 1980 (Commencement) Order, 1981 (S.I. No. 43 of 1981), different parts of the Act came into operation in February and March 1981. The fees for a casual trading licence were increased from £100 to £175, and from £5 to £20, under the Casual Trading Act, 1980 (Licences Fees) Regulations, 1984 (S.I. No. 328 of 1984).

The 1980 Act was repealed and replaced by the Casual Trading Act, 1995 (No. 19 of 1995). The new Act also amended the Occasional Trading Act, 1979. Casual trading is defined as “selling goods at a place (including a public road) to which the public have access as of right or at any place that is a casual trading area”. A “casual trading area” means land standing designated by bye-laws made by a local authority as an area where casual trading might be carried on. Many of the provisions in the 1980 Act are retained in the 1995 Act. The main differences are:

- (a) the number of exceptions to the definition of casual trading is reduced to:
  - selling by auction, except a Dutch auction; selling to a person at the place where he resides or carries on business; and selling for charitable purposes provided there is no gain to the seller. The Minister can amend this list, and a local authority may add to the list;

- (b) instead of a casual trading licence from the Minister and a casual trading permit from a local authority, there is a single casual trading permit from a local authority. The licence authorises a person to engage in casual trading on specified days in a defined area, and it may contain conditions. A licence may be refused or revoked, and may not be given to a person convicted of offences while holding a licence. The licence may continue in force for up to 12 months;
- (c) instead of permitting a local authority to designate a casual trading area under the 1980 Act, there is now an obligation on the local authority, as soon as may be, to make bye-laws in relation to the control, regulation, supervision and administration of casual trading in its functional area. The bye-laws could make provisions, *inter alia*, regarding the designation of a casual trading area, the maximum area for a trading position, access to the area and the fixing of fees for casual trading licences. Notice of proposed bye-laws must be published, and may be appealed to the District Court, and the making of bye-laws is a reserved function;
- (d) authorised officers may be appointed by the local authority, and no longer as well by the Minister, and, as before, they may be assisted by a member of the Garda, who remains able to seize goods, which may be disposed of by a Garda Superintendent;
- (e) a Register of Casual Trading Licences must be maintained by the local authority, and no longer by the Minister; and
- (f) there are changes in the penalties for offences.

As before, trading without a licence is an offence, as is trading outside a designated casual trading area; licences must be clearly and legibly displayed; the local authority may acquire and market rights of a market or fair, and then manage and regulate the market or fair, and may extinguish a market right owned by it.

The Occasional Trading Act, 1979 was amended as follows:

- (a) the Minister was given power to amend the classes of exempted selling specified;
- (b) after granting an occasional trading permit, the Minister had to notify the name and address of the holder to the Minister for Social Welfare; and

(c) the penalties for offences were altered.

Under the Casual Trading Act, 1995 (Commencement) Order, 1995 (S.I. No. 267 of 1995), different parts of the Act came into force in October 1995 and May 1996. Application forms for the Casual Trading Licence were provided in the Casual Trading Act, 1995 (Forms) Regulations, 1996 (S.I. No. 146 of 1996).

In 2000, the Minister requested the Competition Authority to undertake a study into the implementation by local authorities of the Casual Trading Act, 1995. The report of the study was submitted to the Minister in August 2002. The study contained a number of recommendations by the Authority regarding the regulation of casual trading, mainly relating to the manner in which the Act was being implemented. In May 2004, the Minister made an Order in respect of an issue which was not the subject of the recommendations – the Casual Trading Act, 1995 (Section 2(3)) Regulations 2004 (S.I. No. 191 of 2004). These regulations provide that sellers of fruit and vegetables, at certain times of the year, are able to sell their produce without the requirement to obtain a Casual Trading Licence. The study and the Order are described more fully in the section relating to the Competition Authority.

*Competition in the Licensed Drink Trade*

In October 1976, the Minister requested the Commission to undertake a study of the effect on the common good of the nature and extent of competition in the retailing and serving of intoxicating liquor and of non-alcoholic drinks sold in licensed premises, having regard to any types of restrictive practices in operation and the effect on competition of the licensing laws. The Commission's report was submitted to the Minister in June 1977, and was published later that year.

In the introduction to its report, the Commission stated that control of drink prices had become a problem in recent years. Publicans had often implemented increases in drink prices which had not been authorised by the National Prices Commission. Maximum Prices Orders made by the Minister to control prices in a number of urban areas had been defied. The Minister had also been informed by the Examiner of possible breaches by trade associations of the 1965 Restrictive Practices Order which prohibited agreements on selling prices of intoxicating liquor and soft drinks and the issuing of lists of retail selling prices of such beverages.

Following summaries of submissions received from interested parties, the Commission attempted to describe the current operation of the licensing legislation, which was extremely complex, together with a section on licensing practice in Great Britain and Northern Ireland. The Commission outlined the structure of the licensed drink trade and then considered competition in the trade. The Commission only considered aspects of the licensing legislation which it believed had a bearing on competition, particularly the requirement to extinguish existing licences in order to obtain a new public house licence, which had led to a severe curtailment of the number of licensed premises in areas of rapid population growth.

The Commission concluded that the Restrictive Practices (Intoxicating Liquor and Non-Alcoholic Beverages) Order of 1965, had had little, if any, apparent effect in preventing the concerted action by licensed vintners in relation to price increases in a number of centres. Realising the increasing difficulty of obtaining evidence of a breach of the Order, the Commission recommended that the Examiner, in addition to his powers to request an enquiry to review an Order, should be empowered to request

the Commission to hold a sworn public enquiry promptly in any case where he had reason to believe that an infringement of the Order had occurred, but where he was unable to secure evidence of this.

The Commission also concluded that, in a number of respects, the effect on competition of the drink licensing laws was restrictive to an extent which was unnecessary to the functioning of an efficient system of licensing, and that the licensing laws had resulted in a serious distortion in the structure of the trade, and a tendency for the enhancement of operating costs and prices.

The Commission recommended that full licensing should be extended to restaurants complying with certain criteria subject in each case to the approval of the Irish Tourist Board and of the licensing authorities.

In addition, the Commission considered that the procedures for licensing should be improved. The present arrangements for extinguishing existing licences as a requirement for obtaining new licences should be terminated, and an alternative procedure for the approval of new licences should be introduced. The Commission recommended that applications for new licences should be examined in the light of criteria to be laid down by the Minister for Justice. Such criteria might include the number of existing licensed premises in an area, and standards relating to the applicant and the premises concerned, but would not include expressly anti-competitive provisions.

The Commission also recommended a new administrative procedure, which would involve either a Licensing Body for the country as a whole, working in consultation with the local police and the local planning authority, under the Minister for Justice, or a number of local bodies. The new licensing authority would have responsibility for applications for new licences, new premises, transfer of licences, new off-licences, new clubs and new hotels and restaurants. Applications for renewal of licences and occasional licences and temporary exemptions should continue to be handled by the district courts. The new procedures should also be applied to off-licences.

The Commission also recommended that the licence fees should be substantially increased, and that renewal of licences should be required every two years instead of each year. The Commission considered that, until competitive conditions in the trade improved, there was a strong case for continued control of prices by the National Prices Commission.

Finally, the Commission, having considered the suggestion that sports clubs and other clubs should be subject to the same powers of control as public houses, particularly in view of the expansion of such clubs in some centres in recent years, recommended that the powers of the police to enter clubs should be the same as their powers to enter licensed premises. Because of the nature of its recommendations, the Commission did not propose that they should be implemented by way of a Restrictive Practices Order.

Besides the report by the Commission, there were also several reports by the Commission on Liquor Licensing between 2001 and 2003, and an Interim Study by the Competition Authority on the liquor licensing laws and other barriers to entry and their impact on competition in the retail drinks market, which was published in 1998.

There have been a number of changes in the licensing laws since 1977, though they did not go very far in the direction recommended by the Commission. The Intoxicating Liquor Act, 1988 (No. 16 of 1988) included sections relating to special restaurant licences, registered clubs and off-licence sales in premises such as supermarkets.

The Act introduced a “special restaurant licence” (sections 5 to 24). A restaurant was defined as a premises adapted and primarily used for supplying substantial meals to the public for consumption on the premises. The special restaurant licence permitted the sale of a full range of intoxicating liquor for consumption on the premises, provided that the alcohol was paid for at the same time as the meal was paid for. A restaurant could serve alcohol in a waiting area to persons waiting to enter the dining area, but the waiting area could not exceed 20 per cent of the floor area of the dining area. The applicant for such a licence was required to have in force a Bord Fáilte Certificate for the premises, which was issued annually. The Board had to inspect the

restaurant and ensure that it complied with certain quality standards. A fee of £3,000 had to be paid for the licence (and this was never increased). The licence did not permit there being a bar in the restaurant.

Regulations were made setting out the requirements and standards for the issue of a certificate by the Board – the Special Restaurant Licence (Standards) Regulations, 1988 (S.I. No. 147 of 1988). The Regulations provided detailed standards for restaurants, covering the restaurant, the waiting area, the dining area, the kitchen and service area, the cloakroom facilities and toilets, the management and staff, the menu, wine list and drinks list, and catering. The application form and the Certificate were specified, and fees were prescribed for application and inspection, and certification.

Under the 2000 Act (see below), however, the requirement for a certificate from the Board to obtain a Special Restaurant Licence was terminated, along with the associated provisions. Only a relatively small number of Special Restaurant Licences were granted, however.

The 1988 Act also provided for the entry into and search of a registered or unregistered club by a member of the Garda Síochána who had reasonable grounds for suspicion that an offence was being committed (section 43). This provision was amended in respect of registered clubs under the 2003 Act (see below).

In addition, the 1988 Act provided that, where intoxicating liquor was sold for consumption off the premises by a retail outlet such as a supermarket, it should not be sold by self-service methods and should only be sold from an intoxicating liquor counter (section 47). This applied to outlets where other commodities besides alcohol were sold. It did not apply where the off-licence sale of alcohol was the only business being carried on, apart from the sale of ancillary commodities, such as tobacco and other beverages. This provision was to come into operation on a date appointed by Ministerial order. No such order was ever made, and the provision was repealed by the Act of 2000.

The Intoxicating Liquor Act, 2000 (No. 17 of 2000) also made some relevant changes to the licensing laws. There was some relaxation in the requirement to extinguish

existing licences if new licences were sought (section 18). To obtain a new licence, an existing licence, from anywhere in the country, had to be extinguished. The existing licence had to be a full licence or a licence of the same character as the new licence. The Court concerned (either the Circuit Court or the District Court, as appropriate) could prohibit the issuing of a new licence on several grounds, however, including “the adequacy of the existing number of licensed premises of the same character in the neighbourhood”.

The 2000 Act also permitted the holder of a wine retailer’s on-licence attaching to a restaurant to sell beer on the premises, provided that the beer was consumed with, and paid for at the same time as, a meal, and that the restaurant did not contain a bar (section 26). As noted above, the 2000 Act deleted the requirement in the 1988 Act for the obtaining of a certificate from Bord Fáilte in order to obtain a Special Restaurant Licence. It also repealed the sections of the 1988 Act which provided power for the Board to inspect restaurants and those which provided for the making of regulations in respect of restaurant standards. The limitation on the maximum floor size of the waiting area was also removed (section 27).

As noted above also, the 2000 Act repealed the requirement in the 1988 Act for sales of alcohol in supermarkets and similar outlets to be made only from a dedicated counter, and not to be sold by self-service methods (section 32).

Under the Intoxicating Liquor Act 2003 (No. 31 of 2003), any member of the Garda Síochána, whether in uniform or not, was enabled to enter and inspect any licensed premises, including a registered club, for the prevention or detection of offences under the licensing acts (sections 18 and 23).

*Cable Television Systems in Dublin*

In July 1984, the Minister requested the Commission to carry out a review, over a period of approximately two years, of the operation of cable television systems in the greater Dublin area, with particular reference to the implications for the common good and the interests of subscribers. The matter arose out of the common control being exercised by one operator in this area following a takeover. The study was undertaken in the first half of 1986, by the Chairman, Mr. O'Reilly, and one member, Mr. Lyons. It was submitted to the Minister in July 1986 and was published the following October.

Cablelink held the cable television licence for 95 per cent of the homes in the Dublin area and for the cities of Waterford and Galway. 80 per cent of the shares in Cablelink were owned by RTE, the national broadcasting service, following a takeover in 1984. Cablelink was essentially a service to relay certain television channels.

The Commission concluded that cable television (CTV) was a local natural monopoly. It was not considered practical or economically viable to have more than one television cable available to each household. It was found that there was little effective competition to CTV from other sources, such as individual aerials or satellite dishes. If there were no existing licences and Dublin was being cabled for the first time, it was believed that, ideally, there should be between two and five independent licence-holders, each allocated a sensible geographical area, and that none of the licences should be held by RTE. Such an arrangement would allow some degree of, at least indirect, competition in the provision of CTV, in terms of quality and type of service. It would allow for comparisons between the licence-holders of prices, costs and efficiency. It would also avoid any possible conflict between the national broadcaster as such and in the capacity of dominant CTV operator. Finally, this would provide the best setting for the most advantageous development of CTV services in the future. Overall, it was believed that this type of network would best serve the common good and the interests of subscribers.

As no abuse of the monopoly position was found, however, it was considered that remedies such as requiring that the licence be subdivided were too drastic. Since the conclusion meant that there would be no competition for Cablelink, it was considered that some form of regulation was essential. Apart from the pricing recommendations, which were directed to the Minister responsible for the licence allocation, all of the other recommendations were of the self-regulatory type.

Recommendations on pricing:

- (a) the price to subscribers of the basic service should be index-linked to inflation for a period of five years;
- (b) some of the satellite channels available to Cablelink without cost should be included in the basic service to subscribers at no extra cost;
- (c) the price of additional optional services should be left free of control for a period of five years from the date of introduction.

Recommendations to Cablelink:

- (a) the company should proceed as quickly as possible with the introduction of additional channels and services and make the transition from a relay operator to a cable operator in the shortest possible time;
- (b) because the company had a monopoly, it was important that the powers exercised, in the selection from satellite channels, in the commissioning of programmes from independent makers and in the commissioning of locally originated programmes, should be used fairly and sensibly to allow subscribers the maximum choice of programmes at a reasonable cost;
- (c) independent programme makers should have access to cable on a reasonable basis and it was important that there should be no discrimination against them;
- (d) there should be competition between the additional services and RTE for viewers, programmes and, where appropriate, advertising;
- (e) the company should be operated at arm's length from RTE and should not allow RTE to interfere in its operations.

Recommendations to RTE:

- (a) ensuring, as an investor, that the cable television company was run as successfully as possible;

- (b) refraining from exercising editorial or other control on the additional channels supplied by the cable television company;
- (c) delegating to the board of Cablelink the commissioning of programmes, the leasing of channels to independent operators and the obtaining of advertising revenue.

It was decided by the Commission that the operation of CTV in Dublin should be further reviewed within three or four years to examine if the system was being operated in a satisfactory way. The Commission stated that, if they found that the monopoly or the control of the monopoly by RTE, or both, were, on balance, being abused, they would have no hesitation in recommending major changes.

In April 1990, the Minister referred to the Commission the proposed acquisition of 60 per cent of the issued share capital of Cablelink by Bord Telecom Eireann Teoranta, and the retention by RTE of 40 per cent. The investigation was carried out by the Chairman, Mr. O'Reilly. The report was sent to the Minister in May 1990, but was not published. In June 1990, the Minister stated that he had decided not to make an Order prohibiting the proposal. He further stated that, following receipt of the Commission's report, he had sought and received written undertakings from Telecom Eireann which, in his view, provided satisfactory assurances in relation to the points identified by the Commission. The Minister also sought and received an assurance that Cablelink would be operated at arm's length from Telecom (see section on Mergers).

In 1999, the Government, as part of its privatisation of Telecom Eireann, ordered RTE and Bord Telecom to sell Cablelink. That year, a proposal was notified to the Minister whereby NTL Communications Corp. would take over Cablelink. The proposal was not notified to the Authority, and it was allowed to proceed.

Finally, the Commission for Communications Regulation (ComReg) was established under the Communications Regulation Act, 2002 (No. 20 of 2002), and the new European regulatory framework for the regulation of electronic communications networks and services was transposed into Irish law in July 2003 by way of regulations in four statutory instruments. As a result, cable networks, such as

Cablelink, fall within ComReg's jurisdiction. ComReg's predecessor, the Office of the Director of Telecommunications, had been given responsibility for CTV, previously held by the Minister for Communications, in 1996. ComReg, however, does not have concurrent competition law powers. As a consequence of the new framework, cable networks, like other fixed networks, are no longer subject to a licence.

*Report on Alleged Differences in Retail Grocery Prices between the Republic of Ireland and the United Kingdom (including particularly Northern Ireland)*

This report was prepared at the request of the Minister, and was the sole responsibility of the Chairman, Mr. O'Reilly. It was submitted to the Minister in October 1987 and was published in January 1988. It arose from allegations made in a price survey by the Economic and Social Research Institute, followed by a television programme, about the comparative level of prices of certain grocery products in Ireland. The report emphasised that the purpose of the study was to investigate the allegations made and not to determine whether the cost of purchasing grocery goods was dearer or cheaper in Northern Ireland, Great Britain or the Republic of Ireland.

The report concluded that, when value added tax, table water duty, excise duty and monetary compensation amounts were excluded, and other adjustments made, the differences shown by the surveys of prices between the Republic and Great Britain were comparatively small and quite different from those alleged. Significant differences were, however, ascertained in the survey prices of intoxicating drink products.

Among the recommendations in the report were the following:

- (a) that a maximum prices order should be introduced for bread and a retail and wholesale fixed price order for milk;
- (b) that purchasers should seek to have freight differentials between the Republic and Northern Ireland reduced or eliminated by complaining to the European Commission or by obtaining alternative suppliers;
- (c) that purchasers should request the European Commission to investigate the non-compliance with Regulation 1983/83 (the block exemption regulation for exclusive distribution agreements), if they believed that there were barriers to parallel imports;
- (d) that barriers to trade should be reviewed, particularly cigarette regulations concerning health warnings and price discounting, licences to sell milk in Dublin, regulations requiring the use of some container or pack sizes, regulations preventing the sale of returnable bottles, restrictions on sales of certain products and the minimum butter fat content requirement for ice-cream

and arrangements whereby parallel imports of whiskey from Northern Ireland were prevented; and

- (e) that tax harmonisation should be introduced between Ireland and the UK on food and grocery products, clothing and non-prescription medicines, as part of the total tax harmonisation within the EC by 1992.

EC Monetary Compensation Amounts, cost differentials and retailer margins were also considered, and recommendations were made in relation to product sizes, individual price markings, scanning regulations and a television information programme for shoppers.

Finally, it was recommended that future surveys on price comparisons should be carried out at least every two years and that there should be a detailed analysis of the reasons for the differences. Such surveys should be weighted and should include vegetable shops and butchers, and there should also be comparisons with prices in other cities in Ireland, the UK and Europe.

Following the report, two maximum prices orders were introduced:

- (a) the Maximum Prices (Milk) Order, 1988, of 31 May 1988 (S.I. No. 116 of 1988); and
- (b) the Retail Prices (Bread) Order, 1989, of 16 January 1989 (S.I. No. 8 of 1989).

Both Orders were revoked shortly after being made, as follows:

- (a) Maximum Prices (Milk)(Revocation) Order, 1988, of 30 November 1988 (S.I. No.315 of 1988); and
- (b) Retail Prices (Bread)(Revocation) Order, 1989, of 3 February 1989 (S.I. No. 21 of 1989).

It would appear that none of the other recommendations in the report addressed to the Government were implemented.

*Study of Competition Law*

In February 1988, the Minister requested the Commission to undertake a study of competition law, with the following terms of reference:

“To undertake a detailed study of the respective merits and disadvantages of the ‘prohibition’ and ‘control of abuse’ systems for the regulation of competition with particular reference to:

- (i) the changes which would be required, both legal and administrative, in introducing a ‘prohibition’ system, based primarily on Articles 85 and 86 of the Treaty of Rome, into Irish law,
- (ii) the experience in operating such systems in other Member States of the Community where they exist at present,
- (iii) the implications of having the same law apply at national and European Community levels, including the possibility of having different exemptions from prohibitions.”

The study was undertaken by the Chairman, Mr. O’Reilly, and one member, Mr. Lyons. The report of the study was submitted to the Minister in December 1989. It was published in April 1991, at the same time as the Competition Bill, 1991.

The report described the background to competition law in Ireland, the benefits of competition, and the control of abuse and prohibition systems. It outlined the systems in other EC countries, the advantages and disadvantages of systems, and the operation of prohibition systems in other countries. It considered the development of a prohibition system, the structures needed, and the effects on existing orders. It also discussed the mergers and monopolies legislation, the future of enquiries, studies and reviews, other revisions to existing Acts, fair practices, and responsibilities and resources of the Minister/Department, the Courts, the Director and the Commission. Differences of opinion between the authors were described, and the implications of the proposals were discussed.

The two members were in agreement on all the key issues in the study, but agreement was not reached on some matters, as follows:

- (a) prison sentences;

- (b) charges for notifications;
- (c) “de minimis” provisions (market share test);
- (d) actions by Ministers under a statutory duty;
- (e) employer/employee contracts; and
- (f) a separate Mergers and Take-overs Commission.

The Commission recommended that legislation should be introduced to prohibit anti-competitive conduct, incorporating the provisions of Articles 85 and 86 of the Rome Treaty in domestic law, and it made detailed recommendations on how this might be accomplished. There should be a single consolidated Act, containing all of the measures dealing with competition and mergers. The report included a proposed new Competition Act in detail.

Among the main agreed recommendations were the following:

- (a) the Irish law should follow the EC Treaty Articles and the EC procedural Regulations as closely as possible;
- (b) EC block exemption regulations and notices should be adopted, and the Competition Commission could recommend additional block exemptions to the Minister, and could issue new notices;
- (c) agreements could be notified to the Commission, which could grant individual exemptions and negative clearances, and its decisions should be published and appealable to the courts;
- (d) there should be ‘de minimis’ provisions where firms had an aggregate turnover of less than £5 million;
- (e) the Commission should be able to impose fines upon undertakings, and these would be appealable to the courts;
- (f) private actions should be allowed to enforce Irish and EC law;
- (g) there should be a Commission and a Director for Competition, with a unified staff, or, if necessary, a Market Court should be established. The Commission should have five full-time, permanent members, drawn from diverse backgrounds. The Director would be appointed by the Minister, and should be independent of the Commission;

- (h) the Commission should recommend to the Minister whether there should be new Orders to replace the existing ones, and what should be done about the fair trade provisions. There should be no fair trading rules;
- (i) while the Minister should continue to be able to make merger and monopoly Orders, all mergers should be referred to the Commission for examination, and its reports should be published. The Commission's conclusion should be confined to the question of competition, but it should give its opinion also in relation to scheduled criteria. These criteria should omit references to Government or national policies;
- (j) the Commission should be able to undertake studies and analyses, following which the Minister could make an Order, but there would no longer be public enquiries. All reports of the Commission should be published;
- (k) the Commission and the Director should publish annual reports;
- (l) the Commission should give a competition view on existing and proposed legislation and regulations. The Commission and the Director should create a pro-competitive climate;
- (m) the Commission should continue to deal with issues of fair practices;
- (n) adequate resources should be provided to implement the new law and procedures.

Many of the recommendations of the Commission, but by no means all, were incorporated in the Competition Act, 1991 (No. 24 of 1991), including the fundamental proposal that competition law in Ireland should be based on the prohibition principle, with EC laws and practices as its model.. Some of the Commission's other recommendations were included in the 1996 and 2002 Acts.

*National Lottery*

In 1986, the Examiner received a complaint from the promoters of a nationwide lottery to the effect that the condition of the National Lottery requiring sales agents not to sell lottery tickets other than National Lottery tickets was unfairly discriminatory and could jeopardise some of their long established business carried out through retail outlets. The National Lottery advised the Examiner that this condition was necessary in order to protect the integrity of the scheme, to ensure that other lotteries did not benefit from the considerable investment made in the company, and also to dissociate the National Lottery from illegal gambling. In 1987, the Examiner decided that the requirement in question was not unfairly restrictive, and he advised the complainant accordingly. The Director subsequently investigated a complaint that a provision in the National Lottery rules prevented retailers who stocked National Lottery tickets from selling Rehab lottery tickets. The Director decided that this provision was anti-competitive, but the National Lottery refused to amend its rules.

In May 1990, the Minister exercised his power under the 1987 Act, for the first and only time, to make an Order without a prior enquiry by the Commission. In accordance with the Act, however, he consulted the Director, the Commission, the Minister for Finance and the Minister for Communications before making the Order. The effect of the Order was to prevent the National Lottery from imposing as a condition of any agency agreement that the agent was precluded from selling lottery tickets other than those of the National Lottery. The Minister did not proceed with confirmatory legislation since the offending exclusive rule was abolished by the National Lottery.

*Regulation of Taxi Services*

The Commission made a submission in 1991 to the Inter-Departmental Committee to examine legislation applying to small public service vehicles. The Commission stated that it believed that some of the existing regulations in the taxi trade entailed significant restrictions on competition and it considered such restrictions undesirable as they were likely to have adverse effects on consumers and should be removed. It believed that consideration should be given to the complete removal of restrictions on the number of taxis. The number of taxi licences should be increased over a five-year period, with limits on taxi numbers abolished completely at the end of that period. Price control should be withdrawn as soon as possible.

A number of changes in the taxi regulations were announced in October 1991, including the issue of an extra 100 taxi licences for Dublin. A fee of £3,000 would be charged for new licences, and these could not be transferred for five years. The Dublin taximeter area was extended, and new taximeter areas were to be established in other cities and towns. Some years later, following court action, all limits on the number of taxi licences were removed.

*Studies into the Rendering of Certain Professional and Analogous Services*

In April 1984, the Minister requested the Commission to undertake a study into the rendering of certain professional and analogous services. The study was to be concerned in particular with the effect on the public interest of barriers to entry to professions or occupations, prohibitions on the provision of the particular service by non-members of the profession or by persons not recognised as being qualified, restrictions on advertising, concerted fixing of fees and charges, and any other practice which tended to restrict competition in the profession. The Commission decided to examine restrictions on advertising and concerted fixing of fees and charges in the first stage of the study.

Submissions were invited from interested parties on these two topics, but the response was relatively poor. As a result, detailed questionnaires were sent to all known professional organisations in 1985. Meetings were first held with representatives of the accountancy and engineering professions in mid-1986. The Commission decided at that stage, in respect of the legal profession, not to confine the study to the above two issues but to examine all possible restrictive practices.

### The Commission's General Approach to Competition in the Professions

The Commission's general approach to competition in the professions was published in its first report – on the Accountancy Profession – and was also included as an Appendix in its 1987 Annual Report. The topics dealt with were:

- (a) competition in the provision of professional services;
- (b) analysis under the Restrictive Practices Act;
- (c) restrictions on competition in fees and charges;
- (d) restrictions on advertising; and
- (e) an overview.

The Commission stated that it was strongly of the view that competition between the suppliers of professional services, as with suppliers of goods and other services, was desirable as being in the public interest. It generally led to higher quality at lower prices, increased choice, and to innovative and more efficient forms of organisation and service. Impaired competition and the existence of restrictive business practices, on the other hand, tended to produce the opposite results. Where restrictive practices had been eliminated, this had been demonstrated to have benefited the consumer, and the predictions about the dire effects on consumers had tended not to materialise. It had been recognised, however, that there were circumstances where there might be a justification for the retention of certain professional restrictive practices. It was essential, nevertheless, to ensure that any restriction upon competition was both fully justified and no more than was necessary to achieve the benefits proclaimed. There could also be prohibitions on the provision of professional services by persons who were not members of the profession or by persons who were not recognised as being qualified to provide such services. These prohibitions might be imposed by statute, or by members of the profession itself. Thus the profession as a whole was a monopoly, and was protected from competition from persons who were not members of the profession.

The Commission believed that competition in prices charged for any good or service was the most important feature of a free market economy. It considered that prohibitions and restrictions on competition in fees between providers of professional services were unfair practices under the 1972 Act. Unless the detriment to

competition could be demonstrated to be outweighed by other considerations, the Commission regarded such prohibitions as being unfair and as operating against the common good.

The Commission also believed that freedom to advertise goods and services was second in importance only to price competition in the effective operation of a competitive economy, and for very much the same reasons. Consumers required accurate information regarding the availability of goods and services in order to make an optimal choice from alternatives. A prohibition upon advertising of fees, in particular, would tend to limit effective competition in fees. The Commission considered that restrictions upon the advertising of professional services was detrimental to consumers. It was of the view that prohibitions and restraints upon advertising by members imposed by professional bodies were, in general, unfair practices under the 1972 Act, and that they were unfair and operated against the common good. Freedom of communication, however, might have to be made subject to certain limitations in order to protect other principles or legitimate interests. Such limitations should be kept to a minimum, and should in any case have to be justified as being in the interests of the common good.

As a general rule, the Commission considered that providers of professional services should not be restricted by their professional bodies from advertising, nor should restraints be imposed upon the medium used or the size and frequency of advertisements. There were grounds, however, for allowing a degree of control to professional bodies in respect of the contents of advertisements placed by their members. Accordingly, professional bodies should not be prevented from requiring that advertisements placed by their members:

- (a) should not be such as would bring the profession into disrepute;
- (b) should not be false or misleading in any respect;
- (c) should not be in bad taste;
- (d) should not reflect unfavourably on other persons in the profession.

A degree of discretion would be reserved to each professional body, which would be free to decide whether a particular advertisement was or was not acceptable, and which would decide upon the disciplinary measures appropriate in each case. The

Commission considered that, where a body exercised control, the body should act in a reasonable and equitable manner.

Report of Study into Concerted Fixing of Fees and Restrictions on Advertising in the Accountancy Profession

The report, which was prepared by the full Commission, was submitted to the Minister in March 1987, and was published in November 1987. The Commission described the accountancy profession and the professional bodies involved, including restrictions upon the auditing function and entry to the profession. It discussed fees and charges, including guidelines on fees, and advertising, including relaxation of the previous prohibitions on advertising. Finally it presented its conclusions and recommendations, including the form of legislation recommended. As in the case of the other reports on the professions, no Order could be recommended, or made by the Minister, because a study was involved, and not a public enquiry.

The Commission found that accountancy bodies did not have rigid rules prohibiting or controlling advertising or fixing of fees and charges, and that the profession, in general, created less concern from a competition viewpoint than other professions. There were, nevertheless, some restraints in the areas of fees and advertising.

The Commission recommended that the Minister introduce legislation in relation to fees and charges to make it unlawful for any person or group of persons:

- (a) to issue instructions, recommendations or guidelines, or collude in any way, regarding the setting of fees or charges by accountants;
- (b) to prevent an accountant from deciding individually the level of fees or charges to be set; or
- (c) to prevent an accountant from charging fees on a percentage basis or on a contingency basis or any other basis whatever.

The Commission further recommended that it should be unlawful for any person or group of persons to prohibit or restrain the advertising of fees or charges by accountants.

The Commission recommended that the Minister introduce legislation to make it unlawful for any person or group of persons to attempt to prohibit or restrain advertising by accountants. The Commission also considered the questions of direct mailing and cold calling and recommended that it should be unlawful for any person

or group of persons to prohibit or restrain accountants from making unsolicited approaches for business to potential clients by means of direct mailing or cold calling. The Commission recognised, however, that the contents of certain advertisements could bring the profession into disrepute and lead to a loss of confidence in the profession and the individual practitioner and that by virtue of these factors there were grounds for allowing a degree of control to professional bodies in respect of the contents of advertising placed by their members. The Commission considered, therefore, that for advertising, direct mailing and cold calling, a group of accountants might, to the extent that it might consider it necessary for the purpose of protecting the repute of the profession, make rules prohibiting advertising:

- (a) which was such as would bring the profession into disrepute;
- (b) which was false or misleading in any respect;
- (c) which was in bad taste
- (d) which reflected unfavourably on other persons in the accountancy profession.

The implementation of rules prohibiting advertising, direct mailing or cold calling in the form specified above, however, should be exercised in a reasonable and equitable manner.

The Commission recommended legislation but suggested that the Minister might consider inviting the accountancy bodies to amend their rules, with a view to accommodating the stated views of the Commission and thereby obviating the need for legislation. The Minister accepted this suggestion and requested the accountancy bodies to amend their rules within six months.

The Institute of Chartered Accountants in Ireland made three notifications to the Competition Authority under the 1991 Competition Act:

- (a) Byelaws (Notification No. CA/826/92E);
- (b) Rules of Professional Conduct (Notification No. CA/827/92E); and
- (c) Ethical Guide for Members (Notification No. CA/828/92).

The Byelaws set out in detail the internal rules of the ICA, including rules relating to the Council of the ICA and examinations and training. The Authority was concerned that rules on entry to a profession should not be used to control artificially the numbers entering the profession. It was satisfied that the Byelaws did not contravene

section 4(1) of the Competition Act, and it issued a certificate for the arrangements (Decision No. 520 of 12 October 1998).

The Authority later considered the other two notified agreements, which essentially related to the professional standards required of all members of the ICA. It was concerned about certain aspects of the Rules on Professional Conduct and the Ethical Guide, and it issued Statements of Objections in both cases, indicating its intention to refuse a certificate or a licence. An oral hearing was held, and the ICA agreed to amend certain provisions, at the hearing and subsequently. The Authority then considered that the amendments made to the Rules and the Guide met its concerns, and it issued a certificate for both arrangements (Decision No. 584 of 18 September 2000).

Report of Study into the Concerted Fixing of Fees and Restrictions on Advertising in the Engineering Profession

The report of the Engineering Study was submitted to the Minister in May 1987, and was published in April 1988. The study was undertaken by the Chairman, Mr. O'Reilly, and one member, Mr. Rohan. The Commission described the profession of engineer, including the different disciplines, entry to the profession and the two main representative bodies. It discussed fees and charges, including the fee scales of the two professional bodies, fee competition in the public sector and developments in the UK. It also considered the rules on advertising, including fee advertising. Finally it presented its conclusions and recommendations, and the form of legislation recommended.

The report found that two engineering bodies jointly published a document setting out in detail fees to be charged for projects. It was considered that there were no grounds for permitting any interference by engineering bodies in the manner in which fees and charges were decided by their members and that any other course would be unfair and against the common good. It was recommended that the Minister introduce legislation to make it unlawful for any person or group of persons:

- (a) to issue instructions, recommendations or guidelines, or collude in any way, regarding the setting of fees or charges by engineers;
- (b) to prevent an engineer from deciding individually the level of fees or charges to be set; or
- (c) to prevent an engineer from deciding individually the basis on which fees or charges were calculated.

It was also found that some engineering bodies imposed restrictions on their members in relation to advertising, including direct mailing and cold calling, and the advertising of fees. It was concluded that there were no special circumstances in the engineering profession which argued in favour of anything other than the greatest possible amount of freedom being allowed for engineers to advertise, such advertisements being both informative and promotional. In relation to advertising, direct mailing and cold calling, it was recommended that the Minister introduce legislation to make it unlawful for any person or group of persons to attempt to

prohibit or restrain advertising by engineers or to prohibit or restrain engineers from making unsolicited approaches for business to potential clients by means of direct mailing or cold calling. It was recommended, however, that a group of engineers might, to the extent that it considered necessary for the purpose of protecting the repute of the profession, make rules prohibiting advertising, direct mailing or cold calling:

- (a) which was such as would bring the profession into disrepute;
- (b) which was false or misleading in any respect;
- (c) which was in bad taste;
- (d) which reflected unfavourably on other persons in the engineering profession.

The implementation of rules prohibiting advertising, direct mailing or cold calling in the form specified should be exercised in a reasonable and equitable manner.

In relation to the advertising of fees, while it was accepted that it might not be practicable in many circumstances to advertise fees, it was not believed that fee advertising by engineers was never possible and no grounds were found for allowing fee advertising to be prohibited completely. It was therefore recommended that the Minister introduce legislation to make it unlawful for any person or group of persons to prohibit or restrain the advertising of fees or charges by engineers.

The Minister accepted the suggestion that the engineering bodies should be allowed six months to make the necessary amendments to their respective rules on a voluntary basis, but he stated that, if the engineering bodies did not amend their rules within that time, he would consider introducing the necessary legislation.

Discussions subsequently took place between the Department of Industry and Commerce and the engineering bodies concerned on the recommended changes in their rules, but no legislation was introduced. The Minister stated that he intended introducing legislation regarding the professions when he had received the outstanding reports on the legal professions and the architects, surveyors, auctioneers and valuers professions.

Following the enactment of the Competition Act in 1991, the two main bodies – the Association of Consulting Engineers of Ireland and the Institution of Engineers of

Ireland – notified their Conditions of Engagement, which included the recommended scales of fees and charges, to the Competition Authority in September 1992 (Notification No. CA/703/92E). Following correspondence with the Authority, the notification was withdrawn in August 1998.

A new Conditions of Engagement, without any mention of fee scales, was introduced in October 2000. As pointed out in the report prepared by Indecon for the Authority in 2003, relating to the Assessment of Restrictions in the Supply of Professional Services, fee scales could still be accessed on the website of the ACEI, but not on the website of the IEI (page 231). The Indecon report also pointed out that there were no bans on price advertising in either the Code of the IEI or the Rules of the ACEI, but they specified the size of advertisements, and held that statements should be confined to being discreet and moderate in tone (page 233).

### Patent and Trade Mark Agents

The report of the Study into Patent and Trade Mark Agents, prepared by the Chairman, Mr. O'Reilly, was submitted to the Minister in February 1989. The report was never published.

### Architects, Surveyors, Auctioneers and Valuers Professions

The report of the Study into Architects, Surveyors, Auctioneers and Valuers, prepared by the Chairman, Mr. O'Reilly, was submitted to the Minister in March 1990. The report was never published.

The Irish Auctioneers and Valuers Institute notified an agreement with its members to the Competition Authority in 1997 (Notification No. CA/3/97). The notification was withdrawn in July 1999.

The Indecon report on the supply of professional services, prepared for the Authority in 2003, pointed out that the Royal Institute of the Architects of Ireland did not have recommended, mandatory or minimum scales of charges, but it did publish information on levels of charges based on surveys and market rates. There was no specific restriction on the advertising of fees. The RIAI has a Code of Professional Conduct, which contains rules on advertising.

### Study of Restrictive Practices in the Legal Profession

It was decided by the Commission in 1986 that it would study all possible restrictive practices in the legal profession, rather than confine the study, as in the case of other professions, to restrictions on advertising and concerted fixing of fees and charges. Work on this extensive study was interrupted by merger and takeover referrals, a public enquiry into petrol distribution, and other matters. The report of the study was submitted to the Minister in March 1990, and was published in July 1990. The study was undertaken by the Chairman, Mr. O'Reilly, and the other member, Mr. Lyons. The report, which was by far the largest ever prepared by the Commission, was researched and drafted by Mr. Lyons.

The report contained a comprehensive analysis of the structure of the legal profession and of restrictive practices engaged in by solicitors and barristers. Information was also included about the legal profession in several other countries – England and Wales, Denmark, France, Germany, Sweden, Australia, Canada, New Zealand and the USA.

The report commenced with a brief description of the Irish legal system and the Courts, of the professions of solicitor and barrister, and of their professional organisations. This was followed by an overview of the Commission's attitude towards competition generally and in respect of the legal profession. It repeated its strong view that competition between the suppliers of professional services was desirable as being in the public interest. The Commission did not consider that there was any fundamental incompatibility between the maintenance of high standards by lawyers and the subjecting of the providers of legal services to the ordinary market forces of free competition. An analysis was then given of legal costs, primarily derived from solicitors' bills of costs in contentious cases, mainly personal injuries cases. Each subsequent chapter dealt with a specific topic as follows:

- (a) limitations on the provision of legal services;
- (b) division of the legal profession into two branches;
- (c) education and admission;
- (d) the solicitor's right of audience;
- (e) access to the barrister through a solicitor;

- (f) the number of legal representatives involved;
- (g) the form of organisation of legal practice and professional indemnity insurance;
- (h) fee determination;
- (i) advertising;
- (j) legal personnel in employment;
- (k) para-legals/legal executives;
- (l) disciplinary procedures, compensation fund and liability for negligence; and
- (m) miscellaneous matters – the appointment of judges; organisation of the courts; consultation with clients and steps of court settlements; the solicitor’s lien; court dress; personal injuries actions.

In the case of most topics, the facts were first described, generally consisting of relevant statutes, rules and practices. Next, the views expressed to the Commission were recorded as given by other parties, the Law Society and the Bar Council. This was followed by a description of the situation in England and Wales and in other countries. Finally, the conclusions and recommendations of the Commission were presented. The Commission proposed a Restrictive Practices Order, it suggested amendments to the Solicitors Acts, 1954 and 1960, and it recommended other legislation. The main recommendations are summarised below, and are those of the Commission, unless otherwise stated.

#### Limitations on the provision of services

- Conveyancing for reward on behalf of a vendor should be permitted to be done by any person;
- Persons with suitable education and experience should be licensed to carry out conveyances (Chairman);
- A class of “licensed conveyancers” should not be created (Mr. Lyons);
- After the conveyancing process had been simplified, which was estimated to take five to seven years, any person should be permitted to carry out a conveyance for reward (Chairman);
- Lending institutions should be permitted to provide conveyancing services to clients;

- Employed barristers and solicitors without a practising certificate should be permitted to undertake conveyancing on behalf of their employers;
- The drawing or preparing of legal documents, whether under seal or not, for reward should no longer be confined to solicitors;
- Representation in the Circuit and Superior Courts should be confined to barristers and solicitors (Mr. Lyons);
- Representation in those courts should be permitted to a family member or friend or a social worker, in certain circumstances, provided that the services were not given for reward (Chairman);
- A friend or other person should be permitted to represent a lay person in the District Court, and reward should not be precluded.

#### Division of the legal profession into two branches

- The two branches should not be compulsorily fused into a single profession;
- Nothing should be done to frustrate the possibility of the evolution of a fused profession over time.

#### Education and Admission

- Limitations upon numbers entering should not be imposed by the professions, but by the State or by a body delegated by the State;
- There should be a common vocational course for solicitors and barristers with the minimum of separate training, which might require the foundation of an Institute of Legal Education;
- There should be established an Advisory Committee on Legal Education and Training;
- Control over in-training should not remain solely the responsibility of the professional bodies, and in-training should be adequately monitored;
- The proposal that no solicitor may practise as a sole practitioner for three years after admission was acceptable;

- With common vocational training, the only limitation on interchange between the professions should be the undertaking of the in-training requirement of the other branch (Mr. Lyons);
- With common vocational training, a person should be able to transfer from one branch to the other without delay (Chairman);
- For those qualifying under the present systems who wished to transfer, after not less than three years' practice, persons should be required, at most, to pass the professional examinations of the other branch and to undergo six months of pupillage or apprenticeship (Mr. Lyons);
- There should be no restrictions on transfer for such persons, provided they had practised for five years (Chairman);
- The Irish language requirement should be abandoned for both solicitors and barristers, but an obligation should be placed upon the professional bodies to arrange for representation of persons who wished to deal through Irish;
- There should be provision for continuing legal education;
- The requirement that practising barristers should be members of the Law Library should be removed, as should discriminatory fees and rules for membership of the Law Library;
- The EC Directive on the Mutual Recognition of Higher Education Diplomas should not be implemented in an overly-restrictive fashion;
- The appointment of Senior Counsel should not be made by the Government;
- The title of Senior Counsel should carry no implications for the type of work done or the level of fees charged.

#### The solicitor's right of audience

- The Law Society should encourage solicitors to make more extensive use of their rights of audience;
- There should be more training in advocacy for both apprentice and qualified solicitors;
- Judges should be reminded of the statutory right of audience of solicitors (Mr. Lyons).

Access to a barrister through a solicitor

- There should be no rule limiting direct access to a barrister which was collectively enforced;
- The individual barrister should be permitted to refuse to deal with a client except where a solicitor had been engaged;
- There should be a direct contractual relationship between the barrister and the client.

The number of legal representatives involved

- The number of counsel engaged should be no more than was strictly necessary to secure proper representation for the client, and needed to be justified to and agreed with the client;
- Rules which stipulated the number or type of counsel to be engaged should be deleted.

The form of organisation of legal practices; Professional indemnity insurance

- Subject only to appropriate safeguards for the maintenance of professional standards and the protection of clients, the following forms of practice should be permitted:
  - (a) the sharing in common of premises and facilities by barristers;
  - (b) the formation of partnerships by barristers with other barristers;
  - (c) the formation of limited companies by solicitors;
  - (d) the formation of limited companies by barristers;
  - (e) the formation of multi-disciplinary practices between solicitors and members of other professions and other persons;
  - (f) the formation of multi-national legal practices between solicitors and lawyers from other countries; and
  - (g) the formation of multi-national legal practices between barristers and lawyers from other EC Member States.
- Subject to appropriate safeguards, the following should be permitted:
  - (a) the formation of partnerships between solicitors and barristers (Mr. Lyons);
  - (b) the formation of limited companies by solicitors and barristers jointly (Mr. Lyons); and

- (c) the formation of multi-disciplinary practices between barristers and members of other professions and other persons (Mr. Lyons);
- A body such as the Law Library should be permitted to prohibit its members from engaging in partnerships and limited companies with solicitors, and in multi-disciplinary practices (Chairman);
- Professional bodies should be permitted to prohibit specific associations, or to permit them only on specified conditions;
- Mandatory professional indemnity insurance for solicitors and barristers should be permitted (Mr. Lyons);
- All practising barristers should be allowed to participate in the insurance arrangements made by the Bar Council (Mr. Lyons);
- Professional indemnity insurance should not be compulsory for members of the professions (Chairman).

#### Fee determination

- Individual solicitors and barristers should not be prevented from personally determining the level of their fees, and they should be permitted full freedom to negotiate fees with their clients;
- The Rules and Orders prescribing solicitors' fees for conveyancing and non-contentious work should be revoked;
- Neither the Law Society nor the Bar Council should issue any recommendations on fees to their members;
- The Law Society should be permitted to issue a remuneration certificate (Mr. Lyons);
- Representative bodies should be permitted to negotiate fees for their members in respect of work for the State;
- The issuing of fee scales for party and party costs should be terminated, including those prescribed by professional associations;
- The requirement that the junior's fee be two-thirds of the senior's fee should be removed, as should the requirement that the refresher be 50 per cent of the brief fee;
- Consideration should be given to a fundamental change in the principle underlying party and party costs, to a system where each side paid its own costs; or if the loser had to pay the winner's costs, all costs should

be represented by a fixed percentage of the award, the percentage being studied by a Prices Advisory Body; or the level of fees being applied by the Taxing Master should be subjected to a detailed examination by a Prices Advisory Body at least every five years (Chairman);

- Deficiencies in the system of taxation should be remedied, and it should more clearly resemble an arbitration mechanism:
  - (a) where the bill was reduced on taxation by more than one-sixth, the cost of taxation (5 per cent of the taxed sum) should be borne by the party claiming costs, otherwise the cost, at a reduced rate of 2.5 per cent, should be borne by the party which referred the costs to taxation;
  - (b) only items in dispute should be taxed, and the costs of taxation should be related only to the cost items in dispute;
  - (c) Taxing Masters should be given statutory powers to tax barristers' fees directly, and to tax them directly as part of the solicitor's bill of costs;
  - (d) sufficient resources should be made available to the Taxing Masters' office;
  - (e) the establishment of a Prices Advisory Body would serve no useful purpose;
  - (f) the class of persons from whom Taxing Masters could be recruited should be extended; and
  - (g) the one-sixth rule should also apply to the taxation of barristers' fees (Mr. Lyons);
- If the system of taxation was to continue, the above recommendations should be implemented (Chairman);
- The present system of "no foal – no fee" should continue in operation;
- The statutes on maintenance and champerty should be revoked;
- Solicitors and barristers should not be prevented from charging fees on a percentage basis, or on a contingency basis, or on any other basis;
- There should not be a change to a mandatory US-style contingency fee system (Mr. Lyons);
- An expanded system of civil legal aid would be very desirable;

- A major orientation of law reform should be the reduction of complexity and uncertainty, in order to reduce the high level of legal costs (Chairman).

#### Advertising

- Solicitors and barristers should be permitted to advertise, subject to rules limiting the content of advertisements;
- The solicitors' regulations prohibiting touting and the attracting of business unfairly should be abolished;
- Fee advertising by solicitors and barristers should not be prohibited;
- Any prohibition on direct mailing or cold calling by solicitors and barristers should be removed, subject to rules limiting content.

#### Legal personnel in employment

- Employed barristers should be permitted, on behalf of their employers, to undertake conveyancing, to draw or prepare any legal document, to brief barristers directly, and to act as a barrister themselves, including representation in the District Court;
- Provided that he had completed a period of pupillage and was subject to the jurisdiction of the Bar Council, the employed barrister should be entitled to represent his employer in the Circuit and Superior Courts;
- Barristers should be permitted to be employed by other barristers and by multi-national practices;
- Barristers should be permitted to be employed by solicitors and by multi-disciplinary practices (Mr. Lyons);
- The distinction made by the Bar Council between practising barristers and employed barristers should be amended.

#### Legal executives

- A body should be empowered to permit the use of titles, such as legal executive, but not to reserve functions, to persons with suitable education and experience (Chairman);

- There should not be created a new branch of the profession, though the moves to improve the education and training of legal executives were supported (Mr. Lyons);
- The appearances which they made in court should be regularised, and consideration should be given to allowing the costs of a legal executive sent on behalf of a solicitor to be recoverable under the free legal aid scheme (Mr. Lyons).

#### Disciplinary procedures, compensation fund and liability for negligence

- There should be lay representation on the disciplinary bodies of the Law Society and the Bar Council (or the King's Inns) in the ratio of one lay person to two lawyers, the lay persons being appointed by the Minister for Justice;
- The disciplinary committees should be empowered to deal with all complaints and not just misconduct;
- There should be restored to the Law Society such powers to impose penalties upon solicitors, short of suspension, as were consistent with the Constitution;
- Disbarment of a barrister should be a matter for the courts;
- There should be established an office of Legal Ombudsman, to deal with complaints concerning both solicitors and barristers;
- The Legal Ombudsman should be an independent lay person;
- There should be an annual levy on all solicitors and barristers to provide funds for the office;
- The Legal Ombudsman should have the power to prosecute in the courts on behalf of a claimant (Chairman);
- No such function should be conferred on the Legal Ombudsman (Mr. Lyons).

#### Miscellaneous

- Consideration should be given to the possibility of the appointment of solicitors as judges;

- It was essential that the legal process undergo modernising and streamlining, with the greater use of modern management techniques and computerisation;
- The jurisdiction of the Circuit and District Courts should be increased;
- The establishment of a Small Claims Court should be examined;
- The provision of sufficient resources and funding for the court system by the State was essential;
- The solicitor's lien should be ended (Chairman);
- Consideration should be given to dealing with personal injuries actions in a tribunal, and to the introduction of a no fault compensation system;
- Barristers should no longer wear wigs, but there were no strong feelings about the wearing of gowns, though these were regarded as peripheral issues.

In publishing the report, the Minister stated that the Government had not taken any decisions on the specific recommendations made, but that an opportunity for debate was being provided, and submissions concerning the report from interested parties were requested.

There have been a number of important developments in relation to the legal profession, immediately prior to and since publication of the report, which reflect some of the recommendations made or views expressed in the report. In some cases, there was relevant legislation, particularly the 1994 Solicitors Act, but both the solicitors' and the barristers' professions in addition introduced changes, which might also have been influenced by the coming into force of the Competition Act, 1991.

### Amendments to the Solicitors Act, and Regulations

The Solicitors (Amendment) Act, 1994 (No. 27 of 1994), under the auspices of the Minister for Justice, introduced far-reaching changes into the conduct and regulation of solicitors. The main innovations which reflected the concerns of the Commission are outlined below, in the order which they appear in the Act, as follows:

- (a) The Act provides that the re-named Law Society of Ireland can establish committees which may include persons who are not solicitors, as opposed to excluding lay members as before.
- (b) The Law Society was given power to investigate and to impose sanctions on a solicitor for the provision of inadequate services.
- (c) The Law Society was given power to investigate and impose sanctions on a solicitor who had issued a bill of costs which, in the view of the Society, was excessive.
- (d) The Act provided that the Minister could require the Law Society to establish, maintain and fund a scheme for the examination and investigation by an independent adjudicator of any written complaint made to the adjudicator, from a member of the public concerning the handling by the Society of a complaint made to the Society about a solicitor. The consent of the Minister is required for the appointment of any independent adjudicator, who could not be a practising solicitor, a member of the Society, or a practising barrister.
- (e) The Act provided that the President of the High Court should appoint a Disciplinary Tribunal, consisting of not more than ten practising solicitors, and not more than five lay members, who were not solicitors or barristers. (Previously there were no lay members on the Disciplinary Committee, which consisted of present or former members of the Society). The Tribunal was to sit in divisions comprising one lay member and two solicitor members.

- (f) The Disciplinary Tribunal is empowered to enquire into the conduct of a solicitor on the ground of alleged misconduct, on the application of a person or the Society, and the Tribunal reports to the High Court. If it finds misconduct by a solicitor, the Tribunal may advise and admonish or censure the solicitor, direct that the solicitor pay a sum to the Compensation Fund, direct that the solicitor pay a sum in restitution to any aggrieved party, and award costs against the solicitor. Alternatively, the Tribunal may report on their opinion as to the fitness or otherwise of the solicitor to be a member of the solicitors' profession.
- (g) Following receipt of the report of the Tribunal, the High Court is empowered to impose sanctions, including striking the solicitor off the roll, suspending the solicitor for a period or restricting the solicitor from engaging in a particular area of work, or censuring the solicitor and imposing a money penalty. The Court may also order the payment of restitution to any aggrieved party.
- (h) The Act requires the Society to publish annually information about the number and nature of complaints made to the Society and those referred to the Tribunal, and the outcome of investigations by the Tribunal.
- (i) Amended powers are given to the Tribunal regarding taking evidence, etc.
- (j) The Act provides that the Society may make regulations making provision for professional indemnity cover, but solicitors will be free to choose the insurer from insurers approved of by the Society.
- (k) It provides that a solicitor shall not, without the written consent of the Society, commence practice as a sole practitioner unless he has been employed full-time as a solicitor for a prescribed period not exceeding three years.
- (l) Besides amending the requirements for admission as a solicitor and for admission to apprenticeship, the Act amends the provisions for education and examinations. In particular, it provides for the Society to arrange for the provision of courses and the holding of examinations for the education or training (or both), in association with any other body or institution, of persons

seeking to be admitted as solicitors, or of solicitors or other persons. It also provides for the provision of courses and the holding of examinations leading to a joint or common qualification.

- (m) The Act amends the provisions for exemptions for practising barristers who wish to become solicitors. This covers persons who have practised as barristers in the State for up to three years, rather than five years as before.
- (n) It amends the exemptions for members of a corresponding profession (reciprocal provisions). This applies to a profession in another jurisdiction, other than an EC State, which, in the opinion of the Society, corresponds substantially to the profession of solicitor.
- (o) The Society is required to establish and maintain a register of solicitors who are willing to provide legal services to any person who is unable to obtain the services of a solicitor to act for him in civil proceedings against another solicitor.
- (p) The Act requires that a solicitor shall provide the client, after taking instructions to provide legal services, with particulars in writing of the actual charges, or an estimate of the charges, or of the basis on which charges are to be made, and of the circumstances where the client may be required to pay the costs of another party. It also prohibits a solicitor from acting on the basis that all or any part of the charges to the client are to be calculated as a specific percentage or proportion of any damages or other monies payable to the client. A solicitor must furnish the client with a detailed bill of costs.
- (q) The Act amends previous provisions which allowed the Society to make regulations in respect of the professional practice, conduct and discipline of solicitors. It provides that the Society shall not prohibit a solicitor from charging less for a legal service than any charge or fee or remuneration specified for that legal service by way of any statutory scale or scales for the time being in force.

(r) The Act does not permit the Society to prohibit advertising by solicitors. The Society may, however, prohibit advertising which:

- (1) is likely to bring the solicitors' profession into disrepute; or
- (2) is in bad taste; or
- (3) reflects unfavourably on other solicitors; or
- (4) contains an express or implied assertion by a solicitor that he has specialist knowledge in any area of law or practice superior to other solicitors; or
- (5) is false or misleading in any respect; or
- (6) comprises or includes unsolicited approaches to any person with a view to obtaining instructions in any legal matter; or
- (7) is contrary to public policy.

The Act does not permit the Society to prohibit the advertising of any charge or fee by a solicitor for the provision of any specified legal service. It allows the Society to make regulations, after two years, prohibiting the advertising of any charge or fee by a solicitor for any specified legal service, provided that the Minister consents because he is satisfied that such regulations are in the public interest.

The Society is allowed to provide, by regulations, that a solicitor who satisfies the Society of his specialist knowledge in a prescribed area of law or practice may be permitted to designate himself as having specialist knowledge in that area of law or practice.

- (s) The Society, with the concurrence of the Minister given after consultation with the Minister for Enterprise and Employment, may make regulations providing for the management and control of bodies corporate, that is incorporated practices.
- (t) The Society, with the concurrence of the Minister, after consultation with the Minister for Enterprise and Employment, may make regulations for the sharing of fees between a solicitor and a person who is not a solicitor, and between a solicitor and a member of a legal profession in another jurisdiction.

- (u) There are amendments to the restrictions on the drawing of documents, etc., by non-solicitors:
- (1) Legal services may be offered by EU lawyers, other than the preparation of a formal document for obtaining title to administer the estate of a deceased person and the drafting of a formal document creating or transferring an interest in land.
  - (2) The Act allows for acts done by a barrister practising in the State, and for acts done by a barrister employed full-time in the State, in the provision of conveyancing services for his employer, provided that the employer is not a solicitor.
- (v) The Act provided that the Minister may make regulations authorising credit unions to provide the following services:
- (1) to draw up or prepare a will or other testamentary document; or
  - (2) to take instructions for a grant of probate or administration; or
  - (3) to draw or prepare any papers on which to found or oppose any such grants.

The regulations may include provision for, *inter alia*, maximum rates or scales of fees, costs or expenses which may be charged by credit unions for the provision of the services. No such regulations have been made.

Further changes in the law relating to solicitors were made in the Solicitors (Amendment) Act, 2002 (No. 19 of 2002). Substantial alterations were made to the provisions regarding advertising by solicitors. Certain restrictions on the content of advertisements are retained, so that an advertisement must not be likely to bring the solicitors' profession into disrepute, be in bad taste, reflect unfavourably on other solicitors, be false or misleading in any respect, or be contrary to public policy. Nor must an advertisement contain a claim of specialist knowledge superior to that of other solicitors, though the Society can make regulations providing for the recognition by the Society of specialist knowledge possessed by a solicitor, which can be advertised.

The 2002 Act also forbids the publication of an advertisement in an inappropriate location, defined as a hospital, clinic, doctor's surgery, funeral home, cemetery,

crematorium or other location of a similar character. It limits references to, and encouragement of, claims for damages for personal injuries. It provides that only certain information can be included in an advertisement, such as name, address and phone number, qualifications and experience, factual information about the legal services provided, and particulars of charges and fees for any specified service.

The Act requires the Society, with the consent of the Minister, to make regulations to give effect to the provisions on advertising. These regulations shall make provision, *inter alia*, in respect of the manner of publication, and the form, content and size of advertisements, and for the specification of advertisements which are not permitted. They shall provide for restrictions on a solicitor making unsolicited approaches for business to persons. The Society is also empowered to make regulations prohibiting the advertising of any charge or fee for the provision of any specified legal service, provided the Minister approves and is satisfied that this is in the public interest. An advertisement is defined to include any communication to publicise or promote a solicitor's practice, whether oral or in written or other visual form and whether produced by electronic or other means.

The Society continues to be prevented from prohibiting a solicitor from charging less for a legal service than any charge or fee specified under any enactment in force.

The 2002 Act also prohibits advertising by a person who is not a solicitor which undertakes to provide a legal service for a fee, gain or reward directly related to the provision of that service, or from encouraging claims for damages for personal injuries. An unqualified person remains prohibited from acting as or pretending to be a solicitor.

Amendments are also made in the 2002 Act in relation to the Disciplinary Tribunal. The President of the High Court is empowered to appoint up to 20 solicitor members and up to ten lay members, compared to the maxima of ten and five previously. Further, at least 40% of solicitor of solicitor members and of lay members had to be men, and at least 40% had to be women. The procedures set out for the Tribunal are also amended, and the maximum restitution is increased. The powers of the Society in relation to the investigation of complaints are widened.

The Act also provides for facilitating the practice of the profession of lawyer throughout the European Economic Area and the Swiss Confederation, particularly as regards a Member State lawyer practising in another State.

The 1994 and 2002 Acts were followed by a number of regulations in the form of Statutory Instruments.

### Advertising by solicitors

As mentioned in connection with the Commission's Report on Conveyancing and Advertising by Solicitors, which was published in 1985, the Law Society made regulations in respect of advertising by solicitors in December 1988 – Solicitors (Advertising) Regulations, 1988 (S.I. No. 344 of 1988). In brief, these regulations permitted a solicitor to advertise his services, but they contained restrictions on the content of advertisements, including a prohibition on the advertising of fees.

The 1988 regulations were revoked and replaced by the Solicitors (Advertising) Regulations 1996 (S.I. No. 351 of 1996). The Regulations stated that it was lawful for a solicitor to advertise, but an advertisement should not:

- (a) be likely to bring the solicitors' profession into disrepute; or
- (b) be in bad taste; or
- (c) reflect unfavourably on other solicitors; or
- (d) contain an express or implied assertion by a solicitor that he has specialist knowledge in any area of law or practice superior to other solicitors (except as allowed under any regulations made in relation to specialist knowledge); or
- (e) be false or misleading in any respect; or
- (f) comprise or include unsolicited approaches to any person with a view to obtaining instructions in any legal matter; or
- (g) be contrary to public policy.

The regulations provide that an advertisement which used the words "free" or "no foal no fee" or other similar words would, in defined circumstances, be deemed to be an

advertisement which was likely to bring the solicitors' profession into disrepute, and to be in bad taste and to be false and misleading, unless the advertisement made it clear whether or not the client would be liable for any costs incurred by the solicitor and, in a contentious matter, that the client might be liable for the legal costs of another party or parties. They also provided that an advertisement which made reference to a calamitous situation or event would be deemed to be an advertisement which was likely to bring the profession into disrepute, and to be in bad taste and to be contrary to public policy. Any breach of the regulations could be found by the Disciplinary Tribunal to be misconduct, and therefore subject to sanctions and penalties.

Following the 2002 Act, the 1996 regulations were revoked and replaced by the Solicitors (Advertising) Regulations, 2002 (S.I. No. 518 of 2002). The regulations state that it is lawful for a solicitor to advertise, but list the limitations on the right to advertise. These are as laid down in the 2002 Act, including forbidding advertising in an inappropriate location, limiting encouragement of personal injuries damages claims, and restricting the type of information to be included in an advertisement.

The regulations allow for certain factual information to be included in an advertisement relating to a solicitor's practice, such as hours of business, qualifications of solicitors, details of premises, merger of practices, authorship of publications, etc. Information about other clients or transactions may be published with the client's consent and without exaggeration of the solicitor's involvement. Advertisements may be published on television or radio, in the print media, by circulation of material, and by way of public appearances. Advertisements may not, however, be published on any form of transport, on the same page as death notices in a newspaper, or just before or after death notices on radio.

Where there is a reference in an advertisement to "personal injuries", the advertisement must state that a solicitor may not calculate fees or other charges as a percentage or proportion of any award or settlement. Advertisements must not contain a phrase such as "no win no fee" or any wording which might be construed as meaning that legal services involving contentious business would be provided at no cost to the client. Nor can advertisements include cartoons, include dramatic or

emotive words or pictures, make reference to a calamitous event or situation, or refer to the willingness to make hospital or home visits.

The regulations contain provisions on the size and content of advertisements. They provide that, in specified circumstances, a communication, such as a book, an article or a speech, can be regarded as primarily intended to give information on the law, though there are occasions when the communication could represent publicity or promotion. A direct, unsolicited approach to a client, with a view to providing legal services, is not permitted where it is likely to bring the solicitors' profession into disrepute. This is particularly the case where the approach is made at an inappropriate location, at the scene of an accident, or in or near a Garda station, prison or courthouse.

The regulations provide that the Society may investigate a possible breach of the regulations, and it gives powers to the Society to facilitate an investigation, including recovering costs from a solicitor. If the alleged complaint is justified but not serious, the Society may reprimand the solicitor. If the Society considers that the alleged complaint is sufficiently serious, it can apply to the Disciplinary Tribunal for an inquiry into the conduct of the solicitor on the ground of alleged misconduct.

### Lay Representation

There are now lay members on the Registrar's Committee of the Law Society, which is responsible for the investigation of complaints about inadequate services, excessive fees or misconduct by solicitors.

### Professional Indemnity Insurance

In 1995, the Law Society made the Solicitors Acts, 1954 to 1994 (Professional Indemnity Insurance) Regulations, 1995 (S.I. No. 312 of 1995). The principal purpose of the regulations is to make provision for mandatory professional indemnity cover for solicitors. Solicitors applying to the Law Society must have a minimum level of professional indemnity insurance cover incorporating approved indemnity terms in respect of the civil liability owed by solicitors to their clients in the provision

by them of legal services. A Professional Indemnity Insurance Committee is established, and there is provision to set requirements for an insurer to become a qualified insurer to the satisfaction of the Society. A solicitor may choose any insurer from the list of qualified insurers. There is also provision for an Assigned Risks Pool which is comprised of all qualified insurers which can, in certain circumstances, provide the minimum level of professional indemnity insurance cover to solicitors who cannot obtain it from an individual qualified insurer.

### The Independent Adjudicator

The 1994 Act provided that the Law Society could be required to establish and fund a scheme for the appointment of an independent adjudicator. This was done under the Solicitors (Adjudicator) Regulations 1997 (S.I. No. 406 of 1997). The task of the independent adjudicator is to examine or investigate any complaint to the adjudicator, by or on behalf of a client of a solicitor, against the Society, concerning the handling by the Society of a complaint against that solicitor. (The initial complaint to the Society continues to be adjudicated by the Registrar's Committee of the Society, except in the case of claims for grants out of the Compensation Fund).

The adjudicator is appointed and paid by the Society. The person appointed must not be a practising solicitor, a member of the Society or a practising barrister, and must be independent in the exercise of his functions. The adjudicator is given powers to assist this exercise, such as requiring the production of documents possessed by the Society, attending meetings of the Registrar's Committee, and stating in writing his conclusions of fact and his recommendations. The adjudicator may review generally the procedures of the Society in dealing with complaints, and submits an annual report on his activities to the Society for transmission to the Minister and later publication. The adjudicator may also try to resolve a complaint in an appropriate and reasonable manner. The regulations specify circumstances in which the adjudicator may not act.

The adjudicator may direct the Society to re-examine or re-investigate the complaint, or direct the Society to make application to the Disciplinary Tribunal for an inquiry into the solicitor's conduct, or reject the complaint. The Society is required to respond to a direction of the adjudicator as soon as practicable. The regulations also

describe situations in which the adjudicator may decide not to examine or investigate a complaint, but he must give reasons for such a decision.

### Other Relevant Legislation

#### Appointment of Solicitors as Judges

Prior to the Commission's report, whereas a person who had been a practising solicitor or a practising barrister could be appointed as a justice of the District Court, only a practising barrister could be appointed as a judge of the Circuit Court and higher Courts.

Under the Courts and Court Officers Act, 1995 (No. 31 of 1995), it was provided that a person who had been a practising barrister or a practising solicitor of not less than ten years' standing was qualified for appointment as a judge of the Circuit Court. In addition, in the case of a solicitor, service as a judge of the District Court was deemed to be practice as a solicitor. In the case of a barrister, service as a judge of the District Court had been and remained deemed to be practice as a barrister.

These provisions were amended slightly under the Courts and Court Officers Act, 2002 (No. 15 of 2002). It remains the case that a practising barrister or a practising solicitor of not less than ten years' standing is qualified for appointment as a judge of the Circuit Court. It provides, however, simply that a judge of the District Court is qualified for appointment as a Circuit Court judge.

The 2002 Act, more fundamentally, provided that a person is qualified for appointment as a judge of the Supreme Court or the High Court if the person is a practising barrister or a practising solicitor, of not less than 12 years' standing, who has practised as a barrister or a solicitor for a continuous period of not less than two years immediately before such appointment. Provision was also made that persons who had served in EU or international courts in the previous two years are qualified for appointment as a judge of the Supreme Court or the High Court. In addition, a judge of the Circuit Court, who had served for not less than two years, is also

qualified for appointment as a judge of the Supreme Court or the High Court. It remains the case that judges of the High Court are qualified for appointment as a judge of the Supreme Court or as Chief Justice.

### Appointment of Judges

The arrangements for the appointment of judges were changed under the Courts and Court Officers Act, 1995 (No. 31 of 1995). There was established a Judicial Appointments Advisory Board to identify persons, and informing the Government of the suitability of those persons, for appointment to judicial office. The Board consists of the Chief Justice, the Presidents of the High, Circuit and District Courts, the Attorney General, a practising barrister and a practising solicitor, and not more than three persons appointed by the Minister to represent consumer interests. Among other things, the Board can advertise judicial appointments and interview applicants. It must recommend to the Minister at least seven persons for appointment to a judicial office, but the decision on appointment remains with the Government.

### Administration of the Courts

In order to increase the efficiency of the administration of the Courts, there was enacted the Courts Service Act, 1998 (No. 8 of 1998). This established the Courts Service, as an independent body, with the following functions:

- (a) to manage the courts;
- (b) to provide support services for the judges;
- (c) to provide information on the courts system to the public;
- (d) to provide, manage and maintain court buildings; and
- (e) to provide facilities for users of the courts.

The Courts Service operates under a Board and a Chief Executive, and certain property was transferred to the Service.

### Jurisdiction of the Courts

The jurisdiction limit of the Circuit Court was increased from £15,000 to £30,000 and that of the District Court was increased from £2,500 to £5,000 under the Courts Act,

1991 (No. 20 of 1991). This Act also provided that these monetary amounts could be varied by the Government, to take into account changes in the value of money, by Order, which had to be approved by each House of the Oireachtas. In addition, the Act strengthened the provisions limiting the amount of the successful plaintiff's costs which could be recovered if an award was made which could have been made in a lower court.

The jurisdiction limits were increased by the Courts and Court Officers Act, 2002 (No. 15 of 2002), rather than by Order. The jurisdiction limits were raised to €100,000 in the case of the Circuit Court, and to €20,000 in the case of the District Court.

#### The Small Claims Court

Procedures for settling small claims disputes were introduced under the District Court (Small Claims Procedure) Rules, 1991 (S.I. No. 310 of 1991). These provided that persons involved in disputes involving amounts of not more than £500 could seek third party arbitration through a District Court official without recourse to the District Court itself, and without the need for legal representation. Initially, these procedures were introduced on a pilot basis in Dublin, Cork city and Sligo. The Small Claims Registrar, who is a designated district court clerk, receives applications of small claims and tries to settle the dispute between the parties, failing which he refers the matter for hearing in the District Court. Minor amendments to the Rules were made under the District Court (Small Claims Procedure) Rules, 1992 (S.I. No. 119 of 1992).

These two sets of Rules were annulled and replaced by the District Court (Small Claims Procedure) Rules, 1993 (S.I. No. 356 of 1993). Under these Rules, the small claims procedure was extended to cover the whole country. The maximum amount which could be claimed was increased to £600 under the District Court (Small Claims Procedure) Rules, 1995 (S.I. No. 377 of 1995). These last two Rules were annulled by the District Court (Small Claims Procedure) Rules, 1999 (S.I. No. 191 of 1999). They increased the maximum amount of any claim to £1,000. The Rules were added to the District Court Rules, 1997 (S.I. No. 93 of 1997).

### Number of Judges in Each Court

In 1990, when the report of the Commission was published, the number of judges in the Supreme Court was five, there were 17 High Court judges, 16 Circuit Court judges and 39 justices of the District Court. These numbers were increased on several occasions from 1991 to 2002. Under the Courts and Court Officers Act, 1995 (No. 31 of 1995), the number of judges of the Supreme Court is set at not more than eight, including the Chief Justice. Under the Courts and Court Officers Act, 2002 (No. 15 of 2002), the maximum number of judges of the High Court is set at 27, of judges of the Circuit Court is set at 31 and of judges of the District Court is set at 53.

### Court Costume

In the Courts and Court Officers Act, 1995 (No. 31 of 1995), it was provided that “A barrister or a solicitor when appearing in any court shall not be required to wear a wig of the kind heretofore worn or any other wig of a ceremonial type” (section 49).

### Personal Injuries Assessment Board

The Personal Injuries Assessment Board was established under the Personal Injuries Assessment Board Act, 2003 (No. 46 of 2003). This establishes the PIAB and provides that, from 22 July 2004, all personal injury claims must be submitted to the Board before starting legal proceedings, Personal injury includes motor, employer’s liability and public liability claims, but not medical negligence. The Board provides an independent assessment of personal injury claims for compensation following an accident when legal issues are not disputed, without the need to go to the courts.

### Other Developments Relating to Barristers

Apart from some of the above developments, which affect barristers, there have been no statutory provisions made in respect of barristers. The Bar Council, however, has made a number of changes to its rules and procedures. These include the following:

- (a) Recognition has been granted to a number of professional bodies and institutions whose members are granted direct access to barristers in non-contentious matters. The organisations must formally apply for approval for direct professional access. Some 24 bodies have been approved, including accountants, architects, surveyors, engineers, auctioneers and valuers, the Ombudsmen for the credit institutions and the insurance industry, Oireachtas Committees and the Vintners' Federation of Ireland.
- (b) The provisions regarding the mandatory junior counsel and the two-thirds fee rule for junior counsel have been deleted, and the number of counsel to be briefed and the fees to be charged are matters to be agreed with the instructing solicitor.
- (c) The recommended scale fees for the Circuit and High Courts have been withdrawn, (There is no scale of fees apart from those set for State work by the Government).
- (d) A new rule obliges every practising barrister to have professional indemnity insurance for a minimum amount, though the Bar Council scheme is only available to members of the Law Library.
- (e) A revised Bar Council Constitution and Disciplinary Code provides for a new complaints machinery together with an Appeals Board. The Barristers' Professional Conduct Tribunal consists of five practising barristers nominated by the Bar Council, and four other persons. One of these is a non-practising barrister, one is nominated by the Irish Congress of Trades Unions, one is nominated by the Irish Business and Employers Confederation, and there is a third nominated lay member from a broadly based, national organisation. The Tribunal can impose penalties for misconduct ranging from admonishment and fine, to exclusion from the Law Library and removal from the Register of Practising Barristers. It can recommend to the Benchers of King's Inns that a barrister should be disbarred. The complainant or the barrister may appeal to the Appeals Board, which consists of a judge or retired judge, nominated by

the Bar Council, a non-lawyer, nominated by the Attorney-General, and the Chairman of the Bar Council. The Appeals Board may allow or reject the appeal in full or in part, and may impose any penalty which could be imposed by the Tribunal, or refer the complaint back to the Tribunal.

- (f) A barrister is permitted to advertise by placing prescribed information on the website of the Bar Council, but subject to rules and regulations promulgated by the Bar Council, and may advertise by such other means as the Bar Council may prescribe.
- (g) Arrangements for the sharing of facilities by two or more barristers may be made with the consent of the Bar Council.

### Joint Education

In the mid-1990's, a committee was established to examine the possibility of providing a joint course or courses for the education of solicitors and barristers. The committee consisted of representatives of solicitors and barristers together with a number of lay persons. It was not found possible to establish any joint courses.

**OTHER WORK UNDERTAKEN BY THE COMMISSION OR ITS MEMBERS*****Reports***

In November 1957, the members of the Commission were appointed by the Minister as members of a Tribunal of Enquiry into Cross-Channel Freight Rates. The Report of the Tribunal was presented in May 1959, and it was published later that year. (Pr 5068).

In March 1974, because the Commission was so under-occupied with its proper duties due to a lack of recommendations for enquiries from the Examiner, the Minister appointed the Chairman and members to each of three Prices Advisory Bodies, to hold public enquiries and to report on the fertiliser industry and the meat and coal trades. Consultants were appointed to assist the Bodies. The reports were as follows:

- (a) Report of Enquiry into the Domestic Meat Trade. Interim Report, submitted in September 1974. (Published in Main report, Appendix 3). Final Report, published in February 1975. (Pr1 4143).
- (b) Report of Enquiry into the Coal Trade, published in September 1975. (Pr1 4522).
- (c) Because of the critical situation in the fertiliser industry, a full public enquiry was considered undesirable, and the Body decided to proceed on an informal basis. Report of Enquiry into the Fertiliser Industry, published in December 1976. (Pr1 5734).

In 1982, the Chairman of the Commission was appointed Chairman of a Prices Advisory Committee to investigate matters relevant to motor insurance. Accommodation and secretarial facilities for the Committee were provided by the Commission. Report of Enquiry into the Cost and Methods of Providing Motor Insurance, 1982. Published in 1983. (PI 1323).

### *National Prices Commission*

In 1971, the Minister made an Order appointing a National Prices Commission (NPC) to keep under review the prices of commodities and the level of charges and fees for services. Close liaison was maintained between the Commission and the NPC. Matters of common interest were discussed, and the Commission furnished observations on various consultancy and other reports prepared for the NPC.

The Chairman of the Commission, Mr. Walsh, was appointed Chairman of the NPC in May 1975, and retired as Chairman of both bodies in 1978. Mr. Lyons, a member of the Commission, was appointed as a member of the NPC in 1978. He remained a member of the NPC until it was disbanded in January 1986.

### *Organisation for Economic Cooperation and Development*

From 1957, the Commission took an active interest in the activities of the European Productivity Agency, a branch of the Organisation for European Economic Cooperation. This body was re-constituted as the Organisation for Economic Cooperation and Development (OECD) in 1961. Representatives of the Commission attended meetings of the OECD Committee of Experts on Restrictive Business Practices. The name of this Committee was changed to the Committee on Competition Law and Policy in September 1987.

In 1974, the Chairman of the Commission, Mr. Walsh, became a vice-Chairman of the Committee of Experts, until 1978. Ireland was then represented on all the Working Parties of the Committee. A member of the Commission, Mr. Lyons, became a member of the Bureau of the Committee in 1977, and remained a member until 1988.

In 1975, the Committee considered a paper on industrial concentration by Mr. Lyons. In 1977, the Committee established an Ad Hoc Group, which became a Working Party in 1979, under the Chairmanship of Mr. Lyons until 1988. The following reports were prepared, which were approved for publication by the Committee:

- (a) Concentration and Competition Policy (1979);

- (b) Merger Policies and Recent Trends in Mergers (1984);
- (c) Competition Policy and Joint Ventures (1987); and
- (d) International Mergers and Competition Policy (1988).

### ***Commission of the European Communities***

Prior to Ireland's accession to the EEC in January 1973, the Commission had been keeping under review the situation which would arise upon entry, when the provisions of the Treaty of Rome relating to restrictive practices and competition would become applicable in Ireland. In October 1974, the Minister was nominated as the Competent Authority in respect of competition matters. The Chairman of the Commission was nominated as the Irish representative to the EEC Advisory Committee on Restrictive Practices and Monopolies, and a member of the Commission was nominated as the Chairman's alternate. After 30 September 1991, responsibility for representation was divided between the Competition Authority and the Department. A member of the Commission was Rapporteur to the Advisory Committee in several highly important cases.

The Commission produced a booklet for Irish business explaining EEC policy on restrictive practices, the first edition of which was published in February 1973. Revised editions of the booklet were published in 1977 and 1986. Another revised edition of the booklet – *EEC Policy on Competition, A Guide for Irish Business, 4<sup>th</sup> Edition* – was published in 1992 (PI 8783).

### ***Article in Journal***

An article by Mr. John Walsh, Chairman of the Commission – “Restrictive Business Practices in Ireland: Legislation and Administration” – was published in the *Anti-Trust Bulletin*, Vol. XIX, Number 4, Winter 1974, pages 803 – 850.

## COMPLAINTS AND LEGAL PROCEEDINGS

### *Investigation of Complaints*

Apart from those cases in which Enquiries were held or the Fair Trading Rules procedure was utilised, the Commission investigated a considerable number of complaints regarding alleged restrictive trade practices each year up to 1972. Details of these were published in the Annual Reports from 1953 to 1972. The main complaints related to difficulty in obtaining supplies of various products or refusal to supply, and to dissatisfaction with the terms and conditions of supply. They involved a wide range of goods and some ancillary services. There were also complaints about the operation of the Rules and alleged breaches of the Orders.

In a number of cases, the investigation of these complaints resulted in the grievances of the complainants being redressed. In other cases, the Commission's intervention resulted in decisions of general application being taken by suppliers or organisations. In some instances, the Commission found on investigation that there was no basis for the complaints. The Commission also gave advice on request to manufacturers and traders.

### *Legal Actions*

In 1955, the enquiry into the supply of medicines and other products was adjourned pending the outcome of proceedings taken in the High Court at the instance of the Pharmaceutical Society of Ireland to prohibit the Commission from enquiring into the compounding and dispensing of medical prescriptions. The High Court discharged a Conditional Order of Prohibition. The plaintiff appealed to the Supreme Court, which upheld the right of the Commission in this regard in January 1956.

In 1955, the Wireless Dealers' Association commenced proceedings in the High Court claiming that the Act, or parts of it were unconstitutional; that the proceedings in the enquiry, the report and the Minister's Order were unconstitutional; and that the proceedings, report and Order were *ultra vires* the Act and repugnant to the provisions of the Trade Union Acts.

In 1965, there was a High Court action, *Cahill v the Irish Motor Trader's Association and others*, regarding withholding supplies of tyres. An injunction was granted. [1966] IR 430.

### ***Prosecution***

Arising out of investigations carried out by the Commission in 1959 and 1960 into identical tendering, prosecutions in two cases were taken in February 1961 on charges of contravening Article 5(1) of the Building Materials Order, 1955, by the collective fixing of the prices at which timber would be supplied to a local authority. These prosecutions were the first to be brought under the restrictive trade practices legislation. The Court found the charges proved and imposed fines.

## **THE EXAMINER OF RESTRICTIVE PRACTICES**

Following the coming into force of the Restrictive Practices Act, 1972, in June 1972, Nial MacLiam, an Assistant Secretary in the Department, was appointed Examiner of Restrictive Practices, on a part-time basis.

Austin Kennan, a Principal Officer in the Department, took up office as full-time Examiner in May 1973. Mr. Kennan was replaced as Examiner by James Caldwell, a Principal Officer in the Department, in June 1979.

Mr. Caldwell was replaced as Examiner, on a part-time basis, by Sean Dorgan, an Assistant Secretary in the Department, in August 1984.

James Murray was appointed Examiner on four separate occasions in 1985/86. Mr. Murray was, at that time, Director of Consumer Affairs.

When the Restrictive Practices (Amendment) Act, 1987 came into effect in January 1988. it established the position of Director of Consumer Affairs and Fair Trade. It also abolished the office of Examiner and transferred many of the functions of the Examiner to the Director. Mr. Murray was the first Director, from January 1988.

**ANNUAL REPORTS OF THE EXAMINER OF RESTRICTIVE PRACTICES**

Under the 1972 Act, the Examiner was, each year, to make to the Minister a report of his proceedings, and the Minister was required to lay the report before each House of the Oireachtas. Annual reports were published from 1972 to 1987, when the office was abolished, as follows:

1972	Prl 3585*
1973	Prl 4082
1974	Prl 4610
1975	Prl 5348
1976	Prl 6379
1977	Prl 7057
1978	Prl 7828
1979	Prl 8807
1980	Prl 9937
1981	Pl 637
1982	Pl 1417
1983	Pl 2351
1984	Pl 3284
1985	Pl 4319
1986	Pl 5196
1987	Pl 6257 Final Report.

\* Appendix contains the Annual Report for 1972 from the Restrictive Practices Commission.

**REQUESTS BY THE EXAMINER TO THE COMMISSION**

Special review by means of an enquiry of Articles 2 and 3 of the Groceries Order, 1973. (1973).

Special review of Article 3 of the Motor Spirit Order, 1972. (1974).

Special review by means of an enquiry of Article 3 of the Motor Spirit Order, 1972. (1977).

Public enquiry into cinema film distribution. (1977).

Public enquiry into the supply and distribution of daily and Sunday newspapers published in Ireland and of newspapers, periodicals and magazines distributed by wholesalers. (1977).

Public enquiry into conveyancing and advertising by solicitors. (1977)\*.

Public enquiry into the operation of the Motor Spirit Orders, 1961 to 1975, and into the agreements under which motor spirit stations which are company-owned but not company-run are operated. (1978)\*.

Enquiry into travel agency services insofar as they are affected by the activities of the association of travel agents. (1978).

Enquiry into the retail sale of grocery goods below cost. (1979)\*.

Public enquiry into the restriction on the provision of dental services in relation to the supply of artificial teeth to the public. (1981).

Public enquiry into policies of building societies in relation to insurance on mortgaged property and fees for valuers' reports on mortgaged property. (1983).

Special review of the Groceries Order, particularly regarding below cost selling and relationships between manufacturers/suppliers and retailers/wholesalers in the retail grocery trade. (1986)\*.

\* These four requests were made by the Minister and were transmitted through the Examiner to the Commission.

The reports of the Examiner were not published but were included in the reports of enquiries by the Commission, either as an Annex or in the body of the report.

**REPORTS BY THE EXAMINER TO THE MINISTER**

Report at the request of the Minister regarding representations by the West of Ireland Coal Importers' Association, furnished in 1972.

Report of an investigation at the request of the Minister into the operation of pyramid selling, furnished in 1973.

Report of an investigation at the request of the Minister into collective fixing of prices and discounts in the supply and distribution of ground limestone, furnished in 1974.

Report of an investigation at the request of the Minister into the nature and quality of competition in the supply and distribution of pharmaceutical products and cosmetics, furnished in 1975.

Report of an investigation at the request of the Minister into the supply and distribution of sugar, insofar as this was necessary to throw light on the causes of the shortages of sugar on the Irish market, furnished in 1975.

Report of an examination at the request of the Minister of complaints in regard to delays in deliveries of coal by Coal Distributors Ltd, furnished in 1974.

Report of investigation at the request of the Minister into complaints from a retailers' association that the terms of agreements between an oil company and licensees at its company-owned stations were unfair to the licensees and were contrary to the principles of social justice, furnished in 1976. The Minister referred the case back to the Examiner with a view to getting modifications in the terms.

Reports furnished to the Minister in 1976 regarding breaches of the 1972 Act by a bottler and two publicans involving obstruction of authorised officers.

Following a request for an enquiry from the Minister transmitted to the Commission by the Examiner, the Examiner furnished to the Minister a report on conveyancing and advertising by solicitors in 1977.

Following the Minister's decision to ask the Commission to hold a public enquiry, the Examiner furnished a report to the Minister of his investigation into the operation of the Motor Spirit Orders in 1978.

The Examiner recommended that the Minister introduce legislation to ban sales of groceries below cost in 1978.

Following an investigation of an association of travel agents, the Examiner reported to the Minister in 1978 that officers of the association were in breach of the Act, because authorised officers were refused access to minutes of meetings of the association and to correspondence files. In a prosecution in the District Court in 1979 against the Chief Executive of a travel agents' association for a breach of the 1972 Act, the Court found in favour of the Minister. On appeal, the conviction was affirmed by the Circuit Court in 1979.

Report of an investigation into the discount levels applicable in the bakery trade furnished to the Minister in 1981.

In the course of an investigation into action taken by an association of retailers and wholesalers against a supplier of sugar confectionery, the Examiner reported to the Minister in 1981 that three of the wholesalers involved were considered to be in breach of the 1972 Act.

In the course of an investigation, the Examiner reported to the Minister in 1982 that a person was considered to be in breach of the 1972 Act because invoices relating to an advertisement for grocery goods were not produced within a reasonable time.

Report of an investigation of a complaint that independent Dublin city centre cinemas were not receiving films at the same time as suburban cinemas, as recommended by the Commission and accepted by the Minister, furnished to the Minister in 1984.

In the case of two investigations regarding the advertising of grocery goods below net invoice price, the Examiner reported to the Minister in 1985 that persons were in

breach of the 1972 Act because invoices relating to the advertisements were not produced within a reasonable time.

Report of an investigation at the request of the Minister of the terms and conditions of importers of grocery goods, furnished in 1987.

**REPORTS TO THE MINISTER REGARDING BREACHES OF ORDERS**

Report of contravention of the 1972 Motor Spirit Order by a motor spirit wholesaler, who had taken over a retail petrol station and was operating it as a company-owned station, furnished in 1973.

Report of breach of the Groceries Order by three retailers and one supplier, furnished in 1974.

Report of breach of the 1961 Motor Spirit and Lubricating Oil Order by an association of motor spirit dealers, related to a direction to members not to sell motor spirit below the recommended retail price nor to give trading stamps, furnished in 1974.

Report of breach of the 1965 Intoxicating Liquor and Non-Alcoholic Beverages Order by a retail trade association, furnished in 1975.

Report of two breaches of the 1972 Motor Spirit Order in relation to company stations, furnished in 1976.

Reports on breaches of the 1965 Intoxicating Liquor Order in respect of five centres, furnished in 1976.

Report of a breach of the 1955 Building Materials Order, involving collective resale price maintenance, furnished in 1976. A prosecution was taken against an association of timber merchants for breach of the Order, and the Dublin District Court found in favour of the Minister in 1976.

Report of breach of the Groceries Order, furnished in 1977.

Report of two cases of breach of the Groceries Order involving advertising below cost, furnished in 1978.

Reports of four breaches of the Groceries Order, advertising below net invoice price, furnished in 1979.

Report of one breach of the Motor Spirit Order, operation of a company-owned station, furnished in 1979.

Report that a cement manufacturer and two trade unions were in breach of the Building Materials Order, by preventing ex-works supplies, furnished in 1979.

Report of another breach of the Building Materials Order, on the same grounds, also furnished in 1979.

Reports of three breaches of the 1978 Groceries Order, advertising below net invoice price, furnished in 1980.

Reports of seven breaches of the Groceries Order, advertising below net invoice price, furnished in 1981.

Reports of seven breaches of the Groceries Order, advertising below net invoice price, furnished in 1982.

Reports of two breaches of the Groceries Order, advertising below net invoice price, furnished in 1983.

Report that 47 bakeries had failed to reply to the Examiner's request for copies of terms and conditions, in breach of the Groceries Order, furnished in 1983.

Report of breach of the Groceries Order, in relation to maintaining a maximum retail price for milk, furnished in 1983.

Reports of six breaches of the Groceries Order, advertising below net invoice price, furnished in 1984.

Report of breach of the Groceries Order, the issuing by an association of bakeries of proposed price increases for bread, furnished in 1984.

Report of a breach of the Groceries Order, refusal to supply milk and butter under published terms, furnished in 1984.

Reports of ten breaches of the Groceries Order, advertising below net invoice price, furnished in 1985.

Reports of three breaches of the Groceries Order, advertising below net invoice price, furnished in 1986.

(From May 1986 onwards, no further investigations were undertaken because of uncertainty which had arisen as to the interpretation of the relevant article of the Groceries Order following a judgment in the High Court the previous year).

Reports of two breaches of the Intoxicating Liquor Order by associations of vintners, collective price fixing, furnished in 1986.

Report of a breach of the Groceries Order by one retailer, relating to a possible boycott of bakers by independent retailers, furnished in 1987.

Report of a breach of the Groceries Order by a retailers' association, a boycott of bakeries because of the price charged by them for bread, furnished in 1987.

Report of a breach of the Groceries Order, not maintaining a statement of terms and conditions for milk by a dairy, furnished in 1987.

## **OTHER INVESTIGATIONS AND COMPLAINTS**

The Annual Reports of the Examiner dealt with cases concerning the supply and distribution of goods covered by Orders and to goods and services not subject to Orders. In many instances, the investigations arose as a result of complaints from traders or associations, especially where no Order applied.

In a number of instances, the supplier agreed to resume supplying a retailer, or to supply on more acceptable terms. On occasion, the complainant was advised to request the supplier for a copy of his terms and conditions and, if he could meet the terms but was still refused supplies, to contact the Examiner again. In many cases, however, no evidence was found to substantiate the complaint, or the Examiner concluded that the arrangements adopted by the supplier were not unreasonable or were not being operated unfairly.

The Examiner devoted much time and effort in relation to the operation of the Groceries and Motor Spirit Orders, as evidenced by the number of reports of breaches submitted to the Minister. Other sectors investigated included: the distribution of cinema films, including the operation of the Cinema Trade Complaints Committee, and later the film distributors' Product Allocation Committee; the supply and distribution of newspapers and magazines; the supply and distribution of spectacles being confined by law to opticians; the supply and distribution of coal; building materials; pharmaceuticals; watches and clocks; sugar; books; dental auxiliaries; sale of National Lottery tickets; insurance on mortgaged properties; airport hackney services; credit unions; legal fees; and commission paid to motor dealers.

In addition, during 1987, three grocery price surveys were undertaken by the Examiner's office. The first was taken in June, in anticipation of the 1987 Groceries Order, in order to compare price levels prior to the introduction of the prohibition on below cost selling with the levels obtaining some time later. In October, a further five-day survey was carried out in 21 of the outlets covered in the June survey. In September, at the request of the Commission, a two-day survey was carried out of 71 grocery items plus meat and vegetables in two Dublin supermarkets, and of meat and

vegetables in seven other specialist shops. This was in connection with the investigation into price differences requested by the Minister.

## **LEGAL CHALLENGES**

Authorised officers were refused access to records in the office of a film distributor in 1977. The distributor sought a declaration from the High Court that the exigencies of the common good did not warrant the exercise of the Examiner's powers. The judgment of the High Court, on 21 December 1977, gave the plaintiff the declaration sought and granted a stay of execution pending consideration of an appeal.

In 1981, a supplier of grocery goods refused to supply copies of invoices and price lists to authorised officers. The supplier sought a declaration from the High Court that the goods being investigated were not within the scope of the 1978 Groceries Order, or that the exigencies of the common good did not warrant the exercise of the Examiner's powers. In addition, the plaintiff sought an injunction restraining the Examiner or his authorised officers from trespassing on the plaintiff's premises or taking away, examining or copying any of the plaintiff's records. In June 1983, the Examiner was informed that the plaintiff had withdrawn the proceedings, and the case was struck out with costs to the Examiner.

## **OTHER WORK OF THE EXAMINER**

### *Organisation for Economic Cooperation and Development*

The Examiner attended meetings of the OECD Committee of Experts on Restrictive Business Practices.

### *Commission of the European Communities*

The Examiner or his representative accompanied officials of the EC Commission on visits to undertakings in Ireland in connection with investigations under Articles 85 and 86 of the Treaty of Rome from 1973 onwards. The Examiner or his representative also attended some meetings of the EC Advisory Committee on Restrictive Practices and Monopolies.

The Examiner was instrumental in two particular EC cases. In March 1974, the Examiner brought to the attention of the Commission an agreement between two publishers in the UK which prohibited the sale in Ireland of the paperback edition of a book. The Commission informed the parties in 1976 that the agreement contravened the Treaty by preventing exports. The agreement was terminated, and a paperback version of the book became available in all Common Market countries (“The Old Man and the Sea”).

In 1974, three Irish importers of green bananas complained to the Commission that a large international company was selling bananas in Ireland at prices very much below those obtaining on European markets. The Examiner furnished his investigation into the Irish banana market to the Commission early in 1975. The Commission decided that United Brands had abused its dominant position in a substantial portion of the Common Market by charging excessive prices (but not in Ireland). (Chiquita decision of 17 December 1975. OJ [1976] L95, page 1).

## **DIRECTOR OF CONSUMER AFFAIRS (AND FAIR TRADE)**

The 1987 Act created the post of Director of Consumer Affairs and Fair Trade. James Murray, who had been Director of Consumer Affairs, and also Examiner of Restrictive Practices, was Director from 1 January 1988 until 25 May 1990. William Fagan became Director on 16 July 1990.

Under the 1991 Act, the title of the office was changed to Director of Consumer Affairs. Mr. Fagan was Director until October 1998. Carmel Foley became Director in November 1998.

## **ANNUAL REPORTS OF THE DIRECTOR OF CONSUMER AFFAIRS AND FAIR TRADE**

1988 Pl 7047  
 1989 Pl 7571  
 1990 Pl 8718  
 1991 Pl 9585

## **ANNUAL REPORTS OF THE DIRECTOR OF CONSUMER AFFAIRS**

1992 Pn 0700  
 1993 Pn 1499  
 1994 Pn 2323  
 1995/96 -- \*  
 1997 Pn 5548  
 1998 Pn 7070\*\*  
 1999 Pn 7070\*\*  
 2000 Pn 9891  
 2001 Pn 11468  
 2002 Pn 271

\* No Pn number for the Annual Report for 1995/96.

\*\* The same Pn number was issued for the 1998 and 1999 Reports.

## **THE ACTIVITIES OF THE DIRECTOR**

Under the 1987 Act, the functions of the Examiner in relation to investigating trading practices generally and the investigation of alleged breaches of Orders were transferred to the Director. He was also given the power (previously exercised by the Minister) of prosecuting in summary cases for breaches of the Orders. The Director also had the task of investigating and examining trading practices in sectors which had previously been exempt under the 1972 Act. Priority was given to implementation of the Groceries Order. Priority was also given to various requests for investigations by the Minister, and to matters arising from the public enquiry by the Commission into motor fuels in 1989. Most of the Orders, besides the Groceries Order, had ceased to have any real relevance by 1991, according to the Director. The Commencement Order for the 1991 Competition Act retained the Groceries Order but repealed all the other Orders. The powers of the Director to enforce the Groceries Order were also retained.

### ***The Groceries Order***

During the period from 1987 to 2002, there were a number of complaints each year to the Director alleging breaches of the 1987 Groceries Order, mainly relating to the prohibition on sales of groceries below net invoice price. In a number of cases investigated, either the complaint was groundless, or the breach was a relatively minor one. The Director, however, did institute proceedings for breaches of the Order in some cases. On occasion, firms involved were unwilling to stand over a complaint, or to give evidence in court.

The main proceedings were as follows:

- (a) selling of baked beans below cost; injunction obtained (1988);
- (b) removal from the market of quantities of competing sugar; injunction refused pending a full hearing (1988); a preliminary issue was determined by the High Court, which decided that certain papers provided to the Director by the

- complainant should not be discovered, and this was appealed to the Supreme Court (1990);
- (c) order sought requiring a multiple retailer to comply with credit terms; case struck out when a satisfactory undertaking was given (1989);
  - (d) proceedings commenced against eight dairies and a trade association for arrangements relating to the retail price of milk (1991); breach of the Order was acknowledged and undertakings were given (1992);
  - (e) proceedings commenced against five bakeries in relation to arrangements relating to the price of bread (1991); acknowledgement of breaches of the Order and undertakings were given, and the proceedings were stayed (1992);
  - (f) prosecutions for some isolated cases of below cost selling (1991);
  - (g) proceedings against the issue of vouchers by a supermarket multiple for the issuing of money-off vouchers, amounting to under cost selling; injunction granted (1992);
  - (h) two court actions involving below cost selling of beer failed, one because the supplier did not have terms and conditions which would have enabled the establishment of the best list price, and the second because of difficulties with internal pricing between the wholesaling and retailing wings of a major multiple (1992).

Other activities of the Director in the groceries area were:

- (a) two extensive grocery price surveys (1988);
- (b) investigation of special deals or discounts with wholesalers and multiples (1988);
- (c) investigation of advertisements in a retailer's in-house magazine, published by a connected company (1988);
- (d) review of the operation of the provision regarding credit terms (1988);
- (e) investigation of an alleged "bread price war", at the request of the Minister (1989);
- (f) investigation of increases in the price of bread (1989);
- (g) investigation of a circular letter from an association relating to the resale price of milk; assurances by dairies not to withhold supplies because of prices charged (1989);

- (h) investigation of price movements in imported groceries, at the request of the Minister (1989);
- (i) withdrawal of money-off vouchers after warning by the Director (1990);
- (j) investigation of the level of compliance with the requirements on credit terms (1990);
- (k) investigation of boycott of a multiple chain because of price charged for milk (1991);
- (l) investigation of increases in the retail price of milk (1991);
- (m) warning letter about a voucher scheme (1991);
- (n) manipulation of invoices by a supplier (1991);
- (o) investigation of a “computers for schools” scheme, and request for funding by suppliers (1991);
- (p) complaint about non-compliance with credit terms (1991);
- (q) investigation of money-off vouchers scheme (1992);
- (r) non-compliance with credit terms (1992);
- (s) warning about change in terms so as to effect a change in the retail price (1992);
- (t) refusal to supply bread because of price charged (1993);
- (u) investigation into terms of supply of the dominant sugar supplier (1993);
- (v) legal advice circulated to the trade regarding the wholesale drinks industry (1993);
- (w) warning about a boycott of retailers selling own brand milk at a low price (1994);
- (x) warning about manipulation of invoice to secure that bread was sold below cost, and so supplies could be withheld (1994);
- (y) agreement to amend supplementary terms for supply of sugar and more transparent terms of supply, and the level of detail appropriate for inclusion in terms (1994 and 1995);
- (z) undertaking given about requirements to make payments to another company, amounting to “hello money”, after a warning about proceedings (1999).

### ***Other Activities of the Director***

#### *Alcoholic Drinks Order*

In 1988, the Director instituted proceedings against two associations of publicans in relation to circulars to members regarding prices. In the first case to be heard, the summonses were dismissed on the grounds that the circulars merely provided information and did not amount to recommendations, price lists or price proposals. The Director instituted an appeal by way of case stated. The proceedings against the other association were withdrawn. The appeal was unsuccessful before the High Court in 1990. The Director concluded that the Order was virtually unenforceable in the absence of very specific evidence.

Four complaints were investigated in 1989 alleging collusion in relation to drink price increases on the part of groups of publicans in particular areas. The investigations did not yield direct evidence on which prosecutions might be instituted, but there was substantial indirect evidence of collusion between publicans at a local level regarding drink price increases. At the request of the Minister, in November 1989, the price of drink was surveyed in 37 premises in the Dublin area, and extensive non-compliance was found with the price display requirement.

#### *Building Materials Order*

A number of investigations of alleged breaches of the Order were conducted in 1988, but no evidence was found. The Director, however, strongly suspected collusion, price fixing and other anti-competitive practices in the market for building materials.

#### *Motor Spirit Order*

Investigations were initiated during 1988 in a number of cases where some companies were suspected of not complying with the requirement regarding company owned stations. In 1989, two companies were prosecuted for failing to notify the Director of the opening of new company stations, and fines of £25 were imposed in each case.

The Director made a submission in connection with the Commission's public enquiry in 1989 into the motor fuels trade, he attended the public sessions, and he compiled information on the market at the request of the Commission.

### *Other Investigations*

Among the other works undertaken by the Director were the following:

- (a) the Director continued to try to resolve complaints from new outlets which could not get supplies of newspapers (1988, 1990 and 1991);
- (b) investigations continued into the actions of an association of pharmacists in seeking to have supplies of various non-prescription or over-the-counter products confined to pharmacies (1988). The Director formally requested that the Irish Pharmaceutical Union refrain from such practices, and the undertakings were given (1990);
- (c) the Minister requested an examination of the use by the ESB of its billing system in relation to the sale of electrical appliances (1989). No unfair practice was found, but, following a recommendation by the Director, the ESB changed their billing method to show repayment arrears separately from charges for electricity (1990);
- (d) the Minister requested an investigation into the price of smokeless solid fuels, but the Director did not have the resources to analyse the information collected (1989). Following the ban on bituminous coal in Dublin, the Minister requested an investigation of the development of a competitive market for smokeless fuel, and consultants were commissioned to investigate the market (1990);
- (e) a complaint was received about the rules of the Opticians Board in relation to advertising. In a report, the Director recommended that restrictions on advertising should be lifted, but that safeguards should be put in place to avoid advertising which would bring the profession into disrepute. The Board agreed to draft new advertising rules (1991);
- (f) the Director decided that a provision in the rules of the National Lottery, preventing retailers from selling other lottery tickets, was anti-competitive, and the Minister made an appropriate Order. The

offending provision was removed, but the notion of compulsory sales targets was introduced. A complaint about this was investigated, but no basis was established for further action (1991);

- (g) a complaint was investigated that insurance agents/brokers in a particular city had pressurised insurance companies to withdraw business from a certain agent/broker, but the file was closed with the introduction of the Competition Act (1991);
- (h) several other investigations were also terminated when the Competition Act came into operation, e.g. refusal to supply a pharmacist, agreements of a music rights organisation and bid-rigging in the market for tarmacadam ((1991);
- (i) investigations took place of an alleged price cartel among pig processors, but any further investigation or action was prevented because fresh meat was excluded from the Groceries Order (1992);
- (j) an investigation was held into the effects of currency fluctuations on imported magazines, and the Director concluded that there were breaches of the Competition Act by the importers/distributors, who had notified their arrangements to the Authority (1992);
- (k) at the request of the Minister, an investigation was held into the price of imported magazines, following which the Minister made a price control order for magazines, the Maximum Prices (Magazines) Order, 1996 (S.I. No. 207 of 1996). After litigation commenced, this was revoked under the Maximum Prices (Magazines)(Revocation) Order, 1996 (S.I. No. 307 of 1996) (1996);
- (l) price control on alcoholic drinks was introduced in the Retail Prices (Beverages in Licensed Premises) (No. 2) Order, 2000 (S.I. No. 222 of 2000) for a six-month period. Court prosecutions were taken for breaches of the Order (2000). The Order lapsed in January 2001. Some successful prosecutions were taken, but further prosecutions were held in abeyance pending a judicial review of the Order. The High Court applications were withdrawn, allowing the prosecutions to proceed. One licence holder was convicted for breaches of the Order. Three cases were referred from the District Court to the Circuit Court, as the judge declined jurisdiction to hear the cases (2002).

*EU Commission/OECD*

The Director and his staff assisted EU officials in carrying out investigations in Ireland. The Director also attended meetings of the OECD Committee on Competition Law and Policy.

## THE COMPETITION AUTHORITY

### MEMBERSHIP OF THE COMPETITION AUTHORITY

The Competition Authority was established on 1 October 1991. Its first members, who were previously members of the Restrictive Practices Commission, were:

Patrick Lyons – Chairman.

Patrick Massey – Member.

Eamonn Carey – Member.

#### *Chairman.*

Mr Lyons was Chairman from 1 October 1991 to 30 September 1996. Patrick McNutt was Chairman from November 1996 to January 2000. John Fingleton was appointed Chairman in May 2000. He was appointed Director of Competition Enforcement in June 2000, until the position was abolished under the 2002 Act in June 2002.

#### *Members.*

Mr. Massey was a Member from 1 October 1991. He was appointed Director of Competition Enforcement in October 1996, but resigned as Director in June 2000. He remained as a Member of the Authority until September 2001.

Mr. Carey was a Member from 1 October 1991 until June 1993. Desmond Wall was a Member from June 1993 to July 1996.

William Prasifka was a Member from November 1996 to November 1999. Isolde Goggin was a Member from November 1996 to December 2002. Declan Purcell was appointed a Member in April 1998. Paul Gorecki was appointed a Member in June 2000. Terry Calvani was appointed a Member in May 2002.

The Authority was comprised of the following persons when the 2002 Act came into force in June 2002: John Fingleton - Chairman; Isolde Goggin, Declan Purcell, Paul Gorecki and Terry Calvani – Members.

*Chairmen* (year of appointment)

Patrick Lyons (1991), formerly member and Chairman of the Fair Trade Commission.

Prof. Patrick McNutt (1996), formerly a university lecturer in economics.

Dr. John Fingleton (2000), formerly a university lecturer in economics.

*Members* (year of appointment)

Pat Massey (1991), formerly a member of the Fair Trade Commission.

Eamon Carey (1991), formerly a member of the Fair Trade Commission.

Desmond Wall (1993), formerly a Principal Officer in the Department of Enterprise and Employment.

William Prasifka (1996), formerly a private legal consultant in New York and Dublin.

Isolde Goggin (1996), formerly an employee of Telecom Eireann, the European Commission and Ericsson Systems Expertise Ltd.

Declan Purcell (1998), formerly a Principal Officer in the Department of Enterprise, Trade and Employment.

Dr. Paul Gorecki (2000), formerly worked for the Canadian competition authorities and the Economic Council of Canada, and was Director of the Northern Ireland Economic Council from 1992.

Terry Calvani (2002), formerly a Commissioner of the US Federal Trade Commission and acting Chairman of the Commission, a partner in a US antitrust legal practice, and a university lecturer and professor in law.

## ANNUAL REPORTS OF THE AUTHORITY

The 1991 Act obliged the Authority to submit to the Minister an annual report of its activities within four months of the end of each year. The Minister was then required to lay before each House of the Oireachtas a copy of every such report within four months of receiving the report. These reports have been published as follows:

1991	Pl 8782*
1992	Pl 9882
1993	Pn 0817
1994	Pn 1893
1995	Pn 2803
1996	Pn 4183
1997	Pn 5249
1998	Pn 7417
1999	Pn 8798
2000	Pn 9980
2001	Pn 11624
2002	----

\* including the Annual Report of the Restrictive Practices Commission from 1 January to 30 September 1991.

The Competition Act 2002 commenced on 1 July 2002 (except for the merger provisions which commenced on 1 January 2003). Under section 42(1), within two months after the end of each financial year (that is after 31 December), the Authority must publish a report of its activities during that year. The report for 2002 contained a report of the activities of the Authority under the 1991 Act for the first six months of the year, and under the 2002 Act for the remainder of the year.

**NOTIFICATIONS TO AND DECISIONS BY THE AUTHORITY, 1991 – 2002**

Under the 1991 Act, undertakings which wanted a certificate or a licence for their arrangements had to notify these to the Authority. Arrangements in existence on the commencement date, 1 October 1991, had to be notified within one year, while new arrangements could be notified at any time.

The following tables show:

- (a) the number of notifications received each year, those dealt with each year, and cumulative numbers of these, and the number of notifications on hand at the end of each year;
- (b) the number of decisions taken each year, and the cumulative number of these;
- (c) the number of notifications dealt with, the number withdrawn and the number rejected each year; and
- (d) the number of decisions taken by the Authority, from 1991 to 2002, and whether these involved a certificate, a licence, etc.

The notification procedure and the issuing of certificates and licences were abolished on 1 July 2002, when the 2002 Act came into operation, and all notifications on hand lapsed. One decision was quashed in 1993, but it was published in the Annual Report for 1993 (Eason/Newsread). In 2002, the Authority revoked a certificate previously granted relating to the Rules of the Irish League of Credit Unions.

**(a) NOTIFICATIONS, 1991 – 2002**

Year	Notifications Received In Year	Notifications -Cumulative	Notifications Dealt with in Year	Notifications Dealt with -Cumulative	Notifications on Hand
1991	14	14	--	--	14
1992	1,159	1,173	22	22	1,151
1993	67	1,240	506	528	712
1994	34	1,274	277	805	469
1995	38	1,312	179	984	328
1996	35	1,347	90	1,074	273
1997	23	1,370	46	1,120	250
1998	11	1,381	129	1,249	132
1999	17	1,398	108	1,357	41
2000	10	1,408	14	1,371	37
2001	9	1,417	14	1,385	32
2002	3	1,420	4	1,389	31

---

Source: Annual Reports.

Note: Notifications Dealt with in Year includes notifications rejected and withdrawn.

**(b) DECISIONS, 1991 – 2002**

Year	Decisions Taken In Year*	Decisions Taken - Cumulative
1991	--	--
1992	11	11
1993	260**	271
1994	116	387
1995	70	457
1996	19	476
1997	13	489
1998	43	532
1999	44	576
2000	8	584
2001	10	594
2002	2	596

---

Source: Annual Reports.

\* Including category licences.

\*\* One decision quashed.

**(c) NOTIFICATIONS WITHDRAWN AND REJECTED, 1991 – 2002**

Year	Notifications Dealt With in Year	Notifications Withdrawn	Notifications Rejected
1991	--	--	--
1992	22	3	3
1993	506	20	11
1994	277	55	2
1995	179	69	12
1996	90	61	4
1997	46	25	4
1998	129	21	16
1999	108	31	6
2000	14	--	1
2001	14	2	--
2002	4	--	2
<hr/>			
Total	1,389	287	61
<hr/>			

**(d) DECISIONS TAKEN BY THE AUTHORITY, 1991 – 2002**

Certificate issued	503
Licence granted	40
Notification rejected	8
Notification withdrawn	3
Refusal decision	28
File closed	12
Other	<u>2</u>
Total	596

## Notes:

1. Licence granted includes category licences for motor fuels, distribution agreements (expired), LPG dealer agreements and amendment to the licence, and franchise agreements. It also includes a certificate and licence for agreements between suppliers and resellers. It includes one individual decision involving a licence and a certificate.
2. Certificate issued includes a category certificate relating to a merger and/or a sale of business.
3. The Other category is comprised of the annulled decision relating to Eason/Newsread, and the revocation of the certificate issued to the Irish League of Credit Unions.
4. A high proportion of the certificates issued were in relation to shopping centre leases.
5. Each category licence is applicable to a large number of individual notified agreements, and an individual licence or certificate decision might cover several notified agreements.

## COMPETITION AUTHORITY NOTICES

### *Employee Agreements and the Competition Act*

15 September 1992. Iris Oifigiúil, 18 September 1992, p. 632 – 633, and Annual Report, 1992, p. 83 – 85.

In its first Notice, the Authority set out its views regarding the position of agreements between employees and employers under the Competition Act. It indicated that, in its view, employees as such were not undertakings as they normally acted on behalf of the undertaking which employed them, and consequently it did not regard agreements between employers and employees as agreements between undertakings. Such agreements were not within the scope of the Act, and were not notifiable.

Once an employee had left an employer and sought to set up his or her own business, however, the agreement would then be one between undertakings which could be notified. The Authority believed that an attempt by a former employer to enforce a non-competition clause in an employment contract in respect of an employee who had left and was seeking to establish a business would represent a restriction on competition. The combined effect of such agreements in many sectors of the economy would be to greatly restrict competition and the Authority believed that, in these circumstances, such agreements would offend against section 4(1) of the Act, and that it would be difficult for such agreements to satisfy the requirements for a licence under section 4(2).

This Notice was revoked by the Authority with effect from 12 December 2006, since it believed that the statement that the original contract of employment would become an agreement between undertakings, in certain circumstances, was erroneous.

### *Notice in Respect of Mergers and Takeovers which Predate the Competition Act*

4 May 1993. Iris Oifigiúil, 14 May 1993, p. 367, and Annual Report, 1993, p. 141 – 142.

The Authority had received a number of notifications in respect of mergers and sale of business agreements which had been concluded prior to the coming into force of the

Competition Act. In its Notice, the Authority stated that it considered that in such cases that element of the agreement had been discharged by performance before the Act commenced, and the property transferred. That aspect of the arrangements did not come within the scope of section 4(1). It pointed out that non-compete provisions or other ancillary clauses in such agreements would still need to be considered on an individual basis, since they could involve current or continuing contractual commitments on the part of the parties.

*Notice in Respect of Shopping Centre Leases*

2 September 1993. *Iris Oifigiúil*, 10 September 1993, p. 665 – 667, and Annual Report, 1993, p. 132 – 140.

The Authority received a large number of notifications of shopping centre leases. In its Notice, it stated that each lease was basically an agreement between the landlord and the tenant, each of which was an undertaking. The fundamental principle of a shopping centre was that it provided customers with the opportunity of obtaining a wide range of goods and services in a single location. It was essential that the shopping centre should contain a balanced mixture of different types of retail outlet. This was achieved by including in the lease a restricted user clause or an ‘exclusive user’ or ‘permitted user’ clause.

While a restricted user clause tended to prevent the operation of a similar outlet in the shopping centre, the Authority considered that such clauses did not normally offend against section 4(1). The object of a shopping centre was to provide a balanced range of outlets, and this was regarded as being pro-competitive rather than anti-competitive. The restricted user provisions were essential to ensure such developments. From a strictly literal point of view, the effect of the restricted user clause was to restrict competition in the individual shopping centre. The Authority considered that this was too narrow an interpretation of the real effect of such clauses. The relevant geographic market for each shopping centre covered a much wider area than the centre alone. Shopping centres were often in competition with each other, and there was also usually competition from supermarkets and other shops in the vicinity of shopping centres. The Authority concluded that the restrictive clauses in

shopping centre leases had neither the object nor the effect of interfering with competition, and they did not generally offend against section 4(1).

The Authority included in the Notice a number of other obligations in such leases, none of which were considered to restrict competition. Such clauses related to the proper operation of the shopping centre. The Authority stated, however, that any clause which imposed any restriction on the tenant engaging in any form of business activity after termination of the lease would be likely to offend against section 4(1).

As required by the Act, the Authority had to issue individual certificates in respect of all shopping centre leases which had been notified, and for other property agreements.

**CATEGORY LICENCES AND CERTIFICATES**

Category licence for motor fuels agreements. 1 July 1993. Decision No. 25. Iris Oifigiúil, 9 July 1993, p. 513 – 515, and Annual Report, 1993, p. 61 – 98.

Category licence for exclusive distribution agreements. 5 November 1993. Decision No. 144. Iris Oifigiúil, 19 November 1993, p. 954 – 955, and Annual Report, 1993, p. 99 – 131.

Category licence for exclusive purchase agreements for cylinder LPG. 28 October 1994. Decision No. 364. Iris Oifigiúil, 11 November 1994, p. 1212 – 13. .

Category licence for franchise agreements. 17 November 1994. Decision No. 372. Iris Oifigiúil, 9 December 1994, p. 1409 – 1411, and Annual Report, 1994, p. 62 – 77.

Category certificate in respect of agreements involving a merger and/or a sale of business. 2 December 1997. Decision No. 489. Iris Oifigiúil, 9 January 1998, p. 20 – 21, and Annual Report, 1997, p. 36 – 56.

Category certificate/licence in respect of agreements between suppliers and resellers. 11 December 1998. Decision No. 528. Iris Oifigiúil, 11 December 1998, p. 1288 – 1290. Decision No. 144 above no longer applies.

The category certificate in respect of mergers/sale of business, Decision No. 489, lapsed under the Competition Act, 2002. It was replaced by a Notice in respect of agreements involving a merger and/or sale of business on 1 July 2002 – N/02/001. This Notice expired on 31 December 2002.

The category licence in respect of agreements between suppliers and resellers, Decision No. 528, continued in being under the 2002 Act, but the category certificate lapsed. On 1 July 2002, the Authority issued a Notice in respect of agreements between suppliers and resellers to replace the category certificate – N/02/002. This Notice expired on 31 December 2003.

**COMPETITION AUTHORITY DECISIONS, NOS. 1 TO 596**

*Decision No. 1. Nallen/O'Toole. April 1992.*

Sale of business; electrical goods business in Belmullet.

Three year non-compete clause. The owner of the business was an undertaking, and the Act applied to agreements irrespective of the size of the undertakings.

Restrictions on the seller of a business were essential, but had to be limited in terms of duration, geographical scope and subject matter. Two years would generally be regarded as sufficient to ensure the complete transfer of goodwill. Three years was justified in this case.

A certificate was issued.

*Decision No. 2. AGF/Irish Life Holdings. May 1992.*

Parent/subsidiary agreement; non-life insurance.

Each of two subsidiaries of the same parent company agreed to specialise in specific areas of the market. The subsidiaries were wholly owned and had no independent commercial autonomy and were part of a single economic entity with the parent. The companies could not be regarded as in competition with each other, and the agreement could not affect competition, but was merely concerned with the allocation of tasks within the group.

A certificate was issued.

*Decision No. 3. Athlone Travel Ltd/Michael Stein Travel Ltd. June 1992.*

Sale of business; tour operators.

Three year non-compete clause was considered acceptable.

A certificate was issued.

*Decision No. 4. Esso Solus and Related Agreements. June 1992.*

Standard solus agreement, dealer loan equipment agreement, dealer loan agreement and deed of charge/mortgage; exclusive purchase agreement and related agreements with dealers; motor fuels distribution.

The solus dealer was obliged to purchase motor fuels exclusively from Esso for a period not exceeding ten years. The agreement restricted competition, contrary to section 4(1). Most suppliers had such agreements, and operated company-owned

outlets as well. Special commercial or financial advantages were conferred on the dealer, in return for exclusive purchasing. Such agreements were exempted from the prohibition of Article 85(1) of the Treaty of Rome. The agreements satisfied the requirements for a licence under section 4(2).

Esso advised its dealers of maximum recommended retail prices, which were the prices to be charged in its company-operated stations. The exchange of price information by competitors would in general offend against section 4(1), and a licence under section 4(2) would not be justified. Esso agreed not to inform solus dealers in advance of pump price changes at its company-operated stations.

A licence was granted for the four categories of agreements from June 1992 to June 2002.

*Decision No. 5. Performing Right Society/Irish Music Rights Organisation. June 1992.*

Parent/subsidiary agreement; music copyright collection society.

Both bodies were undertakings for gain, and were subject to the Act, since they were engaged in economic or commercial activity, irrespective of whether they were profit-making or not. Because of the parent/subsidiary relationship between the bodies, the agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 6. Woodchester Bank Ltd/UDT Bank Ltd. August 1992.*

Merger; banking sector.

Mergers did not enjoy automatic exemption from the Act, even if they had been approved by the Minister under the Mergers Act, though all mergers did not need to be notified. There was no indication that this merger would result in a diminution of competition in any relevant market, and it could increase competition in certain markets. The non-compete provisions on the vendor were limited to what was necessary to ensure the complete transfer of the goodwill.

A certificate was issued.

*Decision No. 7. Waterford Harbour Commissioners/Bell Lines Ltd. August 1992.*

Priority use of harbour facilities in Waterford; shipping.

Waterford Harbour Commissioners was an undertaking. The relevant market was that for the shipment of goods to the UK and mainland Europe, and a number of other ports within the State and in Northern Ireland provided alternative services. The agreement did not reduce competition between ports.

A certificate was issued.

*Decision No. 8. ACT Group plc/Kindle Group Ltd. September 1992.*

Merger; computer software for financial services.

ACT and Kindle were not competitors in the Irish market, and there was no evidence that ACT would have entered the market. The acquisition did not offend against section 4(1). The non-competition clauses applied to Kindle's management team. The executives were undertakings because they were major shareholders and they exercised effective control over Kindle. The clauses concerned not only the transfer of goodwill but also a degree of technical know-how. The proposed duration of three years for most of the clauses did not offend against section 4(1) because technical know-how was involved. One clause, relating to the disclosure and use of confidential information had no time limit. This was amended to provide for a time limit, and no longer offended. An unlimited restriction on the vendor using the Kindle trade-name did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 9. Phil Fortune/Budget Travel Ltd. September 1992.*

Sale of Budget Travel Schools Abroad Ltd to its senior employee; tour operator.

While Phil Fortune was an individual, she was an undertaking because she was the future proprietor of the business. The non-compete provision for two years was acceptable. A restriction on the vendor from soliciting the employment of former employees for four years was considered to be excessive, and was reduced to three years. A clause which prevented the vendor from using, disclosing or divulging secret or confidential information was also considered to be excessive, and Phil Fortune gave an undertaking not to use this clause so as to prevent the vendor re-entering the market after two years.

A certificate was issued for the amended agreement with the undertaking on confidential information.

*Decision No. 10. GI Corporation/Semiconductor Industries Inc. October 1992.*

Merger; electricity voltage suppressors.

The acquisition did not offend against section 4(1) because GI's market share after the acquisition would be below 10%. There was a high degree of concentration in the market, but barriers to entry were low, and there was considerable competition from imports and small suppliers. A five-year non-competition clause was acceptable because a transfer of know-how was involved.

A certificate was issued.

*Decision No. 11. B. & D. Firestone/Grenfells Ltd and Thoroughbred Promotions and Development Co. November 1992.*

Sale of business; stud farms and a bloodstock auctioneering business (Goffs).

The purchase of two stud farms did not involve the sale of a business, but only property and land, and did not restrict competition. The acquisition of shares in Goffs did not lead to a situation whereby access to bloodstock auctioneering services for other horse breeders was restricted. It did not offend against section 4(1).

A certificate was granted.

*Decision No. 12. Scully Tyrrell/Edberg. January 1993.*

Merger/sale of business; loss adjusting.

Edberg acquired the business of Scully Tyrrell, but a number of former partners in Scully Tyrrell acquired a 38% shareholding in the expanded company. Concentration in a market could be measured by the four-firm concentration ratio and/or the Herfindahl-Hirschman Index. In general, the Authority did not believe that a merger, *per se*, between competitors would adversely affect competition, unless the market was highly concentrated or would become so after the merger. If it were to become highly concentrated, a merger would be unlikely to affect competition where:

- (a) there were no significant barriers to entry by new competitors; and/or
- (b) there was effective competition from overseas suppliers.

In this case, although the market was highly concentrated, the acquisition was unlikely to lessen competition, and did not offend against section 4(1).

The vendors decided to remain on as shareholders and employees of the purchaser, but were still undertakings. An agreement by the vendors not to compete with Edberg for as long as they remained shareholders and employees did not offend against

section 4(1), provided that the shareholding was not held for purely investment purposes and provided that the arrangements were not an artificial construction whose object or effect was to evade the prohibition.

The notified agreements sought to tie the vendors to the business for a minimum period of time and effectively prevented them from competing with Edberg for at least 3 ½ years, which was regarded as excessive. The vendors were also prevented from canvassing orders from clients of Edberg, who were essentially the only potential customers for the services, for five years. Following discussions, amendments were made to the agreements to satisfy these concerns. The amendment restricted the vendors from competing with Edberg for so long as they were employees and/or shareholders, and for two years after they sold their shares. A certificate was issued for the amended agreement.

*Decision No. 13. Peter Mark/Majella Stapleton. February 1993.*

Employment contract; hairdressing.

There was a non-compete clause for six months after employment ceased. Majella Stapleton had been an employee of Peter Mark, and she was solely an employee of the new employer. She had not been and was not an undertaking, and there was not an agreement between undertakings, so the Act did not apply.

The Authority refused to grant a certificate or a licence.

*Decision No. 14. Palace Video Ltd/Abbey Films Ltd. February 1993.*

Distribution agreement; cinema films.

Palace Video was in administration, and the administrator requested withdrawal of the notification. It was later in liquidation.

The Authority accepted withdrawal of the notification.

*Decision No. 15. The 'Old Bushmills' Distillery Co. Ltd/Joseph B. Casey.*

February 1993.

Trademark user agreement.

Because Mr. Casey had ceased trading, withdrawal of the notification was requested.

The Authority accepted withdrawal of the notification.

*Decision No. 16. Association of Optometrists. April 1993.*

Memorandum, Articles of Association and Code of Ethics; optometrists.

The arrangements constituted decisions of an association of undertakings. The restrictions on opticians in the Opticians Act did not come within the scope of the Competition Act, since they were enshrined in separate legislation. A number of features of the decisions did not offend against section 4(1), though the Authority expressed concern that some of them could be applied in an anti-competitive manner. A number of provisions in the Code of Ethics were considered to offend against section 4(1), such as:

- (a) guidelines related to premises;
- (b) restrictions on advertising, including a prohibition on price advertising; and
- (c) the requirement to determine fees in a particular manner and restrictions on the offering of discounts.

Following discussions with the Authority, the Association advised its members that the offending provisions had been suspended, and it informed the Authority that members suspended for breaching the provisions were free to resume full membership. The amended provisions no longer offended against section 4(1).

The Authority considered that a rule of the Opticians Board restricted advertising, especially price advertising. It welcomed the decision of the Board to amend the rule, permitting opticians to advertise in media other than newspapers, and to quote prices in advertisements.

A certificate was issued for the amended agreements.

*Decision No. 17. Chemical International Finance Ltd/Irish Life Assurance plc.*

April 1993.

Sale of business; financial services.

Pursuant to a sale of business agreement, only the deed of covenant incorporating the non-compete provisions was specifically notified. The notified agreement could only be considered as part of the broader sale of business agreement, and, as such, did not offend against section 4(1).

A certificate was issued.

*Decision No. 18. AGF-Irish Life/NEM Insurance. June 1993.*

Sale of business; insurance.

Both companies involved were subsidiaries of the same parent company. The arrangements involved a reorganisation of the activities of subsidiary companies, and did not offend against section 4(1).

A certificate was issued.

*Decision No. 19. Irish Life Building Society/First National Building Society.*

June 1993.

Merger/sale of business; building society.

Irish Life transferred its engagements to First National, and there were no non-compete clauses, and the arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 20. Apex Fire Protection Ltd/Noel Murtagh. June 1993.*

Contract of employment; fire protection products.

The contract of employment obliged the employee not to solicit, within the district in which he had operated, any persons who had been customers of the employer in the two years immediately preceding the date of termination of employment, for two years after such termination. The employee was also precluded from divulging or disclosing to any other party any information gained as a result of his employment. Mr. Murtagh had set up his own business, and was an undertaking, and the agreement was between undertakings. The Authority considered that some restriction on soliciting the former employer's customers was essential, but the restriction should not exceed what was absolutely necessary. The prohibition applied to persons who were no longer customers of Apex when Mr. Murtagh left, and this offended against section 4(1). This was amended to apply only to persons who were customers on the date of termination of employment, and this was acceptable. It had not been demonstrated that the two year period after termination was necessary, and so it did not satisfy the requirements of section 4(2). Apex offered to reduce the post-termination period to 18 months, but this was still not acceptable.

Apex had indicated that the restriction on divulging information would not be used to prevent a person re-entering the market after the expiry of a non-competition clause. The Authority recognised that confidentiality was essential for employer-employee relationships, and concluded that the restriction on disclosure did not offend against section 4(1).

The Authority refused to grant a licence.

*Decision No. 21. Easons/Newsread. June 1993.*

Currency purchase and exchange rate agreement; newspaper and magazine distribution.

The Authority took a decision refusing to grant a licence. Before the decision could be published, Newsread was granted an injunction by Mr. Justice Flood on 17 June preventing publication of the decision. Newsread was granted leave to apply for judicial review and for orders, *inter alia*, directing the Authority to consider its response to the Statement of Objections and to grant it an oral hearing. On 27 July, the Authority consented to an Order by Mr. Justice Carney quashing the refusal decision, and extending the time for the delivery of the response and request for an oral hearing. In December, Easons stated that it was terminating the agreement and that it no longer required any decision upon the application. (A detailed description of the case is contained in Annex 5 of the Annual Report for 1993).

Refusal decision annulled.

*Decision No. 22. Dairygold Cooperative Society Ltd/ Muilleann Ui Luasa Teo and IAWS Group plc. June 1993.*

Sale of assets and property; grain milling and animal feed business.

The agreement contained a three-year non-compete clause, which was reduced to two years following discussions with the Authority.

A certificate was issued to the amended agreement.

*Decision No. 23. Spar (Ireland) Ltd; BWG Foods Ltd; Sancroft Ltd. June 1993.*

Equipment supply and merchandising agreement; supermarkets.

The notified agreement was terminated and withdrawal was requested.

Withdrawal of the notification was accepted.

*Decision No. 24. Cambridge-ACT/Imari. June 1993.*

Shareholding agreement; shipping transport business.

The agreement involved the acquisition of a minority shareholding in Imari for investment purposes and a number of restrictions upon Mr. O'Neill, the managing director of, and a shareholder in, Imari. Mr. O'Neill was an undertaking in the

circumstances. The acquisition of the minority shareholding did not offend against section 4(1).

The Authority had to consider whether the other ancillary provisions were essential to achieve the main purpose of the agreement. Where restrictive clauses went beyond what was necessary to achieve a legitimate end, they would have the object of interfering with competition. A number of clauses were acceptable from the viewpoint of competition, including a clause designed to retain the services of Mr. O'Neill and to ensure that he did not compete with Imari while he remained involved with the company.

There were non-compete obligations on Mr. O'Neill, such as not permitting him to engage in any competing business, to interfere with supplies and to solicit employees of Imari. These restrictions applied for five years from completion or for two years after Mr. O'Neill ceased to be employed by Imari, whichever was the later. A restriction on the parties involved in a business competing with it while they remained a part of the business did not offend against section 4(1). The clauses in question, however, had the effect of preventing Mr. O'Neill from leaving and setting up in competition with Imari, and they lasted after his employment ceased. They offended against section 4(1).

Following discussions with the Authority, the parties amended these clauses by providing that the restrictions would apply from the completion date to the later of (a) the 915<sup>th</sup> day after Mr. O'Neill ceased to hold shares in Imari, or (b) the date on which he ceased to be an employee of Imari. The amended agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 25. Motor Fuels Category Licence. July 1993.*

Exclusive purchase agreements; motor fuels.

The category licence covered agreements between the petrol company supplying motor fuels and the resellers who operated stations (except company-operated stations). It was based on the EC block exemption regulation for exclusive purchasing agreements.

The reseller agrees with the supplier, in return for special commercial or financial advantages, to purchase motor fuels exclusively from the supplier. The agreement could have a duration of not more than ten years in the case of independent dealers,

but for as long as a company-owned station was licensed or leased. An agreement could contain a restriction on a supplier distributing in the reseller's principal sales area.

There could be restrictions on competition imposed on the reseller, such as not selling competing motor fuels, on the advertising of other goods, and on selling competing lubricants. The licence specified restrictions which were not permitted, including exclusive purchasing requirements for other goods or for services, restrictions on the reseller after the agreement expired, and limitations on the freedom of the reseller to determine resale prices.

Provision was made for the withdrawal of the category licence in an individual case. The licence was granted for a period of 15 years, from 1 July 1993 to 30 June 2008. Suppliers who wished to benefit from the category licence had to ensure that their agreements satisfied the conditions specified in the licence. The grant of the licence constituted a refusal to grant a licence to existing agreements which did not fulfil the specified conditions. A list of exclusive purchasing agreements for motor fuels which had been notified was published in the 1993 Annual Report, but this did not imply that the agreements satisfied the requirements of the category licence.

An action was taken to quash the category licence by a Texaco petrol station licensee – *Cronin v Competition Authority and others*. The plaintiff complained that the Authority had failed to supply the Texaco Retailers Association with the text, or a summary of the text, of the agreements notified by Texaco or the Texaco notification, and that the Association had not been permitted to reply to the Texaco submissions. In an unreported High Court judgment in June 1994, Mr. Justice Costello stated that "There was nothing unjust in the way the procedures were followed, and they were eminently fair", and he refused the relief sought. In 1998 this judgment was upheld by the Supreme Court – [1998] 2 I.L.R.M. 51.

*Decision No. 26. Hewetts Travel. July 1993.*

Sale of business; travel agency.

Five persons were the vendors of a travel agency to Hewetts Travel Agency Ltd. The sale of business was completed prior to the commencement date of the Act, and so did not come within the scope of section 4(1). The non-compete clause had expired, so there was no longer any restriction on the vendors.

A certificate was issued.

*Decision No. 27. Apex Fire Protection Ltd/Mr. William Brennan. July 1993.*

Employment contract; fire protection products.

The notifying party requested withdrawal of the notification.

Withdrawal of the notification was accepted.

*Decision No. 28. General Electric Capital Corporation/GPA Group PLC.*

September 1993.

Purchase of aircraft; airline industry.

The agreements related to the purchase of a number of aircraft from GPA, and for certain deferred payments in respect of these aircraft. The Authority considered that the sale of some of its assets by a firm to a competitor did not itself affect competition, and so did not offend against section 4(1), unless it was accompanied by provisions restricting the firms' freedom to compete with one another. The restrictions on GPA re-purchasing the aircraft did not offend against section 4(1).

A certificate was issued.

*Decision No. 29. John D. Carroll Catering Ltd/Sutcliffe Ireland Ltd.*

September 1993.

Sale of business; contract catering facilities.

Sutcliffe purchased Carroll Catering, and one of its owners, Mr. Carroll, entered into an employment agreement with Sutcliffe. The sale of business had no impact on competition, as Sutcliffe was not previously active in the market, and the agreement did not offend against section 4(1).

The sale agreement and the contract of employment imposed restrictions on the Carrolls, which offended against section 4(1), but these were amended. The restriction on the vendors competing was reduced to two years. The five year restriction on transacting business with or soliciting customers of the company was reduced to three years in respect of soliciting customers and two years in respect of doing business with customers. A clause restricting the use of confidential information was amended to provide that it would not be used to prevent the vendor re-entering the market. A restriction on programming or the use of any computer was deleted.

The employment contract with one vendor was considered to be an agreement between undertakings. The Authority considered that the non-compete restriction

after the cessation of employment extended the non-competition clause in the sale agreement. This was amended to limit its duration to the period in which the person was employed, and was limited in scope. As amended, the agreements did not offend against section 4(1).

A certificate was issued to the amended agreements.

*Decision No. 30. J. Murray/L. and J. O'Connell. September 1993.*

Tenancy agreement and lease.

The agreement contained restricted user clauses, preventing the premises being used by the tenants for any purpose other than that specified. The agreements and their restricted user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 31. Energy Control Systems Ltd/Erinova Ltd., and Energy Control Systems Ltd/Belton Engineering Works Ltd. September 1993.*

Exclusive distribution agreements; water turbines.

The two agreements related to distribution in territories outside the State. They did not have an anti-competitive object or effect in the State. Such agreements did not come within the scope of the Act, and were not capable of being notified.

A certificate was issued.

*Decision No. 32. Shamrock Foods Ltd/Brookline Ltd. September 1993.*

Sale of business; foodstuffs.

The sale of business was completed before the Act commenced, and had been discharged by performance, and did not come within the scope of the Act. The three year non-compete clause expired in 1992, and did not offend against section 4(1).

A certificate was issued.

*Decision No. 33. Dairygold Cooperative Society Ltd/J. W. Green & Co. Ltd. September 1993.*

Sale of business; grain drying and storage.

Following the sale, Dairygold would still have less than a 5% share of the relevant market, and the non-compete period was limited to two years from the date of completion. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 34. Viva Travel Dun Laoghaire Ltd/Grainne McDonald Travel Ltd.*

September 1993.

Sale of business; travel agency.

The sale of business was, if anything, pro-competitive since it enabled a new firm to enter the market. The parties agreed to shorten the duration of the vendors engaging in a travel agency business in Dun Laoghaire from five years to three. The amended agreement did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 35. ICC Bank plc/Navenby Ltd/Savage Plastic Packaging Ltd/Savpak Ltd.* September 1993.

Sale of business; plastic packaging.

The sale of business agreement and the non-competition agreement had expired before the Act came into operation and could not be validly notified.

A certificate or licence could not be granted.

*Decision No. 36. ICC Bank plc/Navenby Ltd/Alpha Packaging Films Ltd.*

September 1993.

Sale of business; plastic packaging.

As in the case of the previous decision, the Authority could not issue a certificate as both the sale of business agreement and the non-compete clause had expired before the Act commenced, and thus did not come within the scope of the Act.

A certificate or licence could not be granted.

*Decisions Nos. 37 – 136. Certified Shopping Centre Leases.*

The Authority issued a Notice in respect of shopping centre leases in September 1993. It considered that restricted user clauses in such leases did not offend against section 4(1). The Authority issued individual certificates, as required by the Act, in respect of all shopping centre leases which had been notified. The first tranche of these certificates is given below.

*Decision No. 37. Roches Stores Dublin Ltd/Peter Mark. October 1993.*

Certificate issued.

*Decision No. 38. Mary, Thomas and P. J. McGrath/Tenants at Kilbarrack Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 39. Max Developments Ltd/Pride and Joy Ltd. October 1993.*

Certificate issued.

*Decision No. 40. Max Developments Ltd/Wilhelmina McCormack. October 1993.*

Certificate issued.

*Decision No. 41. Town and County Investments PLC/Marspel Ltd. October 1993.*

Certificate issued.

*Decision No. 42. Mary, Thomas and P. J. McGrath/Tenants at Ballyfermot Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 43. Superquinn/Tenants at Blackrock Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 44. Superquinn/D. F. O'Neill (Chemists) Ltd. October 1993.*

Certificate issued.

*Decision No. 45. Superquinn/Tenants of Superquinn Shopping Centre, Blanchardstown. October 1993.*

Certificate issued.

*Decision No. 46. Eder Trust Company Ltd/D. Horkan Limited. October 1993.*

Certificate issued.

*Decision No. 47. Dorcorn Developments Ltd/Manzares Ltd. October 1993.*

Certificate issued.

*Decision No. 48. Crumlin Investments Ltd/Tenants at Crumlin Shopping Centre.*

October 1993.

Certificate issued.

*Decision No. 49. Cornelscourt Shopping Centre Ltd/Peter Mark. October 1993.*

Certificate issued.

*Decision No. 50. Cornelscourt Shopping Centre Ltd/Governor and Company of the Bank of Ireland. October 1993.*

Certificate issued.

*Decision No. 51. Cornelscourt Shopping Centre Ltd/Tenants at Cornelscourt Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 52. Mary, Thomas and P. J. McGrath/Tenants at Finglas Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 53. Winchurch Investments Ltd/Glenberg. October 1993.*

Certificate issued.

*Decision No. 54. Deerpark Ltd/Baron Craft Company Ltd. October 1993.*

Certificate issued.

*Decision No. 55. Superquinn/Tenants at Superquinn Shopping Centre, Knocklyon. October 1993.*

Certificate issued.

*Decision No. 56. Shannon Town Centre Company Ltd/Power Leisure Ltd.*

October 1993.

Certificate issued.

*Decision No. 57. Riga Ltd/Thomas J. O'Connor. October 1993.*

Certificate issued.

*Decision No. 58. Riga Ltd/Douglas Eyecare Ltd. October 1993.*

Certificate issued.

*Decision No. 59. Riga Ltd/Tenants at Douglas Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 60. Douglas Developments Ltd/Allied Irish Banks plc. October 1993.*

Certificate issued.

*Decision No. 61. Douglas Developments Ltd/Peter Mark. October 1993.*

Certificate issued.

*Decision No. 62. Merchant's Quay Developments Ltd/Peter Mark. October 1993.*

Certificate issued.

*Decision No. 63. City Properties (Cork) Ltd/Glenberg. October 1993.*

Certificate issued.

*Decision No. 64. Wilton Securities Ltd/Glenberg. October 1993.*

Certificate issued.

*Decision No. 65. Paul and Karl Dunleavy/Patrick Sweeney. October 1993.*

Certificate issued.

*Decision No. 66. G.D. Investments (Galway) Ltd/Divilly's (Galway's Leading Butchers) Ltd. October 1993.*

Certificate issued.

*Decision No. 67. Townparks Ltd/The Governor and Company of the Bank of Ireland.*

October 1993.

Certificate issued.

*Decision No. 68. G. D. Investments (Galway) Ltd/Tenants at Westside Shopping*

*Centre.* October 1993.

Certificate issued.

*Decision No. 69. McGee Land Trust Ltd/Vincent Walsh.* October 1993.

Certificate issued.

*Decision No. 70. Civil Engineers (Ireland) Ltd/William and Josephine Donovan.*

October 1993.

Certificate issued.

*Decision No. 71. N. J. Kelly Ltd/Richard J. O'Rourke.* October 1993.

Certificate issued.

*Decision No. 72. Denis Farrell/Peter Mark.* October 1993.

Certificate issued.

*Decision No. 73. Dungoyne Ltd/Power Supermarkets Ltd.* October 1993.

Certificate issued.

*Decision No. 74. Mall Holdings Ltd/Five Star Supermarket.* October 1993.

Certificate issued.

*Decision No. 75. Spearhill Company Ltd/The Governor and Company of the Bank of*

*Ireland.* October 1993.

Certificate issued.

*Decision No. 76. Richfield Investments Ltd/The Governor and Company of the Bank*

*of Ireland.* October 1993.

Certificate issued.

*Decision No. 77. Town and County Investments plc/Coffee Garden (Drogheda) Ltd.*

October 1993.

Certificate issued.

*Decision No. 78. Town and County Investments plc/Coffee Garden Ltd.*

October 1993.

Certificate issued.

*Decision No. 79. Navan Shopping Centre Ltd/Power Supermarkets Ltd.*

October 1993.

Certificate issued.

*Decision No. 80. Five Star Supermarket/Tenants at Sligo Shopping Centre.*

October 1993.

Certificate issued.

*Decision No. 81. Five Star Supermarket/Margaret Conway. October 1993.*

Certificate issued.

*Decision No. 82. Five Star Supermarket/C & W Properties Ltd and Five Star Supermarket/Gerald and Margaret Conway. October 1993.*

Certificate issued.

*Decision No. 83. Cartron Village Management Co. Ltd/Stateline Enterprises Ltd.*

October 1993.

Certificate issued.

*Decision No. 84. Waterford Shopping Centre Ltd/The Governor and Company of the Bank of Ireland. October 1993.*

Certificate issued.

*Decision No. 85. Waterford Shopping Centre Ltd/ Tenants at Waterford Shopping Centre. October 1993.*

Certificate issued.

*Decision No 86. Robert and Mary Tweedy/Power Leisure Ltd. October 1993.*  
Certificate issued.

*Decision No. 87. Westlake Estates Ltd/Tenants of the Town Hall, Mullingar.*  
October 1993.  
Certificate issued.

*Decision No. 88. William Neville & Sons Ltd/John Sutton. October 1993.*  
Certificate issued.

*Decision No. 89. Melcorp Ltd/Marspel Ltd. October 1993.*  
Certificate issued.

*Decision No. 90. Town and County Investments PLC/Tenants at Ballybrack Shopping Centre. October 1993.*  
Certificate issued.

*Decision No. 91. Ardenheath Company Ltd/Colm Stanley. October 1993.*  
Certificate issued.

*Decision No. 92. Ardenheath Company Ltd/Brendan and Sheila Doherty and Declan O'Brien. October 1993.*  
Certificate issued.

*Decision No. 93. Irish Pension Fund Property Unit Trust/Power Supermarkets Ltd.*  
October 1993.  
Certificate issued.

*Decision No. 94. Erin Executor and Trustee Company Ltd/D. Horkan Ltd.*  
October 1993.  
Certificate issued.

*Decision No. 95. National Carways Ltd/Caddens Pharmacy Ltd. October 1993.*  
Certificate issued.

*Decision No. 96. Allied Irish Investment Managers/Darrigowen Ltd.* October 1993.  
Certificate issued.

*Decision No. 97. Albafare/Hubert O'Doherty.* October 1993.  
Certificate issued.

*Decision No. 98. Erin Executor and Trustee Company Ltd/Peter Mark.*  
October 1993.  
Certificate issued.

*Decision No. 99. Friends Provident Life Assurance Company Limited/Tenants of  
Friends Provident Centre.* October 1993.  
Certificate issued.

*Decision No. 100. Wanze Properties (Ireland) Ltd/Tenants at Hartstown Shopping  
Centre.* October 1993.  
Certificate issued.

*Decision No. 101. Power Supermarkets Ltd/Carmel Feeney.* October 1993.  
Certificate issued.

*Decision No. 102. Power Supermarkets Ltd/D. Horkan Ltd.* October 1993.  
Certificate issued.

*Decision No. 103. D. Horkan Ltd/V. Jackson Ltd.* October 1993.  
Certificate issued.

*Decision No. 104. Irish Life Assurance Plc/Peter Mark.* October 1993.  
Certificate issued.

*Decision No. 105. Irish Life Assurance Plc/Eason & Son Ltd.* October 1993.  
Certificate issued.

*Decision No. 106. Killiney Management Shopping Centre Company/Marspel Ltd.*  
October 1993.  
Certificate issued.

*Decision No. 107. Superquinn/Tenants at Superquinn Shopping Centre, Lucan.*  
October 1993.  
Certificate issued.

*Decision No. 108. Superquinn/Peter Mark.* October 1993.  
Certificate issued.

*Decision No. 109. Superior Drug Company Ltd/The Governor and Company of the Bank of Ireland.* October 1993.  
Certificate issued.

*Decision No. 110. Timebrock Ltd/Basil Duffy.* October 1993.  
Certificate issued.

*Decision No. 111. Timebrock Ltd/Duffy Group Old Bawn Ltd.* October 1993.  
Certificate issued.

*Decision No. 112. Power Supermarkets Ltd/Tenants at Phibsboro Shopping Centre.*  
October 1993.  
Certificate issued.

*Decision No. 113. The Park Shopping Centre Ltd/Peter Wong.* October 1993.  
Certificate issued.

*Decision No. 114. The Park Shopping Centre Ltd/Quinnsworth.* October 1993.  
Certificate issued.

*Decision No. 115. Arch Properties Ltd/Noel McManus.* October 1993.  
Certificate issued.

*Decision No. 116. Rathmines Properties Ltd/James Paul and Erica Anne Murray.*

October 1993.

Certificate issued.

*Decision No. 117. Dartgate Ltd/Tenants at Shankill Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 118. Firmount Ltd/Peter Mark. October 1993.*

Certificate issued.

*Decision No. 119. Firmount Ltd/Asha Clothing Ltd. October 1993.*

Certificate issued.

*Decision No. 120. Superquinn/Tenants of Sundrive Shopping Centre. October 1993.*

Certificate issued.

*Decision No. 121. Superquinn/Tenants at Superquinn Shopping Centre, Sutton.*

October 1993.

Certificate issued.

*Decision No. 122. Superquinn/Tenants at Superquinn Shopping Centre, Swords.*

October 1993.

Certificate issued.

*Decision No. 123. Santa Anita Estates Ltd/Linabbey Ltd. October 1993.*

Certificate issued.

*Decision No. 124. L & C Properties Ltd/Peter Mark. October 1993.*

Certificate issued.

*Decision No. 125. Cybury Ltd/Tenants of Walkinstown Shopping Centre.*

October 1993.

Certificate issued.

*Decision No. 126. Shannon Town Centre Ltd/Tenants of Shannon Town Centre.*  
October 1993.  
Certificate issued.

*Decision No. 127. The Governor and Company of the Bank of Ireland/Royal Liver Trustees Ltd.* October 1993.  
Certificate issued.

*Decision No. 128. Quinnsworth/Revoclife Ltd.* October 1993.  
Certificate issued.

*Decision No. 129. Roches Stores Limerick Ltd/Peter Mark.* October 1993.  
Certificate issued.

*Decision No. 130. Westport Developments Ltd/Glenberg.* October 1993.  
Certificate issued.

*Decision No. 131. Feresant Ltd/Power Supermarkets Limited.* October 1993.  
Certificate issued.

*Decision No. 132. Nabola Developments Ltd/Tenants of Maynooth Shopping Centre.*  
October 1993.  
Certificate issued.

*Decision No. 133. M. P. O'Brien (Maynooth) Ltd (now Nabola Developments Ltd)/Sports Locker Ltd.* October 1993.  
Certificate issued.

*Decision No. 134. Mall Holdings Ltd/Bookneeds Ltd.* October 1993.  
Certificate issued.

*Decision No. 135. Dunnes Stores (Limerick) Ltd/Tenants at Sarsfield Shopping Centre.* October 1993.  
Certificate issued.

*Decision No. 136. Francis Spaight and Sons Ltd/Seamus Canty.* October 1993.  
Certificate issued.

*Decision No. 137. General Electric Capital Corporation/GPA Group PLC.*  
October 1993.

Acquisition of control; provision of aircraft.

This decision related to arrangements whereby GE Capital would effectively acquire control over GPA's competitive presence in the market for the provision of aircraft.

There were a number of related agreements, one of which was the subject of Decision No. 28 above. The arrangements contained provisions whereby:

- (a) GE Capital would acquire aircraft and assets from GPA;
- (b) It would receive an option to purchase (within 5 years) between 65% and 80% of GPA's voting equity; and
- (c) Contractual arrangements would be put in place whereby General Electric Capital Aviation Services would acquire (for 15 years) exclusive management of GPA's aircraft and related assets.

The agreements were tantamount to a merger in many respects, although GE Capital would not acquire control over the business of GPA immediately. Since GE Capital had no customers in Ireland, the arrangements had no immediate effect on market shares, but GE Capital was a potential competitor to GPA in the Irish market. There were a large number of suppliers of new and second-hand jet aircraft, and the arrangements did not offend against section 4(1).

A certificate was issued for eleven agreements.

*Decision No. 138. Food Industries plc/Norish plc.* October 1993.

Merger; food refrigeration equipment.

Norish purchased two thirds of the share capital of Gyrtna Ltd in 1989, and the agreement had non-compete provisions for a five year period from the date of completion. In 1992, Norish purchased the balance of the shares. The Authority considered that Norish only acquired full control of Gyrtna in 1992, and a two-year non-compete period from that time would have been acceptable. It considered that it was not the object of the arrangement to extend the non-compete clause beyond what would normally be considered necessary to secure the transfer of goodwill. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 139. Reflex Investments plc/Parity Modules Limited. October 1993.*

Merger; computer systems.

The merger pre-dated the Act. The vendors entered into employment contracts with the purchaser. The vendors were prevented from competing in the same business as that sold for two years from completion or the date of termination of employment, whichever was the later, and from soliciting employees for the same period.

Following discussions with the Authority, the provision preventing competition following cessation of employment was deleted. The amended agreement did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 140. Reflex Investments plc/Parity Maintenance Limited.*

October 1993.

Merger; computer systems.

The merger pre-dated the Act. This was a similar agreement to that involved in the preceding decision. It contained a two year post-employment non-compete clause, which was also in the employment contracts. Following discussions with the Authority, the post-employment non-compete provisions were deleted, and the amended agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 141. Mentec Limited/Online Computing Limited and Others.*

October 1993.

Merger; computers.

The merger pre-dated the Act. It contained a non-compete provision for five years after completion, and a non-solicit clause relating to employees and customers for a similar period. The Authority considered that the case involved not only the transfer of goodwill, but also technical know-how. The five year restriction on competition was justified, and did not offend against section 4(1).

A certificate was issued.

*Decision No. 142. PJD Investment Company/P. J. Donohoe and Paul S. Power/Fitzwilton plc. October 1993.*

Merger; deep freezers and domestic appliances.

The merger pre-dated the Act. There was a non-compete clause for five years after completion in relation to Ireland and other countries. The vendors were also prohibited from soliciting any of the purchaser's employees or customers for the same period, or from disclosing confidential business information. The notifying parties agreed to amend the non-compete clause so that the restrictions (other than the restriction on disclosing confidential information) would cease to operate from 1 October 1993. The geographic scope of the restriction was only considered insofar as it applied to the State. The amended agreement did not offend against section 4(1). A certificate was issued for the amended agreement.

*Decision No. 143. Sigma Wireless Communications Limited/Motorola Ireland Limited. October 1993.*

Merger; mobile communications products.

The merger pre-dated the Act. The vendor was required to adhere to the exclusivity provisions of certain exclusive distribution agreements entered into at the time of the sale for a period of two years from completion. The vendors were also prevented from soliciting employees of the business for two years. The provisions expired on 1 July 1993. The Authority considered that the exclusivity provisions of the agreement under which Sigma was appointed as Motorola's exclusive distributor in Ireland for two years represented a form of non-compete clause, but it did not offend against section 4(1).

A certificate was issued.

*Decision No. 144. Licence for Categories of Exclusive Distribution Agreements. November 1993.*

The category licence covered agreements to which only two undertakings were party – the supplier and the exclusive distributor – and it was based on the EC block exemption regulation for exclusive distribution agreements (Regulation No. 1983/83). The supplier agreed to supply certain goods for resale in a specified area only to the exclusive distributor. The supplier could be obliged not to supply the goods to users in the territory. The category licence permitted certain restrictions on competition to

be imposed on the exclusive distributor. It also specified situations or clauses in agreements which were not permitted, including restrictions on the freedom of the reseller to determine resale prices, and post-termination restrictions on the distributor. The licence provided that the licence could be withdrawn in an individual case, and it made provision for agreements made before and after the Act came into force. It did not apply to agreements for the resale of petroleum products in service stations, or for exclusive distribution agreements which were part of a selective distribution system, including those for motor vehicles. The category licence was granted for a period of five years, from 5 November 1993 to 31 December 1998, so as to permit an early review of its operation. (See also Decision No. 528).

The Authority subsequently considered individual notified agreements in the light of the category licence. It published lists of those agreements which it considered satisfied the requirements of the category licence in the Annual Reports, on occasion after the agreement had been amended. In the case of other agreements the Authority informed the parties that their agreement did not appear to satisfy the requirements of the category licence, and that they were entitled to amend the agreement or to request individual consideration.

*Decision No. 145. Fuel Distributors Ltd/J. Enright. November 1993.*

Sale of premises; coal depot.

The sale agreement prohibited the purchaser from using the premises for the sale or marketing of coal and other solid fuels. The Authority stated that agreements for the sale of property per se did not come within the scope of section 4(1), nor, generally, did restrictions on the future use of property. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 146. First National Bakery Company Limited/Clianthus Limited.*

November 1993.

Merger; bakery products.

The merger pre-dated the Act. The non-compete clause prevented the vendors from becoming involved in a competing business for five years from the date of the agreement, and from soliciting customers or employees for the same period.

Following discussions with the Authority, the purchasers indicated that they would

not seek to rely on the provisions of the non-compete clause after 1 October 1993, and the agreement as amended did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 147. Lee & Company (Dublin) Ltd/Musgrave Limited.* November 1993.

Merger; cash and carry warehouse.

The merger agreement did not offend against section 4(1). It contained a clause preventing the vendor or the directors from operating as a wholesale grocer or cash and carry within a specified area for a period of three years from the date of the agreement. Following the issue of a statement of objections, the parties agreed to reduce the duration of the non-compete clause from three years to two, and it no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 148. Spring Grove Ireland Limited/Initial Services (International)*

*Limited/P & O Services Group/BET plc.* November 1993.

Merger; textile rental and associated services.

The agreement related to the sale of Conkenner Ltd by Initial Services to Spring Grove. The arrangements had been approved by the Minister under the Mergers Act. The Authority considered that, although Spring Grove would have over 40% of the market for some of its services, the existence of potential substitutes for the services meant that the post-merger levels of concentration would be considerably below the thresholds at which the Authority believed a merger might pose problems for competition. The acquisition did not offend against section 4(1).

The arrangements included a number of non-compete provisions which prevented the vendors from competing for a period of three years from the date of the agreement.

There were also restrictions on dealing with customers of Initial and on soliciting employees. There were also restrictions on the use of industrial property rights (mainly trade marks) for up to ten years. Following discussions with the Authority, the parties agreed to amend a number of the non-competition clauses. This had the effect of restricting the vendor, for a period of three years, from transacting business with any person who was a customer at or about the date of the initial agreement where such business had been the result of canvassing or solicitation. A non-compete period of two years would apply in all other circumstances. The non-solicit of

employees clause was reduced from three years to two years. The amended non-compete provisions did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decisions 149 – 218. Certified Shopping Centre Leases.*

The second tranche of shopping centre leases, which contained restricted user clauses which did not offend against section 4(1), and which received certificates, is given below.

*Decision No. 149. Power Supermarkets Ltd/Tenants of Artane Castle Centre.*

December 1993.

Certificate issued.

*Decision No. 150. Hoorn & Winkel (Ireland) Ltd/Tenants of Ballinteer Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 151. Superquinn/Tenants of Superquinn Ballinteer Centre.*

December 1993.

Certificate issued.

*Decision No. 152. H. Williams Tallaght Ltd/Town and County Investments plc.*

December 1993.

Certificate issued.

*Decision No. 153. H. Williams (Tallaght) Ltd (in receivership)/Quinnsworth (formerly Light Bite).* December 1993.

Certificate issued.

*Decision No. 154. Grittar/Light Bite/Heatons Ltd.* December 1993.

Certificate issued.

*Decision No. 155. Ballymun Developments Ltd/Tenants of Ballymun Shopping Centre (Newer tenancies).* December 1993.

Certificate issued.

*Decision No. 156. Ballymun Developments Ltd/Tenants of Ballymun Shopping Centre (Older tenancies).* December 1993.

Certificate issued.

*Decision No. 157. V. O'R Investments Ltd/Power Leisure Ltd.* December 1993.

Certificate issued.

*Decision No. 158. Clondalkin Properties Ltd/Thomas Farren.* December 1993.

Certificate issued.

*Decision No. 159. National Trust and Investment Company Ltd/Tenants of Clondalkin Town Centre.* December 1993.

Certificate issued.

*Decision No. 160. National Trust and Investment Company Ltd/Tenants of Monastery Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 161. Irish Pension Fund Property Unit Trust and Erin Executor and Trustee Company Ltd/Power Supermarkets Ltd.* December 1993.

Certificate issued.

*Decision No. 162. Irish Pension Fund Property Unit Trust and Erin Executor and Trustee Company Ltd/Tenants of Dun Laoghaire Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 163. Trikkala Ltd/Quinnsworth.* December 1993.

Certificate issued.

*Decision No. 164. Wanze Properties (Ireland) Ltd/Tenants of Janelle Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 165. Lillington Ltd and others/8 Tenants of Glenageary Roundabout Shops. December 1993.*

Certificate issued.

*Decision No. 166. Caledonian Insurance Company/tenants of Grafton Arcade (Newer leases). December 1993.*

Certificate issued.

*Decision No. 167. Caledonian Insurance Company/Tenants of Grafton Arcade (Older leases). December 1993.*

Certificate issued.

*Decision No. 168. Mayfield Investments Ltd/Power Supermarkets Ltd.*

December 1993.

Certificate issued.

*Decision No. 169. Killiney Shopping Centre Management Company Ltd/Tenants of Killiney Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 170. Tallaght Shopping Centre Ltd/Glenberg. December 1993.*

Certificate issued.

*Decision No. 171. Tallaght Shopping Centre Ltd/Tenants of Kilnamanagh Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 172. Holland Brooklands Ltd/Abbey Life Assurance (Ireland) Ltd.*

December 1993.

Certificate issued.

*Decision No. 173. Abbey Life Assurance (Ireland) Ltd/Hayes Bookshops Ltd.*

December 1993.

Certificate issued.

*Decision No. 174. Abbey Life Assurance (Ireland) Ltd/Tenants of Merrion Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 175. Abbey Life Assurance (Ireland) Ltd/Power Supermarkets Ltd.* December 1993.

Certificate issued.

*Decision No. 176. Dunloe House Group plc/Peter Mark.* December 1993.

Certificate issued.

*Decision No. 177. Pesenta and Power Supermarkets Ltd/Tenants of Merrion Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 178. Merrion Shopping Centre Ltd and Abbey Life Assurance (Ireland) Ltd, Pesenta, Dunloe House Group plc, Holland Brooklands Ltd, Irish Life Assurance plc/26 Tenants of Merrion Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 179. Melincourt Ltd/D. Horkan Ltd.* December 1993.

Certificate issued.

*Decision No. 180. Royal Liver Trustees Ltd/Texas Homecare (Ireland) Ltd.*

December 1993.

Certificate issued.

*Decision No. 181. Royal Liver Trustees Ltd/Anika Enterprises Ltd.* December 1993.

Certificate issued.

*Decision No. 182. Royal Liver Trustees Ltd/Deanstown Investments Ltd.*

December 1993.

Certificate issued.

*Decision No. 183. Royal Liver Trustees Ltd/Carpet & Bedding Home Ltd.*

December 1993.

Certificate issued.

*Decision No. 184. Royal Liver Trustees Ltd/Tenants at Royal Liver Assurance Park, Naas Road, Dublin 12.* December 1993.

Certificate issued.

*Decision No. 185. AIB Investment Nominees Ltd/Tenants of Nutgrove Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 186. New Ireland Assurance Company plc/Tenants of Nutgrove Shopping Centre, Rathfarnham.* December 1993.

Certificate issued.

*Decision No. 187. Barranca/Nutgrove Shopping Centre (Management) Ltd.*

December 1993.

Certificate issued.

*Decision No. 188. Omni Park Ltd/Quinnsworth.* December 1993.

Certificate issued.

*Decision No. 189. Omni Park Ltd/Tenants of Omni Park Centre.* December 1993.

Certificate issued.

*Decision No. 190. Michael Kavanagh/D. Horkan Ltd.* December 1993.

Certificate issued.

*Decision No. 191. Michael Kavanagh/D. Horkan Ltd.* December 1993.

Certificate issued.

*Decision No. 192. Veritate Ltd/Allied Irish Banks plc.* December 1993.

Certificate issued.

*Decision No. 193. Interfit Ltd/The Tenants of Portmarnock Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 194. Laurence and Catherine Power/Patrick and Margaret Byrne.*

December 1993.

Certificate issued.

*Decision No. 195. Cranford Properties Ltd/The Governor and Company of the Bank of Ireland.* December 1993.

Certificate issued.

*Decision No. 196. Cranford Properties Ltd/Power Meats Ltd.* December 1993.

Certificate issued.

*Decision No. 197. Cranford Properties Ltd/Tenants of Rathfarnham Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 198. Una and Jim Flanagan/Balally Investments Ltd.* December 1993.

Certificate issued.

*Decision No. 199. H. Williams and Company Ltd/Glenberg.* December 1993.

Certificate issued.

*Decision No. 200. Salix Trust Ltd/Huntbrook Ltd.* December 1993.

Certificate issued.

*Decision No. 201. Salix Trust Ltd/Lorcan O'Sullivan.* December 1993.

Certificate issued.

*Decision No. 202. Salix Trust Ltd/The Governor and Company of the Bank of Ireland.* December 1993.

Certificate issued.

*Decision No. 203. Salix Trust Ltd/Tenants of Stillorgan Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 204. Urban Developments Ltd/Glenberg. December 1993.*

Certificate issued.

*Decision No. 205. Glenhest Developments Ltd/Glenberg. December 1993.*

Certificate issued.

*Decision No. 206. The Square Management Ltd/L & C Properties Ltd and others/Tenants of the Square Towncentre. December 1993.*

Certificate issued.

*Decision No. 207. L & C Properties Ltd/Power Supermarkets Ltd. December 1993.*

Certificate issued.

*Decision No. 208. Guardian Assurance plc/The Square Management Ltd/ L & C Properties Ltd/Heatons Ltd. December 1993.*

Certificate issued.

*Decision No. 209. Guardian Assurance plc/The Square Management Ltd/L & C Properties Ltd/Tenants of the Square Towncentre, Tallaght. December 1993.*

Certificate issued.

*Decision No. 210. Airspace Investments Ltd/The Square Management Ltd/5 Tenants of the Square Towncentre, Tallaght. December 1993.*

Certificate issued.

*Decision No. 211. IBI Property Nominees Ltd/The Square Management Ltd/6 Tenants of The Square, Tallaght. December 1993.*

Certificate issued.

*Decision No. 212. IBI Nominees Ltd/The Square Management Ltd/8 Tenants of the Square, Tallaght. December 1993.*

Certificate issued.

*Decision No. 213. AIB Investment Nominees Ltd/The Square Management Ltd/29 Tenants of the Square, Tallaght. December 1993.*

Certificate issued.

*Decision No. 214. L & C Properties Ltd and others/The Square Management Ltd/Tenants of the Square Towncentre, Tallaght. December 1993.*

Certificate issued.

*Decision No. 215. Salix Trust Ltd/The Square Management Ltd/13 Tenants of the Square, Tallaght. December 1993.*

Certificate issued.

*Decision No. 216. Brian and John McCormack/The Square Management Ltd/2 Tenants of the Square Towncentre, Tallaght. December 1993.*

Certificate issued.

*Decision No. 217. Kenneth C. Rohan/The Square Management Ltd/Agricultural Credit Corporation plc. December 1993.*

Certificate issued.

*Decision No. 218. Aviette Trust Company Ltd and Aviette Ltd/Musgraves Ltd. December 1993.*

Certificate issued.

*Decision No. 219. Cadbury Ireland Ltd/Chivers & Sons Ltd. December 1993.*

Exclusive distribution agreement; fruit drinks and cordials.

The notified agreement had expired before the Act came into force. The notification was invalid, and the Authority was unable to grant a certificate or a licence.

*Decisions Nos. 220 – 267. Certified Shopping Centre Leases.*

The third tranche of shopping centre leases, which contained restricted user clauses which did not offend against section 4(1), and which received certificates, is given below.

*Decision No. 220. Power Supermarkets Ltd/Tenants of Ennis Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 221. Power Supermarkets Limited/Mary Jo Duffy.* December 1993.

Certificate issued.

*Decision No. 222. Ballyvolane Limited/Tenants of Ballyvolane Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 223. Nostex Properties Ltd/Tenants of Bishopstown Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 224. Edward and Catherine Drennan/Anthony and Kathryn*

*O'Donovan.* December 1993.

Certificate issued.

*Decision No. 225. Mornington Limited/Tenants of Mahon Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 226. Salix Trust Limited and IBI Nominees Limited/Tenants of Merchants Quay Shopping Centre.* December 1993.

Certificate issued.

*Decision No. 227. Riga Limited/Tenants of Paul Street Shopping Centre, Cork.*

December 1993.

Certificate issued.

*Decision No. 228. Riga Limited/Power Supermarkets Limited. December 1993.*

Certificate issued.

*Decision No. 229. Letterkenny Shopping Centre Ltd/Power Supermarkets Ltd.*

*December 1993.*

Certificate issued.

*Decision No. 230. Aquis Estates Ltd, Paul and Joseph Reynolds and Michael*

*Hegarty/Tenants of the Courtyard Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 231. Galway Homes Ltd/Ballybane Pharmacy Ltd. December 1993.*

Certificate issued.

*Decision No. 232. Drakebury Construction Limited/Investor Landlords/Tenants of  
Eyre Square Centre, Galway. December 1993.*

Certificate issued.

*Decision No. 233. Drakebury Construction Ltd/Governor and Company of the Bank  
of Ireland. December 1993.*

Certificate issued.

*Decision No. 234. G. D. Investments (Galway) Ltd/Michael Breen. December 1993.*

Certificate issued.

*Decision No. 235. G. D. Investments (Galway) Ltd/Michael Breen. December 1993.*

Certificate issued.

*Decision No. 236. Dunnes Stores (Headford Road) Limited, Castlebrook Investments  
Limited and Westport Developments Limited/Tenants of Galway (Headford Road)  
Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 237. Eugenie T. Stokes/Anthony Patterson and Cassandra Collins.*  
December 1993.  
Certificate issued.

*Decision No. 238. Patrick Kennedy/Michael and Bridget Brady.* December 1993.  
Certificate issued.

*Decision No. 239. Michael Reilly and Sons Ltd (now Nabola Developments Ltd)/Doyles Shoe Centre Ltd.* December 1993.  
Certificate issued.

*Decision No. 240. Michael Reilly and Sons Ltd (now Nabola Developments Ltd)/Phoenix Newsagents Ltd.* December 1993.  
Certificate issued.

*Decision No. 241. N. J. Kelly Ltd/Christopher and Anne Lonergan.* December 1993.  
Certificate issued.

*Decision No. 242. Naas Mall Ltd/Tenants of the Caspo Shopping Centre, Naas.*  
December 1993.  
Certificate issued.

*Decision No. 243. Hanford Limited/Tenants of Poplar House, Naas.* December 1993.  
Certificate issued.

*Decision No. 244. Castlebrook Investments Ltd/Tenants of Newbridge Shopping Centre.* December 1993.  
Certificate issued.

*Decision No. 245. Arthur's Quay Developments Ltd/Power Supermarkets Ltd.*  
December 1993.  
Certificate issued.

*Decision No. 246. AIB Investment Nominees Limited, Doncove Ltd and Berryvale Ltd/Irish Handcrafts Limited. December 1993.*

Certificate issued.

*Decision No. 247. AIB Investment Nominees Limited, Doncove Ltd and Berryvale Ltd/Tenants at Arthur's Quay Centre. December 1993.*

Certificate issued.

*Decision No. 248. James Davey/The Governor and Company of the Bank of Ireland. December 1993.*

Certificate issued.

*Decision No. 249. Mall Holdings Ltd/Confrere Ltd. December 1993.*

Certificate issued.

*Decision No. 250. Mall Holdings Ltd/Cassidy's Family Pharmacies Ltd.*

December 1993.

Certificate issued.

*Decision No. 251. Richfield Investments Ltd/William and Anne Dolan.*

December 1993.

Certificate issued.

*Decision No. 252. Richfield Investments Ltd/Five Star Supermarket. December 1993.*

Certificate issued.

*Decision No. 253. Wanze Properties (Ireland) Ltd/Tenants of Drogheda Town Centre. December 1993.*

Certificate issued.

*Decision No. 254. Wanze Properties (Ireland) Ltd/Glenberg. December 1993.*

Certificate issued.

*Decision No. 255. Wanze Properties (Ireland) Ltd/Tenants of Dundalk Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 256. Dunnes Properties Limited, Castlebrook Investments Limited, Westport Contractors Limited and Westport Developments Limited/Tenants of Ballina Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 257. Wanze Properties (Ireland) Ltd/Tenants of Navan Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 258. Noonan Developments Ltd/Rayphael and Breid Kelly.*

December 1993.

Certificate issued.

*Decision No. 259. Five Star Supermarket/Tenants of Clonmel Shopping Centre.*

December 1993.

Certificate issued.

*Decision No. 260. Oakville Limited/Tenants of Oakville Shopping Centre, Clonmel.*

December 1993.

Certificate issued.

*Decision No. 261. Adam F. Torrie (Properties) Ltd/Tenants at Broad Street Shopping Centre, Waterford. December 1993.*

Certificate issued.

*Decision No. 262. Adam F. Torrie Limited/Tenants. December 1993.*

Certificate issued.

*Decision No. 263. Wanze Properties (Ireland) Ltd/Tenants of Athlone Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 264. Edson Investments Ltd/Tenants of Mullingar Shopping Centre, Fairgreen. December 1993.*

Certificate issued.

*Decision No. 265. Outlandus/Tradlew Limited. December 1993.*

Certificate issued.

*Decision No. 266. Wanze Properties (Ireland) Ltd/Tenants of Greystones Shopping Centre. December 1993.*

Certificate issued.

*Decision No. 267. Aviette Trust Company Ltd/Tenants of Firhouse Shopping Centre. December 1993.*

Certificate issued.

*Decisions Nos. 268 – 271. Certified Property Leases.*

A number of property leases had been notified. These leases contained a restricted user clause similar to that in shopping centre leases, and a number of other standard restrictive covenants and obligations. These latter were regarded as being necessary for the maintenance of the landlord/tenant relationship in respect of the tenancy, and as not raising issues under the Act. The restrictive user clauses were not regarded by the Authority as being anti-competitive. The tenant negotiated the user required for his business at the start, but could subsequently seek a change of user, consent to which could not unreasonably be withheld. The tenant was free to undertake other businesses in many other premises, both in the vicinity or elsewhere in the State. A certificate was therefore issued for each notified lease, the first of which are given below.

*Decision No. 268. Baytrust Ltd/Tenants of Old Douglas Premises, Wexford Street. December 1993.*

Certificate issued.

*Decision No. 269. Maeldoon Ltd/Bord Telecom Eireann and An Post.*

December 1993.

Certificate issued.

*Decision No. 270. Comeragh Properties Ltd/Cara Data Processing Ltd.*

December 1993.

Certificate issued.

*Decision No. 271. Fitzwilliam Trust Company/Linen Supply of Ireland Limited/Texas Homecare (Ireland) Limited.* December 1993.

Certificate issued.

*Decision No. 272. Foreign Exchange Company of Ireland Limited/Rochglen Holdings Limited and others.* January 1994.

Merger; VAT refunds for overseas visitors.

Foreign Exchange Company proposed to acquire the entire issued capital of VAT Refunders Ltd from Rochglen Holdings Limited. VRL owned 50% of the share capital of Cashback Limited, the balance being owned by FEI. The arrangements effectively meant that FEI was acquiring full control of Cashback, which obtained refunds of VAT on goods purchased in Ireland by non-EU visitors. There were a number of restrictive clauses, and covenants by directors of the vendor company. The acquisition of complete control of Cashback by a 50% joint owner would have no effect on competition in the relevant market. The restrictions on competing applied for 18 months after completion, and did not exceed what was necessary to secure the transfer of the goodwill of the business to the purchaser. The arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 273. Rhone Poulenc Ireland Limited/Shell Chemicals Ireland Limited.*

February 1994.

Merger; seed treatment products.

Rhone Poulenc proposed to acquire the seed treatment business of Shell. The agreement contained non-compete and non-solicit provisions for four years from

completion, and restrictions on disclosing secret or confidential information. A distribution agreement also had to be executed.

Given the presence of a large number of firms competing in the relevant market, and the claim that entry barriers were low, the Authority concluded that the acquisition was unlikely to have an anti-competitive effect. Since the agreement involved a degree of technical know-how, the four-year restrictions were acceptable, and did not offend against section 4(1). The Authority considered that the restriction on the vendor disclosing technical know-how to third parties did not offend against section 4(1) provided it was not used to prevent the transferrer, after the expiry of the non-compete provisions, from competing with the transferee by means of new and further developments of such know-how.

A certificate was issued.

*Decision No. 274. Falcon Holidays/Ben McArdle Ltd: Package Holiday Insurance.*  
February 1994.

Mandatory travel insurance; package holidays.

Under the agreement, it was mandatory for persons buying Falcon package holidays to purchase the travel insurance offered by the insurance broker, Ben McArdle Ltd. Other tour operators also made it mandatory for customers to take out specific travel insurance, but, in Northern Ireland and Britain, customers had the choice of arranging their own cover. Only a small proportion of the premium paid related to the actual cost of the insurance.

The obligation to take out holiday insurance was imposed by tour operators, not by the State, but the Authority did not consider that this restriction on the freedom of choice of consumers affected competition. It was logical and prudent for consumers to have adequate travel insurance, and a minimum level of cover would have to be specified.

The restriction on the choice of insurer by the customer, however, clearly restricted competition, and offended against section 4(1). The arrangements were not indispensable to secure mandatory travel insurance, and competition for a substantial part of the services in question was restricted, and so the arrangements did not satisfy all the requirements for a licence under section 4(2).

Falcon agreed to amend the arrangements by allowing the customer to take its insurance policy or to make alternative arrangements for insurance, and the amended

arrangements did not offend against section 4(1). (The Authority expressed its concern that four operators would impose a fee if the customer did not take the operator's insurance, as this would frustrate the intention of ensuring greater freedom of choice).

A certificate was issued for the amended agreement.

*Decision No. 275. Sutcliffe Ireland Limited/National Catering Limited.*

February 1994.

Merger; provision of catering services.

Sutcliffe was UK-owned, and proposed taking over Rushmore Investment Company, which owned National Catering, from its shareholders and directors. The agreement included certain non-compete and non-solicit clauses.

There was no indication that the level of market concentration after the merger would pose any threat to competition, and it did not offend against section 4(1). Following discussions with the Authority, the restriction on doing business with customers of the business was reduced from three years to two, but the customers non-solicit clause was maintained at three years. Other non-compete and non-solicit clauses did not exceed in duration what was necessary. Restrictions on the disclosure of know-how and confidential information were amended to provide that these would not be used to prevent the vendor re-entering the market once the non-compete provisions had expired, and they no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decisions Nos. 276 – 283. Certified Shopping Centre and Property Leases.* February 1994.

*Decision No. 276. Cecil and Bella Elkinson, Adeline Jacob and Ivor Elkinson/Damien and Mary Bushe.* February 1994.

Certificate issued.

*Decision No. 277. Rita Power/Frederick and Mary Cleary.* February 1994.

Certificate issued.

*Decision No. 278. Michael and Veronica Grant/Power Leisure Ltd.* February 1994.  
Certificate issued.

*Decision No. 279. Crumlin Investments Ltd/Light Bite.* February 1994.  
Certificate issued.

*Decision No. 280. Leonard Ging and Henry J. Lyons/Five Star Supermarkets/Tenants at Drumcondra Road.* February 1994.  
Certificate issued.

*Decision No. 281. Glenberg/Kieran Coogan.* February 1994.  
Certificate issued.

*Decision No. 282. Cosine Ltd/Con O'Sullivan.* February 1994.  
Certificate issued.

*Decision No. 283. Green Property plc/Tenants at Northside Shopping Centre.*  
February 1994.  
Certificate issued.

*Decision No. 284. Irish Distillers Ltd/Celtic Glass Ltd; Irish Distillers Ltd/Celtic Glass Ltd; Old Bushmills Distillery Ltd/Celtic Glass Ltd; Irish Distillers Ltd/Lough Derg Handcrafts Ltd; Irish Distillers Ltd/LLEDO plc; Irish Distillers Ltd/Tobler Suchard Ltd.* February 1994.

Trademark and/or design agreements; glassware, polyester resin models, models of vintage motor vehicles and liqueur chocolates.

These agreements related to non-exclusive licences to use the trademarks and designs for the sole purpose of the manufacture of the products. Where relevant, there was a requirement that an Irish Distillers' product should be used exclusively, and a royalty was payable in a few cases. The users were not in competition with Irish Distillers, and the latter had property rights in designs and trademarks, which it was entitled to license the use of by others. The various restrictive clauses did not affect competition, and did not offend against section 4(1).

Certificates were issued.

*Decision No. 285. Irish Distillers Group plc/Cooley Distillery plc. February 1994.*  
Merger; Irish whiskey production.

Irish Distillers proposed to take over the entire shares and assets of Cooley. The Authority concluded that the relevant market was the final product market for Irish whiskey in Ireland. The market was highly concentrated already. As IDG and Cooley were the only producers of Irish whiskey, the arrangements would have resulted in all of the existing distilleries in the State being brought under the control of IDG. The Authority considered that the costs involved in building a distillery and in holding stocks of whiskey until maturity constituted sunk costs and posed significant barriers to entry into the relevant market. Cooley was a potential competitor and, given the intention of IDG to close Cooley down, any possibility of Cooley becoming a competitor would be eliminated. The Authority did not accept the parties' submission that the arrangements satisfied the failing firm defence.

The Authority considered that the arrangements would adversely affect competition in the markets for Irish whiskey, other whiskey and certain other drinks. The interim arrangements prevented the supply of export orders and also affected competition. The arrangements offended against section 4(1). They did not meet any of the requirements of section 4(2).

The Authority refused to issue a certificate or grant a licence.

*Decision No. 286. Conoco Consignee Agreement. February 1994.*

Licence to operate a company-owned petrol station and exclusive re-selling;  
petroleum products.

Besides the licence to operate a Conoco station and sell only Jet fuel on the premises, there were special provisions in respect of a convenience store on the premises.

Resale fuel prices were determined by the supplier, and a commission was paid to the consignee. The agreement could have a duration of up to ten years. The consignee was an independent trader in the convenience shop. He paid a commission on sales to Conoco, which could approve of the suppliers to the shop.

The consignee was a self-employed contractor. The Authority stated that the question of agency was quite complex, and each case required individual consideration. It considered that a commercial agent was a self-employed intermediary between the principal and a purchaser or seller. He could undertake no autonomous commercial behaviour, and certain restrictions on him were fundamental to the relationship. The

Authority considered that the Conoco consignee, in operating the petrol station, could be considered to be a commercial agent, but that he was an independent trader, not an agent, in the shop.

An agreement between a principal and a commercial agent did not, in principle, offend against section 4(1), though certain clauses might offend. In this case, neither the agreement nor its provisions offended against section 4(1).

The Authority considered that the provisions regarding the shop did not offend against section 4(1), except for one provision. It was concerned that the right of Conoco to approve suppliers of shop products could limit the freedom of the consignee to determine what products to sell, and from whom he might obtain supplies, thus restricting competition. At the suggestion of the Authority, Conoco agreed to amend the agreement to provide that approval of a supplier would only be withheld for objectively valid reasons which would be disclosed to the consignee. As amended, the agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 287. Irish Distillers Ltd/Peadar O'Lionaird; Irish Distillers Ltd/Phil Thompson; Irish Distillers Ltd/Mileeven Ltd; Irish Distillers Ltd/Lakeshore Foods Ltd. February 1994.*

Trademark and/or design agreements; marmalade, honey and mustard.

For the same reasons given in Decision No. 284, the trademark and design agreements, and their restrictive clauses, did not offend against section 4(1).

Certificates were issued.

*Decisions Nos. 288 – 296. Certified Shopping Centre Leases and Other Property Agreements.*

Shopping centre leases and other property agreements, which contained restricted user clauses, received certificates, as follows:

*Decision No. 288. University College Dublin/The Governor and Company of the Bank of Ireland. March 1994.*

Certificate issued.

*Decision No. 289. University of Limerick/The Governor and Company of the Bank of Ireland. March 1994.*

Certificate issued.

*Decision No. 290. University College Galway/The Governor and Company of the Bank of Ireland. March 1994.*

Certificate issued.

*Decision No. 291. Gardner House Company/The Institute of Chartered Accountants in Ireland/The Governor and Company of the Bank of Ireland. March 1994.*

Certificate issued.

*Decision No. 292. Hotel and Motel Enterprises Limited/The Governor and Company of the Bank of Ireland. March 1994.*

Certificate issued.

*Decision No. 293. NIHE, Dublin (now Dublin City University)/Allied Irish Banks plc. March 1994.*

Certificate issued.

*Decision No. 294. Shannon Aerospace Limited/Allied Irish Banks plc. March 1994.*

Certificate issued.

*Decision No. 295. Glenberg/Associated Restaurants (Ireland) Ltd. March 1994.*

Certificate issued.

*Decision No. 296. Fitzwilliam Trust Company/Fitzpatrick Associates Economic Consultants Limited. March 1994.*

Certificate issued.

*Decision No. 297. Gas & Oil Parts Ltd/Heating Replacement Parts & Controls Ltd. March 1994.*

Merger; spare parts for heating equipment.

The purchaser was not previously active in the Irish market, and the acquired company had a relatively small market share, so the level of market concentration was not affected. The purchaser would constitute a significant new entrant, so there would be no anti-competitive effect.

Most of the non-compete provisions did not offend against section 4(1). The non-compete and non-solicit clauses were for a period of three years post-completion. The period was reduced to two years, and the provisions no longer offended against section 4(1). The restriction on the disclosure of confidential information was acceptable provided that it was not used to prevent the vendor re-entering the relevant market after the non-compete clause had expired.

A certificate was issued for the amended agreement.

*Decision No. 298. Reflex Investments plc/Auto Computing Limited. March 1994.*

Merger; computing industry.

The sale of business was completed prior to the commencement date of the Act, and so did not come within the scope of section 4(1).

Non-compete provisions for two years after completion had expired, but did not offend against section 4(1). One employee was subject to a non-compete clause for one year after employment ceased, and another for two years. These offended against section 4(1), but the restrictions were waived by the purchaser. A five-year restriction on the vendors from purchasing shares in any unquoted competing Irish company did not offend, since technical know-how was involved. An unlimited restriction on using or disclosing confidential information did not offend provided that it was not used to prevent the vendor re-entering the market.

A certificate was issued for the amended agreement.

*Decision No. 299. IAWS Group plc/Shamrock Foods Limited. March 1994.*

Merger; foodstuffs.

The acquisition was completed prior to the commencement of the Act, and the subsequent purchase of the minority shareholding of the vendor/directors did not offend against section 4(1). The non-compete and non-solicit provisions applied while the vendors remained as shareholders, and for 18 months after they ceased to be shareholders, and this did not offend either.

A certificate was issued.

*Decision No. 300. Irish Nurseries Limited/Uniplumo (Ireland) Limited. March 1994.*  
Merger; wholesale fruit business and plant nursery.

The sale of business was completed prior to the commencement date of the Act. The non-compete restrictions had a duration of three years after completion, but the restrictions were not absolute. The vendor firm went into liquidation before the three years expired, so the question of restricting competition no longer arose. The other restrictions, including that on the vendor selling a premises to a competing business, also did not offend against section 4(1).

A certificate was issued.

*Decision No. 301. Rohan Construction Limited/Rohcon Limited. March 1994.*

Asset purchase; construction industry.

The purchaser effectively acquired the on-going business of the vendor. The impact on market concentration would be relatively slight, and the sale of business did not offend against section 4(1). The vendor was prevented from competing in the construction business for an unlimited period of time. The purchaser agreed to reduce the period of restriction to four years after completion. There was a non-compete clause in respect of a named individual for five years, which was reduced to four years. While these periods were longer than the Authority would normally accept, it considered that in the circumstances of the construction industry, with infrequent purchase of products, the longer duration of the restriction did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 302. Barlo Group plc/Kingspan Group plc. March 1994.*

Asset purchase; radiator manufacture.

Kingspan proposed to acquire the assets and property of Kingspan Veba, but not the actual company or its liabilities. The two firms had a combined market share of over 70%, and a detailed analysis of the industry was required. The barriers to entry did not act as a major deterrent to potential entrants, imports accounted for a significant degree of radiator sales in Ireland, and a significant proportion of Irish production was exported. The arrangements were unlikely to result in a diminution of competition. Veba was in financial difficulties, and, in the absence of Barlo, the plant would be unlikely to attract any alternative purchaser and would almost certainly close. This

would inevitably lead to a higher degree of market concentration in any event. The acquisition did not offend against section 4(1).

The non-compete and non-solicit clauses had a duration of two years. The restriction on the use or disclosure of confidential information was acceptable provided it was not used to prevent the vendor re-entering the market.

A certificate was issued.

*Decision No. 303. Patrick Flynn/Wardell Roberts. April 1994.*

Agency; wine and spirit distribution.

Mr. Flynn was a self-employed contractor, selling goods on behalf of the principal at prices determined by the principal, and receiving a commission. He was considered to be a commercial agent, and neither the agency agreement as such, nor any of its constituent clauses, offended against section 4(1).

A certificate was issued.

*Decision No. 304. SuperToys. April 1994.*

Exclusive purchasing; toys.

This related to the standard agreement between Musgrave Limited and a number of independent toy retailers trading under the name of SuperToys. Musgraves undertook to negotiate with suppliers on behalf of the retailers for the provision of a certain range of toys. They also produced SuperToys catalogues and other advertising material. The retailers undertook to display the SuperToys fascia sign prominently, to purchase a range of toys from suppliers nominated by Musgraves, and to distribute the advertising catalogue locally.

There was a prohibition on the retailers purchasing certain toys from other suppliers, but they could purchase all other goods from any source they wished. The Authority considered that this was more akin to a group purchasing agreement than exclusive purchasing, and the retailers were free to leave the group at any time, so this restriction did not offend against section 4(1).

The retailers were also required to abide by the prices specified in the twice-yearly catalogue. In practice, the prices were proposed by Musgraves to a Council of Retailers and, if agreed, were put before a full meeting of members for endorsement. The Authority considered that this arrangement amounted to an agreement to fix the retail selling prices of the goods. The agreement also included some element of

vertical price fixing or resale price maintenance. It therefore offended against section 4(1).

The Authority acknowledged that price display was an essential feature of a published catalogue and that the recommending of prices was acceptable, but it should be made clear that the retailer was not obliged to adhere to the catalogue price. Musgraves agreed to allow the retailers complete freedom to set their prices, and to include a statement on the front cover of the catalogue that the prices were merely recommended. The agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decisions Nos. 305 – 318. Certified Shopping Centre Leases and Other Property Agreements.*

*Decision No. 305. Moralto Investments Limited/Tenants of Island House.*

April 1994.

Certificate issued.

*Decision No. 306. Hoorn & Winkel (Irl) Limited/Esmonde Motors Limited.*

April 1994.

Certificate issued.

*Decision No. 307. Boreenmanna Investments Limited/Tenants of Elm Court.*

April 1994.

Certificate issued.

*Decision No. 308. McMullan Bros. Limited/Power Supermarkets Limited.*

April 1994.

Certificate issued.

*Decision No. 309. Todd Burns & Company Limited (now ABF Properties Limited)/Power Supermarkets Limited.* April 1994.

Certificate issued.

*Decision No. 310. Bridtron Limited/Tenants of 9/10 Lower Bridge Street.*

April 1994.

Certificate issued.

*Decision No. 311. Liam O'Farrell, and Philomena, Carmel Anne, Orlaith, Siobhan and Seamus McDermott, and Geranth Limited/Tenants of Merchants Hall.*

April 1994.

Certificate issued.

*Decision No. 312. Liam O'Farrell, and Philomena, Carmel Anne, Orlaith, Siobhan and Seamus McDermott, and Bridtron Limited/Tenants of Merchants House.*

April 1994.

Certificate issued.

*Decision No. 313. Owen McDermott and Liam O'Farrell/Tenants at Merchants Court.* April 1994.

Certificate issued.

*Decision No. 314. Swintron Ltd/Design Factory Limited.* April 1994.

Certificate issued.

*Decision No. 315. Rowe Mark Holdings and Peter Holdings/Bally London Shoe Company Limited.* April 1994.

Certificate issued.

*Decision No. 316. Power Supermarkets Limited/Pat Owens.* April 1994.

Certificate issued.

*Decision No. 317. Omni Park Limited/Omni Med Limited.* April 1994.

Certificate issued.

*Decision No. 318. Vallbury Limited/Cassidys Family Pharmacies Limited.*

April 1994.

Certificate issued.

*Decision No. 319. Campus/Delta Distributor Agreements – Guarantee; Licence; Licence; Debenture; Debenture; Equipment. April 1994.*

Exclusive distribution; fuel oils.

This decision related to four types of document signed by Campus/Delta with some of their exclusive distributors. The arrangements were associated with the standard distribution agreement, which the Authority had decided satisfied the conditions of the category licence (Decision No. 144). They were dependent upon, and sometimes strengthened, the distribution agreements. All the agreements offended against section 4(1), because they underpinned an agreement which itself offended against section 4(1). The related agreements also satisfied the conditions of the category licence, and the requirements of section 4(2).

Licences were granted for the six agreements, for the period from 21 April 1994 to 31 December 1998 (the expiry date of the category licence). No conditions were attached.

*Decision No. 320. Maxol Distributor Agreements – Licence; Deed of Charge. April 1994.*

Exclusive distribution; fuel oils.

The Authority considered that the standard exclusive distribution agreement for fuel oils, as amended, satisfied the conditions of the category licence (Decision No. 144). For the reasons given in the previous decision (Campus, No. 319), these related agreements offended against section 4(1), but they satisfied the conditions of the category licence and those of section 4(2).

Licences were granted for the period from 21 April 1994 to 31 December 1998, and no conditions were attached.

*Decision No. 321. Statoil Distributor Agreements – Cash Advance; Loan. April 1994.*

Exclusive distribution; fuel oils.

As in the case of Campus (Decision No. 319) above, licences were granted for the period from 21 April 1994 to 31 December 1998, and no conditions were attached.

*Decision No. 322. Burmah Castrol/Distributor Agreement (Loan Equipment). April 1994.*

Exclusive distribution; fuel oils.

As in the case of Campus (Decision No. 319) above, licences were granted for the period from 21 April 1994 to 31 December 1998, and no conditions were attached.

*Decision No. 323. Canada Life Assurance Company of Great Britain Limited/Lloyds Abbey Life plc. May 1994.*

Merger; life assurance and pensions.

The relevant market was highly concentrated, largely due to the size of a single firm. The increase in market concentration arising from the agreement was quite low, and the acquisition was unlikely to have any effect on competition in the market. The non-compete and non-solicit provisions were reduced from three years after completion to two years, and they no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 324. Burmah Castrol (Ireland) Ltd. Existing cash loan agreement.*

May 1994.

Cash loan; lubricating oil and equipment.

Burmah had made cash loans to certain resellers for the purchase of lubricating oil equipment. The purchaser agreed not to enter into any arrangement with another supplier which would fetter its dealing in Castrol products. The effect of the agreement was to permit the sale of Castrol, and not to prevent or hinder the sale of any competing lubricating oils, and it did not offend against section 4(1).

A certificate was issued.

*Decision No. 325. Shell Appointment and Licence. May 1994.*

Agency; petrol station operation.

This was a standard agreement with Shell licensees for the operation of a Shell-owned petrol station only. The Authority followed the approach adopted in the Conoco consignee agreement (Decision No. 286). It regarded the operator as a commercial agent, and it considered that none of the clauses offended against section 4(1).

A certificate was issued.

*Decision No. 326. Performing Right Society and individual creators/publishers (Assignment of Copyright). May 1994.*

Exclusive assignment; music copyright.

Three standard agreements were notified by the PRS and its then subsidiary, the Irish Music Rights Organisation, relating to the assignment by creators and publishers of copyright in musical works to PRS. This assignment enabled PRS to administer the performing right in the State, in the UK and throughout the world.

PRS was granted the exclusive right necessary to exploit the copyright, and each member of PRS was precluded from administering the performing right himself. The agreements also involved a restriction on the freedom of copyright users to purchase the performing right from any supplier other than PRS. The Authority considered that the arrangements, taken in their collective context, constituted an exclusive copyright enforcement system involving independent undertakings. Such arrangements, between actual or potential competitors, were restrictive of competition and offended against section 4(1).

The Authority considered that other provisions also offended against section 4(1), as follows:

- (a) the form and duration of the assignment agreement;
- (b) the restriction on the times at which rights might be divided by category or by country;
- (c) restrictions on termination of membership; and
- (d) restrictions on allowing members to administer the performing right themselves.

The Authority accepted that a collective copyright enforcement system, in general, produced an improvement in the provision of services, and it involved efficiencies, and that consumers would be allowed a fair share of the benefits. It concluded, however, that preventing PRS members from granting non-exclusive licences to individual users for particular purposes was not indispensable. It concluded that the other restrictions were not indispensable either. The three year period for the notice of termination of membership was not considered to be indispensable, though a reduction of the period to one year would satisfy its concerns. All the conditions for a licence under section 4(2) were not satisfied.

Following the issue of a statement of objections, a response by PRS and an oral hearing, PRS informed the Authority that they were not prepared to make any amendments.

The Authority refused to grant a certificate or a licence.

*Decision No. 327. Shell Licence. May 1994.*

Agency; petrol station operation.

This was a standard agreement for the operation of a Shell-owned petrol station and a convenience shop. Following the approach in the Conoco consignee agreement (Decision No. 286), the operator was regarded by the Authority as a commercial agent in respect of the petrol station, but an independent trader in the shop. The agency clauses did not offend against section 4(1). Shell agreed to amend the agreement to provide that the obligation upon the licensee to withdraw from the site any shop products, etc., which Shell considered inappropriate would only be invoked for objectively valid reasons which would be disclosed to the licensee, and this no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 328. Esso Contractor Agreement. May 1994.*

Agency; petrol station operation.

This was a standard agreement with Esso operators of company-owned stations, known as contractors, in respect of a petrol station and a convenience shop. The Authority considered that the contractor was a commercial agent both in respect of the petrol station and in respect of the shop (shop products being purchased and resold for the account of Artane, a subsidiary of Esso, at prices determined by Artane). The clauses in the agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 329. Reflex Investments plc/Storage Technology Ltd. May 1994.*

Exclusive distribution; computer products.

The Authority considered that the agreement offended against section 4(1), for the reasons given in the category licence for exclusive distribution agreements (Decision No. 144). The agreement was made before the Act commenced, but was terminated in May 1993. A licence could not be made retrospective in this case, even if the

conditions for the grant of a licence were satisfied. Certain restrictions would not have satisfied the requirements of the category licence, nor would they have satisfied the conditions of section 4(2).

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 330. James and Hilda Underwood/Ye Olde Coopers Inns Ltd.*

May 1994.

Sale of business; licensed premises, restaurant and bed and breakfast.

The sale of business did not offend against section 4(1). The parties agreed to reduce the non-compete period from three years to two years, and this no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 331. EBS Building Society/Midland and Western Building Society.*

May 1994.

Transfer of engagements (merger); building society.

The agreement was notified to the Minister under the Mergers Acts, and no order was made, and also to the Central Bank. The Authority considered that the arrangements would not have a significant effect on the level of market concentration, and would not result in any lessening of competition. There were no non-compete clauses.

There were certain restrictions on what the MWBS and its directors could do between the date of the transfer of engagements and the date of its registration with the Central Bank. These provisions did not offend against section 4(1).

A certificate was issued.

*Decision No. 332. Sedgwick Dineen Limited/Legal and Commercial Insurances*

*Limited.* May 1994.

Sale of business and assets; insurance services.

The agreement was completed prior to the commencement date of the Act, and did not come within the scope of section 4(1). There was a non-compete clause and a non-solicit clause for five years from the date of completion. The parties argued that the sale involved technical know-how, but this was not accepted by the Authority. In the service agreements with the transferring employees, there was a restriction on the employee from soliciting other employees for one year after termination of

employment. The restrictions offended against section 4(1), and did not satisfy the requirements of section 4(2). (A statement of objections was issued, but no oral hearing was requested).

The Authority refused to issue a certificate or grant a licence.

*Decision No. 333. Martin Andrew Doyle/Joseph Moffitt. June 1994.*

Sale of business; veterinary practice.

The arrangement related to the creation of a veterinary partnership and for the subsequent purchase of the business by one of the partners, over a period of ten years, and there were certain non-compete provisions. The sale of business, while slightly unusual in form, did not offend against section 4(1). There was a non-compete clause for five years after completion of the sale, which offended against section 4(1). The purchaser was restricted from providing certain services for five years from the date of the agreement, and this also offended. A number of restrictions in the partnership deed were considered not to offend, but this did not apply to a five-year non-compete provision after dissolution of the partnership. In combination, the non-compete provisions also offended against section 4(1). The restrictions were not regarded as indispensable, and they did not satisfy the requirements of section 4(2). (A statement of objections was issued, but no response to it was received).

The Authority refused to issue a certificate or grant a licence.

*Decision No. 334. Estuary Distributor Agreements – Debenture; Guarantee and Indemnity. June 1994.*

Exclusive distribution; motor fuels.

These were related to the standard distribution agreement between Estuary and its distributors which, as amended, satisfied the conditions of the category licence for exclusive distribution agreements (Decision No. 144). They offended against section 4(1), but satisfied the conditions of the category licence and the requirements of section 4(2).

Licences were granted for the period from 10 June 1994 to 31 December 1998, and no conditions were attached.

*Decision No. 335. Irish Stock Exchange Rules in relation to dealings in Irish Government Securities. June 1994.*

The rules set out the basis on which member firms of the Stock Exchange might deal in Irish Gilts. They provided that brokers could operate in an agency capacity only and set out fixed commissions to be charged by all member firms. The rate of commission had been approved by the Minister for Finance.

The Authority concluded that the setting of fixed minimum commissions constituted price fixing. The agency only rule prevented the possible emergence of market makers in the gilt market and therefore competition in the market was distorted to some degree. It considered that the rules offended against section 4(1), and did not satisfy the requirements for a licence under section 4(2). A statement of objections was issued.

The Exchange decided to abolish the rules on fixed commissions, and stated its intention to change the agency rule subject to the approval of the Minister for Finance. The decision was not concerned with any new rules which might be introduced by the Exchange.

The Authority refused to issue a certificate or grant a licence.

*Decision No. 336. The Net Book and Related Agreements – Members Version; Non-Members Version; Book Club Regulations 1985; Library Licence; Book Agent's Licence; Quantity Book Buying Scheme; National Book Sale Conditions; Primary and Secondary School Licence. June 1994.*

Price maintenance; books.

These arrangements, comprising eight agreements known as the Net Book Agreement, related to the imposition by UK publishers of a minimum net price on most of their books sold within the State. The most significant clause in the agreement was that which provided that, except in specified circumstances, books covered by the agreement (known as net books) could not be sold at less than the net published price, i.e. the price fixed by the publisher.

The arrangements were both an agreement and a decision of an undertaking. The Authority considered that the agreement involved a degree of resale price maintenance, which offended against section 4(1). The members' and non-members' versions did not satisfy any of the requirements for a licence under section 4(2). The

primary aim of the other agreements was to ensure the effective operation of resale price maintenance, and they also failed to satisfy the requirements for a licence. The Authority refused to issue a certificate or issue a licence for the notified agreements.

*Decision No. 337. Thomas Wixted/Patrick Healy. June 1994.*

Property lease.

The lease and the restricted user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 338. Trustees of Telecom Eireann Superannuation Fund/Bord Telecom Eireann. June 1994.*

Property lease.

The lease and the restricted user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 339. Trustees of Telecom Eireann Superannuation Fund/Bord Telecom Eireann (Lapp's Quay, Cork). June 1994.*

Property lease.

The lease and the restricted user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 340. Toal O'Muire, John Smyth, David Kavanagh/Toscarva Rest Ltd. June 1994.*

Property lease.

The lease and the restricted user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 341. Ethel and Ann Gorman/Adrian Elkinson. June 1994.*

Property lease.

The lease and the restricted user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 342. Ipodec Ordures Usines S. A./GKN United Kingdom plc.*

June 1994.

Merger; waste disposal.

The sale of business was completed prior to the commencement date of the Act, and did not come within the scope of the Act. There were non-compete and non-solicit clauses for five years from the date of the agreement. The Authority considered that there was no degree of technical know-how. It considered that the restrictions offended against section 4(1), and satisfied none of the requirements for a licence under section 4(2). Following the issue of a statement of objections, there was no request for an oral hearing.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 343. IAWS (Sales) Ltd/Bolands Mills Ltd. June 1994.*

Merger; flour milling.

The transfer of assets occurred before the commencement of the Act, and did not come within the scope of section 4(1). The two-year non-compete clause did not offend against section 4(1).

A certificate was issued.

*Decision No. 344. Siuicre Eireann cpt/Talmino Ltd and Messrs. Charles Lyons, Charles Garavan, Thomas Keleghan and Michael Tully. June 1994.*

Merger; sugar distribution.

Besides the agreement for a sale of business, there were employment contracts with the vendors, with non-compete provisions. The sale of business was discharged by performance before the Act commenced, and did not come within the scope of section 4(1). There was a five-year non-compete clause in the share purchase agreement, and a restriction of unlimited duration on enticing any person employed by the company to leave. The service contracts contained non-compete restrictions for three years after employment ceased, and a restriction on soliciting any employee at any time. All these offended against section 4(1). The purchaser agreed not to enforce the restrictive covenants after 31 March 1994, and they no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 345. Grittar/David J. Bolger. June 1994.*

Sale/lease of land.

The restrictive and exclusive user clauses in the agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 346. Dairygold Cooperative Society Ltd/Conor and Annabella O'Brien. June 1994.*

Sale of premises.

The sale of premises was completed prior to the commencement date of the Act, and did not come within the scope of the Act. The restrictive and exclusive user clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 347. Dairygold Trading Limited/Suttons Limited. July 1994.*

Merger; energy, hardware and agricultural products.

Suttons had only a relatively small share of the market, so that the agreement was unlikely to lead to an increase in market concentration to an extent that would threaten competition. It did not offend against section 4(1), and there were no restrictive provisions.

A certificate was issued.

*Decision No. 348. The Booksellers Association (Currency Conversion Chart).*

September 1994.

Agreement on exchange rate conversion; books.

This related to arrangements between members of the Irish branch of the Booksellers Association involving a currency conversion chart for converting the cover price of books imported from the UK into Irish pounds for sale to consumers. The Authority concluded that the arrangements facilitated the operation in Ireland of the Net Book Agreement. The latter had been refused a certificate or a licence (Decision No. 336). An agreement which involved resale price maintenance, or was designed to facilitate its operation, offended against section 4(1), and the arrangements did not satisfy any of the requirements for a licence under section 4(2).

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 349. Sedgwick Overseas Group Limited/P. J. Dineen. September 1994.*

Share purchase; pensions and insurance.

Sedgwick held 80% of the shares in Sedgwick Dineen, and obtained an option to purchase the remaining 20% from Mr. Dineen. There was also an employment agreement relating to Mr. Dineen. The acquisition of the remaining shares had no implications for competition, and did not offend against section 4(1). The non-compete clause for two years after completion of the sale agreement did not offend either. The employment agreement prevented Mr. Dineen from soliciting clients or employees for one year after cessation of employment, but did not prevent him from competing with the former employer. This did not offend against section 4(1).

A certificate was issued.

*Decision No. 350. Ove Arkil A/S/Tarmak Company Ltd. September 1994.*

Merger; tarmacadam products.

The agreement involved the purchase of the entire share capital of Tarmak, and it contained a non-compete clause. It also provided that the vendors enter into service agreements with the purchaser. There was a five year non-compete clause from the date of the agreement, including non-solicit provisions. This was reduced to two years following the issue of a statement of objections. The service agreements prevented the vendors from competing during their employment, and for one year after employment ceased. The restrictions were limited to the period of employment. With these amendments, the agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 351. IAWS-Agri Society Ltd/Unigrain Ltd. September 1994.*

Merger; agricultural products.

The sale of business was completed before the commencement date of the Act, and did not come within the scope of section 4(1). There was a provision preventing the vendors from competing with the purchaser, or from soliciting employees, for three years from the completion date, and this had expired in January 1992. Another provision prevented two of the vendors, who had become employees, from competing or soliciting employees for the duration of their employment, and for three years after the cessation of employment. The employment of one person ceased in 1990, and the non-compete clause expired in 1993. The provision continued to apply to the other

person. A statement of objections was issued, to which there was a response, but no oral hearing was requested. The Authority considered that the restrictions offended against section 4(1), and did not satisfy the conditions for a licence under section 4(2). The Authority refused to issue a certificate or to grant a licence.

*Decision No. 352. Kantoher Food Products Ltd/Carton Brothers Ltd.*

September 1994.

Merger; turkey processing.

The Authority considered that the sale of business agreement came within the scope of the Act, but did not offend against section 4(1). The non-compete provision prevented the vendor from competing with the purchaser for three years from the date of the transfer of equipment. The Authority considered that the duration of the non-compete clause was too long and was concerned that it only began to operate long after the date of the agreement. The restriction offended against section 4(1), and it did not satisfy the conditions for a licence under section 4(2). A statement of objections was issued, to which there was a response, but an oral hearing was not requested.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 353. Hickson International plc/Angus Fine Chemicals Ltd.*

September 1994.

Merger; chemicals and pharmaceuticals.

The arrangements included a number of related agreements. The sale of business was unlikely to have any effect on competition in the relevant market, and did not offend against section 4(1). Non-compete provisions for four years did not offend against section 4(1), since technical know-how was involved. There was an indefinite prohibition on the use and disclosure of confidential information, including technical know-how, which offended against section 4(1), and did not satisfy the requirements of section 4(2). Following the issue of a statement of objections, this unlimited restriction was essentially limited to four years, and no longer offended against section 4(1). The supply agreement obliged the acquired firm to purchase 90% of its requirements of a particular product from its previous owner. The Authority considered that this offended against section 4(1), but, as it gave an essential

guarantee of supply, it satisfied the requirements of section 4(2). The licence was limited to a period of five years from the date of notification.

The Authority granted a licence to the supply agreement, from July 1992 to July 1997, and it issued a certificate to the sale and related agreements.

*Decision No. 354. Musgraves Ltd – Licensee and Franchise Agreements.*

September 1994.

Licensee and franchise agreements; grocery stores.

Musgraves, trading as SuperValu and Centra Distribution, had standard agreements with licensees and franchisees. The retailers were obliged to purchase all of their requirements from the range of merchandise offered by Musgraves. This was an exclusive purchasing agreement. The licence agreements together formed a network of restrictive agreements which tended to introduce a considerable degree of rigidity into the market, and they offended against section 4(1).

The licensee was obliged to stock and display Musgraves own brand goods at the price recommended by Musgraves. This was likely to result in selling at these recommended prices and was a form of resale price maintenance, and offended against section 4(1). It also restricted the retailer's ability to advertise lower prices, and this also offended against section 4(1). The retailers had to adhere to the prices of goods, both own brand and non-own brand, set by Musgraves for goods on promotion, and this offended against section 4(1) as well.

Other clauses in the licence agreements offended against section 4(1), including:

- (a) a requirement to purchase all fixtures and fittings from Musgraves;
- (b) a requirement not to sell the business to a competitor of Musgraves;
- (c) a requirement to give Musgraves first option to purchase the business; and
- (d) a requirement not to compete in the grocery trade within a limited radius of the business for one year after termination of the agreement.

(The post-termination requirement would be acceptable where Musgraves had purchased the business).

The franchise agreements obliged the franchisees to purchase all their requirements from Musgraves or from approved suppliers for a period of ten years. Musgraves owned these outlets and this requirement did not offend against section 4(1). The restrictions on franchisees in relation to recommended prices, however, offended

against section 4(1). Other restrictions on franchisees also offended against section 4(1), as follows:

- (a) restrictions in respect of the provision of insurance services and the nomination of an accountant; and
- (b) a post-termination non-compete clause for one year after termination of the agreement.

The Authority concluded that the exclusive purchasing obligation in the licensing agreements satisfied the requirements for a licence under section 4(2). The pricing requirements and the other restrictions did not satisfy the requirements for a licence. Musgraves proposed several amendments to the offensive clauses, but it proved impossible to reach agreement on acceptable amendments.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 355. Mount Juliet/David Leadbetter Golf Academy Inc.*

September 1994.

Exclusive arrangements; golf academy.

The agreement related to the opening of a golf school at Mount Juliet golf course, and David Leadbetter would be the sole provider of golf tuition there. It would also not provide golf instruction services to any third party in Ireland or Northern Ireland. Mount Juliet agreed not to engage the services of any of the Academy directors or instructors for 18 months after termination of the agreement. Another clause prevented the disclosure of confidential information relating to the Academy or its tuition methods by Mount Juliet or its employees. None of these restrictions affected competition, and they did not offend against section 4(1).

A certificate was issued.

*Decision No. 356. Cable & Wireless Ltd/Irish Telephone Rentals Ltd/Sound Systems Ltd. Standard rental contracts with business users.* September 1994.

Rental agreements; telecommunications equipment.

Cable & Wireless and its subsidiaries had notified 25 different types of rental agreement. It agreed to supply and rent out equipment for a fixed term of years, varying from five to fourteen years or more. The annual rental payment usually included a charge for maintenance. No additions or alterations could be made to the

installation without the consent of C & W, nor could the customer repair or replace the equipment. The customer was not permitted to pass on intellectual property, such as software, to third parties. In some cases, the customer had to purchase batteries for transceivers from C & W.

The Authority considered that rental agreements did not offend against section 4(1), but it was concerned about certain restrictions which offended against section 4(1) and did not satisfy the requirements of section 4(2). C & W amended certain clauses by providing that their consent for additions, alterations or extensions would only be withheld for objectively valid reasons which would be disclosed to the customer. It also removed the requirement to purchase batteries from the relevant agreements. As amended, the agreements no longer offended against section 4(1).

A certificate was issued for the amended agreements.

*Decision No. 357. Statoil Distributor Agreement (Equipment Loan).*

September 1994.

Equipment loan agreement; fuel oils.

This was related to the standard distribution agreement between Statoil and its distributors, which satisfied the conditions of the category licence for exclusive distribution agreements (Decision No. 144). It was also linked to other Statoil distributor agreements (Decision No. 321). It offended against section 4(1), but satisfied the conditions of the category licence and the requirements of section 4(2). A licence was granted for the period from 20 September 1994 to 31 December 1998, and no conditions were attached.

*Decision No. 358. FBD Developments (Cork) Limited/Southern Health Board.*

October 1994.

Property lease.

A certificate was issued.

*Decision No. 359. Wanze Properties (Ireland) Ltd/FAS. October 1994.*

Property lease.

A certificate was issued.

*Decision No. 360. George and Margaret Paul/Riobard Lyne. October 1994.*

Sale of business; guest house.

The sale of the guest house did not offend against section 4(1). The vendors were prevented for two years from the date of sale from soliciting any client of the business, or from becoming involved in the hotel, hostel or guest house business within a three mile radius of the premises, and this did not offend against section 4(1). A certificate was issued.

*Decision No. 361. Burmah Castrol (Ireland) Ltd. Hire purchase agreement and lubricating equipment loan agreement (existing versions of agreements).*

October 1994.

Exclusive use of equipment and exclusive purchasing; lubricating oils.

In one case, Burmah loaned equipment to the reseller, and the reseller agreed to use the equipment exclusively for Castrol products. He agreed to return the equipment if he ceased to purchase his total requirements of oils and greases from Castrol. Each agreement was for an indefinite period. Under the hire purchase agreement, Burmah supplied equipment on hire purchase terms, and the reseller paid a monthly rental, the equipment eventually becoming his property. The reseller agreed to use and stock in the equipment Castrol lubricants exclusively. These agreements had a duration ranging from one to ten years.

The Authority considered that the exclusive use provisions had the effect of ensuring exclusive purchasing in many cases and offended against section 4(1). The indefinite duration of the equipment loan agreement, with no provisions for early termination, was likely to amount to foreclosure of products of competitors, and offended against section 4(1), as did the exclusive purchasing requirement in this agreement, again for an indefinite period.

The Authority recognised that restraints in vertical agreements could have pro-competitive features, but that benefits did not automatically result from such agreements. It considered that the exclusive purchasing requirement did not satisfy the conditions of section 4(2). It could take a more favourable view of exclusive use of equipment requirements, if they were limited to the period of the loan, or to five years, whichever was the shorter.

The notified agreements did not comply with this criterion, and they did not satisfy the conditions of section 4(2). Burmah proposed amendments to the agreements, but

the Authority considered that the amendments were not sufficient to meet its concerns, and they still did not satisfy the conditions of section 4(2).

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 362. Murphy Brewery Ireland Ltd/Clada Soft Drinks Ltd.*

October 1994.

Distribution agreement; beer.

Under the agreement, Clada delivered the products to Murphy Brewery customers, in return for which it was paid a fee. The agreement did not involve the purchase and resale of the products, nor did it involve commercial agency, but related only to the delivery of products within a defined territory on an exclusive basis. The agreement involved delivery only and it did not offend against section 4(1), nor did any of its clauses, including those which provided for a lengthy duration of the agreement, the remuneration and the territorial exclusivity.

A certificate was issued.

*Decision No. 363. Murphy Brewery Ireland Ltd/Distributors.* October 1994.

Agency; beer.

The distributors took orders from, and delivered products to, Murphy Brewery customers in a defined territory, in return for the payment of a fee. The Authority considered that the distributors were commercial agents of Murphy, and that neither the agreement as a whole, nor its individual clauses, offended against section 4(1).

A certificate was issued.

*Decision No. 364. Cylinder LPG Category Licence.* October 1994.

Exclusive purchasing; cylinder LPG.

Three suppliers of cylinder liquefied petroleum gas notified their standard agreements with dealers for resale. The dealer agreed to purchase cylinder LPG exclusively from one supplier, for a period of up to five years. The dealer was obliged to display a notice furnished by the supplier showing the current retail price of the product. The Authority decided to proceed by way of a category licence.

Exclusive purchasing by cylinder LPG dealers was only permitted by the category licence provided that the agreements had a duration of not more than two years, and

provided that the other specified conditions were satisfied. The reseller could be obliged not to sell any competing brand in the specified premises.

The category licence listed a number of requirements which were regarded as not offending against section 4(1). It included clauses which were not permitted, such as post-term restrictions on the dealer, and any restriction on the dealer in setting resale prices. It provided that the licence could be withdrawn in an individual case, where the conditions of section 4(2) were not satisfied. Suppliers who took advantage of the category licence were required to send a report to the Authority each year showing the number of dealer agreements in operation, the number of agreements made and terminated during the preceding year, and total sales to dealers. The category licence constituted a refusal to grant a licence to notified agreements which did not fulfil its conditions.

The category licence was granted for a period of five years, from October 1994 to October 1999. (See also Decision No. 402).

*Decision No. 365. Gill and Macmillan Terms and Conditions. October 1994.*

Terms and conditions of sale; books.

The standard terms and conditions for selling books to bookshops applied to books published by Gill & Macmillan and by other publishers. They included provisions for payment dates, delivery and return of overstocks. They also specified that books could not be sold at retail level at less than the unit price indicated on the invoice. The Authority considered this to represent full scale resale price maintenance, which offended against section 4(1), and did not satisfy the conditions for a licence under section 4(2). When it was decided to delete this clause, the agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 366. Gill & Macmillan Ltd/Attic Press; Brandon Book Publishers; Lilliput Press; Irish Academic Press; Four Courts Press; Round Hall Press; O'Brien Press; Wolfhound Press; Townhouse and Countryhouse Publishers Ltd.*

October 1994.

Distribution agreement; books.

Gill & Macmillan agreed to act as sole distributor for the books of these publishers, for which it imposed a service charge. The agreements implied acceptance of the

above terms and conditions of sale. The agreement did not represent exclusive distribution, since G & M did not purchase the books for resale, but it was something more than the provision of a delivery service. The distribution agreements and the individual clauses did not offend against section 4(1), but because they implied acceptance of the price maintenance clause in the terms and conditions, no certificate or licence could be granted. When the offending clause was deleted from the terms and conditions, the agreements with publishers no longer offended against section 4(1).

A certificate was issued.

*Decision No. 367. United Drug plc/Kodak and Sterling-Winthrop. October 1994.*

Exclusive delivery; drugs.

United Drug collected products from Kodak for delivery to customers of Kodak and Sterling, for which it was paid a fee. The delivery-only distribution agreement did not offend against section 4(1), nor did any of its clauses.

A certificate was issued.

*Decision No. 368. Johnson Brothers Ltd/Campbell Grocery Products Ltd.*

October 1994.

Distribution agreement; foodstuffs.

Campbell agreed to supply products to Johnson for resale in the State, but not on an exclusive basis. Campbell could distribute the products itself and appoint other distributors. Johnson had an obligation not to deal in competing goods without the supplier's consent, which would not be unreasonably withheld, and this was a form of exclusive purchase agreement. In the circumstances, the agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 369. The Agricultural Trust/Newsread Ltd. October 1994,*

Exclusive delivery; newspapers.

Newsread was appointed sole distributor of the Irish Farmer's Journal for a period of ten years. The agreement did not involve the purchase and resale of the product, and was not an exclusive distribution agreement. It did not offend against section 4(1).

The requirement that Newsread sell to retailers at a price specified by the Trust was

not anti-competitive because Newsread was merely providing a delivery service and was not acting as reseller. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 370. Warner Lambert Ireland Limited/Fraxinor Anstalt.*

October 1994.

Share purchase agreement; bulk fine chemicals.

Warner Lambert acquired 34% of the share capital of Plaistow from Fraxinor, which owned most of the share capital. The merger was notified under the Mergers Acts, and no order was issued by the Minister. The acquisition had no effect on competition in either the pharmaceutical or bulk fine chemical markets within the State since neither firm was engaged in the market of the other, and the degree of concentration remained unchanged. The arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 371. Jones Engineering Ltd.* October 1994.

Shareholders agreement; building and construction industry.

The agreement imposed a number of restrictions on the shareholders, some of whom were also employees of Jones Engineering. Most of the restrictions did not offend against section 4(1). The employment contract was regarded by the Authority as an integral part of the shareholding agreement. It contained a one year non-compete clause after termination of employment, and a two year non-solicit clause, which offended against section 4(1), and did not satisfy the conditions for a licence.

Following the issue of a statement of objections, the post-termination non-compete clause was deleted, and the two year non-solicit clause was reduced to one year. The agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 372. Category Licence for Franchise Agreements.* November 1994.

A franchise agreement was described as consisting essentially of a licence of industrial or intellectual property rights relating to trade marks or signs and know-how, which could be combined with restrictions relating to the supply or purchase of goods. The category licence covered agreements for the retailing of goods or the

provision of services to end-users, or both. The know-how involved was defined as a package of non-patented practical information, which was secret, substantial and identified. The Authority considered that franchise agreements as such were not restrictive of competition, nor were obligations which were necessary to support the essential ingredients of the franchising relationship.

The category licence permitted obligations on the franchisor regarding certain activities in the contract territory, as well as certain obligations on the franchisee in respect of exploiting the franchise. It listed a number of other obligations on the franchisee which generally did not offend against section 4(1). It also specified clauses which were not permitted in agreements, including restrictions on the franchisee in setting resale prices. It provided that the licence could be withdrawn in an individual case, where the conditions of section 4(2) were not satisfied. The category licence was granted for a period of just over five years, from November 1994 to December 1999.

The Authority stated that it would inform notifying parties whether their agreement fulfilled the conditions of the licence, and, if it did not, the reasons for this. The Authority published lists, in Annual Reports, of notified agreements, amended where necessary, which came within the scope of the category licence and satisfied its conditions.

*Decision No. 373. Dairygold Co-Operative Society Limited/C. M. P. Dairy/Michael Cotter. November 1994.*

Sale of business; liquid milk.

Mr. Cotter sold his milk round to Dairygold, which appointed him as exclusive distributor of its products in the area of the existing milk round. The agreement contained a number of non-compete clauses, for a period of three years after termination of the agreement. Mr. Cotter was obliged to deliver and sell the products at a price not exceeding the recommended retail price.

The sale of business was completed prior to the commencement date of the Act, and did not come within its scope. The Authority considered that, following the sale of the business, Mr. Cotter was an exclusive distributor of Dairygold products. A purchaser was not entitled to a longer period of restriction on competition if, because of the way he chose to operate the business, he failed to secure the goodwill of the business purchased. The Authority considered that the non-compete provisions

offended against section 4(1), as did the restriction on pricing. Dairygold did offer to remove the pricing restriction. The non-compete and non-solicit of customers clauses, and the pricing restriction, did not satisfy the requirements for a licence under section 4(2).

The Authority refused to issue a certificate or grant a licence.

*Decision No. 374. Cerestar UK Ltd/Betco Marketing Ltd. November 1994.*

Agency agreement; starch and glucose.

Betco acted as commercial agent for three separate principals, including Cerestar.

The products were not in competition with each other, and the notified agreement did not offend against section 4(1), nor did the individual clauses relating to exclusivity, territorial restrictions and the setting of prices by the principal. The Authority considered that the one year post-termination non-compete clause did not offend against section 4(1), nor did the restriction on the use of confidential information by the agent after termination of the agreement.

A certificate was issued.

*Decision No. 375. Rotterdamsche Margarine Industrie/Betco Marketing Ltd.*

November 1994.

Agency agreement; edible oil products.

This was a commercial agency agreement which did not offend against section 4(1), nor did any of its clauses, including exclusivity and the setting of prices.

A certificate was issued.

*Decision No. 376. Betco Marketing Ltd/Holland Sweetener Co. VOF.*

November 1994.

Agency agreement; sweeteners.

The commercial agency agreement as such did not offend against section 4(1), nor did any restrictive clauses, such as territorial restrictions and the setting of prices by the principal, and the restriction on the use of confidential information by the agent after termination of the agreement.

A certificate was issued.

*Decision No. 377. Power Supermarkets Ltd/Richard and Susan Whyte.*

November 1994.

Sale of property; retail shops.

The sale of premises was completed before the commencement date of the Act, and did not come within the scope of section 4(1). The restricted user clause did not offend against section 4(1).

A certificate was issued.

*Decision No. 378. David Allen Holdings Limited/Adsites Limited – Licence Agreement.* November 1994.

Exclusive licence agreement; outdoor advertising.

This related to an exclusive licence for David Allen to market and sell certain advertising panels owned by Adsites for a three year period, for which they paid Adsites all revenue received from renting such sites (less costs and commission). The Authority decided that the agreement involved two competitors deciding to cease competing with one another in respect of a particular product, and to allow one to have sole responsibility for the joint marketing of that product. It offended against section 4(1), and did not satisfy the requirements for a licence.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 379. The First National Bakery Company Ltd.* November 1994.

Sale of business; bakery industry.

IAWS and others agreed to establish and operate First National Bakery Company, which would acquire several companies involved in the bakery industry in return for the issue of shares in First National. The agreement included some non-compete and non-solicit provisions for two years after a party ceased to be a shareholder in the company. The agreement had been notified to the Minister under the Mergers Act, and no order had been made.

The Authority considered the arrangements to be akin to a sale of business. The transfer of the assets occurred before the commencement date of the Act, and did not come within the scope of section 4(1). The non-compete clauses did not offend against section 4(1).

A certificate was issued.

*Decision No. 380. Burmah Castrol (Ireland) Ltd loan agreement (new version).*

December 1994.

Loan agreement; lubricating oils.

Burmah Castrol made a cash loan to the reseller for the purchase of lubrication equipment, in return for which the reseller agreed to use exclusively on the premises lubricants, additives and brake fluids supplied by Burmah Castrol. The maximum period was stated to be five years.

The agreement amounted to an exclusive purchasing agreement and, for the reasons stated in Decision No. 361, the Authority considered that it offended against section 4(1), as did the reference to 'additives'. It did not satisfy the requirements for a licence. Burmah Castrol amended the agreement by requiring that the equipment financed by the loan should be used exclusively for its products (for a maximum period of five years), and by deleting the reference to additives. The Authority considered that the exclusive use of equipment requirement still offended against section 4(1), since it would amount to exclusive purchase in many cases, but it satisfied the requirements of section 4(2).

A licence was granted to the amended agreement for the period from November 1994 to November 2004.

*Decision No. 381. Adsites Limited/David Allen Holdings Limited.* December 1994.

Option to purchase agreement; outdoor advertising.

This involved an agreement whereby David Allen acquired the option to purchase Adsites interests in certain outdoor advertising panels which were marketed by David Allen under the exclusive licence agreement referred to in Decision No. 378 above. The market was already highly concentrated, and the arrangement would increase that level of concentration, especially in Dublin. It offended against section 4(1), and did not satisfy the requirements for a licence.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 382. Carlow Developments Ltd/Naas Holdings Ltd.* December 1994.

Sale of land; shopping centre.

The sale agreement related to a plot of land which was part of an area being developed as a shopping centre. It provided for access through the remainder of the site and for car parking facilities, and there were restricted user clauses.

The sale of the premises was completed before the commencement date of the Act, and did not come within the scope of section 4(1). The agreement could involve a restriction not only on the use of the property sold, and its immediate environs, but also to any other property in the town owned or acquired by the transferee. This offended against section 4(1). The transferor agreed not to enforce this element of the covenant, and the restriction no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 383. Irish Music Rights Organisation Ltd/UK Television Companies and other Copyright Holders/Cable Relay and MMDS Operators. December 1994. Copyright licensing; cable television.*

This involved a standard agreement between the holders of copyright in television programmes broadcast from the UK and Irish cable/MMDS operators, in relation to the retransmission of programmes within the State. The copyright holders granted to each operator a non-exclusive licence to re-transmit programme services to the licensee's subscribers within the State. The agreement provided for the calculation of licence fees with all payments to be made to IMRO, it being the licensors' duty to apportion the amounts paid between themselves.

The agreement was also notified to the EU Commission which concluded that the agreement fell within Article 85(1) of the Treaty. Following amendments to the agreement, the Commission decided that exemption could be granted under Article 85(3). The agreement notified to the Authority was similarly amended.

The Authority took the view that collective licensing agreements, per se, between actual or potential competitors offended against section 4(1), but that this agreement satisfied the conditions of section 4(2).

The Authority granted a licence for the period from December 1994 to December 2004, and no conditions were attached.

*Decision No. 384. Irish Music Rights Organisation Ltd/UK Television Companies/Copyright Holders. December 1994.*

Copyright licensing; cable television.

This agreement was related to the agreement in the previous Decision (No. 383).

Under it, all the copyright holders in UK television programmes authorised IMRO to act on their behalf in the administration of the agreements with the cable relay/MMDS

operators. This provided for the allocation of revenues between the parties, and IMRO was given responsibility for monitoring and ensuring compliance by licensees with the terms of their re-transmission agreements. The Authority decided that, because of the connection of the notified agreement with the re-transmission agreements and its part in these arrangements, it offended against section 4(1), but that it satisfied the conditions for a licence under section 4(2). The Authority granted a licence for the period from December 1994 to December 2004, and no conditions were attached.

*Decision No. 385. Irish Potato Marketing Ltd/Donegal Potatoes Ltd.*

December 1994.

Merger; seed and table potatoes.

The agreement provided for the acquisition by Irish Potato Marketing of 50% of the shares in Donegal Potatoes from the liquidator. It already owned the remaining 50% of the shares. The Authority concluded that the arrangements would have no effect on the number of parties operating in the relevant market, and they involved no restrictive provisions, and they did not offend against section 4(1).

A certificate was issued.

*Decision No. 386. Power Supermarkets Limited/Town and Country Investments plc.*

December 1994.

Sale and lease of commercial premises.

The sale of the premises was completed prior to the commencement date of the Act, and did not come within the scope of section 4(1). The restrictive user clause did not offend against section 4(1).

A certificate was issued.

*Decision No. 387. Belfield Management Ltd/USIT Ireland.* December 1994.

Management of premises agreement; student accommodation.

Under the agreement, Belfield Management appointed USIT as manager for the management and letting of a student apartment complex on the UCD campus during the three month summer vacation. The arrangement and the restrictions it contained did not result in any restriction of competition, and did not offend against section 4(1).

A certificate was issued.

*Decision No. 388. Flogas Limited – bulk customers. April 1995.*

Exclusive purchasing; bulk LPG.

This standard agreement between Flogas and its bulk LPG customers provided for exclusive purchasing by the customers of all of their LPG requirements from Flogas for a maximum period of five years. Storage equipment was provided on a rental basis by Flogas, and the equipment had to be used solely for Flogas LPG. Given the large number of Flogas bulk agreements, and the fact that the other suppliers, Calor and Blugas, also had similar agreements, the Authority concluded that the Flogas agreement offended against section 4(1). The clause requiring exclusive use of the equipment did not represent an exclusive purchasing obligation, and it did not offend against section 4(1), nor did any of the other clauses. The Authority considered that the exclusive purchasing agreement for a maximum term of five years satisfied the conditions of section 4(2), but a longer period would not be regarded as indispensable. It accepted five year agreements, as opposed to two years in the case of exclusive purchasing of cylinder LPG by dealers, because market conditions were different. The Authority granted a licence for the period from April 1995 to April 2005, and was made subject to annual reporting conditions.

*Decision No. 389. Blugas Limited – bulk customers. April 1995.*

Exclusive purchasing; bulk LPG.

This standard agreement between Blugas and its bulk LPG customers provided for exclusive purchasing from Blugas for a period of five years. It was virtually identical to that of Flogas, and the Authority took a similar view towards it.

The Authority granted a licence for the period from April 1995 to April 2005, and was made subject to annual reporting conditions.

*Decision No. 390. ESB Industrial Holdings Ltd/Irish Cement Ltd. April 1995.*

Supply agreement; pulverised fuel ash.

The ESB produced large quantities of pulverised fuel ash as a low value residual waste material from its coal fired power station at Moneypoint. Under the agreement, it sold the raw PFA to Irish Cement, which processed the material, and used it in cement and concrete products and made it available to third party users. Irish Cement agreed to purchase minimum annual quantities of raw PFA, for an initial period of ten years. The Authority considered that the agreement did not have any anti-competitive

object or effect in the markets for raw PFA, processed PFA or end products, including cement. It did not offend against section 4(1).

A certificate was issued.

*Decision No. 391. Premier Milk Distributors Agreement. April 1995.*

Delivery agreement; liquid milk.

These standard agreements between Premier and contractors provided for the delivery of liquid milk and other dairy products outside the Dublin area for onward delivery to households and shops. The agreements with the contractors, who were former Premier employees, had an initial period of three years. There was a non-compete clause for one year after termination, and a side-letter provided for the retention of part of the redundancy payment to secure adherence to the non-compete clause. The Authority considered that the delivery agreement did not offend against section 4(1). Following the issue of a statement of objections, Premier agreed to delete the post-termination clause and the redundancy provisions. The agreement then no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 392. Premier Wholesale Delivery Agreement. April 1995.*

Delivery agreement; liquid milk.

This concerned a standard wholesale delivery agreement, under which certain former employees agreed to provide delivery and ancillary services to Premier, in respect of the distribution of liquid milk and other products to multiple supermarkets in the Dublin area. The agreement had an initial term of two years, and was non-exclusive. The contractor was obliged, during the term of the agreement and for one year after termination, not to distribute competing products within a specified area and not to distribute or deliver to customers any products distributed by Premier at the date of termination of the agreement. Another clause, which was also included in a side letter, provided for the retention of a proportion of the redundancy payment to secure adherence to the non-compete clause. Following the issue of a statement of objections, Premier proposed to reduce the scope of the non-compete obligations, and to amend the redundancy provisions. The Authority considered that the delivery agreement did not offend against section 4(1), nor did the provisions as amended.

A certificate was issued for the amended agreement.

*Decision No. 393. Omnitron Limited/Cryptovision A/S. April 1995.*

Exclusive distribution; electronic equipment.

The Authority considered that the notified agreement did not satisfy the conditions of the category licence for exclusive distribution agreements, or of section 4(2), because the distributor was not free to set its own resale prices. Following the issue of a statement of objections, this aspect of the agreement was amended in a manner which met the concerns of the Authority. The agreement also included clauses which were not usually found in exclusive distribution agreements. The Authority considered that the confidentiality provisions, provided that they were not used to prevent competition, did not offend against section 4(1), nor did a registered trademark user agreement.

A licence was granted for the amended agreement from April 1995 to April 2000, and no conditions were attached.

*Decision No. 394. RHM Ltd/Naresa Ltd. April 1995.*

Lease of premises.

The lease and the standard restrictive covenants and obligations did not offend against section 4(1). The Authority considered that a clause which prevented the lessor from operating the premises in competition with the lessee's business, for one year after the lessee surrendered the lease, offended against section 4(1). A statement of objections was issued, but no formal response was received.

A certificate was refused.

*Decision No. 395. Mentec Ltd/Industrial Credit Corporation and others/Share Subscription Agreement. April 1995.*

Share subscription agreement; computer systems.

The agreement made provision for the subscription for and issue of new shares in Mentec to the ICC and others. It was a venture capital type agreement for a minority equity shareholding. Such an investment did not offend against section 4(1), nor did a limited number of continuing contractual commitments including warranties given by the original shareholders.

A certificate was issued.

*Decision No. 396. Prince of Wales Hotel Ltd/Share Subscription and Shareholders Agreement 1991. April 1995.*

Share subscription agreement; hotel.

Two designated investment funds agreed to subscribe for new shares in Prince of Wales Hotel, Athlone. This involved a minority stake in the company. The investment did not offend against section 4(1), nor did the continuing contractual commitments and the non-compete and non-solicit restrictions on the original shareholders for the term of the agreement.

A certificate was issued.

*Decision No. 397. Irish Ropes Limited/Newtec UK Limited. April 1995.*

Agency; packaging equipment.

The Authority considered that this was an agency agreement which did not offend against section 4(1), nor did any clauses contained in it, including a sole agency clause and a clause providing that the agent should not dispute any patent or other property right of the principal.

A certificate was issued.

*Decision No. 398. Killarney Park Hotel Ltd/Hamptoncove Holdings Ltd/Share Subscription Agreement. April 1995.*

Share subscription agreement; hotel.

This related to a BES scheme whereby a designated investment fund made a venture capital type investment in a hotel. It involved the purchase of a majority stake in the company to be held for a five year period, after which the original owners could regain 100% of the shares in the company. Such an investment did not offend against section 4(1), nor did any of the contractual commitments, restricted transactions and non-compete provisions.

A certificate was issued.

*Decision No. 399. Baroncastle Ltd/Share Subscription Agreement. April 1995.*

Share subscription agreement; poultry products.

This involved the acquisition by a designated investment fund of new shares in Baroncastle, under the BES scheme. This venture capital type investment for a

majority stake did not offend against section 4(1), nor did the other clauses in the agreement.

A certificate was issued.

*Decision No. 400. An Post/Postmasters. April 1995.*

Agency; post office services.

This standard agency agreement covered the provision of counter postal services in sub-post offices. Neither the agency agreement, nor any of its clauses, offended against section 4(1).

A certificate was issued.

*Decision No. 401. H & K International Inc/Shareholders Agreement. May 1995.*

Shareholders agreement; catering equipment.

This agreement between various shareholders related to a reorganisation of the H & K Group, and was made for the purpose of regulating the future conduct of the business and the relationship between the shareholders and the corporation. The agreement did not offend against section 4(1), nor did the non-compete and non-solicit restrictions and the restriction on using confidential information.

A certificate was issued.

*Decision No. 402. Amending the Cylinder LPG Category Licence (Decision No. 364). June 1995.*

In order to benefit from the category licence, LPG suppliers were required to make a report containing certain information each year, the first report being required before the end of March 1995. Since no report was received from any supplier of cylinder LPG, the Authority published notice in May 1995 that no agreement for exclusive purchase of cylinder LPG satisfied the requirements of the category licence.

Following the notice, reports were submitted by two suppliers. The Authority decided to amend the category licence by providing that the reports had to be submitted each year before the end of June by all suppliers who took advantage of the category licence. For the avoidance of doubt, it was stated that failure by a supplier to comply with this condition would have the effect that the agreements of that supplier did not benefit from the category licence.

*Decision No. 403. The Grand Hotel Malahide Ltd/Elvetham Ltd/Goodbody James Capel. June 1995.*

Share subscription agreement; hotel.

This involved an investment under the BES scheme in the Grand Hotel Malahide. The agreement did not offend against section 4(1), nor did the continuing contractual commitments, restricted transactions, non-compete restrictions and restrictions on share disposals.

A certificate was issued.

*Decision No. 404. Cambridge Business Expansion Fund Ltd/Standard Subscription Agreement with Investee Companies. June 1995.*

Standard share subscription agreement.

This standard agreement was used by Cambridge for investments in qualifying companies under the BES scheme. Cambridge obtained an equity shareholding in the investee company. Such an agreement did not offend against section 4(1), nor did the contractual commitments, obligations on the parties, restricted transactions, and non-compete and non-solicit restrictions. The latter were for periods less than the estimated duration of the BES investment.

A certificate was issued.

*Decision No. 405. Fexco Innovations Limited/BIG Estates Limited. June 1995.*

Joint venture; VAT refunds.

By virtue of an asset sale agreement and a shareholders agreement, a joint venture was established in order to operate the business of providing VAT refunds to visitors from non-EU countries. Although one of the companies had a large share of the market, and the other was potentially a significant competitor, the Authority concluded that the agreement did not offend against section 4(1), since it was relatively easy to enter the relevant market. The other restrictive clauses in the agreement also did not offend against section 4(1).

A certificate was issued.

*Decision No. 406. RNH Wood Products Limited/Isotherm Company/AG (Ireland) Limited.*

June 1995.

Merger; wooden cable drums and reels.

The relevant market was highly concentrated and the purchaser was a potential competitor, but there were no significant entry barriers, and the sale of the business did not offend against section 4(1). The non-compete provisions were limited to a two year period after completion, and there were other restrictions, including the non-disclosure of confidential information, which did not offend against section 4(1). A certificate was issued.

*Decision No. 407. Burmah Castrol (Ireland) Ltd/ Hire purchase agreement and lubricating equipment loan agreement. June 1995.*

Hire purchase and equipment loan agreements; lubricating oil.

These notifications followed the decision of the Authority in 1994 to refuse a certificate or licence to standard agreements relating to hire purchase loans and equipment loans (Decision No. 361). These amended agreements involved exclusive use of equipment for Castrol lubricating oils for periods of five years. The Authority again considered that the exclusive use of equipment requirements represented, in many cases, an exclusive purchasing requirement, and that, because there was a network of such agreements, the standard agreements offended against section 4(1). The agreements had a limited foreclosure effect, but this was considerably reduced since the exclusive use requirement had been reduced to five years, and they now satisfied the requirements of section 4(2).

A licence was granted from May 1995 to May 2005, and no conditions were attached.

*Decision No. 408. Calor Teoranta/bulk customers. June 1995.*

Exclusive purchasing; bulk LPG.

The Calor agreement with bulk customers differed from the Flogas and Blugas agreements (Decisions Nos. 388 and 389) in that it involved exclusive purchase for a minimum period of five years and because the customer was not permitted to make any additions or alterations to the gas system without the prior approval of Calor. The agreement offended against section 4(1). The Authority expressed its concern about these provisions in a statement of objections, following which Calor agreed to amend the agreement. The maximum term was set at five years, and the other clauses were amended to relate to maintaining the safety of the gas system. The amended agreement satisfied the conditions of section 4(2).

A licence was granted to the amended agreement from June 1995 to June 2005, and was made subject to reporting conditions.

*Decision No. 409. Eureka Ireland Holdings Limited/Celtic International Insurance Company Limited. June 1995.*

Merger; non-life insurance.

Eureka acquired Celtic International, and the merger was notified under the Mergers Acts, but the Minister did not issue an order. The Authority considered that the sale of business did not offend against section 4(1). The agreement included a non-compete clause on one of the vendors for two years after he ceased to be a director of any of the companies. The same person was also prevented from soliciting employees for two years after he ceased to be a director. The Authority expressed its concern regarding these provisions. The parties waived the non-compete provision, and reduced the non-solicit provision to one year. The amended agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 410. Brooks Thomas/Agents. June 1995.*

Agency; builders providers and hardware suppliers.

While this was claimed to be a franchise agreement, the Authority considered it to be an agency agreement. This did not offend against section 4(1). The agent agreed for two years post-termination not to solicit away from Brooks Thomas the custom of any person who dealt with Brooks Thomas or the business run by the agent, or who was negotiating with Brooks Thomas or the business. This extended therefore not only to the geographical area and the customers of the agent, but also to the area and customers of the principal, and also extended to two years after the date of termination, and it offended against section 4(1). The agent was also prohibited from soliciting or employing any employee of Brooks Thomas for two years after termination, and this offended against section 4(1). These clauses would not have satisfied the requirements of section 4(2). Following the issue of a statement of objections, the post-term non-compete clause was reduced from two years to one, and its geographical scope was reduced to cover only customers of the agent's business. The post-term restriction on the agent soliciting former employees of Brooks Thomas

was also removed. As amended, the standard agreement did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 411. Brooks Haughton/Agents. June 1995.*

Agency; builders providers and hardware suppliers.

This standard agency agreement was almost identical to that in the previous decision, with the same post-termination restrictions. Following the issue of a statement of objections, the same amendments were made as described above. The amended agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 412. Cross Vetpharm Group Ltd (t/a Osmonds)/Agents. August 1995.*

Agency; veterinary products.

The standard agency agreement, and all except one clause, did not offend against section 4(1). This clause provided for a one year post-termination non-solicit clause in respect of all customers of the principal, and not just those with whom the agent had dealt. This offended against section 4(1), and did not satisfy the requirements of section 4(2). No arguments were given to justify a licence. A statement of objections was issued, but no response was received.

The Authority refused to issue a certificate or grant a licence.

*Decision No. 413. Conoco Ireland Ltd/distributor agreement; bulk storage loan agreement; distributor depot licence. August 1995.*

Distribution agreements; fuel oils.

This decision concerned a standard agreement between Conoco and its distributors, and two related agreements – a bulk storage loan agreement and a distributor depot licence. Under the first agreement, the distributor was appointed as authorised distributor of Conoco products, and was required not to deal in competing products. Originally, the distributor was appointed exclusively in a specified area, but this was modified to remove the concept of area, and to allow the distributor freedom to sell and supply the products wherever he wished. Essentially, the distributor had to purchase exclusively from Conoco, for a term not exceeding ten years.

The distributor agreement was an exclusive purchasing agreement, not exclusive distribution. Because there was a network of Conoco agreements, and other oil companies had similar arrangements, the Conoco agreements offended against section 4(1). The agreement also contained a non-compete clause for nine months after termination of the agreement, which offended against section 4(1), but this was deleted. The other two agreements were connected with, and dependent upon, the exclusive purchasing agreement, and they also offended against section 4(1).

The Authority considered that the distributor agreement, after deletion of the non-compete clause, satisfied the requirements of section 4(2), except for the ten year duration of the agreement. Following the issue of a statement of objections, Conoco agreed to amend the agreements by limiting the period of exclusive purchasing to a maximum of five years. The amended agreements satisfied the requirements of section 4(2).

A licence was granted to the amended agreement from August 1995 to August 2005, and no conditions were attached.

*Decision No. 414. Azinger Limited/Fispak Holdings Limited and George McNulty, David Gray, Rory McNulty and Kieran Hayes. August 1995.*

Merger; packaging products.

The notification involved deeds of covenant with four shareholders in Fispak, pursuant to the acquisition of 72% of the share capital of Fispak by Azinger. There were non-compete and non-solicit clauses for two years from the date of the agreement or for two years after shareholding ceased, whichever was the greater.

The disclosure of confidential information at any time was prohibited.

The Authority concluded that the covenants could not be considered in isolation, but had to be examined in the context of the broader sale of business arrangements. It considered that the sale of business and the non-compete and non-solicit clauses did not offend against section 4(1). The Authority objected to restrictions on disclosing confidential information since they involved a restriction on using technical know-how. The agreements were amended to provide that the vendors would not be prevented from using technical know-how after the expiry of five years from the date of the agreement or the disposal of their shares, if later, and they no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 415. Sedgwick Group plc/TSB Group plc. August 1995.*

Merger; insurance and pensions.

Sedgwick acquired the Noble Lowndes Group from the TSB Group. The merger was notified under the Mergers Acts, and no order was made by the Minister. The sale of business did not offend against section 4(1). The non-compete and non-solicit clauses had a duration of three years after completion, which offended against section 4(1). Following an expression of the Authority's concern, the duration of the period was reduced from three years from completion to two years. This no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 416. Mr. Flor Griffin/Mr. Teddy O'Connor. September 1995.*

Use of shop; electrical goods.

Mr. Griffin operated several electrical shops in Cork city and county. He permitted Mr. O'Connor to set up and operate an electrical retail shop under the name of "Flor Griffin" in Mallow. Though the agreement was described as a "franchise", the Authority considered that it did not come within the scope of the franchise category licence. A number of restrictive clauses offended against section 4(1), since Mr. O'Connor's shop was constituted as a legally and economically independent undertaking rather than an agency. The agreement involved price fixing between independent sellers of goods, restrictions on Mr. O'Connor opening a similar business during the term of the agreement and for one year after termination, and an obligation to give first refusal for both the business and the premises to Mr. Griffin. These clauses offended against section 4(1), and did not satisfy the conditions for a licence. Following the issue of a statement of objections, the proposed amendments did not meet the concerns of the Authority.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 417. Prince of Wales Hotel Ltd/Share Subscription and Shareholders Agreement 1990. September 1995.*

Share subscription agreement; hotel.

Under the agreement, a designated BES investment fund agreed to make a venture capital type investment to obtain a minority shareholding in the hotel. The investment and several of the restrictive clauses did not offend against section 4(1). However, the

covenantors were prevented for 18 months after disposing of their shares from engaging not only in the business of hotels within the State but also from being engaged in the restaurant and public house and other businesses anywhere in the State. This could have applied to some of the covenantors for an even longer period. The restrictions on soliciting customers and employees were for an indefinite period after ceasing to be a shareholder or employee. These restrictions offended against section 4(1), and did not satisfy the requirements of section 4(2). A statement of objections was issued, but no views were expressed by the parties on the particular objections.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 418. Tara Meats (Kilbeggan) Ltd/Share Subscription and Shareholders Agreement 1990. September 1995.*

Share subscription agreement; meat products.

This was a BES investment in the company. The agreement and most restrictive clauses did not offend against section 4(1). One clause had the object and could have had the effect of extending the non-competition period far beyond the period necessary for the transfer of the business, and it offended against section 4(1). This requirement was waived, and the agreement no longer offended against section 4(1). A certificate was issued for the amended agreement.

*Decision No. 419. Tara Meats (Kilbeggan) Ltd/Share Subscription and Shareholders Agreement 1989. September 1995.*

Share subscription agreement; meat products.

This agreement was virtually identical to the agreement in the previous decision. The Authority took the same view, and the agreement was amended so that it no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 420. Newspaper Publishing/Irish Times. September 1995.*

Syndication agreement; newspapers.

Newspaper Publishing granted to the Irish Times the right to reproduce certain articles published in its own newspapers, namely the Independent and the Independent on Sunday. The service was provided on an exclusive basis. The Independent on

Sunday was later removed from the arrangements. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 421. Adidas/FAI. September 1995.*

Exclusive rights to supply; sportswear.

This involved an agreement between Adidas and the Football Association of Ireland for the exclusive supply of sportswear by Adidas to the FAI, for use by their international teams, and the grant by the FAI to Adidas of an exclusive right to market the sportswear using the official FAI crest, both for a four year period. The notified agreements were limited in time and competition between suppliers to secure rights to supply the FAI occurred at regular intervals. The arrangements involved some intellectual property issues because of their exclusive nature. Adidas, however, could produce other sportswear and other suppliers were not prevented from entering the sportswear market. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 422. Adidas/Sports Stars. September 1995.*

Sponsorship agreement; sports personalities.

Under the sponsorship agreement, Adidas made payments to a sports personality over a period of time and had an exclusive right to provide them with all their footwear and clothing requirements for their sporting activities free of charge. In return, Adidas had the right to use photographs of the individual in Adidas kit for advertising purposes. The Authority regarded the sports personalities as undertakings, because they were providing services for gain. The arrangements did not prevent any other firm from selling sportswear in Ireland, and they did not offend against section 4(1).

A certificate was issued.

*Decision No. 423. Gallaher/Snooker Players. September 1995.*

Sponsorship agreement; snooker players.

In agreement with the World Professional Billiards and Snooker Association, Gallaher (Dublin) sponsored a snooker tournament in Ireland for five years. In return, Gallaher, trading as Benson & Hedges, were allowed to advertise their products at the tournament. The Association had to ensure that none of the participating players

would play or participate in any snooker exhibition, snooker match or promotional event within a radius of 50 miles of the tournament venue whilst the tournament was in progress without first obtaining written consent of the two parties. The Authority considered that anyone could organise a rival competition involving other players, or could organise a competition including the same players at any other time of the year. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 424. Irish National GESA Groupe Assistance Ltd/Shareholders Agreement. September 1995.*

Shareholders agreement; emergency assistance service for motorists and householders.

INGA was a joint venture between Irish National Insurance Company and Groupe European SA. The agreement related to an increase in the share capital so that INI would own 51% of the shares, and GESA 49%. The merger was notified under the Mergers Acts, but was not regarded as notifiable. Both parties were owned by the same parent, L'Union des Assurances de Paris. Subsidiaries of the same parent were not regarded as independent, and the agreement between them did not offend against section 4(1).

A certificate was issued.

*Decision No. 425. Circa Group Europe Ltd/Subscription and Shareholders Agreement. September 1995.*

Share subscription agreement; science and technology consultancy.

This related to a share subscription agreement between six shareholders in Circa and trustees for University College Dublin. A number of undertakings, each engaged in the provision of consultancy services on a small scale, established a company to market their services jointly so as to obtain major contracts. The operation was not in competition with the individual undertakings. It did not offend against section 4(1), nor did its individual clauses. These included a non-compete provision during the term of the agreement and for one year after the subscriber ceased to be a shareholder or consultant to the company, a non-solicit of employees clause for a similar period after cessation, the prohibition on the disclosure or use of confidential information,

and a clause providing that any improvements made or discovered by a subscriber should be the property of the company.

A certificate was issued.

*Decision No. 426. Lister Tubes Ltd/Jonava Properties Ltd. September 1995.*

Sale of land; steel stockholding.

Lister, which was a subsidiary of British Steel, sold land containing a warehouse adjacent to a site where it was engaged in steel stockholding. DFDS Transport was the ultimate purchaser, and was engaged in the business of shipping agents and transport. The agreement provided that the purchaser not use the premises for steel stockholding for two years after purchase without the prior written consent of British Steel. The Authority considered that the sale of land, and the restriction on its future use, did not offend against section 4(1).

A certificate was issued.

*Decision No. 427. The Cheque Card Committee. October 1995.*

Regulation of cheque guarantee cards.

The arrangements concerned the regulation of cheque guarantee cards, involving the four associated banks, the ACC, the TSB and Irish Permanent plc. It related to the rules and regulations for such cards, including provisions that cards only be manufactured by authorised companies for security reasons and that the guarantee be limited. Provision was made for the apportionment of costs. Membership was open to all licensed credit institutions authorised to provide money transmission services. Any non-member could operate its own scheme. The arrangement did not offend against section 4(1), nor did any of the rules of the scheme.

A certificate was issued.

*Decision No. 428. Colour Books Ltd/Allied Combined Trust Ltd/Share Subscription Agreement. October 1995.*

Share subscription agreement; book printing.

ACT agreed to make a venture capital type investment by way of a minority equity shareholding in Colour Books. This did not offend against section 4(1), nor did the standard provisions it contained. The non-compete provision, however, applied for the period of one year after the date the covenantor ceased to be a shareholder in, or

employed by, the company. If the person continued to be employed by the company after disposing of his shares, the non-compete clause would have continued to operate until one year his employment ceased. This offended against section 4(1). Following an expression of the concern of the Authority, Act agreed not to enforce the non-compete covenant for a period in excess of one year after the shareholding ceased. This no longer offended against section 4(2).

A certificate was issued for the amended agreement.

*Decision No. 429. Norish plc/Fee Farm Grantees at Norish Food City.*

October 1995.

Sale of land; food industry.

The standard agreement concerned the sale of land units at Food City by Norish to companies engaged in food products, principally in relation to freezing and cold storage facilities. The sale of land did not offend against section 4(1), nor did the standard restrictions and provisions. The purchaser, however, was prevented from competing with any of the businesses carried on by the vendor in the Food Park in Northern Ireland and in more than half the land area in the State, containing 60 per cent of the population of the State. This restriction on the activities of the grantee outside the sold lands offended against section 4(1). Following the issue of a statement of objections, this provision was deleted, and the agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 430. Norish plc/Viking Food Products Ltd (now Baroncastle Ltd).*

October 1995.

Sale of land; foodstuffs.

This concerned the sale of land by Norish at Food City for the construction of premises for the provision of freezing and cold storage facilities for the food industry. The sale of land did not offend against section 4(1), nor did the standard restrictions and provisions. The non-compete clause was that described in the previous decision. When it was deleted, the agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 431. Norish plc/Biko Farm Limited (now Irish Food Processors Ltd).* October 1995.

Sale of land; meat products.

Land was sold by Norish at Food City for the construction of a premises for the provision of freezing and cold storage facilities. It was subsequently acquired by Anglo Irish Meats Ltd, part of the Goodman Group. The sale of land did not offend against section 4(1), nor did the standard restrictions and provisions. The non-compete clause was that described in Decision No. 429. When it was deleted, the agreement no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 432. Maxol Ltd/Mulfield Co. Ltd.* October 1995.

Exclusive distribution; fuel oils.

Because of the special features of this agreement, an individual decision was considered to be necessary. Mulfield was appointed non-exclusive distributor of Maxol fuel oil products in Dublin and surrounding areas. It was required to purchase exclusively from Maxol and was prohibited from dealing in competing products. The distributor was prohibited from seeking customers, establishing any branch or maintaining any distribution depot for the products outside the territory. Maxol had a standard exclusive distribution agreement with its other distributors, and they were not permitted to seek customers actively outside their respective territories. In the circumstances, the Authority considered that the agreement with Mulfield was, de facto, an exclusive distribution agreement, and not an exclusive purchasing agreement. It offended against section 4(1), but it satisfied the conditions of the exclusive distribution category licence (Decision No. 144).

*Decision No. 433. Group 91 Architects Ltd/Shareholders Agreement.* October 1995.

Shareholders agreement; architectural services.

A number of architects formed a joint venture company to provide architectural services in particular for the Temple Bar Framework Plan Competition won by the company. The Board decided which practice was allocated any commission received. The members agreed not to compete with the company, not to solicit employees of the company, nor to use or disclose confidential information. These restrictions applied during the term of the agreement, and for 18 months after the shareholder ceased to

own shares. The partnership was pro-competitive and did not offend against section 4(1), nor did the other provisions and restrictions, including the non-compete provisions.

A certificate was issued.

*Decision No. 434. Carlton Cards Ltd/Balladeer Ltd. October 1995.*

Exclusive purchasing; greeting cards.

The agreement related to the exclusive purchase for six years by Balladeer, a retailer in Cork, from Carlton Cards, and Balladeer was granted a substantial and revolving credit facility in respect of such purchases. The object was to prevent the collapse of Balladeer. It would have no significant effect on competition, due to the large number of other retail outlets, and it did not offend against section 4(1).

A certificate was issued.

*Decision No. 435. Associated Marketing Ltd/Waterford Carpets Ltd. October 1995.*

Marketing agreement; floor coverings.

Associated Marketing agreed to provide marketing, sales, promotional and debtor management services in the State on condition that Waterford agreed to sell carpets exclusively to Associated Marketing. The Authority issued a statement of objections on the basis that this agreement operated as an exclusive distribution agreement, and that the price and territory restrictions offended against section 4(1), and did not satisfy the conditions of the category licence. The request for a licence was withdrawn in reply to the statement of objections. The Authority concluded that the arrangements were not designed solely to enhance the efficiency of distribution and that creating territorial exclusivity was not indispensable. It also objected to the provision that the manufacturer would fix the resale price of the product. These offended against section 4(1).

A certificate was refused.

*Decision No. 436. Associated Marketing Ltd/Joseph Hamilton & Seaton Ltd.*

October 1995.

Marketing agreement; floor coverings.

This agreement was virtually identical to that in the previous decision. The Authority again considered that the provisions relating to resale prices and territorial exclusivity offended against section 4(1).

A certificate was refused.

*Decision No. 437. Carroll Products and Designs Ltd/Kleerex Licensing Ltd/Licence agreement. October 1995.*

Exclusive manufacturing licence; merchandising systems.

Carroll granted to Kleerex an exclusive licence relating to the manufacture of acrylic merchandising systems. The two companies had common shareholders and common directors, and the agreement between them, which related to a territory outside the State, did not offend against section 4(1).

A certificate was issued.

*Decision No. 438. Kleerex Licensing Ltd/ICC Business Expansion Fund Ltd.*

October 1995.

Licence for intellectual property rights; merchandising systems.

Kleerex effectively agreed not to license certain intellectual property rights granted to it by Carroll in Europe, under the agreement in the previous decision, without the consent of ICC BEF, which had subscribed for shares in Kleerex International. The Authority considered that the agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 439. Blugas Limited/distributors. October 1995.*

Exclusive distribution; cylinder LPG.

This related to a standard agreement with exclusive distributors of Blugas, whereby the distributors supplied Blugas dealers with cylinder LPG and bulk customers with LPG. The distributors were also shareholders in Blugas. In normal circumstances, the Authority would have regarded these agreements, which involved exclusive distribution and purchasing, as offending against section 4(1), but capable of satisfying the requirements for a licence. Because the distributors were shareholders in Blugas, however, different conditions applied. The restrictions on competition did not offend against section 4(1), so long as the distributors were significant

shareholders in Blugas.

A certificate was issued.

*Decision No. 440. The Irish League of Credit Unions.* November 1995.

Membership rules; credit unions.

The rules set out the requirements for membership of the ILCU. Members of ILCU were required to take out life savings and loan protection insurance with ECCU, a wholly owned subsidiary of ILCU. The Authority considered that the rules did not offend against section 4(1), nor did the insurance requirement, since the latter involved only a tiny proportion of the insurance market and because credit unions could opt out of these arrangements.

A certificate was issued. (See also Decision No. 596).

*Decision No. 441. The Dublin Bankers' Clearing Committee.* November 1995.

Clearing rules; banking.

The clearing rules regulated arrangements for the clearing, exchange and settlement of payment transactions within the State involving the four associated banks, the Central Bank and TSB Bank. Membership was available on a full and associate basis. The Authority considered that the rules did not offend against section 4(1), nor did any provisions contained in the rules.

A certificate was issued.

*Decision No. 442. The Direct Debiting Committee.* November 1995.

Direct debiting rules; banking.

The rules regulated the operation of the direct debiting scheme. The parties involved in the Committee were the four associated banks, TSB Bank and the Central Bank. Institutions paid a share of the operating costs and new entrants paid an entry cost of 5% of past development costs. The arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 443. Seletar Ltd/AIB Investment Managers Ltd – Share Subscription Agreement.* November 1995,

Share subscription agreement; hotel.

This related to a BES type investment in a company which owned a small hotel in Bray. The hotel was sold in February 1995. There were non-compete and non-solicit restrictions in the agreement until the termination date. There were no post termination restrictions in an employment contract. The arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 444. F.B.H. Distributors Limited/Harty Security Limited/Harty Holdings Limited/F.B.H. Limited – Asset Purchase Agreement. November 1995.*

Asset purchase agreement; security products.

This concerned the sale and purchase of the assets and business of a security products and equipment business. Payment was to be made over a ten year period. The non-compete provision was for a period of five years from the date of the agreement. The Authority rejected the claim that the period was justified because it extended for two years from the date of the last payment. A statement of objections was issued, to which there was no response. The agreement offended against section 4(1), and did not satisfy the requirements for a licence.

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 445. Irish Music Rights Organisation/Writers, Publishers (Non-corporate) and Publishers (Limited Company). December 1995.*

Exclusive assignment; music copyright.

These three standard copyright assignment agreements, between IMRO and creators and publishers, were similar to agreements previously notified by the Performing Right Society, of which IMRO was then a subsidiary. The PRS agreements were refused a certificate or a licence in May 1994 (Decision No. 326). IMRO became an independent company in December 1994, and entered into copyright assignment agreements with its members. Besides the agreements which IMRO notified, the Authority also took into consideration the Memorandum, Articles and Rules of IMRO, regarding them all as part of the overall agreement between undertakings. The creators or publishers assigned exclusively to IMRO the performing rights in their musical works to enable IMRO to exploit those rights and to collect royalties on behalf of its members. One rule provided that a member could require IMRO to grant to the member a non-exclusive licence for the public performance of a work. The

Articles provided that, for the first two years, three of the directors should be nominated by PRS, and two thereafter. The Authority expressed its concerns regarding the limitations and restrictive pre-conditions for the grant back of a non-exclusive licence to a member, and at the fact that PRS, a potential competitor, was entitled to appoint directors of IMRO, even though IMRO had become independent of PRS. IMRO then amended its Memorandum, Articles and Rules to meet the concerns of the Authority. The amendments provided that the member could require the grant back of a non-exclusive licence for any part of the performing right, and eliminated the more restrictive pre-conditions. Arrangements for the appointment of directors by PRS were deleted.

As in the earlier decision, the Authority took the view that the arrangements constituted an exclusive collective copyright enforcement system involving independent undertakings, and that it offended against section 4(1). It considered that the arrangements notified relating to the grant-back of a non-exclusive licence were restrictive and offended against section 4(1), but since they were amended they no longer offended. It considered that the arrangements relating to directors nominated by PRS offended against section 4(1), but they were deleted. The amendments removed terms which the Authority regarded as not indispensable, and all the requirements for a licence under section 4(2) were satisfied.

A licence was granted for the amended arrangements from October 1995 to October 2010, and no conditions were attached.

*Decision No. 446. North Western Cattle Breeding Society Ltd/John Doherty, Michael Tarpey, John O'Loughlin and Sean McHugh. December 1995.*

Contractors agreement; artificial insemination services.

Four versions were notified of a standard agreement between the Society and independent contractors for the provision of A. I. services within a designated area of the Society's region. The contractors were formerly employees of the Society. Neither the agreements nor the surrounding facts provided sufficient indication that the contractors were operating as agents of the Society, as claimed by the Society, and the Authority took the view that they were not agents. A number of the clauses in the agreements offended against section 4(1), and did not satisfy the requirements of section 4(2). These concerned exclusivity, equalisation of earnings and post-termination non-compete provisions. Following the issue of a statement of objections

and an oral hearing, the agreements were amended so as to create a relationship of agency, and the agreements no longer offended against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 447. Computa Tune Services Franchise. December 1995.*

Franchise agreement; vehicle engine tuning and servicing.

This related to a master franchise agreement for the Computa Tune service.

Following the granting of the category licence for franchise agreements (Decision No. 372), the Authority wrote to the parties involved stating that it considered that the notified agreement fell within the scope of the category licence, but did not satisfy its requirements. The parties responded to this letter. A statement of objections was issued, but no response was received. The franchise agreement as such was not restrictive of competition, though certain clauses offended against section 4(1). These included a clause under which the master franchisee had to publish a recommended price list after consultation with the franchisor; a post-termination restriction on soliciting employees; and a confidentiality restriction, even if the information had come into the public domain. The notified agreement did not conform with the provisions of the franchise category licence. The notification did not include a request for a licence, and so the Authority did not consider the grant of an individual licence.

A certificate was refused.

*Decision No. 448. The Eurocheque Committee. December 1995.*

Eurocheque rules; cross-border personal payment system.

The Eurocheque system involved the four associated banks, and it related to a personal payment system for cross-border use, involving cheques and a cheque card, both in a common format. The arrangements of the Eurocheque Committee as a whole were involved as well as those of the Irish Committee. The rules covered the operation of the scheme, the allocation of costs, membership and arrangements for new entrants. The Authority considered that the system, per se, did not offend against section 4(1), nor did most of its provisions. The setting of commission rates, however, did offend against section 4(1), as it amounted to a form of price fixing. The system satisfied the requirements of section 4(2), especially since no centralised

clearing system would be possible without agreement on commission rates, and because there were alternatives to Eurocheques.

A licence was granted, without conditions, from December 1995 to December 2005.

*Decision No. 449. Irish Music Rights Organisation Ltd/Independent Radio Stations.*  
December 1995.

Copyright licence; music.

Under this standard agreement, IMRO licensed the broadcast of its repertoire of musical works to independent radio stations, in return for the payment of royalties. The licence granted by IMRO was non-exclusive and covered all its repertoire, and was a blanket licence to use all copyright music. It was not the only means by which the users could secure the right to use copyright music. They could deal directly with IMRO members and with overseas societies. The IMRO blanket licence meant that all copyright music was sold collectively, but this was not anti-competitive per se and did not offend against section 4(1). The Authority considered that it was not its function to adjudicate on the fairness of an agreement, and in particular to arbitrate on prices.

A certificate was issued.

*Decision No. 450. An Post – Standard Franking Machine Licence Agreement.*  
December 1995.

Licence agreement; postal services.

This related to a standard licence agreement issued by An Post to business firms for the use of a postal franking machine. The agreement itself did not offend against section 4(1). The licence contained certain restrictions relating to the inspection and maintenance of machines, which were essential for the efficient operation of the system and the prevention of fraud.

A certificate was issued.

*Decision No. 451. An Post/Ascom Hasler Mailing Systems Limited/Zurich Insurance Company.* December 1995.

Supply of postal franking machines.

This agreement set out the conditions under which An Post would allow Ascom Hasler to supply postal franking machines to the Irish market. Zurich provided a

guarantee to An Post for the obligations of Ascom under the agreement. There were three suppliers to the Irish market, and An Post would not restrict the number of suppliers. The agreement did not offend against section 4(1), nor did any of its provisions. Any restrictions were necessary to prevent fraud and to ensure the proper operation of the system. The supplier was not restricted by An Post in respect of its charges to consumers.

A certificate was issued.

*Decision No. 452. An Post/Pitney Bowes/Barclays. December 1995.*

Supply of postal franking machines.

The decision was the same as that in the preceding decision, No. 451.

A certificate was issued.

*Decision No. 453. An Post/Neopost/BNP. December 1995.*

Supply of postal franking machines.

The decision was the same as that in Decision No. 451.

A certificate was issued.

*Decision No. 454. Collins/Butler/O'Brien. December 1995.*

Partnership agreement; auditors and accountants practice.

The partnership agreement did not offend against section 4(1), nor did any of its provisions, including non-compete and non-solicit of customers restrictions for 18 months after a person ceased to be a partner, within a ten mile radius of the premises of the partnership.

A certificate was issued.

*Decision No. 455. Shell Loan Agreement for Lubrication Bay Equipment.*

December 1995.

Loan of equipment; lubrication equipment.

This concerned a standard form agreement relating to the loan of lubrication bay equipment by Shell to certain resellers, in return for which the user agreed to use the equipment exclusively for brands marketed by Shell for a period of ten years. Upon expiry or earlier termination, the user had to return the equipment to Shell, or if this was not possible on earlier termination, the user had to pay to Shell one tenth of the

sum expended by Shell for each unexpired year of the agreement. The user could terminate the agreement on giving not less than three months notice, and he could either return the equipment or purchase it at the discounted price.

The Authority took a similar view to that in the case of the Burmah loan agreements (Decisions Nos. 361 and 407), and expressed its concern at the ten year duration of the agreement. Shell agreed to amend the agreement so that it had a duration of five years, with other consequential amendments. While the agreement offended against section 4(1), the amended agreement satisfied the requirements of section 4(2).

A licence was granted to the amended agreement for the period from November 1995 to November 2005, and no conditions were attached.

*Decision No. 456. Irish Music Rights Organisation Ltd/Radio Telefis Eireann.*

December 1995.

Copyright licence; music.

This related to the copyright music licence agreement between IMRO and RTE. The Authority took the same view of this agreement as it had done in the case of the agreement with independent radio stations (Decision No. 449).

A certificate was issued.

*Decision No. 457. Irish Music Rights Organisation Ltd/Public Performance Users.*

December 1995.

Copyright licence; music.

This concerned the standard copyright music licence contract under which IMRO licensed public performance users – public houses, hotels/restaurants, retail shops and centres, cinemas, clubs, theatres, industrial and commercial companies, dance halls, discos, stadia and premises used for individual events and concerts. The contract licensed the public performance of musical works in return for the payment of royalties. While the Authority took the same view as in the case of the agreements with broadcasters (Decisions Nos. 449 and 456), there were some important differences in the decisions.

The Authority considered the general arrangements for the licensing by IMRO of its repertoire and the standard conditions in the licence. It did not consider the tariff and user category which was applied to each of the thousands of licences in existence,

since such individual agreements had not been notified. The notified standard licence was considered by the Authority to be a decision by an association of undertakings. Again the Authority considered that the IMRO blanket licence was not the only means by which the users could secure the right to use copyright music. The Authority had already accepted that the agreements between IMRO and the creators and publishers offended against section 4(1) but it had granted a licence (Decision No. 445). The Authority did not believe that, in the context of section 4, there should be a requirement that there be more than one collecting society.

The Authority stated that the financial terms inserted in an individual agreement could cause that agreement to offend against section 4(1) in certain circumstances, but it would be the individual agreement containing such terms which would offend, rather than the standard agreement. Any abuses of a dominant position by IMRO were prohibited under section 5 of the Act, but it was not the function of the Authority to take a view on any section 5 issues that might arise out of the notified agreements. A certificate was issued.

*Decision No. 458. BnM Fuels Ltd/Fuel Distributors Ltd. February 1996.*

Merger; coal distribution.

Under the agreement, BnM Fuels, a subsidiary of Bord na Mona, acquired the business of Fuel Distributors and the National Coal Company. This business involved the importation and distribution of coal to wholesalers and retailers, and involved small retail sales of coal. Bord na Mona was involved in the production of turf and turf products, and distributed other solid fuels, including coal.

Most of the business of FDL came within the exclusive jurisdiction of the European Commission under the European Coal and Steel Treaty, and could not be considered under national legislation. The Commission had confirmed that the merger was exempted, not on its merits but on the basis that it fell below the de minimis thresholds. The Authority could therefore consider only retail sales of coal to domestic consumers, and sales of turf and briquettes. The Minister considered that the part of the merger which remained within the scope of domestic law was below the threshold for notification under the Mergers Acts.

FDL's retail coal business accounted for less than 1% of the total household solid fuel market, and that part of the merger which could be considered would have no impact

on competition. The agreement did not include any non-compete provisions. It did not offend against section 4(1).

A certificate was issued.

*Decision No. 459. Tedcastle/Star Oil. February 1996.*

Exclusive purchase; fuel oils.

Tedcastle appointed Star Oil to be a distributor of its fuel oils, in return for which Star Oil agreed to purchase Tedcastle products exclusively for a period of years. The agreement continued in force for five years, and for successive five year periods thereafter, unless terminated by either party. Since distributors of these products generally were subject to long-term exclusive purchasing requirements, the Authority considered that the agreement offended against section 4(1). Such an obligation needed to be limited in duration. The notified agreement was of indefinite duration, and it was subject to a lengthy period of notice of termination. It did not satisfy the requirements of section 4(2). After the issue of a statement of objections, Tedcastle agreed to amend the agreement to provide that it would terminate automatically at the end of five years, and this satisfied the requirements of section 4(2).

A licence was granted for the amended agreement from February 1996 to February 2006, and no conditions were attached.

*Decision No. 460. Tedcastle/Clarke. February 1996.*

Exclusive purchase; fuel oils.

The agreement and the amendment and the Authority decision were virtually identical to those in the preceding decision.

A licence was granted for the amended agreement from January 1996 to January 2006, and no conditions were attached.

*Decision No. 461. Premier Dairies/City distributors. March 1996.*

Exclusive purchase; liquid milk distribution.

This related to the appointment by Premier of distributors of its liquid milk and other products to doorstep customers and certain smaller retail outlets in Dublin and surrounding areas. The Authority considered that the agreement was concerned with the purchase and resale of liquid milk by the distributors, and thus these were not commercial agents of Premier. While the distributor was granted an exclusive licence

to sell Premier products to doorstep customers within a defined area, Premier itself distributed to retail outlets for resale and to other large customers in the territory. This did not constitute exclusive distribution as defined in the category licence (Decision No. 144).

The agreements per se did not offend against section 4(1), but they contained certain clauses which did offend. The Authority was concerned about certain references to prices, which were unclear or ambiguous, and that it was not stated that the distributor was free to set his own resale prices. The agreement obliged the distributor to avail of a billing preparation service to be provided by Premier. The Authority was concerned that this system could be used by Premier to ensure adherence to resale prices set by Premier. It also considered that this clause did not satisfy the requirements of section 4(2). Following the concern expressed by the Authority, Premier informed its distributors that they were able to set their own resale prices, and that they were free to avail of the billing service or not. As amended, the agreement no longer offended against section 4(1).

There was a 12-month post-termination non-compete clause, which in a distribution agreement would generally offend against section 4(1). In this case, the Authority considered it to be a non-compete obligation following the sale of a business, since the distributor could sell the round, and the obligation did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 462. The Electricity Supply Board/The Register of Electrical Contractors of Ireland Ltd. March 1996.*

Agreement on the connection of electrical installations to the electricity supply. This concerned an informal unwritten agreement between the ESB and RECI, that ESB would only connect customer electrical installations to the ESB supply provided a valid completion certificate had been prepared and submitted by an electrical contractor registered by RECI, or by an inspector employed by RECI. The agreement was the subject of High Court proceedings brought by a number of electrical contractors against the ESB. The High Court ruled that, for a period until new rules were adopted by RECI, the ESB was in breach of section 5 of the Competition Act because the RECI agreement was anti-competitive within the meaning of section 4.

The decision of the Authority also covered the rules of RECI, and its Memorandum and Articles. The Authority did not consider that the issuing of such certificates per se offended against section 4(1). Non-registered contractors, however, were placed at a competitive disadvantage relative to registered contractors, because of the cost of the fee charged for inspections and because of the need to have their work certified by RECI inspectors. This offended against section 4(1). There was also an implication that membership might be restricted to applicants whose business was above a certain size, and this offended against section 4(1), as did the requirement that a contractor should have a suitable premises, and the power of RECI to reject an application for registration without disclosing reasons and without permitting appeals against these arbitrary decisions. These restrictions did not satisfy the requirements for a licence under section 4(2). RECI amended certain aspects of its rules after the Authority had expressed concern, and the amended arrangements satisfied the requirements of section 4(2).

A licence was granted for the amended agreement for the period from March 1996 to March 2006, and no conditions were attached.

*Decision No. 463. Careerline Ltd/Bank of Ireland. April 1996.*

Exclusive supply and purchase of corporate clothing for Bank employees.

The Bank granted Careerline a loan and credit facilities to set up the company to carry out this service, and the Bank was committed to dealing exclusively with Careerline in respect of specified corporate clothing. The Bank could procure alternative corporate wear, and the arrangements could be terminated at any time on giving two months' notice. The contracting out of this service, which had previously been carried out in-house, did not offend against section 4(1). The prices were agreed between the company and the Bank, although they were purchased by the Bank's employees, but this did not constitute resale price maintenance.

A certificate was issued.

*Decision No. 464. Musicmaker Ltd/Retailers. April 1996.*

Agreement for the supply of musical and amplification equipment.

This concerned a standard verbal agreement between Musicmaker and the retailers for certain of its products, particularly amplification equipment. The customer agreed to maintain an agreed schedule of product in stock and on display. Musicmaker agreed

to recognise them as official stockists and to supply stock at discounted prices. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 465. Cado Pvt. Ltd/Mr. Tom O'Connor/CFP International Ltd/Mr. Andrew Beasley. May 1996.*

Sale of business; cinema complex.

Mr. Tom O'Connor agreed to sell to CFP and Mr. Beasley his entire shareholding in Cado, which operated a cinema complex in Cork. The vendor agreed not to own or operate a cinema for two years within a radius of three miles of Douglas, Cork, or in the town of Carrigaline, nor to solicit employees. The sale of business and the restrictions imposed did not offend against section 4(1).

A certificate was issued.

*Decision No. 466. Northern Telecom/TEIS. June 1996.*

Non-exclusive distribution; communication products.

NT manufactured telecommunications equipment and it appointed, under an oral agreement, TEIS, which was wholly owned by Bord Telecom Eireann, non-exclusive distributor of certain products. NT had a written distribution agreement with another undertaking for the same products. TEIS was not prevented from dealing in competing products. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 467. Tedcastle/Primo. June 1996.*

Exclusive purchase; fuel oils and petrol.

Primo agreed to purchase its total requirements of fuel oils and petrol from Tedcastle, for an initial period of five years and for successive five year periods thereafter. As in the case of Tedcastle/Star Oil (Decision No. 459), the Authority considered that the exclusive purchasing agreement offended against section 4(1), but, because of its indefinite duration, it did not satisfy the requirements for a licence. When the agreement was amended so as to terminate automatically at the end of five years, it then satisfied the requirements of section 4(2).

The agreement also provided that the distributor was obliged not to dispose of its facilities or property without the consent of Tedcastle, or without offering an option to

Tedcastle. These requirements did not offend against section 4(1) insofar as they related to the oil distribution business. Primo, however, operated two retail petrol stations, and, following the motor fuels category licence (Decision No. 25), the Authority stated that restrictions upon the freedom of the dealer to sell his petrol station, and another to buy the premises, offended against section 4(1). The clauses were amended so that they no longer related to Primo's petrol stations, and they then did not offend against section 4(1).

A licence was granted for the amended agreement for the period from June 1996 to June 2006, and no conditions were attached.

*Decision No. 468. Grey Communications Group Ltd/Campbell Advertising Ltd.*

June 1996.

Share purchase; marketing and communications services.

Grey purchased 40% of the issued share capital of Campbell, and the notification also involved a number of related agreements. The share purchase did not offend against section 4(1), nor did conflict of interest and compensation provisions. It was also provided that one of the vendors, Mr. Campbell, had to retain 10% of the shares of the company until October 2010. This effectively tied him into the company for 15 years after the agreement, and for six years after an option agreement had expired. Because there was no non-compete clause in the agreement, this clause did not offend against section 4(1).

A certificate was issued.

*Decision No. 469. Irish Helicopters Limited/Bristow Helicopters Limited and others.*

June 1996.

Merger and shareholders' agreements; helicopter services.

Under the sale and purchase agreement, Bristow purchased 51% of the shares in Irish Helicopters from Aer Lingus, and Petroleum Helicopters Inc purchased the remaining 49%. The shareholders agreement dealt with the management and operation of the joint operation. Neither of the purchasers operated in the State at that time, and the arrangements had no effect on the actual level of competition. Petroleum Helicopters was restricted from operating within the EU on its own by virtue of a Council Regulation regarding aviation services. The shareholders agreement did not offend against section 4(1) either, including a clause preventing the solicitation or

employment of staff for the duration of the agreement and for one year after termination.

A certificate was issued.

*Decision No. 470. Tedcastle/McCrystal. June 1996.*

Exclusive purchase; petrol and gas oil.

Tedcastle appointed Mr. McCrystal to be a distributor of its petrol, and McCrystal Oils to be a distributor of fuel oils. The distributor agreed to purchase Tedcastle products exclusively for an initial period of five years, and for successive five year periods thereafter. As in the case of Tedcastle/Star Oil (Decision No. 459), the Authority considered that the agreement offended against section 4(1), and, because of its indefinite duration, it did not satisfy the requirements for a licence. The agreement was amended so that it terminated automatically at the end of five years, and it then satisfied the requirements of section 4(2).

A licence was granted for the amended agreement for the period from June 1996 to June 2006, and no conditions were attached.

*Decision No. 471. Irish Seafood Producers Group Ltd/Producers. December 1996.*

Agency agreement; farmed salmon and sea trout.

The agreement involved a joint selling operation, with ISPG deciding the selling arrangements, including prices and discounts, and production schedules, while the producers were prevented from marketing any of their own output. The arrangements offended against section 4(1). ISPG was a producer organisation as defined in an EU Regulation. This provided for the common organisation of the fishery market, and included a requirement that members disposed of their total output through the producers' organisation. There was, however, no provision in the Competition Act for the exemption of such agreements from the Act. The Authority stated that, if there were any conflict between the Act and an EU Regulation, it was not free to treat the Act as if it were implicitly amended. The Authority originally intended to refuse a licence, and it issued a statement of objections. Eventually it accepted that the agreement satisfied the requirements for a licence, since it considered that a producers' group could not exist without the requirement that all production should be supplied to it, and the agreement applied to only 22% of total output.

A licence was granted from December 1996 to December 2006, with no conditions.

*Decision No. 472. Bewleys Coffee Machines 1.* December 1996.

Loan agreement; coffee machines.

Bewleys loaned coffee machines, in this case small machines, to many catering outlets, such as cafés, hotels, pubs, restaurants, offices and shops. In return, the customer agreed to purchase a specified minimum amount of coffee from Bewleys, and to use only Bewleys coffee in the machines. Customers were free to terminate the agreement at any time, and they were free to use other brands of coffee, but not in the machines. The exclusivity requirement was necessary to guarantee that consumers were actually being served Bewleys coffee, and the minimum purchase requirement was not prohibitive, given the possibility of terminating the agreement at any time. The arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 473. Bewleys Coffee Machines 2.* December 1996.

Loan agreement; coffee machines.

This concerned the standard loan agreement for Bewleys 'large' coffee machines.

Apart from the larger minimum purchase requirement, the agreement and the analysis by the Authority were the same as in the preceding decision.

A certificate was issued.

*Decision No. 474. The Professional Golfers' Association.* December 1996.

This related to the Constitution and Regulations of the PGA, which formed a contract between the PGA and its members who were golf professionals in the whole island of Ireland. A PGA member was forbidden from playing in another event or tournament which conflicted with a PGA-approved tournament in which he was eligible to play without the permission of the PGA. No member or his caddie could display any offensive advertising matter. The Authority considered that golf professionals were not employees, but were self-employed, and thus they were undertakings. The arrangements did not offend against section 4(1).

A certificate was issued.

*Decision No. 475. Athlone Regional Technical College/The Governor and Company of the Bank of Ireland.* December 1996.

Exclusive concession; banking.

This licence agreement involved Athlone RTC granting the sole right to the Bank of Ireland to carry on bank sub-office services at the college campus, and providing premises on campus for these purposes. The term was nine years, with a first option to renew. In return, the Bank paid a substantial lump sum to College Support, a development company to the RTC. The Bank was granted the exclusive right to recruit accounts of all students on the campus, and all European Social Fund or similar grants were mandated to the Bank. No competitor of the Bank was allowed to establish a presence on the campus. There was no obligation on students to maintain an account with the Bank. The grant of such exclusive licences did not offend against section 4(1).

A certificate was issued.

*Decision No. 476. United Utilities Plc/Bronica Ltd. December 1996.*

Share purchase; waste and water treatment plants.

This essentially involved a management buy-out by two executive directors of Jones Environmental Ltd from United Utilities, and it included several related agreements. The share purchase agreement did not offend against section 4(1). The service agreements provided for the employment of the joint managing directors for five years, and they contained several restrictions, which did not offend against section 4(1). The Authority was concerned that the restriction on the disclosure of confidential information could be used to prevent the person re-entering the market after five years had elapsed. The executive was prohibited from being engaged in a competing business for six months after termination of employment. Normally this would not have been acceptable, but the Authority stated that the restriction in this case did not amount to a total prohibition on competition, and was only for six months, and it did not offend against section 4(1). JEL was required to continue to obtain bond facilities from the vendor for some time after the business was sold. The Authority considered that this was an arrangement whereby a company which had sold a business continued to exercise control over that business, and that this offended against section 4(1). The agreement satisfied the requirements for a licence under section 4(2). It was concerned that the bonding requirements might continue indefinitely, and it granted a licence for only five years.

A licence was granted for the period from March 1996 to March 2001, and no conditions were attached.

*Decision No. 477. Irish Times Newspapers Ltd/Retailers. March 1997.*

Distribution agreement; newspapers.

This related to a standard distribution agreement between the Irish Times and newspaper retailers. The agreement set out the requirements for the supply of newspapers, such as opening hours, minimum orders, price, etc. Three notifications were submitted, covering three aspects of the arrangements, but the Authority examined the whole agreement.

A statement of objections was issued, and the Irish Times offered to amend one clause which the Authority found offensive. Among the clauses of interest were the following:

- (a) the newsagent was required to pay all charges on a weekly basis by means of a direct debit;
- (b) unsolds were accepted up to 5% of the newspapers supplied;
- (c) the newsagent was required to purchase a minimum of 10 copies of the paper per day, or 60 per week; and
- (d) a recommended retail price, printed on the newspaper, applied to the sale of the paper.

The last clause was amended so that the newsagent was free to set its own price, though a resale price would still be recommended.

The Authority first rejected the claim that the retailers were agents of the Irish Times. They could not be regarded as an auxiliary organ of the newspaper publishers. The arrangements constituted a selective distribution system, and such agreements might or might not be anti-competitive. The Authority believed that refusals to supply had been based on qualitative rather than quantitative criteria, and it concluded that the distribution agreements did not per se offend against section 4(1), nor did most of the other clauses in the agreements.

The requirement that all retailers sell the newspaper at the price specified on the masthead amounted to full scale resale price maintenance, which restricted competition and offended against section 4(1). The Authority stated that the notified arrangements did not satisfy the requirements of section 4(2). After the RPM requirement was removed, the agreement no longer offended against section 4(1). A certificate was issued for the amended agreement.

*Decision No. 478. Development Capital Corporation Ltd/Capco Holdings Ltd/Shareholder Agreement. March 1997.*

Shareholder agreement; building products.

This concerned a shareholder agreement under which DCC, an industrial investment holding company, acquired shares in Capco to assist a management buy-out. The shareholder agreement contained standard restrictions regarding the operation of the company and set out safeguards in favour of DCC. It also provided that the two directors of Capco would not compete with the company while they were shareholders or employees of the company, and for two years after shareholding or employment ceased, whichever was the later. The employment agreements contained a restriction on the directors soliciting any of the company's customers for one year after their employment ceased. Following the issue of a statement of objections, an amendment was made to the arrangements, whereby DCC agreed not to enforce the non-compete clause for a period in excess of two years after the director ceased to be a shareholder.

The Authority considered that the agreement did not offend against section 4(1), nor did the standard provisions and most of the non-compete provisions. The Authority stated that it did not believe that a post-shareholding restriction would be justified if an individual's shareholding was 5% or less, in which case a certificate would be revoked. The post-employment non-compete provisions offended against section 4(1). These were removed by the amendment, and they no longer offended.

A certificate was issued for the amended agreement.

*Decision No. 479. Development Capital Corporation Ltd/Direct Marketing Technologies Group Ltd/Shareholder Agreement. March 1997.*

Shareholder agreement; software and marketing – insurance.

This involved a shareholder agreement under which DCC subscribed for shares in Direct Marketing. The share subscription agreement and the employment agreements were similar to the DCC/Capco agreements in the preceding decision, with standard restrictions and safeguards and two year non-compete and non-solicit of customers clauses after termination of shareholding or employment. There was also a clause prohibiting the revealing of trade secrets or confidential information without a time limit. Following the issue of a statement of objections, the arrangements were amended, whereby the non-compete clause applied only for two years after

shareholding ceased, and the non-solicit clause was not to be enforced for a period in excess of one year after cessation of employment.

The Authority took a similar view as in the DCC/Capco case, and held that the investment of venture capital to obtain a minority shareholding, the standard restrictions and the non-compete and non-solicit restrictions for two years after shareholding terminated did not offend against section 4(1). It objected to the two year non-compete and non-solicit clauses after employment ceased, but the amended clauses no longer offended against section 4(1). The confidentiality clause did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 480. Snowcream Ltd/John Greene. April 1997.*

Distribution agreement; liquid milk.

This concerned an agreement whereby a person was appointed by Snowcream as a distributor of its liquid milk and other products to doorstep customers and certain smaller retail outlets in a specified area. Snowcream had purchased the goodwill in the milk round from the distributor, and the latter was appointed distributor in the round. The agreement provided for the operation of the round, and required, inter alia, that products were to be purchased exclusively from Snowcream, at a price notified by Snowcream after consultation with the National Milk Distributors Association.

Following the issue of a statement of objections, Snowcream amended the notified agreement by providing that terms in respect of the purchase price, margins and delivery fees would be negotiated directly with the distributor and not with the NMDA, and by confirming that the distributor was free to set his own resale prices. Snowcream products were also distributed to retail outlets for resale to customers in the territory, and so the agreement did not come within the scope of the category licence for exclusive distribution agreements (Decision No.144). The Authority considered, as in other milk distribution cases (such as the Premier decisions Nos. 391 and 461) that the arrangements did not offend against section 4(1), though they did contain certain clauses which offended.

The distributor or any employee was not allowed to deal in competing products for 12 months after termination of the agreement, and this did not offend against section 4(1). Because the distributor had not been informed that he was free to set his own

resale prices, the arrangements were considered to offend against section 4(1). Purchase prices and delivery fees were agreed after consultation between Snowcream and the NMDA. For a number of reasons, the Authority considered that an agreement between resellers in these circumstances regarding common purchase prices, margins and fees offended against section 4(1). The Authority also stated that the agreement did not satisfy the requirements for a licence. Following amendment of the agreement to meet the Authority's concerns, it no longer offended against section 4(1). A certificate was issued for the amended agreement.

*Decision No. 481. Bank of Ireland Credit Card Services Ltd/American Express Services Europe Ltd. April 1997.*

Operation of credit card services.

This decision related to a licence in respect of an arrangement whereby the Bank of Ireland would carry on the existing charge card and merchant acquisition and servicing business in Ireland of American Express Services Europe, for an initial period of ten years, the first five of which were on an exclusive basis. The Authority considered that the agreement was more analogous to a licence arrangement than a sale of business, and it was not anti-competitive. It stated that the relevant market was very competitive, with all the major financial institutions in the State issuing credit cards, and that the market could accommodate new entrants easily, Amex having a relatively small share of the market. The agreement did not offend against section 4(1). The Authority recognised the commercial basis for the five year exclusivity term as a means for Bank of Ireland to secure its investment in the business, and found that this did not offend against section 4(1).

A certificate was issued.

*Decision No. 482. Independent Newspapers Marketing Ltd/Retailers (agencies). April 1997.*

Distribution agreement; newspapers.

This related to three standard distribution agreements between Independent Newspapers Marketing and newspaper retailers. One agreement applied to new retail outlets, the second to existing outlets and the last applied in the case of transfer of ownership of outlets. Each agreement contained terms and conditions of supply, and the agreements set out various requirements for the supply of newspapers to retail

outlets, such as opening hours, premises, credit-rating, location and home delivery. One clause specified that the publication had to be sold at the cover price only, and could not be sold to a third party for resale, except with prior consent. Sale of the publications was restricted to the premises of the applicant only.

The Authority issued a statement of objections to Independent, which led to a written response and an oral hearing. Independent suggested amendments to certain clauses. The Authority considered that the arrangements constituted part of a selective distribution system for the newspapers, and that the arrangements offended against section 4(1). The agreements provided that the publications had to be sold at the cover price only, and that the retail price remained solely within the discretion of the Independent. As in the case of the Irish Times (Decision No. 477), this was considered to amount to full scale resale price maintenance, which offended against section 4(1). The Authority considered that the ban on sales to a third party for resale, the restriction of sales to a specified premises, and the requirement to pay the account of the previous newsagent, all offended against section 4(1), but it noted that Independent were prepared to amend these requirements. It considered that restricting entry by setting a quantitative limit on the number of retailers in any given area, and the other clauses which offended against section 4(1), did not satisfy the conditions for a licence.

The Authority refused to issue a certificate or grant a licence to any of the three notified agreements.

*Decision No. 483. Kleerex Licensing Ltd/ICC Bank plc/Subscription and Shareholders Agreement. May 1997.*

Shareholders agreement; acrylic merchandising products.

This decision, along with the next two decisions, was concerned with a series of arrangements whereby ICC Bank invested venture capital in Kleerex Licensing (Kleerex L) and related companies, by way of subscription and shareholding agreements. (Two other related agreements had previously been certified in 1995 (Decisions Nos. 437 and 438)). The notified agreement provided for the subscription by ICC for shares, and it regulated the future conduct of the business of the company and the relationship between the shareholders and the company. It also contained standard provisions and restrictions related to the operation and internal management of the company.

The agreement provided that the three warrantors would not engage in any directly competing business for a period of five years from the date of the agreement or for 18 months after ceasing to be a shareholder in, a director of or employed by, the company. They also agreed not to solicit, in direct competition, the custom of any customer after they ceased to be a shareholder or employed by the company, apparently without any time limit. The service agreements also contained non-compete and non-solicit clauses.

The Authority considered that an agreement to invest venture capital in return for a minority shareholding was not anti-competitive, nor were the standard provisions relating to the management and operation of the company. Insofar as the non-compete and non-solicit restrictions applied for the period that a covenantor remained as a shareholder, director or employee, they did not offend against section 4(1). Similar provisions for 18 months after the disposal of shares did not offend either. Since the agreements exceeded these limits, they offended against section 4(1), and they did not satisfy the conditions of section 4(2). Following the issue of a statement of objections, amendments acceptable to the Authority were made by way of waivers from ICC. Similar waivers were required from Kleerex L, because of the need to amend the service agreements, but no evidence was furnished that such waivers had been executed.

The Authority refused to issue a certificate or grant a licence.

*Decision No. 484. Kleerex International Ltd/ICC Bank plc/Subscription and Shareholders Agreement. May 1997.*

*Decision No. 485. Carroll Products and Designs Ltd/ICC Bank plc/Subscription and Shareholders Agreement. May 1997.*

These decisions related to investments by ICC Bank in two other companies related to Kleerex L. The agreements were similar to that described in the preceding decision, and the restrictive clauses were identical. Waivers were executed by ICC, but not by the other party, and the consideration of the Authority was the same.

The Authority refused to issue a certificate or grant a licence.

*Decision No. 486. Christopher Terry/Carne Co. Ltd – Peter and Deirdre Coyne (Fat Freddy's). June 1997.*

Sale of business; restaurant.

This was concerned with a sale of business agreement for a pizza restaurant in Galway city. The vendors continued to engage in selling foods other than pizzas in an adjoining premises. The vendors agreed that they would not engage in manufacturing or selling pizzas and associated pizza products in Galway county borough for two years and six months from a date 23 days prior to the date of the agreement. The vendors also agreed that they would not solicit any regular customer of the business either inside or directly outside "Fat Freddy's", apparently without any time limit. The Authority considered that agreements for the sale of property did not come within the scope of section 4(1). The non-compete and non-solicit clauses did offend against section 4(1). Following the issue of a statement of objections, the purchasers indicated that they would not enforce these clauses beyond a period of two years from the date mentioned above. The agreement no longer offended against section 4(1). A certificate was issued for the amended agreement.

*Decision No. 487. Irish National Petroleum Corporation Ltd/Purchasers of Petroleum. June 1997.*

Purchase agreement; petroleum products.

This related to a standard agreement which INPC proposed to introduce for purchasers of its petroleum products. It consisted of a standard supply agreement and general terms and conditions of sale for customers of the Whitegate oil refinery. The agreement covered products sold on a commercial basis, and not to the sale of products under the mandatory purchase regime. The supply agreement would be for a maximum period of five years, with provision for earlier termination, and the minimum quantity to be supplied would be 25,000 tonnes per annum.

The Authority stated that it did not regard supply contracts, per se, as offending against section 4(1). It did not believe that the effect of the agreement was anti-competitive. It was not exclusive, and purchasers were free to acquire petroleum products from other suppliers in addition to INPC. The company had also undertaken substantial capital investment, and it was good commercial practice to enter into long-term arrangements with purchasers of the product. The Authority considered that the duration and the notice terms did not offend against section 4(1).

A certificate was issued.

*Decision No. 488. Applied Micro Electronics Ltd/Share Subscription Agreement. July 1997.*

Share subscription; electronic test equipment for computers.

This concerned a share subscription agreement between Applied Micro Electronics, several subsidiary firms, its shareholders (two of which were directors and promoters), and the Industrial Development Authority. The agreement contained standard covenants related to the operation of the business, the provision of information to the IDA, and restricted transactions, including restrictions on the sale of shares. There were non-compete and non-solicit restrictions on the promoters for as long as the IDA held not less than 5% of the A ordinary shares in the company. While the IDA had such a 5% shareholding, it could not take any ordinary shareholding in any company which was in competition with AMEL in specified businesses.

Following the issue of a statement of objections, the beneficiaries of the post-termination non-compete and non-solicit clauses indicated, by way of a waiver, that the restrictive covenants would be exercised only for a period of 18 months after a promoter ceased to be a shareholder of 5% or more of the issued share capital.

The Authority considered that an agreement involving venture capital type investment did not offend against section 4(1), nor did the standard provisions regarding the management and operation of the company. The non-compete restriction applied for 18 months after the promoter ceased to be an employee or director, if this was later than the share disposal. This offended against section 4(1), but the amended provision did not offend. The non-solicit of employees restriction for 18 months after employment or directorship ceased also offended against section 4(1), but the amended provision did not offend. The Authority accepted that a restriction on the IDA competing with a business for as long as it remained part of the business did not offend against section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 489. Category Certificate in Respect of Agreements Involving a Merger and/or a Sale of Business. December 1997.*

This was the first category certificate issued by the Authority since the 1996 amending Act provided for the issue of such category certificates. It indicated that an agreement for the sale of a business was not automatically outside the scope of section

4(1). It also stated that in many cases a merger or sale of business would not offend against section 4(1). The Authority defined circumstances in which such an agreement would not prevent, restrict or distort competition. The circumstances included those where post-merger market concentration levels were relatively low, where the entry of new competitors was easy, and where imports could provide competition to domestic suppliers. Two different measures of concentration might be used – the four-firm concentration ratio and the Herfindahl-Hirschman index. A merger would not contravene section 4(1) if the four-firm concentration ratio in the relevant market following the merger was below 40%. The Authority took the view that a horizontal merger between two firms, where either firm had a market share of 35% or more, should be subjected to individual scrutiny, and such an agreement was specifically excluded from the coverage of the category certificate. A vertical merger would not contravene section 4(1) unless it was considered likely to result in market foreclosure. The category certificate also included the views of the Authority on ancillary restrictions on competition in merger agreements, such as non-compete and non-solicit clauses for a period following completion of the transaction.

*Decision No. 490. Statoil Ireland Ltd/Clare Oil Co. Ltd – Share purchase agreement and service/employment agreement. January 1998.*

Share purchase; petroleum products.

This decision, and the three following decisions, related to a number of agreements under which Statoil, an oil importer, acquired an interest in some of its distribution companies. Statoil purchased the entire issued share capital of Clare Oil, and this agreement was accompanied by an employment agreement with one of the former shareholders.

Besides providing for the purchase of all the shares, the main agreement contained a non-compete clause on the vendors for two years from completion, and clauses relating to the non-solicit of customers and employees for the same period. The vendor was also prohibited from disclosing confidential information about the business. Under the employment agreement, the executive agreed not to solicit customers for one year from the date of termination of the agreement, and he agreed to keep secret confidential information.

The Authority applied the analysis set out in the merger category certificate (Decision No. 489). As far as its horizontal effects were concerned, the agreement did not

offend against section 4(1). From the vertical perspective, the merger did not have the effect of foreclosing entry to the market, and it did not contravene section 4(1). The post-completion non-compete and non-solicit clauses, and the restriction on the use or disclosure of confidential information, did not contravene section 4(1), nor did the employment agreement.

A certificate was issued.

*Decision No. 491. Statoil Ireland Ltd/Rabbitt Oil Co. Ltd – Share purchase agreement. January 1998.*

*Decision No. 492. Statoil Ireland Ltd/Shreelawn Oil Co. Ltd – Share purchase agreement and shareholders' agreement. January 1998.*

*Decision No. 493. Statoil Ireland Ltd/Baldoyle Oil Co. Ltd – Asset purchase agreement. January 1998.*

Share purchase; petroleum products.

These three decisions were similar to the Statoil/Clare Oil decision described above, although each transaction differed somewhat. The assessment was the same in each case as that in the Clare Oil decision, and the agreements did not contravene section 4(1).

A certificate was issued in each case.

*Decision No. 494. Cannon Hygienic Products (Ireland) Ltd/Initial Services (Ireland) Ltd – Supply agreement. February 1998.*

Supply agreement; sanitary products.

This related to an agreement for the provision of sanitary and medical disposal units together with the provision of sanitary towel and tampon dispensing machines to the public. Under the agreement, Initial Services appointed Cannon to be its sub-contractor for the purpose of providing, servicing and maintaining the dispensing machines and disposal units. During the term, each party was prevented from soliciting the customers of the other, and neither party was allowed to disclose confidential information about the other during the term and after termination. The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 495. Irish Insurance Federation Agreement on Maximum Rates of Remuneration for Life Business. February 1998.*

Agreement on commissions; insurance.

This related to the Irish Insurance Federation agreement on maximum commissions paid to insurance intermediaries in respect of life business. The Authority stated that there were two markets affected by the agreement – that for the sale of life insurance products, and that for the services of insurance intermediaries. Under the agreement, all members of the IIF had to pay intermediaries no more than specified rates of commission for life assurance, personal pensions, and the like.

The Authority considered that the agreement contravened section 4(1). Virtually all life products were distributed through intermediaries, and virtually all customers paid a fixed charge for this. The charge was not disclosed, and was not related to the actual cost of distribution, but it was a payment for each insurance product sold.

There was no incentive for an insurance company to compete for business by reducing the level of commission. Competition was restricted when all the purchasers of a service agreed the maximum price they would pay for the service and/or the forms which payment would take. The agreement required the sharing by competitors of information, and removed some of the uncertainty about competitors' prices, which was an important component of price competition. There was also a danger that the level of commission would be treated as a minimum level, with all insurers paying the same level. The agreement also removed any incentive for competition between intermediaries on price or the quality of service. The Authority noted that, despite warnings, the Minister had not fixed a ceiling on commissions for life products. The agreement did not satisfy the conditions for a licence under section 4(2).

The Authority refused to issue a certificate or grant a licence.

*Decision No. 496. Omnitron/Cryptovision A/S /Cablelink Limited/Tandberg A/S. April 1998.*

Security for a supply agreement; electronic equipment.

Under a separate agreement, Omnitron agreed to supply Cablelink with certain products. Omnitron obtained these products from Cryptovision, a Norwegian company owned by Tandberg, under an exclusive distribution agreement which was granted a licence (Decision No. 393). This security agreement provided Cablelink

with certain rights in the event of the insolvency of Cryptovision or Omnitron. It did not offend against section 4(1).

A certificate was issued.

*Decision No. 497. ACC Bank/Leinster Branch IRFU – Sponsorship Agreement.*

April 1998.

Sponsorship agreement; rugby.

This concerned a sponsorship agreement between ACC Bank and the Leinster Branch of the IRFU, whereby, in return for payment, the Leinster Branch agreed to display certain advertisement features/logos of ACC Bank on its grounds and on items of clothing, to the exclusion of competitors of ACC, for two rugby seasons. Some advertising positions contained elements of exclusivity. The Authority considered that the relevant market was the market for corporate sponsorship for sporting organisations and sporting events in Ireland. It considered that the arrangements did not affect competition, as it had determined in previous cases involving commercial sponsorship of sporting activities, and they did not offend against section 4(1).

A certificate was issued.

*Decision No. 498. Delphi Software/Contractors – Contract for Services.* April 1998.

Contract for services; information consultancy.

The agreement concerned a standard contract for services between Delphi Software and its contractors, who performed work on behalf of Delphi for Delphi's customers. The contractors were self-employed independent contractors. The agreement contained obligations on the contractors in respect of confidentiality, and there was a non-compete clause whereby the contractor agreed not to work for Delphi's client, or at the client's site, during the period of the contract, and for six months afterwards.

The agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 499. Delphi Software Ltd/Clients – Terms and Conditions of Trading.*

April 1998.

Terms of supply of personnel; information consultancy.

A parallel agreement was also notified between Delphi Software and its customers.

This standard contract provided for the terms and conditions under which Delphi

supplied skilled personnel and other services to its customers, and for the non-solicitation of employees and contractors of Delphi by its customers. These terms and conditions remained in force for the duration of the assignment and for six months afterwards. The Authority took a similar view to that expressed in the preceding decision, that the agreement did not offend against section 4(1).

A certificate was issued.

*Decision No. 500. Snowcream Ltd/Oliver Murphy. May 1998.*

Distribution agreement; liquid milk.

This concerned the appointment by Snowcream of Oliver Murphy as an independent distributor and seller of milk and associated products on a door to door basis on a particular round in Co. Wexford. Mr. Murphy was appointed as “the agent” and was granted a licence of Snowcream’s goodwill in the round. He was to be paid a certain consideration, and the agreement continued for three years, after which it was renewed. Mr. Murphy was obliged to purchase his requirements solely from Snowcream, and he was not allowed to deal in competing products. Other products could be sold with the consent of Snowcream. The agent agreed not to re-sell the products at a price in excess of that permitted by law. The agreement was very similar to the agreement between Snowcream and John Greene, which had been certified by the Authority (Decision No. 480), except, for example, that there was a post-termination non-compete clause in the agreement with Mr. Greene, but not with Mr. Murphy. The Authority followed the reasoning in the John Greene case, and decided that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 501. TDI Worldwide Inc./Metro Poster Advertising Ltd. May 1998.*

Sale of business; outdoor poster sites.

This concerned a share purchase agreement whereby Metro Poster Advertising was sold by its owners to TDI Metro. The Authority had previously considered the outdoor advertising market in the David Allen Holdings cases (Decisions Nos. 378 and 381), and it repeated its views in the present case. This agreement contained a non-compete clause for two years after completion of the transaction, and a clause preventing the solicitation of any employee of the acquired company for a similar period. Because this merger occurred in a concentrated market, and would increase

concentration, the Authority considered that it did not benefit from the category certificate for mergers and sales of business (Decision No. 489). Nevertheless, it applied the analysis used in the category certificate to this merger. The Authority considered that, overall, the effect of the notified agreement would not be to reduce competition but rather to increase it, because it increased the ability of the combined entity to act as a competitive constraint on the behaviour of the largest firm in each relevant market. The agreement did not offend against section 4(1), in respect of its horizontal effects. The post-completion non-compete and non-solicit clauses did not offend either.

A certificate was issued.

*Decision No. 502. Dalgety Agriculture Ltd/Spillers Ltd/Thomas Hill & Co. Ltd.*

June 1998.

Know-how agreement; horsefeed.

This was a know-how agreement between Dalgety and Thomas Hill. There was also a trademark licensing agreement between the parties, which was the subject of the next decision. Hill was appointed the sole licensee, and was authorised to use technical and marketing information in the manufacture and marketing of horsefeed products in the territory, which comprised several Munster counties. Hill was required to comply with the formulations, quality control procedures and standards laid down by Dalgety. All the products had to be sold under the trademark. Hill was required not to sell any other horsefeed in the territory (though this was subsequently deleted). Outside the territory, in relation to the products, it was required not to seek customers, establish any branch, or maintain any distribution depot. The technical information was to be used only in connection with the products. Dalgety agreed not to sell horsefeed in the territory to customers other than Hill. The Authority decided that clauses in the know-how agreement did not restrict competition. Hill had a small market share, and the agreement had a negligible impact on competition. The Authority had a concern about the clause requiring Hill not to sell competing horsefeed, but this had been deleted in 1995, before the agreement was examined by the Authority. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 503. Dalgety Agriculture Ltd/Spillers Ltd/Thomas Hill & Co.*

June 1998.

Trademark licence agreement; horsefeed.

This concerned a trademark licensing agreement which was associated with the above know-how licensing agreement. Hill was authorised to use the trademarks in the territory in relation to the manufacture of horsefeed provided that it accorded with the clauses in the know-how licensing agreement. All products had to be sold under the trademarks. Dalgety and Spillers were associated firms. The Authority concluded that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 504. Dalgety Agriculture Ltd/Spillers Ltd/E. Morrin & Sons Ltd.*

June 1998.

Know-how agreement; feedstuffs for game birds.

*Decision No. 505. Dalgety Agriculture Ltd/Spillers Ltd/E. Morrin & Sons Ltd.*

June 1998.

Trademark licence agreement; feedstuffs for game birds.

These related to a know-how licensing agreement and a trademark licensing agreement respectively, and they were virtually identical to the agreements covered by the two preceding decisions, except for the territory covered. Neither the agreements, nor any obligations in them, contravened section 4(1).

Certificates were issued.

*Decision No. 506. Bord Telecom Eireann/L. M. Ericsson Holdings Ltd. June 1998.*

Shareholders agreement; telecommunications technologies research.

This concerned a shareholders' agreement between Bord Telecom Eireann and Ericsson. A joint venture firm was established to enable the two parent firms to participate in the EU programme for communications technologies. Trinity College also became a shareholder. The market was considered to be that for research and development in advanced telecommunications. In addition to describing the objectives of the joint venture, the agreement, inter alia, included standard restrictions on company transactions. The Authority considered that a joint venture of this kind, between a user and a supplier of telecommunications equipment and systems, did not

*per se* contravene section 4(1), nor did the standard restrictions relating to the internal management of the company.

A certificate was issued.

*Decision No. 507. Burmah Castrol (Ireland) Ltd – Motor fuels equipment loan agreements. June 1998.*

Equipment loan agreements; fuel oils.

Burmah Castrol supplied equipment on loan to distributors for the dispensing of middle distillates. The equipment was to be used exclusively for Burmah products, for a period of five years. After this period, the distributor could purchase the equipment for its written down value, which was nil. The Authority had granted a licence for a similar agreement notified by Burmah (Decision No. 322), which related to the loan of equipment to a distributor. In that agreement, if the distributor ceased purchasing exclusively from Burmah, it had to purchase the equipment outright. The present agreements did not prevent the distributor from dealing with a competitor of Burmah, or penalise it if it did so. The distributor could deal with a competitor, but could use the relevant equipment only for Burmah products. The agreements were not connected with exclusive distribution agreements, and did not contravene section 4(1).

A certificate was issued.

*Decision No. 508. TDI Metro Ltd/Coras Iompair Eireann. June 1998.*

Licence to use advertising space; outdoor advertising.

This concerned a licence agreement under which CIE gave the right to TDI Metro to use advertising space on CIE poster sites, and on buses, trains and other CIE property. As in previous decisions, the Authority considered that the relevant market was that for outdoor advertising space, and it treated 48-sheet posters and all other poster sizes as separate markets. The Authority considered that the agreement clearly resulted in increased concentration in a market which it believed to be highly concentrated already, where there were barriers to entry and where potential competition from imports was non-existent. It concluded that the effect of the arrangement would be to increase, rather than reduce, competition, and it did not contravene section 4(1).

A certificate was issued.

*Decision No. 509. TDI Metro Ltd/Joseph John Patchell. June 1998.*

Share purchase agreement; outdoor advertising.

This concerned a share purchase agreement relating to the sale of Roadshow Advertising Ltd by Mr. Patchell to TDI Metro. As before, the Authority considered that 48-sheet posters constituted a separate segment of the outdoor advertising market. It was provided in the agreement that the purchaser and the vendor should enter into an employment agreement, but this was not supplied, and did not form part of the decision. The non-compete clause restricted the vendor from dealing with any of the panels concerned in the agreement, or with any panels used by the purchaser or by any of its subsidiaries, or from engaging in the business of 48-sheet admobile advertising, for as long as the vendor was employed by the purchaser, and for a period of two years thereafter.

The horizontal effects did not result in a contravention of section 4(1). The Authority objected to the post-employment restriction on the soliciting of suppliers since it extended for more than one year after termination of employment. The restriction on the vendor from engaging in the business of 48-sheet admobile advertising was considered to be a post-employment non-compete provision, which was not necessary for the transfer of the business. TDI Metro then agreed to limit the first non-solicit clause to one year after employment terminated, and to waive the second restriction entirely. The Authority concluded that these two features in the agreement would contravene section 4(1). Once the agreement was altered to satisfy the concerns of the Authority, it no longer contravened section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 510. Dublin Institute of Technology/Joint Purchasing Agreement.*

June 1998.

Joint purchasing agreement; computer software and services.

This concerned joint purchasing arrangements, and a draft agreement for the development and supply of computer software, on behalf of an association of 14 third-level educational institutions, including the Dublin Institute of Technology. The relevant market was stated to be that for business and administrative software and software services. The market was global and very large. The suppliers included major multinational companies. The arrangements covered purchases which were estimated to represent about 0.6% of the Irish market. The unwritten joint purchasing

agreement was described as an association to negotiate joint terms for the purchase of information technology software on behalf of the institutions. The customers could purchase other systems, goods and services on an optional basis within three years. In addition, customers were free to purchase systems, goods and services of the same or a similar kind from other sources. In the circumstances, since purchasers could conclude agreements outside the group purchasing scheme, the Authority considered that the arrangements did not contravene section 4(1).

A certificate was issued.

*Decision No. 511. First Rate Bureau de Change Ltd/Minister for the Marine.*

June 1998.

Exclusive concession; banking services.

This related to an exclusive concession and licence agreement between First Rate Bureau de Change and the Minister for the Marine for the operation of a bureau de change and an automated teller machine facility at the ferry terminal in Dun Laoghaire harbour. The arrangement was made for a period of four years and nine months from February 1996. The Minister was not entitled to appoint anyone else to provide similar services. Under the Harbours Act, 1996, it seemed clear to the Authority that the Minister for the Marine, in relation to Dun Laoghaire Harbour, was engaged for gain in the provision of goods and services, and was therefore an undertaking. The Authority had on many occasions indicated its view that exclusive user clauses in the letting of premises in a shopping centre did not contravene section 4(1). It considered that the same view should be taken about the grant of an exclusive concession to use business premises in a building complex.

A certificate was issued.

*Decision No. 512. Guinness Ireland Group Ltd/United Beverages Holdings Ltd.*

June 1998.

Merger; beers and soft drinks distribution.

Guinness Ireland Group notified a share subscription agreement under which it would acquire the 69.24% of the total issued share capital of United Beverages Holdings which it did not already own, giving it total ownership. The share purchase agreement was notified to the Minister since it clearly came within the scope of the Mergers Acts. After requesting and receiving additional information from the parties,

the Minister referred the proposal for examination by the Authority. The Authority discovered that the Minister's referral was beyond the time allowed by the Mergers Acts, and it decided that it could not deal with the matter, and the Minister withdrew the referral. Following statements by the Minister that possible action under the Competition Acts was being considered, the parties notified the agreement to the Authority under these Acts.

GIG was ultimately a subsidiary of Guinness plc, and there was a merger between Guinness and Grand Metropolitan plc, which led to the creation of a new firm, Diageo. Besides its beer and spirits interests in Ireland, GIG owned two beer and soft drinks distributors. It also owned 49.6% of C & C Wholesale Ltd, which was also involved in the distribution of beer and soft drinks. UBH was primarily involved in the wholesale distribution of packaged beers, soft drinks and mineral water, and alcoholic fruit juices. It also manufactured plastic bottles for its own use and for sale to others. Besides GIG, major shareholdings in UBH were owned by James Crean plc and Fyffes plc.

The Authority determined that the effects of the merger would occur where there was an overlap between the current activities of Guinness and UBH – wholesaling, production of soft drinks/mixers/fruit juices, and alcopops. Related industry sectors had also to be taken into account, especially the upstream brewing market, in assessing the vertical effects of the merger. Guinness was a major brewer, and, while UBH was not a brewer, it had exclusive distribution agreements for certain beers. The Authority considered that there were two relevant markets – the production of soft drinks, and the wholesaling of packaged beer and soft drinks. The sending of a statement of objections was advertised, and several submissions were received from interested parties, including independent wholesalers.

Following the decision of the EU Commission in the Guinness/Grand Metropolitan merger case, Guinness stated that Diageo was prepared to reduce its shareholding in C & C below 10%, not to appoint directors and to waive its first option rights to purchase shares in C & C.

The Authority then advertised the fact that it intended to issue a licence under section 4(2) of the Act, and further submissions were received objecting to the proposals.

The Authority rejected the argument of Guinness that there was no justification for attributing C & C's share of the drinks distribution market (or any part of it) to Guinness. While the Authority did not necessarily ascribe the market shares of C & C

to Guinness in the calculations of market share measures, it stated that the overall effect of the cross-shareholding had to be taken into account. The Authority had stated that it was an anti-competitive situation for a company with Guinness's strength in the brewing market to be so heavily involved in the wholesale market. The proposal by Guinness to reduce its shareholding in C & C to under 10% and other actions would, in the Authority's view, effectively remove C & C from the control of Guinness and leave it as an independent competitor to UBH.

The market for the production of soft drinks was already highly concentrated. If C & C was not connected to Guinness and UBH, the merger would only produce a slight increase in concentration. If C & C was included with Guinness, however, the increase in concentration would be substantial. The Authority considered that barriers to entry appeared to be low in the market for the production of soft drinks. It accepted that entry barriers were low and sunk costs were minimal in relation to the market for the wholesaling of packaged beer and/or soft drinks. But it considered that any analysis of the market for wholesale distribution of packaged beer had to take account of barriers to entry in the upstream brewing market. Given the strength of Guinness's brands in all sectors of the packaged beer market, the Authority considered that a portfolio effect existed, and that this was likely to act as an entry barrier in the supply of packaged beer. The Authority also considered that the structure of the distribution market post-merger could create a barrier to entry into the brewing market for new entrants, and that the height of the barrier increased with the degree of vertical integration. The potential competition from imports was limited by the nature of the products and the costs of bulk shipping, though there was potential for import competition to increase in the future.

The Authority considered that the effects of a vertical merger would be serious enough to warrant blocking the merger if the size of the vertical link and the degree of foreclosure were such as to eliminate competition in respect of a substantial part of the products or services in question. It considered that only 35% of the market was vertically integrated, and that all wholesalers dealt with all brewers, so that the extent of vertical integration was less than would be suggested by the ownership integration. A beer producer who wished to launch a new product on the Irish market would find plenty of wholesale capacity to sell his wares. For this reason, and because of the relatively low level and the incompleteness of vertical integration, the Authority did not consider that the transaction created competitively objectionable barriers to entry.

Given the highly concentrated nature of the market for the production of soft drinks, the limited number of significant competitors, the existence of some sunk costs, the limited nature of potential competition from imports and the link between Guinness and C & C, the Authority considered that the effect of the notified arrangements would be to contravene section 4(1). If the market share of C & C were treated separately from that of Guinness, the increase in concentration would be slight. In the absence of Guinness control over C & C, the Authority considered that the agreement would not contravene section 4(1).

The Authority considered that the problems of increased concentration in the wholesaling market, and of the substantial vertical link between Guinness's interests in the brewing and wholesaling markets, were compounded by its links with C & C. The arrangements would increase market concentration, there was a lack of potential competition from imports, there were barriers to entry in brewing, there was a lack of successful new entrants into brewing, and there was a possibility of foreclosure because of the vertical effects of the transaction and the link between Guinness and C & C. The Authority concluded that the arrangements would adversely affect competition in the market for the wholesaling of packaged beers and soft drinks, and thus they contravened section 4(1). If the market shares of Guinness and C & C were disaggregated, the merger would lead only to intermediate concentration. In the absence of Guinness control over C & C, the agreement would not contravene section 4(1). Because of the Guinness shareholding in C & C, overall the Authority considered that the notified agreement contravened section 4(1).

The Authority concluded that the transaction would eliminate competition in respect of a substantial part of the products or services in question, if Guinness were to retain any degree of control over C & C. This requirement of section 4(2) would only be satisfied if Guinness ceased to exercise any such control.

Guinness had provided certain undertakings to the Authority, including a commitment to reduce its shareholding in C & C to less than 10%. If these undertakings were to have immediate effect, the Authority considered that they would make the transaction eligible for a certificate. The arrangements promised by Guinness, however, involved complex financial transactions which would take time to complete. The Authority considered it appropriate in this case to grant a licence, on condition that the aspect of the transaction which the Authority found offensive, that is the influence of Guinness over C & C, was removed as soon as possible, or at least within a specified time

frame. The Chairman of the Authority, however, requested the recording of his dissent to the grant of a licence, but no indication was given about the nature of the Chairman's concern and the reasons for his dissent.

The Authority's licence was granted subject to the conditions that Diageo plc and Guinness should, not later than 15 January 1999:

- (a) reduce their shareholding in C & C to under 10%;
- (b) relinquish all rights to representation on the Board of C & C and procure the resignation of their existing nominees on the C & C Board; and
- (c) waive their rights to a first option to purchase any shares in C & C which might be offered for sale by any shareholder.

The expiry date for the licence was set at 31 December 1999, the commencement date being the date of the decision, which was 17 June 1998.

This decision was the subject of an appeal and a request for a judicial review by a number of drinks wholesalers – Murphy Brewery Ireland Ltd, M. & J. Gleeson & Co., Comans Wholesale Ltd and J. Donohoe Ltd against the Authority and its decision.

The case was heard in the High Court for 23 days in January and February 1999. The case was eventually settled by the parties to the appeal and the parties to the agreement, without a judgment, when certain undertakings were given by Guinness Ireland Group Ltd.

*Decision No. 513. Lee Strand Co-operative Creamery Ltd/Distributors. July 1998.*  
Distribution agreement; liquid milk.

This provided for the appointment by Lee Strand of distributors of its liquid milk and other products, sold to doorstep customers. Within the area, the same products were also distributed by Lee Strand to retail outlets for resale to customers. Under the standard agreement, the distributor was given a right to sell the products in a defined territory, and no other person would be granted a licence within the territory. The distributor could not deal in competing goods, and he had to keep information confidential during the term of the agreement, and for 18 months after termination. He was not permitted to distribute outside the territory. Neither party was permitted to canvass or supply the customers or outlets of the other party. The distributor was obliged to pass on to customers the full benefit of all special offers, price reductions, etc., offered by Lee Strand. He also agreed not to deal in competing products in the territory for six months after termination of the agreement. One clause, which

prevented the distributor from selling products to excluded customers (if any), was subsequently deleted. Following the issue of a statement of objections, Lee Strand agreed to amend the agreement by providing that the six-month post-termination non-compete clause would apply only where there was a sale of business. It also proposed to issue a circular letter to distributors relating to their freedom to choose their own prices and stating that the recommended prices were not binding on the distributors. The agreement as amended did not contravene section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 514. Minister for Tourism, Transport and Communications/Dublin Airport Restaurants Ltd. July 1998.*

Exclusive licence; airport catering services.

This related to the grant of an exclusive licence by the Minister for Tourism, Transport and Communications to Dublin Airport Restaurants for the provision of catering services in the terminal building at Dublin Airport. The Authority considered that the relevant market was that for catering services to the public within the precincts of the airport terminal building. In return for the sole and exclusive right to provide such services, the company was required to pay a minimum annual fee to the Minister for the use of the premises. It was also required, in the second and subsequent years, to pay an additional sum based on a percentage of turnover. The licensee could not vary its prices without giving prior notice to the Minister, and the Minister retained the right to fix prices and to prohibit any variation in prices. There were also clauses of a landlord and tenant nature in the agreement, and some other restrictions.

In the context of this agreement, the Authority concluded that the Minister was not primarily engaged in a regulatory or administrative function, but was an undertaking. It decided that standard restrictions and obligations on both parties, regarding the operation of the concession and the occupation of the premises, and the grant of exclusive facilities, did not contravene section 4(1). The ability of the Minister to fix the licensee's prices would, at first sight, seem to be prohibited by the Act. But the Authority concluded that the object of the price clause was not to interfere with competition, but rather to serve the common good, by protecting captive consumers against abusive pricing by the caterer. It accepted that, in practice, the existence of

the Minister's power had not had an anti-competitive effect, and it did not contravene section 4(1).

A certificate was issued.

*Decision No. 515. Bride & Blackwater Valley Cooperative Dairy Society Ltd/Rules of the Society. July 1998.*

Joint selling; milk and milk products.

This related to the rules of the cooperative society, a group of dairy farmers in the south-west. The primary business of the society was the purchase and resale of milk and milk products. Under EU regulations, all whole milk produced had to be supplied by dairy farmers to cooperative societies and other authorised purchasers. Members were required to transfer their milk deliveries to the society or to a nominated purchaser. The society was required to accept all milk produced by members, for as long as it was a registered purchaser, to the limit of its members' milk quotas.

While there was a qualified exemption from EU competition rules for farming organisations such as the society, there was no similar exemption from section 4 of the Act. The Authority characterised the society as a joint selling arrangement on behalf of its members. It stated that joint selling arrangements among competitors who were in a position to sell directly in the market were an obvious example of the type of co-ordinated practice which the competition rules were designed to prohibit. The arrangements here, however, were very different from typical joint selling arrangements among competitors. The dairy farmers had to sell to authorised purchasers under the EU milk quota scheme. Since the farmers were prohibited from selling product individually to downstream customers, the Authority considered that joint selling arrangements in the milk market could not be deemed to be inherently anti-competitive. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 516. Dekra Eireann Teoranta/Agents. July 1998.*

Exclusive licence; motor vehicle testing.

This concerned a standard agreement which was to be entered into by Dekra and about 70 agencies around the country, if Dekra was successful in its bid for the franchise to operate the national roadworthiness testing scheme for all private cars over four years old, which was required under an EU Directive. Dekra was a

proposed joint venture between Dekra International, a Luxembourg company which operated in several European countries, and the Society of the Irish Motor Industry. The Minister had indicated an intention to appoint a single franchise for vehicle testing throughout the country. The Authority stated that, although such an arrangement would be outside of the Competition Acts, it was concerned at the proposal to establish a monopoly franchise for vehicle testing.

Under the proposed agreement, the principal appointed the agent to provide and sell the roadworthiness testing service for motor vehicles within a defined area. The principal agreed not to appoint any other agent in the territory. The agent agreed to provide the service only within the territory. The agreement was to continue in force for ten years, unless terminated sooner. The agent undertook to provide only the services described in the Operating Manual, on the terms and conditions set out. All sales of the service had to be at the price specified in the price lists supplied by the principal, there was to be no deviation from these prices, and all payments from customers had to be lodged in a bank account in the name of Dekra. The agent, its managers and employees, were subject to non-competition and confidentiality clauses. The agent was obliged to invest in the products and equipment required to provide the service.

The agent was not permitted, without consent, to be engaged in any other business, particularly a business concerned with the sale, repair or testing of motor vehicles. The products, materials and equipment required had to be purchased from the principal, unless the principal confirmed that those from another source satisfied the principal's quality specifications. The agent was bound not to engage in providing any similar or competing service during the term of the agreement and for six months after its expiry. The agent had to contribute to an insurance policy designated by the principal, or maintain a policy approved by the principal. The principal agreed to pay the agent a certain percentage commission on the net sales value of the services.

Following the issue of a statement of objections and an oral hearing, the agreement was amended, but this did not satisfy all the concerns of the Authority.

The Authority did not consider that the arrangements created a relationship of commercial agency, but that they were of the nature of a franchise agreement. In the absence of an agency relationship, the Authority considered that certain clauses offended against section 4(1) – the creation of an exclusive territory, and the setting of fixed prices by the principal and the terms and conditions for the service. The non-

compete clauses during the agreement and for six months after expiry satisfied the category licence for franchise agreements (Decision No. 372), as did the requirement on the agent not to reveal confidential information. The Authority considered that the creation of an exclusive territory satisfied the conditions for a licence under section 4(2), following the reasoning in the franchise category licence. It did not consider that the clauses which allowed Dekra to set the prices charged for the service had beneficial effects, and the agreement did not satisfy the requirements of section 4(2). The Authority refused to issue a certificate or to grant a licence.

*Decision No. 517. Irish Farmhouse Holidays Association. July 1998.*

Rules of Association; farmhouse holidays.

This related to the rules of the Irish Farmhouse Holidays Association and the Memorandum and Articles of Irish Farmhouse Holidays Ltd. The IFHA was involved in the marketing of farmhouse holidays on behalf of its members. It operated a voucher system with tour operators, it offered guidance and advice to members, and it provided an annual brochure detailing their premises. The rules set out the objective of the IFHA, and they contained provisions relating to entry, expulsion and cessation of membership. The right to a fair hearing was preserved. The arrangements constituted decisions of an association. They formed an agreement between competitors to market their product collectively, but competition was evident in terms of price and facilities offered. The overall arrangements did not contravene section 4(1), nor did any of the individual clauses.

A certificate was issued.

*Decision No. 518. Doyle, Donnelly, Flynn, Hanlon & Brannelly/JWT/WPP Holdings. July 1998.*

Shareholders agreement; advertising agency.

This concerned a shareholders' agreement and related agreements arising from the acquisition of a 20% shareholding in DDFHB and Eastcastle Ltd by the J. Walter Thompson Group Ltd. The related agreements were a royalty and licence agreement. The agreement provided that, inter alia, all services provided to the companies by the shareholders would be on arm's length terms. There were several non-compete and non-solicit clauses which applied while the shareholder remained as a shareholder or employee, and for 12 months after cessation of shareholding or employment.

According to the Authority, the net effect of the overall arrangements on competition within the State was that, by taking a shareholding in the Irish companies, JWT effectively agreed not to enter the Irish market. Since JWT was not operating in the Irish market before the agreements, the overall arrangements did not eliminate an actual competitor, but a potential one. Although the arrangements gave JWT its first presence in Ireland, Ogilvy and Mather, a sister company, had already been operating in the Irish market for advertising and associated services. While the combined entity of JWT and Ogilvy and Mather was in a stronger market position than its component parts, it was not a dominant one. In the circumstances, the Authority considered that the overall arrangements, per se, did not contravene section 4(1), nor did any of the constituent clauses and the related agreements.

A certificate was issued.

*Decision No. 519. Celtic International Insurance Co. Ltd/Stellar International Ltd/Dotinga Investments B.V. September 1998.*

Licence; computer programme for motor insurance.

This concerned an agreement relating to the licensing for thirty years by Stellar to Celtic of a method for programming a computer and a programme to generate quotations for motor insurance and the communication of such quotations to potential customers. In the motor insurance market in the State, Celtic had a very small market share and it was not in a position to use its intellectual property rights over the invention and the programme in a manner contrary to section 4(1).

A certificate was issued.

*Decision No. 520. Institute of Chartered Accountants in Ireland/Bye-laws.*

October 1998.

Rules of association; accountants.

This concerned one of three related notifications of agreements by the Institute of Chartered Accountants in Ireland. Among the main functions of the ICAI were the education, training and qualification of accountants, and the maintenance of high professional standards. The Authority considered that the relevant market was the market for accounting services, including audits, in the State. It considered that, while the ICAI was enabled by statute to make bye-laws, this power had to be carried out in accordance with law, including the Competition Acts. The Bye-laws regulated

entry into the Institute. The Authority considered that controlled entry into a profession did not contravene section 4(1) as long as the effect of such restrictions was not to control artificially the numbers entering the profession. It had no evidence that entry into the ICAI was regulated in an anti-competitive manner. The Authority considered that the discretion to refuse membership into a professional body did not contravene section 4(1), so long as what constituted a fit and proper person was reasonable and was not used to control artificially the numbers entering the profession.

A certificate was issued.

*Decision No. 521. Fiat Auto Financial Services Ltd/Bank of Ireland Finance Ltd.*

October 1998.

Financial services agreement; auto finance.

This concerned the terms and conditions upon which BIF would provide financial services, including systems, accounts, collection and other back office services to Fiat and to purchasers, hirers and lessees of motor vehicles from the Fiat dealer network.

The Authority considered that the relevant markets included the market for the provision of backup financial services, the market for car loans and the market for automobiles. It considered that auto-finance was a derived demand from consumers' demand for cars. Thus the markets for cars and car finance were intrinsically linked and it was important to examine the impact of the agreement in both markets.

Under the agreement, BIF evaluated the customer application, and the provision of finance was the responsibility of Fiat, which bore the sole risk. The initial term of the agreement was three years. BIF undertook to keep the Fiat database confidential. For the duration of the agreement, and for 12 months thereafter, BIF and its subsidiaries were not allowed to provide auto-finance facilities through the dealer network. For a similar period, BIF was restricted from targeting auto-finance facilities or products (similar to Fiat's products) at purchasers or dealers of Fiat or Alfa Romeo motor vehicles. BIF was restricted from using any confidential information during and after the agreement.

The Authority decided that, in the markets for cars and car finance, neither Fiat or BIF could be considered to have appreciable market power. In addition, it was possible for a company such as Fiat to provide auto-finance services internally. The Authority considered that the time-limited protection of intellectual property, the customer

database, through the non-compete provisions did not contravene section 4(1), nor did the other restrictions.

A certificate was issued.

*Decision No. 522. MBNA International Bank Ltd (Credit Card Affinity Agreement).*

November 1998.

Affinity agreement; credit cards.

This concerned a standard credit card affinity agreement between MBNA and the affinity groups. The agreement was a marketing arrangement under which the affinity groups gave MBNA access to their mailing lists, and MBNA, in conjunction with the affinity group, marketed their credit cards to people on these mailing lists. The affinity groups were groups which had common interests or loyalties, such as professional societies, members of clubs and employees of large corporations. The term of the agreement was for an initial period of five years. The Authority considered that the relevant market was that for the issuing of credit cards and the provision of credit card services. It also considered that the market was highly competitive and that the emergence of MBNA and potential competitors augured well for competition. The restrictive provisions in the agreement were an integral part of any new promotion/marketing effort which attempted to ensure compliance with the agreement and to secure the achievement of its objectives. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 523. MBNA International Bank Ltd/AGF-Irish Life Holdings plc.*

November 1998.

Affinity agreement; credit cards.

This involved a specific example of the standard agreement referred to in the preceding decision. The only difference from the standard agreement was that the initial term was three years rather than five years. The Authority concluded that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 524. Poldys Fresh Foods (Portumna) Ltd/Birds Eye Walls Ltd.*

November 1998.

Sole manufacturing; frozen foods.

This concerned an agreement under which Poldys was appointed sole manufacturer and supplier of four types of frozen pastry pies to Birds Eye Walls. The initial term of the agreement was one year, and it continued thereafter unless terminated by either party. Besides the appointment of the exclusive supplier, the agreement prevented the exclusive supplier from entering into a supply agreement with certain third parties during the term of the agreement in respect of the specific products. The Authority considered that, given that Poldys supplied sellers other than Birds Eye, the existence of other manufacturers in the State, and the extent of trade in parallel imports, the market was open to significant competition. The restriction on Poldys supplying third parties was necessary to give Poldys the incentive to perform its functions, and it did not contravene section 4(1).

A certificate was issued.

*Decision No. 525. Irish Life Assurance plc/Irish Intercontinental Bank Ltd.*

November 1998.

Share acquisition; mortgage loans.

This related to agreements between Irish Intercontinental Bank, Irish Life Assurance, the ILF Group and Irish Life Finance Ltd. The ILF Group acquired shares in Irish Homeloans Ltd, and IIB and Irish Life acquired shares in the ILF Group. The agreements were a sale and purchase agreement, a hive down agreement and a shareholders agreement. There had been no objection to the share acquisition under the Mergers Acts. In essence, the arrangements involved the sale by Irish Life of its one-third interest in Irish Homeloans to ILF Group, and the acquisition by Irish Life of a one-third interest in ILF Group. The business of ILF Group was transferred to its subsidiary, ILF Ltd.

The Authority stated that some elements of the transaction could be viewed as the creation of a merger or sale of business which was concluded prior to the Competition Act, and such a transaction was outside the scope of section 4(1). Other aspects, however, involved the restructuring of the corporate relations between Irish Life Assurance and IIB, and the reallocation of functions among their subsidiaries, and the Authority considered that these did not come within the scope of section 4(1). Instead of attempting to disentangle the various aspects of the transaction, the Authority decided to consider the effect of the arrangements as a whole on competition. It

applied to this transaction the analysis in the Category Certificate for mergers and sales of business (Decision No. 489). Insofar as its horizontal effects were concerned, the agreement did not offend against section 4(1). In addition, the arrangements merely involved a reallocation of functions within the Group, and did not contravene section 4(1).

A certificate was issued.

*Decision No. 526. Nitrigin Eireann Teoranta/Irish Fertiliser Industries Ltd.*

November 1998.

Parent/subsidiary agreement; sales of natural gas.

NET notified two related agreements. One was a long-term agreement whereby NET agreed to purchase certain quantities of natural gas from Bord Gais Eireann, while the second related to the onward sale by NET of this gas to Irish Fertiliser Industries. The latter agreement was the subject of this decision. NET was wholly-owned by the State, and it was engaged in fertiliser manufacture. In 1987, NET formed a 51/49% joint venture with ICI, a UK chemicals and fertiliser company, to establish IFI. NET hived down to IFI the fertiliser business, and IFI was described as a subsidiary of NET. BGE, also a State company, was the only supplier in the State of natural gas, and the sales to NET represented about 20% of the total market of natural gas in the State. Under the agreement, IFI purchased from NET, and NET sold to IFI, all the natural gas supplied by BGE to NET. IFI agreed that it would use the natural gas only to produce ammonia and/or fertiliser, and that it would not sell the natural gas supplied to any other party. The Authority concluded that NET and IFI were not separate entities, and were thus not in competition with each other. There was a parent/subsidiary relationship, and the arrangements merely involved a reallocation of functions within the group. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 527. Coillte Teoranta/Coillte Allocation Scheme.* November 1998.

Supply agreement; sawlogs.

This agreement, the Coillte Allocation Scheme, related to the guaranteed supply of minimum quantities of sawlogs to sawmills for the timber production industry. The notified arrangements consisted of several different documents. In mid-1997, the Authority was informed that the original notified allocation scheme was no longer in

operation, but that Coillte did not wish to withdraw the notification. The notified scheme had been superseded in mid-1996 by a new log sales system, the Timber Sales System, which was notified to the Authority (but the Authority rejected the notification on the grounds that the agreement was not notifiable, without giving any reasons). In this case, the agreement had expired before the Authority could make a decision on it, and the Authority considered that a decision on the issue of a certificate in this case would have no legal meaning or effect. A similar position arose in respect of the possible grant of a licence. There was no provision under the Act for the retrospective licensing of agreements which were already in existence at the commencement of section 4(1). Since the agreement had already expired, to grant a licence now would again have had no legal meaning or effect.

The Authority closed the file without considering whether or not the agreement warranted a certificate or licence.

*Decision No. 528. Category Certificate/Licence in Respect of Agreements between Suppliers and Resellers. December 1998.*

The existing Category Licence for Exclusive Distribution Agreements (Decision No. 144) expired at the end of 1998. Following analysis, the Authority concluded that, in certain circumstances, non-price vertical restraints were not anti-competitive and identified a category of such agreements which, in its opinion, did not contravene section 4(1). The Authority also identified a second category of such agreements which could normally be regarded as satisfying the conditions for the grant of a licence under section 4(2).

The new certificate/licence applied to vertical agreements between undertakings which operated at different stages in the supply chain in respect of the same product or service whereby one party supplied the product or service to another party for resale. It included, for example, agreements between manufacturers, importers and suppliers on the one hand and distributors, wholesalers and retailers on the other. The vertical agreements concerned included exclusive distribution, exclusive purchasing, franchising and selective and non-exclusive distribution, and these were defined in the certificate/licence.

A non-exclusive distribution agreement did not contravene section 4(1), and benefited from the category certificate. In the case of other agreements, the Authority was of the view that, where neither the supplier nor the reseller had a market share in excess

of 20 per cent of the relevant market, the agreement did not contravene section 4(1), and benefited from the category certificate. Where either party had more than 20 per cent of the market, it could enjoy a degree of market power. In those circumstances, non-price vertical restraints might contravene section 4(1). Where the market share of either party was greater than 20 per cent, but did not exceed 40 per cent, they could normally be expected to satisfy the requirements of section 4(2), and so benefited from the category licence. The Authority considered that, where the market share of either party exceeded 40 per cent, such arrangements did not necessarily satisfy all the requirements for a licence, and the category licence did not apply in such circumstances. (An individual agreement of this type might satisfy the requirements of section 4(2), but this would have to be determined in each particular case). Certain clauses in agreements, irrespective of the market shares of the undertakings, did contravene section 4(1), that is:

- (a) resale price maintenance;
- (b) clauses which provided absolute territorial protection; and
- (c) post-term non-compete clauses, except for franchise agreements where the duration of the clause did not exceed one year.

Such clauses would not satisfy the requirements of section 4(2), and did not benefit from the category licence. Suppliers were permitted to recommend resale prices and, provided that resellers were free to set their own resale prices, the recommending of prices did not contravene section 4(1), though, *inter alia*, the reseller had to be informed that he was free to set his own prices.

Neither the certificate nor the licence applied to exclusive purchasing agreements concerning liquefied petroleum gas for resale in cylinders. The certificate did not apply to exclusive purchasing agreements for motor fuels, and the licence only applied if the duration of such an agreement did not exceed ten years, and did not provide for any first option to renew upon termination.

Neither the certificate nor the licence applied to agreements between suppliers of identical goods or services, or of goods or services which were considered by users as equivalent in view of their characteristics, price and intended use. The Authority could amend the certificate or licence, in particular, to exclude a particular category of goods or services, where, in its opinion, the cumulative effects of any existing agreements was such as to prevent effective entry to the market by a new supplier. The category licence applied from January 1999 until December 2003.

The Decision was taken on 4 December 1998, and by the end of the month 41 notified agreements had been dealt with under the category certificate/licence. 26 of these agreements related to the distribution of motor vehicles, all of which were deemed to satisfy the conditions of the category certificate (although they might have come within the scope of the EU block exemption for motor vehicle distribution).

*Decision No. 529. Gallaher/Ritmeester. December 1998.*

Exclusive distribution; cigars.

This concerned an agreement under which Ritmeester appointed Gallaher as the exclusive distributor of Ritmeester cigars in the State. Because the market shares were so high, neither the new category certificate nor the category licence were applicable. The Authority considered that there were several quite distinct segments in the market for cigars, and the agreement was not between competing manufacturers as the Authority first believed. It quoted estimates of the share of the cigar market held by Gallaher and Ritmeester ranging from 58% to 75%. It considered that, apart from large/luxury cigars, there were four distinct segments as described by the parties. The Authority accepted that, apart from price, cigars were differentiated by characteristics such as size, the type and taste of tobacco used, the length of time required to smoke the cigar, etc. It was satisfied that two specific brands of cigar, in particular, were not easily substitutable and were not competing directly in the same market, but they were complementary products. The Authority was satisfied that the other Ritmeester brands distributed by Gallaher faced strong competition from competing brands in other market segments. It concluded that the effective distribution of Ritmeester brands through Gallaher had increased competition, and that the agreement satisfied the requirements of section 4(2).

A licence was granted for the period from December 1998 to December 2003, and no conditions were attached.

*Decision No. 530. Gallic Distributors Ltd/Motor Vehicle Loan Agreement and Mortgage. December 1998.*

Loan agreement and mortgage; motor vehicles.

This concerned a standard loan agreement and a standard mortgage between Gallic Distributors and a distributor of Citroen motor vehicles. The mortgage was security for the loan. The Authority considered that the relevant market was that for the

financing of motor vehicles and the business of motor vehicle distribution. The loan was only available to dealers who had a distribution agreement with Gallic, and then only to finance improvements in the car sales premises. The Authority stated that the notified arrangements did not contain any provisions which fell within the prohibitions contained in the category certificate on vertical agreements (Decision No. 528). It considered that commercial loan agreements and mortgages generally did not offend against section 4(1).

A certificate was issued.

*Decision No. 531. Gowan Distributors Ltd/Motor Vehicle Loan Agreement and Mortgage.* December 1998.

Loan agreement and mortgage; motor vehicles.

This related to a standard agreement between Gowan Distributors, the importer of Peugeot motor vehicles, and a distributor, for a loan and mortgage for the purchase of these vehicles by the distributor. The Authority took the same view as in the previous decision, that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 532. Rover Ireland/Motor Vehicle Loan Agreement.* December 1998.

Loan agreement; motor vehicles.

This concerned a standard loan agreement between Rover Ireland, Rover Ireland Finance Ltd, and a distributor. The loan was for the purchase of vehicles by the distributor from Rover Ireland, the importer, and the vehicles were security for the loan. The Authority took the same view as in the preceding two cases, that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 533. Unisolutions/Dascom/Manix.* January 1999.

Non-exclusive licence; computer software products.

The agreement provided that Unisolutions grant to Dascom and Manix the non-exclusive right and licence only to produce, develop and market computer software products in Europe, including the State. The distributor agreed to keep restricted information confidential, and to use it only under the agreement, with some exceptions. For three years after termination the distributor could not be involved in a

business which utilised or duplicated the products. The Authority noted that the distributor did not purchase goods from Unisolutions for resale, although its functions were in many respects analogous to those of a normal distributor of goods for resale. It considered that the intellectual property rights of Unisolutions had to be sufficiently protected. A clause ensuring that any improvements or alternative uses made by Dascom of the intellectual property would be licensed back to Unisolutions did not contravene section 4(1). The Authority took the same view concerning obligations on Dascom to furnish Unisolutions with a list of end-users, and the quantity and amount of sales, and to assign the benefit of all existing contracts to Unisolutions upon termination, since the property rights were at all times vested in Unisolutions. It considered that a post-term non-compete clause was necessary in this case to protect the property rights of Unisolutions, and in order to facilitate the transfer of specialist know-how and technology under the agreements, and it did not contravene section 4(1).

A certificate was issued.

*Decision No. 534. Odenberg Engineering/Inspectron. January 1999.*

Research and development; electronic sorters.

This concerned one of two connected agreements relating to research and development of electronic sorters for the food industry – the general services agreement. There was a confidentiality clause during the agreement and for two years after termination, a clause on ownership rights to intellectual and other property right discoveries by the consultants while in the service of Odenberg, and a non-compete clause during the agreement and for two years after termination. The Authority considered that the post-term non-compete clause was necessary to protect the intellectual property rights of Odenberg, and that other provisions were essential to facilitate the transfer of specialist know-how and technology under the agreements. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 535. Odenberg Engineering/Inspectron. January 1999.*

Research and development; electronic sorters.

This related to the special projects research and development agreement between Odenberg and Inspectron. It was virtually identical to the general services agreement in the preceding decision, and the opinion of the Authority was the same.

A certificate was issued.

*Decision No. 536. Malting Company/Beamish and Crawford. January 1999.*

Supply agreement; malt.

This concerned an agreement for the supply of malt by the Malting Company to Beamish & Crawford, a brewing company. Under the supply agreement, in return for a cash consideration from Malting Company, Beamish agreed to purchase its annual malt requirements, between a minimum and maximum quantity, at a price agreed between the parties. The Authority considered that the provisions regarding price did not contravene section 4(1). It stated that the duration of the agreement, at least seven years, was not much beyond that for normal long-term sales agreements in the malt industry. The Authority considered that the parties held small market shares, that the agreement was non-exclusive and that it did not contravene section 4(1), nor did the agreement duration.

A certificate was issued.

*Decision No. 537. Cahill May Roberts Ltd/Elizabeth Arden Ltd. February 1999.*

Selective distribution/agency agreement; cosmetics.

Under this agreement, Elizabeth Arden appointed Cahill May Roberts as exclusive agent in the State for the distribution of its cosmetics. All title to the products remained with Arden until sold to customers, and CMR was paid a commission by Arden. CMR performed stockholding, physical distribution, invoicing and account collection services. CMR could only supply products to stockists approved by Arden. The agreement did not contain any clauses which were blacklisted in the category certificate for vertical agreements (Decision No. 528), and the parties to the agreement each had less than 20% of the relevant market. The agreement could not benefit from the category certificate, however, since CMR did not take title to the products, and thus the agreement involved agency rather than reselling. The Authority considered that the category certificate was relevant to its assessment of the agreement, and it concluded that it did not contravene section 4(1).

A certificate was issued.

*Decision No. 538. Cahill May Roberts Ltd/Guerlain Ltd. February 1999.*

Selective distribution/agency agreement; cosmetics.

This was similar to the CMR/Arden agreement in the preceding decision. Guerlain appointed CMR as its exclusive agent for cosmetic products in the State. CMR could only supply products to Guerlain approved stockists, and would not actively seek sales outside the State. All title to the products remained with Guerlain until sold to customers, and CMR was compensated for its services by a commission paid by Guerlain. The Authority took the same view of this agreement as it did of the Arden agreement, that it involved agency, and that it did not contravene section 4(1).

A certificate was issued.

*Decision No. 539. Johnstone Paints/Circle Paints Ltd. March 1999.*

Exclusive distribution; paint products.

Circle was appointed by Johnstone as its sole distributor of certain paint products in the State. The Authority considered that the agreement would have fallen under the new category certificate and licence for vertical agreements (Decision No. 528), but for a concern that the exclusive distribution agreement was between parties which might be regarded as manufacturers of identical or equivalent goods. Although the agreement was between competitors, the Authority concluded that the products were exposed to effective competition in the relevant market from the products of rival competitors, and that the market shares of the parties were small. The agreement did not contravene section 4(1). It considered also that the provisions in the agreement would have been permissible if they had fallen under the category certificate and licence.

A certificate was issued.

*Decision No. 540. E. R. Squibb & Clonmel Healthcare Ltd. March 1999.*

Licence to use product; pharmaceuticals.

Clonmel Healthcare was granted by Squibb a licence to import the substance Captopril and to convert it into a finished pharmaceutical product for human use and to market and sell the finished pharmaceutical product in Ireland from the date of the licence – June 1996 – to the date of expiry of the patent – February 1997. The licence was exclusive, except for the existing rights granted in favour of Squibb's Irish affiliate. In this case, market shares were relatively small and there was effective

competition, and no aspect of the agreement affected the freedom to take independent commercial decisions, and it did not contravene section 4(1).

A certificate was issued.

*Decision No. 541. Trinity College Dublin Students' Union, STA Travel Ltd.*

March 1999.

Exclusive dealing; travel services.

This concerned an exclusive dealing agreement between the Trinity College Dublin Students' Union and STA Travel. STA Travel agreed to provide TCDSU with travel related services (airline tickets, ferry tickets, train tickets, car hire, etc.) for onward sale to students and staff at TCD. The agreement was contained in two documents – an agency agreement regarding sales, and a partnership agreement, under which STA Travel gave TCDSU an interest-free loan. TCDSU agreed not to sell any directly competing alternative student and youth travel services to its customers. Having regard to the availability of alternative service providers, the Authority considered that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 542. Hampden Group/Homebase. March 1999.*

Franchise agreement; DIY products.

This related to a franchise agreement between Homebase, the franchisor, and Hampden Group, the franchisee, for the sale of certain DIY products in the State and Northern Ireland. In this case, Sainsbury, the parent company of Homebase, also owned 29% of Hampden, and had the right to appoint two directors. This shareholding was sufficient to bring the two companies under common control, according to the criteria in the Mergers Acts. The Authority therefore considered that the notified agreement was not in fact an agreement between separate undertakings but rather was an assignment of functions between different parts of the same organisation. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 543. Warner-Lambert/Elan Pharma/Hornsea; Hornsea/Elan; and Warner-Lambert/Hornsea. March 1999.*

Joint venture; pharmaceuticals.

This related to a joint venture agreement between Warner-Lambert and Elan Pharma, and of two related agreements – a supply agreement between the joint venture company and Elan in respect of certain pharmaceutical compounds, and a services agreement between the joint venture company and Warner-Lambert in relation to management and marketing services. The Authority considered that these three agreements had expired. As in the case of the Coillte Allocation Scheme (Decision No. 527), the Authority decided to close the files in the three cases without considering whether or not the agreements merited a certificate or licence.

*Decision No. 544. Gilbeys/Pedrotti. March 1999.*

Trademark licence and exclusive purchasing; liquors.

This concerned a trademark licence and exclusive purchase agreement between Pedrotti Interdrink and Gilbeys of Ireland for the distribution of wines, spirits and liqueurs in the State. Gilbeys was granted the sole and exclusive licence in perpetuity to use the Pedrotti trademark in Ireland. Gilbeys would not purchase wine or sparkling wine which they marketed under the Pedrotti label from any supplier other than Pedrotti for the period of five years from the date of the licence agreement (September 1988). The agreement was not about resale and so did not benefit from the category certificate and licence for vertical agreements (Decision No. 528). The product had a very small market share. The Authority concluded that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 545. Bimeda Chemicals Limited/Orion Yhtymä Oy. April 1999.*

Exclusive manufacture and distribution; veterinary pharmaceuticals.

This concerned an exclusive manufacture and distribution agreement between Bimeda Chemicals and Orion. The agreement was essentially a manufacturing agreement using Orion's technology and know-how whereby Bimeda paid a royalty of 6% of sales. The Authority concluded that the agreement was pro-competitive rather than anti-competitive, and the market shares were small. Although the agreement was between potential competitors, the Authority considered that the products were exposed to effective competition in the relevant market from the products of rival competitors. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 546. Clonmel Chemicals Company Limited/Ethical Pharmaceuticals Limited. April 1999.*

Know-how licence; pain killers.

This concerned a know-how licence agreement between Clonmel Chemicals and Ethical Pharmaceuticals. The product involved was a narcotic pain killer called morphine sulphate. The Authority concluded that the agreement did not benefit from the category certificate/licence for vertical agreements (Decision No. 528) because it was a know-how licence providing for the manufacture and sale of the product in the relevant market. It took the view, however, that the products involved had a market share in the State of less than 5%, and the agreement did not contravene section 4(1). A certificate was issued.

*Decision No. 547. GreenScience & Micro-Bac International. April 1999.*

Exclusive manufacture and distribution; bacterial products.

This agreement related to the purchase of technology and exclusive manufacture and distribution of bacterial products between GreenScience and Micro-Bac. The products were based on naturally occurring bacteria and had an application in the degradation of organic matter, such as grease, slurry and sewage. GreenScience was appointed sole licensee for the territory, which included the State. The Authority stated that the parties notified the agreement as an agreement for the purchase of technology and the exclusive manufacture and distribution of bacterial products. It was, in many respects, a know-how licensing agreement, with the possibility of using trademarks, and with an exclusive right to exploit the licensed technology within the State. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 548. Irish Life Assurance plc/First National Building Society.*

April 1999.

Tied agency; life assurance.

This related to an agreement whereby the insurer, Irish Life, appointed First National as a tied insurance agent. The Authority considered that the markets affected by this agreement were (i) that for the sale of life assurance products in Ireland and (ii) that for the services of insurance intermediaries for life assurance. Under the agreement, which was of indefinite duration, First National was empowered to act as a tied agent

for the insurer's products. First National agreed not to enter into a tied agency agreement or arrangement with any other insurer. One clause provided that the commission was subject to the maximum levels of commission allowable under the current version of the Insurance Industry Federation's agreement on maximum rates of remuneration. On termination, the Society undertook, for a period of one year, not to procure any policy holder of the insurer for which the Society was the selling agent to terminate any contract with the insurer, or to approach or solicit any policy holder for this purpose.

Following the issue of a statement of objections, indicating the Authority's intention to refuse a certificate or a licence to the arrangements because of the requirement to adhere to the agreement on maximum rates of remuneration, Irish Life stated that it no longer adhered to the IIF agreement and it was fully aware of its obligation not to do so. It also wrote to the tied agent that it would not enforce any provisions relating to the maximum levels of commission payable under the IIF agreement.

The Authority considered that the agreement created an agent-principal relationship between First National and Irish Life, and this did not contravene section 4(1). The Authority had, however, refused to issue a certificate or licence to the IIF agreement on maximum commissions (Decision No. 495), and it considered that the reference to the IIF agreement in this agency agreement did contravene section 4(1). Once Irish Life had confirmed that it had waived all rights to, and would not enforce, any provisions relating to the IIF agreement, the agency agreement no longer contravened section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 549. Irish Life Assurance plc/Registered Irish Life Insurance Brokers.*  
April 1999.

Agency agreement; life assurance.

This related to an agency agreement between Irish Life and all registered Irish Life insurance brokers. An insurance broker was defined as an intermediary who held appointments from at least five insurance companies. There was no exclusivity involved in the arrangements. Most of the agreement related to obliging the broker to comply with the requirements imposed under the Insurance Act 1989. Other provisions related to maintaining the image and integrity of Irish Life products and to the importance of honesty and ethical behaviour. The broker was not allowed to act

or hold himself out to be an agent of the insurer. The agreement provided that the commission to be paid was subject to the maximum levels in the IIF agreement. The Authority issued a statements of objections because of this last clause. Irish Life stated that it no longer adhered to this agreement, and it wrote to its brokers stating that this provision would not be enforced.

The Authority considered that insurance brokers were self-employed intermediaries between Irish Life and the purchasers of life assurance and pension schemes. The relationship was not one of commercial agency, however, since the broker provided a combination of services to the insurance company and to the retail customer, and it was not clearly, or exclusively, or continuously, the agent of either the insurer or the customer. The broker could offer a service of information provision about the insurance products of a number of different insurers, and could not therefore be said to form an integral part of the business of any one insurer. The Authority stated that the relationship between Irish Life and its brokers did not in itself contravene section 4(1). The individual clauses of the agreement did not contravene section 4(1) either, except for the provision relating to the IIF agreement on maximum rates of commission. Since this provision no longer applied, the agreement did not contravene section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 550. Irish Life Assurance plc/Registered Irish Life Insurance Agents.*  
April 1999.

Agency agreement; life assurance.

This concerned an agency agreement entered into between Irish Life and its insurance agents. An insurance agent was defined as an intermediary who held appointments for up to four life assurance companies. The agreement was almost identical to the agreement with brokers described in the preceding decision, including the reference to the maximum levels of commission allowable under the IIF agreement. Following the issue of a statement of objections, Irish Life stated that it no longer adhered to the IIF agreement, and it wrote to its insurance agents stating that this provision would not be enforced. While the relationship was described as that of agency, the Authority did not consider that a true commercial agency relationship was created, because the agent did not form an integral part of the business of any one insurer. The agreement did not, per se, contravene section 4(1). As before, the Authority considered that the

requirement relating to the IIF agreement did contravene section 4(1). Once this was deleted, and would not be enforced, the agreement no longer contravened section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 551. Bewleys Manufacturing Ltd & Butlers Irish Confectionery/Others.* May 1999.

Share purchase agreement; chocolates.

This concerned a share purchase agreement between Bewleys and Butlers Irish Confectionery. Bewleys acquired a minority shareholding in Butlers with a view to establishing a manufacturing joint venture for the production of boxed confectionery products sold under the Bewley's and Butler's brand names. Restrictive clauses included the exclusive right to manufacture and wholesale the confectionery product under the Bewley's name, and that all customers currently purchasing Bewley's chocolate and fudge should transfer their custom to the new company. The Authority considered that the confectionery market was diverse with many different products available. It decided that this agreement was unlikely to have a significant effect on competition. There was a large number of competitors in the market, barriers to entry were low and the market share of the joint venture company was small. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 552. J Donohoe Ltd/Bubble Up International Ltd (The Monarch Company).* May 1999.

Exclusive bottling and distribution; soft drinks.

This related to an exclusive bottling and distribution agreement where Bubble Up gave an exclusive licence and right to Donohoe to manufacture, bottle and distribute Bubble-Up beverages in five south-eastern counties. The Authority stated that the market shares were small, and that the likely impact on competition was negligible. Although the agreement was between potential competitors, it concluded that the products in question were exposed to significant competition in the relevant market. The agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 553. Dynochem Ireland Limited/Irish Fertiliser Industries Limited (Urea Supply Agreement). May 1999.*

Supply agreement; urea.

This decision related to a long-term agreement between Dynochem and Irish Fertiliser Industries for the supply of urea, and an ancillary Services Agreement. The product involved was technical grade urea, which was used by Dynochem to manufacture formaldehyde and formaldehyde derivatives, including certain resins which were used to manufacture panelboard products, such as fibreboard, particleboard and plywood. The agreement formed part of an arrangement whereby IFI, which owned and operated a manufacturing plant in Cork, leased part of its property to Dynochem so that Dynochem could manufacture the products. Under the ancillary arrangements, which are the subject of the next decision, IFI bought back a certain proportion of urea formaldehyde concentrate from Dynochem. Under the 15 year agreement, Dynochem had to buy not less than 80% of its requirements of the product from IFI. There were also confidentiality obligations which applied for the duration of the agreement and for five years after termination. The Services Agreement was between IFI, Dynochem and Dyno, a Norwegian company. IFI agreed to lease to Dynochem a portion of its property, for Dynochem to construct and operate manufacturing plants, and IFI also agreed to provide certain services and assistance, including the use of a jetty. The term of the agreement was 35 years, unless terminated earlier. It also contained confidentiality clauses.

The Authority stated that the aspects of the agreement which could give rise to competition concerns were the proportion of the market which was closed off to other competitors by the agreement and its duration. In this case, the amount of urea covered by the exclusive purchase agreement represented 18% of annual purchases in the State. The Authority considered that other producers and other consumers of urea were not disadvantaged, and that the exclusive purchase aspects of the agreement did not contravene section 4(1). It considered that the duration of the supply agreement had to be looked at in the context of the overall relationship between the parties. The Authority believed that Dynochem was justified in seeking long-term assurances regarding supply and purchase of the product, and that the term of the agreement was a reflection of this. Furthermore, the agreement had been freely entered into by both parties in a market where there were a number of other suppliers and customers. The

agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 554. Dynochem Ireland Limited/Irish Fertiliser Industries Limited (Urea Formaldehyde Concentrate Agreement). May 1999.*

Supply agreement; urea formaldehyde concentrate.

This related to a long term agreement whereby Dynochem supplied IFI with urea formaldehyde concentrate. IFI had to buy not less than 80% of its requirements of the product from Dynochem. There were also confidentiality provisions during the period of the agreement and for five years after termination. For the same reasons as in the preceding decision, the Authority considered that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 555. Burmah Castrol (Ireland) Ltd/Motor Fuels Equipment Loan Agreements. May 1999.*

Equipment loan agreements; lubricants.

This related to a standard agreement between Burmah Castrol and its commercial customers for the loan of equipment for use by the customer for Castrol branded lubricants (rather than motor fuels). Castrol supplied equipment on loan to the customer for the dispensing of lubricants. The equipment had to be used exclusively for Castrol products. The period of exclusivity was five years. After that period, the agreement provided for the commercial customer to purchase the equipment from Castrol at its written down value, which at the end of five years, provided that the customer had made all payments due, was nil. There was no requirement for the customer to purchase all, or any, of its requirements for lubricants from Castrol. The customer was free to deal with a competitor of Castrol even during the term of the agreement, and the Authority considered that the agreement did not contravene section 4(1). The Authority also considered the likely competitive effects of vertical trading relationships in this market, but it concluded that exclusive arrangements entered into by a firm such as Castrol with its customers did not raise any competition concerns either on an individual or a cumulative basis, and the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 556. Moulinex S.A./Glen Dimplex/Irish Sugar plc. May 1999.*

Joint venture; electrical appliances.

This concerned an agreement under which Moulinex, Glen Dimplex and Irish Sugar established a joint venture company, GMX Limited, to manufacture certain electrical goods, and there had been three supplemental agreements to the joint venture agreement. When the agreement was made, in 1989, none of the finished products manufactured by GMX for Moulinex competed with products supplied by Glen Dimplex. When GMX began to produce electric kettles, it was producing a product which would compete with products from Glen Dimplex. The joint venture agreement included a licence agreement for the licensing to GMX of certain patents owned by Moulinex and for the provision of know-how and assistance by Moulinex. GMX was effectively controlled by Moulinex, since the agreement gave the latter a majority of its voting rights. It was thus a subsidiary of Moulinex from the company law and accounting standpoints. Under the agreement, Moulinex was granted the right to purchase up to 100% of the output of GMX, and there was a reciprocal obligation on Moulinex to purchase certain percentages of GMX products. Certain non-compete obligations were imposed on Irish Sugar and Glen Dimplex for a period of ten years from the commercial start-up. Moulinex was required to license, on a non-exclusive basis, certain technology and know-how to GMX.

The Authority stated that co-operative joint ventures between actual or potential competitors would generally contravene section 4(1) if they led to co-ordination between the parties in the production of goods which either or both of them could produce themselves. The arrangements in the present case were essentially for the provision of intermediate inputs (and recently of one finished product) to one of the parties only, and the joint venture was set up almost exclusively to be a supplier of mainly intermediate products to Moulinex. Because Moulinex controlled the share voting rights of GMX and its Board, the Authority was satisfied that the agreement was not a joint venture in the true economic or legal sense, but rather a greenfield start-up operation by a French company, which involved substantial equity investment, but not control or participation, by either of the other two parties. Essentially, the agreement was one whereby Glen Dimplex and Irish Sugar had taken a minority interest in GMX. In the Authority's opinion, competition issues might arise where a firm even had a minority shareholding in a competing firm. Such a shareholding might lead to a reduction in competition, particularly where the

shareholders were competitors or potential competitors. In this case, GMX functioned primarily as an intermediate input producer for Moulinex, and most of its products did not compete with Glen Dimplex products, except for electric kettles. In the circumstances, where GMX acted primarily as an intermediate producer, the Authority considered that the acquisition by Glen Dimplex and Irish Sugar of a minority shareholding in GMX did not contravene section 4(1). None of the know-how, etc., granted to GMX by Moulinex was to be shared with any third party, including Glen Dimplex. This precluded GMX being used as a vehicle to share intellectual property in a cartel-like manner.

A certificate was issued.

One of the members, Mr Massey, who was the Director of Competition Enforcement, requested the recording of the fact of his dissent, but no reasons were given for the dissent.

*Decision No. 557. Sunkist/C & C. June 1999.*

Bottling agreement; soft drinks.

*Decision No. 558. Sanbra Fyffe Ltd/Share Purchase Agreement. June 1999.*

Share purchase agreement.

*Decision No. 559. Curust Financial Service Limited/Loewe-Lack-Werk Otto Loewe GmbH & Co. K. G. June 1999.*

Exclusive distribution.

*Decision No. 560. BTE/Motorola Ltd/Eirpage Ltd.*

*BTE/Motorola Ltd/Eirpage Ltd.*

*Eirpage Operating Agreement.*

*BTE/Motorola Ltd/Eirpage Ltd. June 1999.*

Joint venture and related agreements; telecommunications.

In all these cases, the Authority considered that, on the basis of the facts in its possession, the notified agreements had expired. The agreements were in existence when the Act came into force in 1991.

The Authority decided to close the files without considering whether or not the agreements merited a certificate or licence.

*Decision No. 561. Hampden/Allied Carpets. June 1999.*

Franchise agreement; carpets and floor coverings.

This concerned a franchise agreement between Allied Carpets (the franchisor) and Hampden Group (the franchisee) for the sale of Allied carpets in Northern Ireland and the Republic. The exclusive franchise was to last from year to year until termination. The services which had to be provided were defined as the laying or fitting of goods for customers, the provision of insurance cover for the benefit of customers against the risk of accidental damage to the goods, and any other pre-sale or after-sale services. Goods and services had to be provided from the franchise stores only, and the Allied method, trade name and cost price information had to be used solely and exclusively in the operation of the franchise, and there were other restrictions.

The Authority pointed out that it had issued a certificate and licence in respect of a category of agreements between suppliers and resellers (Decision No. 528), which also related to franchise agreements. In the case of franchise agreements, the Authority considered that a limited post-term non-compete clause of one year or less did not contravene section 4(1). In this case, however, the franchisee agreed that it would not, at any time, contact or seek to negotiate with any supplier to the Allied group in relation to the goods or services. This clause had no time limit. The Authority considered that, while a provision preventing a franchisee from negotiating directly with suppliers for the duration of the agreement, and for a certain period afterwards, could be justified, there was no justification for a permanent prohibition on such activities, which would serve to extend the duration of the non-compete clause indefinitely. Since this clause extended for a period in excess of one year after the termination of the franchise agreement, it contravened section 4(1). The parties confirmed to the Authority that this clause was intended only to have force or effect during the currency of the agreement, and not further or otherwise. In these circumstances, the clause no longer contravened section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 562. Combined Performance Measurement Services Ltd. July 1999.*

Joint venture; reports on investment funds.

This concerned agreements between William M. Mercer Fraser Ltd, Pension and Investment Consultants Ltd. Irish Pension Trust Ltd and Combined Performance Measurement Services Ltd, under which a joint venture company was formed to produce reports on the performance of investment funds. A shareholders agreement was notified, and the Memorandum and Articles of CPMS. There were restrictions on the use or disclosure of confidential information during the term of the agreement and for three years after its termination, and there were other restrictions. The Authority took the view that a merger which had occurred between Marsh & McLennan and Sedgwick Group, each of which had owned the separate companies involved, was sufficient to bring the parties to the agreement under common control. Therefore the companies were not in competition with each other and the agreement did not affect competition, and did not contravene section 4(1).

A certificate was issued.

*Decision No. 563. Hampden Group plc/Reid Group plc. July 1999.*

Joint venture; sale of furniture.

This concerned a joint venture agreement between Hampden Group and Reid Group for the sale of upholstered furniture and ancillary goods in the State and Northern Ireland. Under the agreement, Reid supplied the products exclusively to the joint venture at an agreed transfer price. Each of the shareholders, while holding shares and for one year thereafter, were not permitted to compete with the joint venture nor solicit any supplier or customer of the joint venture, nor solicit or employ any employee of the joint venture. The Authority considered that the agreement was one between a manufacturer of furniture and a retailer, and such an agreement in general did not pose any competition concerns. In view of the size and nature of the household goods market generally and the number of participants, the Authority took the view that there was no prospect of competition being eliminated, and the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 564. ESM Paper Limited/Berghuizer Papierfabriek NV. July 1999.*

Exclusive distribution.

The Authority considered that the agreement had expired.

It decided to close the file without considering whether or not the agreement merited a licence.

*Decision No. 565. Integrated Payment Systems Inc., American Express Travel Related Services/JWT (Forex) Limited. July 1999.*

Agency and trust agreement; money transfer service.

This related to a Moneygram Agency and Trust agreement between American Express Travel Related Services and JWT (Forex), its agent in Ireland. Moneygram was the provision of a money transfer service, which had undergone several changes of ownership since the agreement was notified in 1995. The Authority considered that, in its dealings with IPS, JWT did not act as an independent trader. The customer dealt with JWT but the money transfer contract was made with IPS. The Authority considered that the relationship created by the agreement was one of principal-agent. The relationship of principal and agent did not contravene section 4(1), nor did any of the clauses in the agreement.

A certificate was issued.

*Decision No. 566. Tennant & Ruttle Distribution Ltd/The Wrigley Company Ltd. July 1999.*

Exclusive distribution; chewing gum.

This concerned an exclusive distribution agreement made in 1948 whereby Tennant & Ruttle was appointed the sole distributor for the chewing gum of Wrigley in the State. This notification was made in May 1999. The agreement consisted of a letter of January 1948 appointing the sole distributor. It was stated that it was fully understood by Wrigley that it was not permitted to determine the prices at which the distributor sold the products or the prices at which the retailer sold the products. Tennant & Ruttle recommended resale prices to wholesalers and retailers, and the price list informed wholesalers and retailers that they were free to set their own resale prices. Tennant & Ruttle were prevented from handling any competing lines of chewing gum.

The agreement had previously been notified to the Authority in 1992, and the Authority had concluded that it came within the scope of the category licence in respect of exclusive distribution agreements (Decision No. 144). The Authority considered that, as the market was defined as that for chewing gum/bubble gum rather

than that for confectionery products, the agreement was not covered by either the category certificate or the category licence for vertical agreements (Decision No. 528), and had to be assessed on its own merits. Despite the 95% market share of Wrigley, in the particular circumstances of this case, the Authority concluded that the agreement had no effect on competition in the Irish market, and that it did not contravene section 4(1).

A certificate was issued.

*Decision No. 567. Irish Insurance Federation Register. August 1999.*

Compilation of database; insurance.

This concerned an arrangement relating to the registration of life assurance sales persons which had been established by the Irish Insurance Federation. The object of the scheme was to put together a database of all people engaged in the sale of life assurance. It was stated that there were few restrictions on entry to the market for life assurance intermediary or selling services. There was a statutory requirement for all intermediaries (brokers and agents) to be in an investor compensation scheme. A competency scheme was introduced by the IIF in May 1998. The scheme was intended to protect investors by making it more difficult for unauthorised persons to sell life assurance contracts. The registration scheme was managed by a Registration Council, which was comprised of nominees from the IIF and from the Irish Brokers Association. The IIF competency testing requirement applied to all salespersons otherwise qualified for entry into the register.

The Authority considered that the IIF register scheme did not contravene section 4(1). The introduction of competency testing by the IIF, however, raised different issues than those presented by the originally notified register. The Authority concluded that it was not likely to be used as a tool to artificially restrict entry. In addition, the EU Commission had recommended that member states or recognised professional bodies should establish standards of professional competence for insurance intermediaries for purposes of consumer protection. The competency test did not contravene section 4(1).

A certificate was issued.

*Decision No. 568. Cadbury Ireland Limited/Premier Brands UK Limited.*

October 1999.

Exclusive distribution agreement and trademark licence; confectionery.

This related to an exclusive distribution agreement between Cadbury Ireland and Premier Brands, and a related trademark/licensing agreement between Cadbury Schweppes, the parent of Cadbury Ireland, and Premier. The Authority took the view that the relevant market was that of chocolate confectionery, biscuits and cocoa flavoured drinks, rather than confectionery as a whole. Premier appointed Cadbury to be its exclusive distributor in the State for the sale of specified products, and the agreement contained clauses regularly found in such agreements. Under the second agreement, Cadbury licensed the use of its trademarks to Premier, in order for Premier to manufacture the various products, and it retained certain quality control rights. The Authority stated that the only effect of the arrangement was that Cadbury sourced from Premier the products which it had previously sourced from Cadbury Schweppes, and it concluded that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 569. MCPS/MCPSI/Various Agreements. October 1999.*

Membership and user agreements; music copyrights.

Notification had been made by Mechanical Copyright Protection Society Ltd (MCPS) and Mechanical Copyright Protection Society Ireland Ltd (MCPSI) of eighteen agreements. Two of these were membership agreements between MCPS and its own members, while the remainder were between MCPS and different categories of users of copyright in musical works, for which MCPSI acted as a royalty collection agency. Some of the agreements involved the UK-based parent company, MCPS, while others involved its Irish subsidiary, MCPSI. Some of the original notifications were withdrawn, one was rejected and one was re-notified. This decision dealt with eight of the agreements. One of these was the basic agreement between MCPS and its members, while the other seven were between MCPS and various categories of users of copyright musical works. MCPSI acted as agent for MCPS, as well as for overseas collecting societies which had reciprocal arrangements with it. MCPSI acted as agent for the copyright owners of musical and related literary works, in licensing the copyright in those works for mechanical reproduction on sound recordings and the synchronisation of the works to audiovisual recordings. The basic membership agreement was between MCPS and its Irish members, who were music writers and music publishers. The main user agreement was a standard form agreement between

MCPSI and individual record producers for the payment of royalties. The other agreements were made with other users.

In the Authority's opinion, the relevant market was that for the provision of copyright administration services as agent for composers and publishers of musical and related literary works in licensing their mechanical reproduction rights on sound recordings and other formats for music users. Under the membership agreement, MCPS was appointed to act as the member's sole and exclusive agent, to collect royalties from record companies. The member was permitted, in certain circumstances, to collect royalties direct from record companies licensed by MCPS. The member also had some freedom to grant licences direct to users. The duration of the agreement was one year, following which six months' notice of termination by either party was required. The user agreements included arrangements for the distribution of net royalties to MCPS members, but their main object had to do with methods for extracting royalties from users. The royalty rate for the manufacture or import of records was negotiated between MCPSI and the Irish Recorded Music Association.

The Authority accepted that MCPS was an intermediary between the copyright owner and the purchaser of the right to use his musical work, and was therefore an agent of the owner, but the agreement was not a true agency agreement. This was because MCPS negotiated prices/royalties, it was free to make commercial decisions, and generally it carried out a role more usually associated with principals. The Authority considered that the membership agreement should not be regarded as a standard agency agreement but as a series of individual agreements between an association of undertakings and its members. The essential feature of the arrangements was that the member appointed MCPS to act as his sole and exclusive agent in the territory to manage and administer the rights in the works. The Authority considered that, taken from the viewpoint of an individual creator of copyright work, the appointment did not contravene section 4(1). But, if one person or body controlled the vast majority of this market, such sole and exclusive terms, taken collectively, would raise concerns under section 4(1). MCPS controlled up to 95% of the relevant market, and the Authority considered that a requirement that members could only join if they appointed MCPS as sole and exclusive agent contravened section 4(1). The fact that the agent had the right to determine royalty rates, etc., led to the possibility of horizontal price-fixing, which also contravened section 4(1). This applied to all the

user agreements covered by the decision. The agreement with record producers also included a ban on direct approaches to copyright holders. While it was arguable that this did not rule out approaches to their representatives, the Authority considered, on balance, that this restriction contravened section 4(1). No other clauses in these agreements were found to be offensive.

The Authority concluded, however, that the agreements satisfied all the requirements for a licence under section 4(2). It did state that it considered that, in the majority of cases, horizontal price-fixing arrangements would not meet any of the conditions for the grant of a licence. It did, however, recognise the very peculiar nature of this particular market, and it accepted the price-fixing arrangements. All the requirements of section 4(2) were satisfied. The Authority referred to its previous decisions in respect of the Irish Music Rights Organisation (Decisions Nos. 445, 449, 456 and 457), though it noted that the situations were not identical.

A licence was granted for each of the notified agreements for the period from October 1999 to October 2014, and no conditions were attached.

*Decision No. 570. MCPSI/Synchronisation Licence; and MCPSI/Radio Station Licence Agreement. October 1999.*

User agreements; music copyright.

This dealt with the remaining two user agreements involving MCPSI which were originally notified. The Synchronisation Licence was made with advertising agencies (for music used on TV and radio advertisements), production companies and facility houses (for the use of music in corporate videos, television programmes and on general release). The second involved a standard-form agreement with independent radio stations in relation mainly to in-house advertisement production. The royalty rates were individually negotiated between the owner and those seeking to use the material, and the licence was then issued by MCPSI at the rate specified by the member. The Authority considered that none of the standard terms in either agreement contravened section 4(1).

A certificate was issued for each agreement.

*Decision No. 571. Aral, BP, Mobil and Statoil. November 1999.*

Joint venture; fuel cards.

This concerned a joint venture agreement and ancillary agreements between a number of oil companies. The parties to the agreement had devised an arrangement whereby each party would issue its own international commercial cards for the cashless purchase of motor fuel and related products by commercial customers in all suitable service stations throughout Europe. In addition to the joint venture agreement, there was a purchase and sale agreement, a trademark management agreement, a share sale and transfer agreement/option agreement and a trademark licence agreement, all of which were notified as a single agreement.

The Authority considered that the relevant market was that for fuel card issuance and use. The arrangements had been notified to the European Commission, which issued a “comfort letter”, and closed its file in the case. The Authority considered that the agreement was one to facilitate the issuance of commercial fuel cards. There were five other fuel cards in the State, and the Authority took the view that Statoil’s entry into the market would facilitate the development of the fuel card market in the State, and the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 572. Bord Telecom Eireann/Postgem Limited/Inet Limited.*

November 1999.

Joint venture; telecommunications.

The Authority considered that the arrangements had expired, and it had closed the file without considering whether or not the arrangements warranted a certificate or licence.

*Decision No. 573. MCPSI/Production (Library) Music Side Agreement.*

November 1999.

User agreement; music copyright.

This related to an agreement between the Mechanical Copyright Protection Society and some of its members in respect of production music, and it replaced a notified agreement which had been withdrawn. A number of related agreements had been granted a licence or certificate in Decisions Nos. 569 and 570. These arrangements provided for the appointment of MCPS as exclusive agent to manage and administer the member’s sound recording rights which subsisted in production recordings.

MCPS was entitled to negotiate and enter into blanket and standard licence

agreements with users, and to determine the terms and conditions of licences, including royalty rates, though the member could exercise these rights in limited circumstances. As in the case of other MCPS and MCPSI agreements, the Authority stated that the arrangements, taken in their collective context, constituted an exclusive collective copyright enforcement system involving independent undertakings and they were restrictive of competition and contravened section 4(1). In addition, the use by MCPS of standard royalty rates in its blanket licensing system led to the possibility of horizontal price-fixing, and also contravened section 4(1). The Authority considered that this agreement fulfilled all the conditions for a licence under section 4(2). A licence was granted for the period from November 1999 to October 2014, and no conditions were attached.

*Decision No. 574. Hibernian Insurance Company Limited/Bank of Ireland Insurance Services Limited. November 1999.*

Non-exclusive agency; motor car insurance.

This provided for the appointment by Hibernian Insurance of Bank of Ireland Insurance Services as its non-exclusive agent to sell its private motor car insurance policies in Ireland. There was also a services agreement. Besides the appointment of BIIS as non-exclusive agent, Premier, a subsidiary of BIIS, was to provide specified insurance services to Hibernian on an exclusive basis in relation to the provision of motor insurance for preferred risks. There were clauses prohibiting the solicitation of each party's employees by the other, during the term of the agreement and for six months after termination, and there were confidentiality provisions.

The Authority first considered whether the agreement was an "agency" agreement or not. In this case, the situation was slightly complicated by the fact that BIIS had a certain latitude, within strictly defined boundaries, to vary prices. Taking into account the total relationship between Hibernian and BIIS, the Authority considered that BIIS, in selling Hibernian insurance products, was a commercial agent. The Authority considered that the commercial agency agreement did not offend against section 4(1), nor did the individual clauses in the agency agreement, including the non-solicitation and confidentiality clauses. The Insurance Services Agreement was a straightforward commercial agency agreement, and it did not infringe section 4(1). A certificate was issued for the two notified agreements.

*Decision No. 575. University College Dublin/Allied Irish Banks. November 1999.*

Sole concession; banking.

This concerned the grant by University College Dublin of a sole concession to Allied Irish Banks to operate a bank branch on the university campuses for a period of ten years. The Authority considered that exclusive concession agreements to use premises in a building complex for the purposes of a banking business did not offend against section 4(1), when alternative facilities were available to consumers.

A certificate was issued.

*Decision No. 576. Eirtrade Limited/International Network Services Limited.*

December 1999.

Exclusive distribution; telecommunications equipment.

The Authority considered that this agreement had expired, and it decided to close the file without considering whether or not the agreement merited a certificate or a licence.

*Decision No. 577. Esat Telecommunications Ltd/CIE/Iarnrod Eireann – Non-exclusive Licence to Lay Cables. January 2000.*

Non-exclusive licence; telephone cables.

This related to an agreement whereby CIE and Iarnrod Eireann had granted to Esat a non-exclusive licence to lay fibre optic cable along the railway lines operated by Iarnrod Eireann for 20 years, with a possibility of renewal for a further 10 years. The relevant product market in this case was that for the provision of terrestrial transmission capacity for telecommunications services. Liberalisation of alternative infrastructure for certain telecommunications services occurred in 1997, enabling Esat to build and operate its own national infrastructure. Esat agreed to pay CIE a fixed annual licence fee and a variable performance fee, and to grant CIE certain cables. CIE would use one cable for its own purposes, but the use of five other cables for the commercial provision of leased lines and data services to end users was restricted under a number of provisions. In the agreement as originally notified, CIE could not install or permit the installation of any other telecommunications on its property prior to the construction of Esat's network. Thereafter, it had to give notice to Esat before it allowed the installation of any other cables. The agreement had been notified to the European Commission. The parties clarified the formulation in the original

agreement in order to address possible concerns about the nature of the access rights granted to Esat. CIE could then install or permit the installation of other cables for third parties, provided that, for a period, Esat would be granted priority access over CIE infrastructure for the purpose of deploying and putting into service of its network. The EU Commission had issued a comfort letter in respect of the amended Esat/CIE agreement in October 1999. The Authority stated that it would not regard access to CIE/Iarnrod's property to lay cable as an essential facility. It would, however, take the view that CIE/Iarnrod should not grant exclusive access to its infrastructure and thereby limit its freedom to enter profit-maximising commercial transactions with other operators. The Authority considered that the original contract, which required CIE to give sometimes lengthy notice to Esat before allowing the installation of any other cables, would have contravened section 4(1).

The proposed amendments appeared to meet the concerns about third party access which arose from the original restrictive clauses. The Authority also considered that Esat's right of first refusal and the post-termination rights of Esat were an integral part of the commercial transaction, and that they did not affect competition. The agreement as a whole did not contravene section 4(1).

A certificate was issued.

*Decision No. 578. Dublin Institute of Technology Joint Purchasing Agreement.*

January 2000.

Joint purchasing; computer hardware.

This concerned a notification by Dublin Institution of Technology, acting on behalf of 15 third-level educational institutions in an ad hoc association, of joint purchasing arrangements for information technology hardware, DIT being delegated to manage the contract award process. It involved a minimum committed purchase and optional additional purchases. The arrangements relating to the purchase of software had been granted a certificate (Decision No. 510). The Authority considered that the primary feature of the agreement was that it involved joint purchasing which was exclusive within the terms of a specific project funded by the Department of Education and Science. As in the earlier decision on the software agreement, in view of the small market share, and the freedom of suppliers to negotiate directly with the institutions outside the scheme, the Authority considered that the arrangements did not contravene section 4(1).

A certificate was issued.

*Decision No. 579. Animal & Plant Health Association Ltd/Others. January 2000.*

Publication of sales data; animal health products.

This concerned an agreement between the Animal & Plant Health Association and companies involved in the sale of veterinary products in the State. The parties agreed that APHA would collect information relating to product sales from the companies by means of a survey and disseminate the results among them, APHA was the representative body for manufacturers and sole distributors of animal health (veterinary products) and plant health (plant protection/agrochemical) products in Ireland. The other parties were wholesalers and others who sold animal health products directly to retailers. The subject matter of the survey concerned the Irish animal health market. Information collected from the firms was limited to the product sold, the amount sold, and the identity and category of the purchaser. In order to derive monetary amounts for product sales, APHA would match products and amounts sold against published price lists of the relevant companies. APHA would not collect any information from client firms as to actual prices charged, either in particular transactions or on an aggregate basis. APHA intended to aggregate the information collected across product lines by type of customer. The survey would not reveal any individual transactions in the market, nor information about actual prices charged in the market.

The Authority recognised that information exchanges could enhance competition by providing firms with valuable information for management purposes. But such information exchanges had to be scrutinised to ensure that they did not facilitate collusion among independent firms. In this case, the Authority was satisfied that the information agreement did not restrict competition in the animal health products market, and it noted two characteristics of the scheme. No information was collected or circulated as to prices actually charged in the market, and price information was taken entirely from non-confidential, publicly available sources. Secondly, the information would be aggregated so that it would not be possible to identify individual transactions. This was the result of the large number of buyers and sellers active in this market. Due to these two factors, the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 580. Phonographic Performance (Ireland) Ltd/Various Agreements.*  
January 2000.

Assignment and user agreements; music copyright.

PPI notified six agreements to the Authority in 1992, and another one in 1996. Three of the originally notified agreements related to the assignment by a number of member record companies of performing rights in sound recordings to PPI, with related forms of assignment mandate. The others were between PPI and different categories of users of copyright in sound recordings, for which PPI acted as a royalty-collecting society on behalf of its members, the most recent notification being between PPI and independent radio stations. This decision was concerned with the three assignment agreements and the independent radio station agreement. PPI differed from IMRO, which administered the performing rights in music on behalf of composers and publishers, and MCPSI, which looked after the mechanical copyright, or the reproduction of musical works. In brief, MCPSI licensed record companies to use music for the manufacture of sound recordings. Besides producing discs and tapes for sale, the record companies used PPI to administer the rights from the public use of recordings, for example, on radio and in discos, pubs, etc. The products involved were the performing rights in sound recordings and music videograms made by PPI members. The agreements with radio stations granted the right to use the whole of the PPI repertoire for a specified purpose, and they set out the royalty payable. PPI's primary activity, as the record industry's collecting society, was collecting equitable remuneration on behalf of its members from various categories of users. It collected royalties for Ireland only, and it did not need reciprocal arrangements with societies in other countries, unlike other collecting societies. The three arrangements between PPI and each of its members, by which it acted as agent, comprised the Memorandum and Articles of Association, standard forms of assignment of the performing right in sound recordings from its member record companies, and standard letters of mandate by members. The radio station agreements licensed the use by radio stations of sound recordings, and, in essence, they provided for rates of equitable remuneration to be paid by the stations, calculated on the basis of a sliding percentage of net advertising revenue.

The Authority stated that the arrangements involved a transfer of ownership of the performing right to PPI, thus precluding the record company from administering the right itself. There was a cumulative effect from the network of similar agreements

between the many Irish record companies, and this created a restriction on the freedom of users to purchase the global right from any supplier other than PPI. Competition in the supply of performing rights between individual members was also restricted. The establishment and maintenance of uniform rates of royalty and other conditions also eliminated price competition between members. Collectively, the arrangements constituted an exclusive collective copyright enforcement system which restricted competition and contravened section 4(1). The radio station agreements included identical royalty rates in each case, and they involved horizontal price fixing. These also contravened section 4(1). The Authority, however, took the same view of this collective copyright enforcement system as it had done in other cases concerning IMRO and MCPSI. It considered that the arrangements satisfied all the conditions for a licence under section 4(2). The Authority treated the assignment of rights as it had done in the case of the agreements between IMRO and its members (Decision No. 445), where it had granted a licence. A PPI member could request a re-assignment of rights, such re-assignment being at the absolute discretion of PPI. No PPI members had ever requested a re-assignment, and the Authority had no reason to believe that any request would be refused. Any refusal by PPI might constitute a material change in circumstances which could lead to withdrawal of a licence. Horizontal price-fixing arrangements would not generally satisfy any of the conditions for the grant of a licence, but the Authority recognised the very peculiar nature of this particular market.

A licence was granted for the period from January 2000 until January 2010, and no conditions were attached.

*Decision No. 581. Nitriigin Eireann Teoranta/Irish Fertiliser Industries Limited/Bord Gais Eireann. February 2000.*

Supply agreement; natural gas.

This concerned an agreement between Bord Gais, Nitriigin Eireann and Irish Fertilisers for the supply of natural gas by BGE to NET. It was amended to allow the resale by NET to its subsidiary, IFI, of all natural gas purchased from BGE. The arrangements terminated at the end of 1999. Since the agreement had expired, the Authority decided to close the file without considering whether or not the agreement merited a certificate or licence.

*Decision No. 582. Edward Dillon & Co. Ltd/Jas Hennessy & Co. Ltd.*

February 2000.

Agency agreement; brandy.

This related to an agency agreement under which Dillon was appointed as exclusive agent for the distribution and sale of Hennessy cognac brandies to in-bond customers within the State. A related agreement was also notified, appointing Dillon to be the exclusive distributor of these products to duty paid customers. The Authority decided in 1994 that this latter agreement satisfied the conditions of the category licence for exclusive distribution agreements (Decision No. 144). In the present case, the Authority sent a statement of objections, to which both parties responded. Hennessy was part of the French group LVMH Louis Vuitton Moët Hennessy. Guinness owned 34% of Moët Hennessy, a subsidiary of LVMH, and LVMH owned an 11.5% shareholding in Guinness. In 1998, Guinness and Grand Metropolitan merged to form the Diageo group. At the time of the decision, Hennessy and Diageo each owned one third of the shares in Dillon.

The Authority considered that brandy occupied a distinct market segment of its own. Under the notified agreement, Dillon could only sell the products to in-bond customers, whereas it also dealt with wholesale and retail customers in the rest of its business. Dillon was not permitted to deal in other brands of cognac or grape brandy, except specified brands. Dillon was to receive a commission on the prices of all orders accepted by Hennessy. The in-bond prices were to be determined by Hennessy, so as to be internationally competitive.

The essential offending point in the statement of objections was that Dillon, as exclusive distributor, was in competition with its supplier Hennessy, while simultaneously acting as agent for Hennessy, and that Dillon had access to information which would not normally be available to competitors. The Authority considered that the key fact of this case was that Hennessy had a one-third shareholding in Dillon. It considered that, in relation to this product market alone, and while Dillon did not distribute brandy on behalf of any of the other shareholders, Hennessy was likely to have decisive influence over Dillon, and that, for the purposes of the notified agreement, they could be considered as forming a single economic unit. As the undertakings involved were not competitors, the Authority considered that the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 583. Connaught Airport Development Company Limited and Knock Cargo Handling Limited. February 2000.*

Exclusive agreement; freight handling services.

This concerned a services agreement under which Connaught Airport granted Knock Cargo Handling the exclusive right to provide cargo handling, freight forwarding and freight management services, establish and operate a customs warehouse, ground handling solely to facilitate the provision of these services, back-office and data support services and all other services ancillary to or necessary for the provision of these services at Knock International Airport. The initial term of the agreement was ten years, after which the rights granted ceased to be exclusive, and the restrictive covenants no longer applied. Under the latter, the airport company undertook not to, and not to allow any third party to, compete with the business of the freight company, nor to solicit its customers, directors or employees, for the duration of the agreement. The Authority considered that the agreement did not necessarily contravene section 4(1) because it was an exclusive arrangement. It also considered that a provision preventing the parties from competing with the business for as long as the agreement lasted did not contravene section 4(1).

A certificate was issued.

*Decision No. 584. Institute of Chartered Accountants in Ireland/Rules of Professional Conduct and Ethical Guide for Members. September 2000.*

Association rules; accountants.

This involved two agreements concerning the Rules of Professional Conduct and the Ethical Guide for members of the Institute of Chartered Accountants in Ireland. A third notification related to the Bye-Laws of the Institute, which had been granted a certificate (Decision No. 520).

Following its initial assessment, the Authority issued statements of objections in both cases. It objected to some of the statements in the Ethical Guide. The statement regarding changes in a professional appointment required a prospective auditor or advisor to communicate with the existing professional. The Authority considered that a consumer of any good or service should, in principle, be able to change his supplier without the hindrance of the existing supplier having, in effect, first refusal. The statement on consultancy stated that where a practitioner obtained the advice of another member on a consultancy basis, the consultant should not accept any work

from the client which was being carried out by the first practitioner for three years. The Authority considered this to be a direct and unwarranted restriction on the commercial freedom of the consultant to compete for and obtain client business. The Authority considered that a reference to “a fee calculated by reference to the custom of the profession” had the effect of directly or indirectly fixing purchase or selling prices, and it contravened section 4(1). Although the statement allowed firms to agree their own prices with clients, the Authority considered that, in the absence of an agreement, stated reliance on industry-wide norms could lead to floor prices being set for the provision of accounting services.

Another statement provided that, if a firm charged significantly less than other firms for audit work, this might appear to mean that their objectivity was threatened. The Authority considered that this could dampen price competition between firms, since it associated aggressive price competition with the suspicion of unprofessional conduct, and it contravened section 4(1). It was also provided that members should not make comparisons between their fees and those of others. The Authority considered this to be in contravention of section 4(1), because it was an essential element of competition that consumers were able to compare prices across firms. In addition, the prohibition on unsolicited personal visits and telephone calls – cold-calling – to obtain work was, in the Authority’s opinion, a restriction on accountants’ ability to compete for business, and it also contravened section 4(1). The Rules of Professional Conduct contained several provisions which mirrored statements in the Ethical Guide, and the Authority had the same concerns about them, while other rules also raised competition concerns.

The Institute made a written response to the statement of objections and attended an oral hearing. The Institute made proposals to amend the Guide and the Rules, including the prohibition on cold-calling. The Authority accepted, however, that price comparisons would be very difficult to make or sustain, which was why a provision banning comparative advertising had been allowed in an EU Directive. In the circumstances, the Authority accepted that the Institute had satisfactorily addressed its concerns. It concluded that the amended Guide and Rules did not contravene section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 585. An Post/Standard Postal Franking Machine Licence Agreement.*  
March 2001.

User agreement; postal franking machines.

This related to a standard licence agreement issued by An Post to businesses and institutions for the use of a postal franking machine. The notified agreement was an amended version of a previous agreement which had been issued a certificate (Decision No. 450). Under the agreement, An Post authorised large numbers of business customers to use postal franking machines as a means of payment for postage services. The agreement set out the terms and conditions which applied to the licence and use of the franking machines. The Authority stated that the agreement was essentially one to use the postal franking machine as a means of paying An Post for using its postal services, and was not in itself anti-competitive. The licence contained certain restrictions relating to the inspection, maintenance and removal of machines. The Authority considered that these conditions were essential for the efficient operation of the system and the prevention of fraud. The licence did not contravene section 4(1).

A certificate was issued.

*Decision No. 586. Canada Dry Corporation Ltd/Cantrell & Cochrane.*  
May 2001.

*Decision No. 587. Schweppes International Limited/Cantrell & Cochrane.*  
May 2001.

*Decision No. 588. Cantrell & Cochrane (Dublin) Ltd/Pepsi Co. Inc.*  
May 2001.

Exclusive bottling and distribution; soft drinks.

The first two of these agreements involved a drinks franchise agreement, including exclusive manufacture and distribution, between Cantrell & Cochrane and Canada Dry and Schweppes respectively. The third was an agreement whereby Pepsi appointed Cantrell & Cochrane as its exclusive bottler, to bottle, sell and distribute beverages under the Pepsi and Pepsi-Cola trademarks. The Authority considered that the agreements had expired in either 1999 or 2000.

The Authority had closed the file on these notifications without considering whether or not the agreements merited a certificate or licence.

*Decision No. 589. Smith & Nephew Ltd/Beiersdorf UK Ltd. June 2001.*

Exclusive distribution; toiletries.

This related to an agreement under which Beiersdorf appointed Smith & Nephew as exclusive distributors for a number of its branded consumer toiletries in the State, such as soaps, face and body creams, sun-protection creams and hair-care products, almost all being sold under the Nivea brand. The agreement was part of a broader operation under which Smith & Nephew sold the trademark rights for the Nivea brand in Ireland and the UK to Beiersdorf, which owned the Nivea trademark rights outside Ireland and the UK. The dual ownership of the Nivea brand resulted from the expropriation of Beiersdorf's assets in Ireland and the UK towards the end of the Second World War. The entire assets of Beiersdorf's UK and Irish subsidiaries were sequestered as enemy property. The trademark rights were ultimately assigned to Smith & Nephew.

The agreement contained many clauses which were usually found in exclusive distribution agreements. There was a major difficulty with this agreement, since Smith & Nephew had to sell specified products (called "regime products") on terms and conditions and at prices approved and controlled by Beiersdorf. Usually, if not invariably, the exclusive distributor must be free to determine resale prices.

The draft agreement had been notified to the EU Commission in 1992. The Commission issued a comfort letter stating that the agreement could benefit from an exemption, but it required the parties to agree that Smith & Nephew should not be free to set the resale prices and terms and conditions of sale of Beiersdorf's products, because some of these were in direct competition with Smith & Nephew products.

The arrangements had also been cleared under German competition law.

The Authority considered that the notified agreement was between actual or potential competitors and it provided for retail price maintenance. It contravened section 4(1), and it did not fall within the scope of the category licence for exclusive distribution (Decision No. 528). The Authority stated that the restrictions on the freedom of the reseller to determine terms and conditions, including prices, could not normally be justified under section 4(2). But it considered that the unusual circumstances of the case, and particularly the historical circumstances regarding the Nivea trademark, required the Authority to carefully assess the agreement. Because there were exceptional circumstances which justified the restrictions, the requirements of section 4(2) were satisfied.

A licence was granted from June 2001 to June 2006, and a reporting condition was attached.

*Decision No. 590. Cadbury Ireland Sales Limited/Retailers/Standard Loan Agreement. June 2001.*

Equipment loan agreement; confectionery.

This concerned a standard loan agreement for the lease of display equipment between Cadbury and individual retailers. The display equipment was for the use in retail stores for the exclusive display of Cadbury impulse confectionery. The Authority decided that the relevant market was that of impulse confectionery. The retailer agreed that the equipment would be used exclusively for Cadbury's products, and situated in an agreed position within the retail unit. The retailer also agreed to provide sales data to Cadbury as required of products displayed and sold from the unit; not to dispose of the unit without Cadbury's permission; and not to dispose of the premises where the unit was kept without giving Cadbury advance notice. The unit was at all times owned by Cadbury, and the rental payable was included in a schedule to the agreement.

The Authority stated that the unit was an instance of non-price competition, since it stored products at a temperature lower than the ambient temperature, which it was believed was preferred by consumers. If it was successful it should, other things being equal, give a competitive edge to Cadbury and improve the welfare of consumers. There were, however, attributes of the impulse confectionery market and of Cadbury's role in the market which might raise competition concerns. The market was highly concentrated, the products were heavily advertised, there was evidence of economies of scale, and Cadbury had the largest market share. An important potential concern for the Authority was that the agreement might foreclose the market to other manufacturers, thereby strengthening the position of Cadbury as the market leader. But the Authority pointed out that the unit was not essential for the sale of the products, and a number of factors militated against Cadbury foreclosing the market as a result of the agreement. In addition, if the unit offered a decisive advantage over existing display units, then a competitive response could be expected. The Authority considered that it was only where the agreement could be shown to prevent or exclude other impulse confectionery undertakings from entering or remaining in the market

that the agreement could be deemed to be anti-competitive. In this case, the agreement did not contravene section 4(1).

A certificate was issued.

*Decision No. 591. Independent Radio Sales/Shareholders Agreement. June 2001.*

Shareholding agreement; radio advertising sales.

This concerned a draft shareholders' agreement between Independent Radio Sales and each of its shareholders. One share was held by IRS and the remainder were held by 16 independent local radio stations. These local radio stations proposed to engage in the joint sale and marketing of radio advertising slots on their stations, through the establishment of the company. The product was radio advertising slots and the relevant market was that for the sale and marketing of those slots in the State. Each of the shareholders of IRS operated at a local level, and at that time there was only one licence for each of the franchise areas of the IRS stations, roughly equivalent to a county. None of the IRS stations were based in Dublin, Cork, Galway or Limerick. IRS offered various packages to advertisers whereby they could book simultaneous advertising slots on all 16 IRS member stations and thus advertise on an almost nationwide basis. The pricing of slots on all 16 stations was decided by IRS. It was also possible to book slots on a single station and to book slots on any number of IRS stations, and thus advertise on a local or regional basis. The pricing of slots on a single station, on its own or as one of a number of stations (but not all stations), was decided independently by each station concerned. There were a further six independent local radio stations in the market which were not shareholders of IRS, all located in the main urban centres. They sold their own airtime exclusively. The agreement provided for IRS to promote a combined "rate card" offering an almost nationwide service. The rate card gave details, including the price, of various packages of radio advertising slots and promotions which covered all 16 member stations. The agreement contained non-compete restrictions. The shareholders were not permitted to join or be associated with other companies or persons which competed with the business of IRS without the written consent of the other shareholders. This restriction did not apply to shareholders after they had exited the agreement. A shareholder could still market and sell its own advertising. Following concerns expressed by the Authority, the parties made certain amendments to and deletions from the agreement.

The Authority took the view that the formation of IRS effectively constituted a commercialisation agreement whereby the shareholders cooperated in the joint selling and promotion of advertising slots. The scope of the arrangement was extensive, involving the joint determination of almost all commercial aspects related to the sale of the product, including price in the case of packages for advertising on all 16 stations. IRS competed for nationwide radio advertising campaigns as well as offering slots on individual stations. While the shareholders all competed in the market, and they were therefore “competitors”, each shareholder did not compete with all of the other shareholders. Each of the member radio stations competed for listeners, and by extension advertising, with its neighbouring local stations only. In the Authority’s view, the member stations sold largely complementary products. The arrangements also provided a central focal point through which orders for a number of geographical areas could be met. The cost savings through reduced duplication of advertising sales and promotion resources were likely to be substantial, and promoted competition.

The Authority also took the view that the existence of uniform prices for 16-station packages was indispensable in this case for the integration of the members’ marketing and sales functions, and was restricted to what was necessary to enable them to compete for advertising against the nationally-broadcast stations. The Authority noted that the scope of the non-compete provision was initially defined far beyond radio advertising sales and marketing, resulting in an extremely broad non-compete provision. The parties had since agreed to limit the scope of the provision to radio advertising sales and marketing only. The agreement had an indefinite duration, and the Authority believed, for this reason, that the restriction on each member’s ability to withdraw from the agreement would raise serious competition concerns. The parties had, however, agreed to delete all provisions in the agreement whereby shareholders had to obtain the permission of any of their fellow shareholders in order to exit the agreement. The agreement as amended effectively required a minimum membership period of four and a half years (18 months’ notice after three years’ membership). In view of the market conditions, this did not seem excessive to the Authority. The Authority concluded that the notified agreement contravened section 4(1), but that the amended agreement did not contravene section 4(1).

A certificate was issued for the amended agreement.

*Decision No. 592. MBNA Europe Bank Limited/ACC Bank plc (Credit Card Affinity Agreement).* June 2001.

*Decision No. 593. MBNA Europe Bank Ltd/TUSA Financial Services Limited (Credit Card Affinity Agreement).* June 2001.

Affinity agreements; credit cards.

These two decisions, which were almost identical, related to credit card affinity agreements between MBNA and ACC Bank and TUSA respectively. Each agreement was an amended version of MBNA's standard credit card affinity agreement, which had been granted a certificate in 1998 (Decision No. 522). The agreements set out the terms and conditions for the marketing of an MBNA/ACC or MBNA/TUSA credit card to the partner firm's customers, employees and others. MBNA was not being given direct access to the other firms' customer lists. Marketing was targeted to "affinity groups" which had common interests or loyalties, such as professional societies, members of clubs, employees of large corporations, financial institutions and so on. In addition to servicing the credit cards, MBNA offered economic incentives to the endorsing groups and financial institutions. In each case, there was a Purchase Agreement, under which MBNA bought a portfolio of "eligible" credit card accounts and the receivables relating to these accounts. Each of the other parties was a competitor of MBNA in the credit card market but, following the agreement, neither any longer competed with MBNA in this market.

The Authority considered that MBNA and the other parties were not competitors in the relevant market, nor did they currently compete in any other market. The agreements led to a concentration of the relevant market, but they also facilitated the emergence of a significant competitor to AIB and Bank of Ireland. The clauses of the agreement which appeared verbatim in MBNA's standard affinity agreement, which had already received a certificate, still did not contravene section 4(1).

A certificate was issued for each agreement.

*Decision No. 594. Irish Bankers' Federation and Irish Mortgage and Savings Association/Euro Changeover Agreement.* September 2001.

Agreement on changeover to euro; banking.

This related to a Euro Changeover Operational Agreement between the member institutions of the Irish Bankers' Federation and the member institutions of the Irish Mortgage and Savings Association. The agreement concerned operational matters

relating to the final changeover to the euro, that is the period during which the Irish pound was phased out as a sub-division unit of the euro and the introduction of euro notes and coins commenced. Ireland's currency became the euro on 1 January 1999, the introduction of euro notes and coins was to commence on 1 January 2002, and the period of dual circulation was to continue in Ireland until 9 February 2002. The notified agreement dealt with the coordinated phased withdrawal of handling by the member institutions of IBF and IMSA of the 'legacy currency', that is the Irish pound, in all its forms, such as cash, cheques and electronic transfers. A recurring feature of the arrangements set out in the agreement was the fixing of dates after which instruments of exchange/transfer denominated in Irish pounds would not be accepted. The arrangements covered a variety of subjects related to the euro changeover, such as technical and administrative matters and communication with customers.

The Authority stated that the essence of many of the points of agreement was that various products/services (e.g. bank accounts, cheques) formerly available in Irish pounds should no longer be available in that currency. The situation whereby the products/services became available only in the new version was not regarded by the Authority as having a distorting effect on competition. The Authority was satisfied that the agreement to withdraw Irish pound and other legacy currency denominated versions of the products/services in question did not contravene section 4(1). As regards points of agreement relating to the allocation of technical responsibilities (for conversion of transactions to euros and for errors in processing) within the banking system, and the clauses relating to cheques which had their currency manually altered, the Authority was satisfied that these did not raise competition issues. In respect of those points of agreement relating to the dual display of figures, the Authority was satisfied that they would not impact upon competition in these circumstances. The Authority noted that none of the arrangements concerned the fees, or rates or bands of interest, charged or employed by any of the member institutions. As regards the recommendations to dissuade customers from availing of certain services, the Authority was satisfied that no restriction or distortion of competition arose in the circumstances of the euro changeover. The Authority was satisfied that none of the points of agreement and none of the recommendations contravened section 4(1), but solely in the singular circumstances of the euro changeover.

A certificate was issued.

*Decision No. 595. Irish Payment Services Organisation/An Post (OTC Bill Payments).* April 2002.

Bill payment service; banking.

This related to an agreement between IPSO and An Post regarding over-the-counter bill payment services. IPSO was acting on behalf of Allied Irish Banks, the Bank of Ireland, National Irish Bank and TSB Bank. Under the agreement, each bank would cease to provide OTC bill payment services to their customers, and these would then be provided by An Post through its national post office branch network. OTC bill payments involved the presentation of a bill, such as utility bill, at a bank counter and payment by cash or cheque. The Authority issued a statement of objections and, following an oral hearing, a revised agreement was submitted by the parties. The parties agreed to cooperate in the establishment of an agreed framework to migrate OTC bill payments to the post office branch network, and to cooperate in the actual programme of migration. Each of the banks would, as from a certain date, cease or start to cease providing OTC bill payment services to their customers. In the statement of objections, the Authority considered that the agreement was a horizontal one between competitors which constituted market-sharing, and it contravened section 4(1). It did not satisfy the requirements of section 4(2). The revised agreement was designed to facilitate the response of the banking sector, through IPSO, and An Post as applicable, to the request by the Government to develop cooperatively more efficient and cost-effective payment methods. The OTC initiative would involve the banks providing for a phased withdrawal from the services if they were satisfied that customers could still access such services from other providers, including An Post. The role of An Post would be limited to participating in the IPSO information programme. The core objection, however, lay in the agreement between the banks simultaneously and collectively to withdraw the facility of OTC bill payments, and the Authority concluded that the agreement would contravene section 4(1), and would not meet the requirements of section 4(2).

The Authority refused to issue a certificate or to grant a licence.

*Decision No. 596. The Irish League of Credit Unions – Revocation.* June 2002.

Revocation of certificate; credit unions.

This was the final decision of the Authority under the Competition Acts of 1991 and 1996, taken just before the Acts were repealed and replaced by the 2002 Act. The

decision involved the revocation of a previous Authority decision, the first time that this had happened. The Rules of the Irish League of Credit Unions were notified to the Authority and, in 1995, the Authority issued a certificate stating that the Rules did not offend against section 4(1) (Decision No. 440). Under section 8(6) of the Act, the Authority was enabled to revoke a certificate if it considered that there had been a material change in the circumstances on which the certificate was based, or that the certificate was based on materially incorrect or misleading information. Complaints were received by the Authority relating to the application of the Rules and the resultant effect on competition, in particular the requirement that ILCU members were obliged to obtain certain insurance services from ECCU Assurance Company Ltd, a wholly owned subsidiary of the ILCU. Those services related to life assurance cover in respect of the credit unions' individual members' loans and savings (LP/LS cover). The Authority had stated that this arrangement was more akin to a joint venture buying arrangement than an exclusive purchase arrangement, since the member credit unions had agreed to purchase insurance jointly and indeed had set up their own company to provide such insurance services. At the time of the original decision, the Authority did not believe, given the tiny proportion of the market involved, and the fact that ILCU member credit unions could opt out of these arrangements, that this provision contravened section 4(1).

The Authority had received complaints from credit unions, together with supporting evidence, that less expensive LP/LS cover was available than that provided by ECCU. The ILCU had moved to disaffiliate members which had availed themselves of the cheaper LP/LS cover. When a credit union was disaffiliated from the ILCU, it was unable to recover its share of the ILCU's Savings Protection Plan (the SPS) fund or to be able to continue to avail of its benefits. The ILCU had changed its standard rules for credit unions following the passage of the Credit Union Act 1997, which had made SPS insurance compulsory. The SPS fund of the ILCU provided insurance cover for credit unions in the event that they became insolvent.

In the present decision, the Authority noted several facts relating to the granting of the certificate which had changed since the original decision had been made. Some changes did not amount to material changes in circumstances, but other changes were considered to be material. The first was the fact that a number of complaints had been made by members of the ILCU about the joint buying arrangement for cover from ECCU. One of the reasons for the complaints was that cover was being offered by

other undertakings at lower rates than ECCU, and the ILCU had attempted to prevent members from accessing such assurance. In addition, at the time of the original decision, it had not been compulsory for a credit union member to take out SPS cover, but the subsequent change was regarded as material. Implicit in the original decision was that the switching costs of individual credit unions away from the ECCU cover were low or zero, that is a credit union would incur little or no penalty or extra cost if it left the ILCU. There was now a substantial barrier to exit because a credit union which left the ILCU had no claim on its share of the SPS fund or its benefits.

The Authority considered that these changes had limited the development of a competitive market in LP/LS insurance for credit unions, and that the rules of the ILCU were operating in such a manner as to discourage that market developing, and so preventing, restricting or distorting competition to the detriment of consumers. As a result of these material changes in circumstances, the Authority was no longer prepared to certify that the notified agreement did not contravene section 4(1).

The certificate was revoked, with immediate effect.

## **GUIDELINE BROCHURES**

In September 1997, the Authority issued four guideline brochures in connection with the establishment of an effective enforcement regime under the 1996 Act to ensure compliance with the provisions of the 1991 Act. The contents of these brochures are described briefly below.

### ***The Competition Acts 1991 and 1996 Enforcement Guidelines***

The first brochure outlined the prohibition on restrictive agreements under section 4 and the prohibition on the abuse of a dominant position under section 5, and it identified the enforcement priorities of the Authority. The guidelines described the factors which would be taken into account by the Authority in deciding when to institute either civil or criminal proceedings. The Authority stated that it would give priority to breaches of the Acts of greatest harm to the economy and consumers. It proposed to pursue criminal actions in respect of 'hard-core' cartel practices, particularly agreements which either directly or indirectly involved price fixing arrangements between rival firms. Another priority for action would be agreements between firms not to deal with certain parties, i.e. collective boycotts. In respect of possible abuse of a dominant position, the Authority indicated that it would consider the relevant market and market power within that market. It would analyse the market share of a firm, the level of concentration, the relative sizes of firms, potential competition and barriers to entry. It stressed that the dividing line between aggressive competition and abuse of a dominant position could be narrow, and that it would probably bring civil rather than criminal proceedings in such cases. Under both sections, the Authority would give priority to breaches which caused harm across a wide range of consumers, allowing a private right of action in other cases. It might decide not to initiate proceedings where the parties gave undertakings to cease their behaviour, in order to avoid the cost of litigation.

### ***Competition Law and the Consumer***

This brochure was intended as a summary of the main provisions of the Acts for public information, and it advised consumers of their rights under the Acts. It explained that fair competition benefited the consumer, particularly by cutting prices and/or improving quality. Anti-competitive behaviour was designed primarily to

harm consumers by making them pay more than they should for goods and services, the clearest examples being price-fixing and collusive tendering or bid-rigging. Factors were described which might indicate the existence of such practices which were prohibited under the legislation. It was explained that enforcement was by way of civil actions by aggrieved private parties, or by civil or criminal actions brought by the Authority.

### ***Competition Law and Small Business***

This brochure explained the provisions of the Act for small firms, explaining their rights and their obligations under the legislation. It gave a summary of the responsibilities of business in complying with competition law, and explained how competition law could protect the legitimate competitive interests of small firms. There was an outline of horizontal restraints, such as price fixing, market sharing and boycotts, though some types of cooperation were not anti-competitive. Vertical restraints were also described, including agreements between suppliers and their distributors and/or retailers, and these could involve price restraints and non-price restraints. Resale price maintenance has been regarded as contrary to section 4(1), and has not been licensed, but category licences had been granted for exclusive distribution, franchising and exclusive purchasing of motor fuels and cylinder LPG. Examples of behaviour prohibited under section 5 included predatory pricing, tying, imposing unfair prices or trading conditions and price discrimination. It was explained that small firms could contact the Authority or the EU Commission if they believed that another firm or other firms were engaged in anti-competitive behaviour, and they also had a right to take action in the courts to obtain an injunction and/or damages.

### ***Guidelines on the Detection and Prevention of Collusive Tendering on Public Service Contracts***

This brochure was designed to enable public sector agencies to identify possible collusive tendering on public sector projects. It was pointed out that collusive tendering resulted in higher costs to state agencies and ultimately to the taxpayer, thus leading to higher taxes and/or cutbacks in services to the general public. The brochure identified various circumstances which might indicate collusion, and urged officials responsible for handling tenders in state agencies and local authorities to be

on the look out for such indications of anti-competitive activity. Where they encountered such activity, they should contact the Authority. The brochure described precautionary steps which agencies could take to detect and deter collusion, so making it more difficult for those submitting tenders to collude.

## **INFORMATION BOOKLETS**

The Authority published a set of information booklets in April 2000. They were part of an initiative to promote greater awareness among the business community and the wider public of the necessity to eliminate anti-competitive behaviour, and of the benefits to business, consumers and the economy in general of greater competition. The booklets are described briefly below.

### ***Cartel Watch***

This booklet identified the pursuit of cartels as the top priority of the Authority. It described the threat posed by cartels and advised the public of the warning signs of price-fixing, market-sharing and collusive tendering. The booklet explained the remedies available to anyone who had been the victim of unlawful cartel behaviour. It described in detail the procedure followed when a person reported a cartel to the Authority, emphasising the importance of evidence in proceeding with a case of an alleged cartel. The booklet also included guidelines for business to ensure that the individual firm did not engage in cartel behaviour. Firms might also consider whether they needed to adopt a competition law compliance policy.

### ***Refusal to Supply***

This booklet outlined for business the circumstances in which a refusal to supply might constitute a breach of the Acts, though refusal to supply was not necessarily a breach. It was intended to assist firms which might experience difficulties in obtaining supplies of products to decide whether they might have legitimate grounds to complain to the Authority. It outlined the relevant information which the Authority would need in order to assess any complaint. It also explained the right of legal action for persons aggrieved by anti-competitive behaviour.

### ***Category Certificate/Licence in respect of Agreements between Suppliers and Resellers***

#### ***Explanatory Guide to the Certificate/Licence***

The first of these booklets contained the actual 1998 decision granting the category certificate/licence (Decision No. 528). The second was an explanatory guide to the category certificate/licence. It explained the use of market share thresholds in the

assessment of vertical price and non-price restraints. Certain practices were not permitted, i.e. resale price maintenance and absolute territorial protection. The booklets were intended to simplify the rules for vertical agreements, thus reducing the need for firms to notify individual agreements to the Authority for approval. This should enable the Authority to focus its attention on those cases which were most detrimental to economic welfare.

***Category Certificate in respect of Agreements involving a Merger and/or a Sale of Business***

This booklet contained the 1997 decision issuing a category certificate for certain mergers and sales of business (Decision No. 489). This set out the circumstances in which an agreement for a merger or a sale of business would not prevent, restrict or distort competition. The category certificate was designed to assist businesses in determining whether or not to notify agreements to the Authority. The category certificate set out pre- and post-merger market concentration thresholds to identify which agreements came within its scope. Consideration was also given to barriers to entry and the level of actual and potential competition in the market. Mention was also made of vertical mergers and of ancillary restrictions on competition, such as non-compete clauses for a limited period which would not contravene section 4(1).

## **DISCUSSION PAPERS**

In 1997, the Authority initiated a series of Discussion Papers, the eleven of which are outlined below.

### ***Discussion Paper No. 1***

Submission to the Merger Review Group in relation to the Mergers Acts. February 1997.

This contained a submission by the Authority to the Merger Review Group in which it called for changes to the Mergers Act to increase transparency and effectiveness while ensuring that competition concerns were addressed. The Paper contained a description of merger legislation, the position in other countries and an analysis of merger control in Ireland, followed by the Authority's views on a more rational treatment of mergers.

The Authority argued that merger controls were an essential element of competition law, but should only prevent mergers which would have an anti-competitive effect. Many mergers took place for perfectly legitimate business reasons, however, and there should not be any unnecessary obstacles to such mergers. There had been a large number of unnecessary notifications, and there was a lack of transparency. Steps should be taken to improve effectiveness and efficiency, promote greater transparency, reduce the cost to business and ensure that competition concerns were more fully taken into account in the assessment of notified mergers. This could be achieved in one of two ways.

One option was to retain the present system while increasing the resources devoted to dealing with mergers, the issue of clear policy guidelines and publication of all mergers notified. A more radical alternative would require that mergers above a certain size would be notified to an independent agency rather than the Minister, either the Authority or a specialist merger review body. This agency would decide within 30 days whether the proposed merger raised any genuine competition concerns. If so, a more detailed second stage review would be undertaken. The Authority would then recommend whether or not the merger should be approved to

the Minister, who would take the final decision. The Authority also proposed amending the legislation to make it clear that mergers were not subject to section 4(1), but mergers should not automatically be excluded from the scope of section 5.

***Discussion Paper No. 2***

Second Submission to the Merger Review Group, dealing with the effectiveness of competition legislation and associated regulations. April 1997.

The Authority stated its belief that the effectiveness of competition legislation was directly related to its coverage of the economy as a whole. It argued that other legislation which actually or potentially excluded or affected the application of the Competition Acts, such as the Prices Acts, the Groceries Order, the Consumer Credit Act and the Health Insurance Regulations, signalled a contradiction of the basic premise of the Competition Acts and harmed its acceptance and enforcement. The Authority considered that the decision to have sector specific regulators should only be taken where there was genuine market failure, and that structural changes might often be preferable to the introduction of a regulator. Any sector specific regulation should be carefully linked in to the existing competition regime. The Authority also argued that it should have a wide competition advocacy role which would allow it to state its view on the possible effects of proposed legislation and regulation which had a potential to affect competition.

***Discussion Paper No. 3***

Proposals for the Electricity Supply Industry in Ireland: Comments on the Consultation Paper published by the Department of Transport, Energy and Communications. November 1997.

The Authority dealt with the basic features of the electricity industry, the EU Directive on common rules for the international market in electricity, the proposals made by the Department, market structures and competition, and institutional aspects of regulation. The Authority stated that it believed that the consultation paper did not address a number of key issues.

The main conclusions of the Paper were as follows:

- (a) the introduction of competition into the electricity sector was desirable as it was likely to benefit the economy as a whole;
- (b) the question of vertical separation of the ESB, which would involve establishing separate stand alone companies which would own and operate the transmission and distribution networks needed to be considered;
- (c) consideration should be given to limiting the amount of new generating capacity which could be built by the ESB as a means of promoting greater competition in generation;
- (d) a more detailed analysis of the relative merits of Third Party Access and the Single Buyer models was required;
- (e) a specialised regulatory regime needed to be established to deal with questions such as access charges for use of the transmission and distribution networks and possibly to regulate output prices. This should operate alongside existing competition law; and
- (f) questions of abuse of dominance, other than output and access pricing issues, should continue to be subject to general competition law and the Authority should continue to be responsible for enforcement.

The Authority noted that, where the electricity transmission and distribution network was owned by a firm which was dominant in electricity generation, the firm faced obvious incentives to deny access to the network to rival generators or to grant such access on unfavourable terms. While problems of access could be dealt with by means of regulation, such regulation was quite complex and could be made less difficult when the transmission and distribution systems were owned by independent companies, not engaged in the generation business. The Authority report also suggested that, in order to promote greater competition in generation, it might be desirable to limit the amount of new generating plant that could be built by the ESB for a period of time to allow for a diminution of its dominant position in generating. The Authority also suggested that a specialist regulator would be necessary to deal with problems of access charges and might be necessary to regulate electricity charges as long as the ESB remained dominant in the generation business, but the electricity industry should be subject to the same competition rules as everyone else.

***Discussion Paper No. 4***

The Treatment of Vertical Restraints Under Competition Law. May 1998.

This Paper contained an examination of the economics of vertical restraints and it considered the implications of their treatment under competition law. The author of the Paper, Mr. Massey, concluded that non-price vertical restraints should not be considered to be either pro or anti-competitive *per se*. A number of indicators needed to be employed in the assessment of these, such as the presence or absence of market power, the degree of market concentration, evidence of efficiency gains, the existence of economies of scope at retailer level and the impact of restraints on horizontal competition. The author argued that, where the relevant market shares were low, non-price vertical restraints were highly unlikely to have any adverse effects on competition and so could be certified. Where market shares were intermediate, a revised category licence might be appropriate. Cases where market shares were relatively high should be assessed on a case by case basis.

***Discussion Paper No. 5***

Competition in the Natural Gas Industry. November 1998.

This contained a submission by the Authority to proposed directives by the Department of Public Enterprise on third party access to the natural gas transmission network. The Paper examined the main economic characteristics of the gas industry and considered the potential for competition in the market. It considered the setting of access charges for use of the network, and analysed the Department's proposals. It was concluded that the proposed regime for setting access prices was broadly acceptable, but that it required some fine tuning. The inclusion of a number of provisions was suggested. The Authority believed that competition should be introduced on a much wider scale, and it saw no justification for retaining the monopoly position of Bord Gais Eireann in respect of the vast majority of gas users.

***Discussion Paper No. 6***

Solving Dublin Taxi Problems. *Urban-Sharecroppers v Rentseekers*. November 1998.

The authors of this Paper were the Chairman, Prof. McNutt, and an economist with the Authority, Mr. Kenny. It described the legal regime for the operation of public service vehicles, the issue of taxi plates, PSV driving licences, taxi plate owners and taxi drivers, and the secondary market for taxi plates. The authors expressed the view that Dublin's taxi problem could not be solved unless the transferability of taxi licences was removed. They also said that the taxi problem in Dublin was characterised by a secondary market for taxi plates, and that, as demand for taxis in the city progressively increased, profits accruing from owning a taxi plate increased thereby driving up the price of taxi plates on the secondary market.

***Discussion Paper No. 7***

Competition and Regulation in Public Utility Industries. July 1999.

This Paper analysed proposals for the liberalisation of gas, electricity and telecommunications, and it considered the difficulties for competition arising from the natural monopoly features of those industries. It examined the case for regulation, and weaknesses in a regulatory regime, and some policy implications. It was argued that regulation was not a substitute for competition, and that consideration should be given to permitting greater competition in the gas and electricity sectors. There was a need for an efficient regime for dealing with access charge disputes, and vertical separation would simplify the task. There was a need also for close cooperation between regulators and the Authority. A coordinating group should be established to prevent forum shopping, and to ensure that particular issues were dealt with by the agency best equipped to deal with them.

***Discussion Paper No. 8***

Competition, Parallel Imports & Trademark Exhaustion: Two Wrongs from a Trademark Right. December 1999.

This Paper was written by the Chairman, Prof. McNutt, and Mr. Kenny, an economist with the Authority. The Paper discussed the principle of the exhaustion of trademark rights in relation to parallel imports, and European Court of Justice judgments and the differing positions of the EU and the US on trademark exhaustion. It described the economics of trademarks and intellectual property rights, and the economics of

parallel imports and competition. The authors concluded that EU jurisprudence had acted to increase the market power of trademark holders for certain goods, and had raised the prices and lowered the consumption of these goods, resulting in a loss for EU consumers.

***Discussion Paper No. 9***

Response to the Competition and Merger Group's "Proposals for Discussion in relation to Competition Law". December 1999.

In this Paper the Authority welcomed the publication of the Group's proposals, on the grounds that it was appropriate for competition law and policy to be reviewed on a periodic basis, with the review covering both technical amendments and wider issues confronting a government body entrusted with the application of competition law in Ireland. However, while supporting a number of the recommendations in the report, especially in relation to the interaction between competition law and industry-specific regulation and the reduction of unnecessary legislative impediments to competition, the Authority considered that the report appeared to concentrate largely on issues, such as the notification system, which were of limited relevance to all but a small number of firms and their advisors, while missing out on the opportunity to recognise the importance of competition and of vigorous enforcement of competition law in a modern economy. The Authority stated that the proposals were in many respects a solution to yesterday's problems, and that consideration needed to be given to ending the system of notifying agreements to the Authority, making unnecessary many of the procedural changes in the proposals. In order to reduce the legal costs in competition cases, alleged breaches of section 4(1) should be brought in the Circuit Court. The Paper also contained point-by-point comments on the Group's recommendations.

***Discussion Paper No. 10***

Response to the Competition and Merger Review Group Report on the 1987 Groceries Order. February 2000.

While the overall recommendation of the Group was that the Order should be repealed, arguments were also put forward in favour of its retention. The Paper addressed these arguments and considered why the Order should be repealed. The

Paper disputed the notion that removal of the Order would cause a reduction in the number of independent retailers. It showed that the number of independent retailers had in fact declined in the presence of the Order. The Paper also questioned the argument that Irish suppliers needed the Order to protect them from the power of foreign multiples and discounters. Instead it was argued that affording Irish suppliers special treatment on the domestic market would only serve as an impediment to developing the scale and efficiency needed to compete on the European market. The Paper described how the provisions of the Order might on the one hand fail to tackle genuinely anti-competitive behaviour, while on the other hand prevent practices which were not anti-competitive. Errors of this type could have serious adverse effects on the sector and the economy in general. The Paper also showed how the Order was in conflict with competition law in that it placed sectoral interests above consumer interests, and protected competitors rather than the competitive process. The ban on selling goods below the invoice price imposed an artificially high legal minimum price for food products, resulting in higher prices for consumers.

***Discussion Paper No. 11***

Market Definition and Market Power in Competition Analysis: Some Practical Issues. October 2000.

This last Paper in the series was written by Mr. Massey, Director of Cartels Division. The Paper described the different approaches that had been used by the courts to define markets in the US, the EU and Ireland. It explored the different techniques for defining a market and argued that developments in the literature had rendered these techniques inappropriate for the purposes of competition analysis. The Paper emphasised how market definition was only a means to an end and that the ultimate consideration was establishing whether or not a firm had market power. Some methods for measuring market power directly, without the need to identify the relevant market first, were discussed. The advantages of these methods over traditional market definition approaches were discussed and it was argued that measuring market power directly would enhance the quality of decisions in competition cases.

## **OTHER AUTHORITY PUBLICATIONS**

### ***Guide to Irish Legislation on Competition.***

The Authority prepared a comprehensive Guide to Irish Legislation on Competition, which was published in February 1993 (PI 9199). The Guide provided a detailed description of the Competition Act, and gave a history of previous legislation and compared sections 4 and 5 of the Act to the then Articles 85 and 86 of the Treaty of Rome, upon which the Act was based. The procedures of the Authority under section 4, on anti-competitive agreements, were described at length. Section 5, the abuse of a dominant position, including its enforcement, was also covered, and rights of action generally were explained. A section dealt with mergers and takeovers, including the involvement of the Authority. The Guide also referred to studies and analyses by the Authority and to the 1987 Groceries Order, which remained in force.

### ***Study on the Supply and Distribution of Newspapers***

On 11 October 1994, the Authority was requested by the Minister to undertake a study and analysis of the practice and method of competition affecting the supply and distribution of newspapers in Ireland, including an analysis of any developments outside the State which impinged on the State. Later that month, the Authority was requested by the Minister to undertake an interim study to address the issues arising from transfrontier competition in the Irish newspaper industry. On 22 December 1994, in the light of possible implications of the announcement that Independent Newspapers plc had purchased a 24.9% interest in Irish Press Newspapers Ltd and Irish Press Publishing Ltd and had made a loan of £2 million to these companies, the Minister requested that the study be extended to include the issue of possible dominance and its implications for competition in the newspaper industry, and that an early report be submitted. An interim report was submitted to the Minister on 30 March 1995, and this was confined to the topics of competition from UK newspapers in Ireland and possible dominance in relation to the share acquisition and loan by Independent Newspapers. The Minister published a summary of the report on 11 April 1995, and an expurgated version of the report on 27 April.

In the opinion of the Authority, there was no evidence to support claims that UK newspaper groups, particularly News International, had engaged in predatory pricing

of newspapers within the State, and it recommended that no action be taken in respect of their pricing behaviour.

The Authority considered that the acquisition by Independent Newspapers of a shareholding in the Irish Press, and the provision to it of loans by the Independent, represented both an abuse of a dominant position, contrary to section 5 of the Competition Act, and an anti-competitive agreement, contrary to section 4 of the Act. Since it regarded these actions as very serious breaches of the Act, the Authority strongly recommended that the Minister take action under section 6 of the Act against these arrangements.

In a minority report, one member of the Authority, Mr. Massey, while agreeing with the recommendation, stated that failure to take action in a case such as this would seriously undermine the credibility and effectiveness of the Competition Act.

Following submission of its interim report, the Authority wrote to the Minister to ascertain whether it should proceed further with the study or whether, given that the most important issues had been dealt with, there was a need for further work on newspapers. In the light of the announcement by the Minister about the establishment of a commission of inquiry into the newspaper industry, the Authority informed the Minister that it assumed that it was no longer required to proceed with the second stage of the study.

### *Taxis*

In 1997, a comprehensive review was initiated into all aspects of the operation and regulation of the taxi/hackney service in the wider Dublin area, on behalf of the four Dublin local authorities. The Authority made a submission on this topic. The Authority referred to the submission made by the Fair Trade Commission in 1991. The Commission had stated that taxi regulation restricted competition and adversely affected consumers, and that the restrictions should be removed. Consideration ought to be given to the complete removal of restrictions on taxi numbers, though this should be achieved by a gradual increase in the number of taxi licences over a five year period. It believed that price competition would operate effectively once the number of taxi licences was increased, and that price control should cease.

The Authority considered that the conclusions of the Commission were still valid. It stated that numerical control of the number of taxis was unnecessary and had not been shown to guarantee high standards in taxi service. It considered that piecemeal solutions, such as permitting a small increase in the number of licences, had been tried in the past and had failed. Numerical restrictions could be removed all at once, or could be phased out gradually. The Authority considered that, once the number of taxi licences had been increased, price competition would operate effectively. It proposed that price control should be withdrawn as soon as supply and demand in the taxi industry had been equalised.

In its Annual Report for 2001, the Authority noted that the supply of taxi services had changed dramatically in November 2000. New legislation provided that any suitably qualified individual could provide taxi services, and, during 2001, the number of taxi licences increased both steadily and rapidly. In Dublin, the number of taxis supplying the market tripled. While welcoming this development, the Authority pointed out that free entry had not solved all problems. It outlined the steps which were necessary, in its view, for the effective regulation of taxi markets. It made recommendations in respect of:

- (a) the implementation of systematic fare control which would require periodic reviews of fares, a reliable means of gathering information about demand and supply, and suitable technical expertise;
- (b) improved quality regulation, involving raising driver qualifications, regular maintenance checks, spot checks, meaningful penalties for offenders and a responsive customer-led complaints system; and
- (c) in respect of the system of regulation itself, responsibility for regulating all aspects of the taxi market should be handed to a single politically-independent agency, preferably one with responsibility for regulating transport generally.

In April 2002, the Authority made a submission to the Department of the Environment and Local Government relating to qualitative improvements in taxi services and future regulation of these services. It argued that the following steps were necessary to deliver the full benefits to consumers and society generally of the regulatory reform undertaken up to then:

- (a) a systematic fare review process should be developed and implemented;

- (b) fares should be re-balanced to reduce excess supply and ensure adequate service at all times;
- (c) maximum fare controls should be retained and fare competition below these levels should be encouraged;
- (d) quality standards should be tightened and the threat of enforcement made more credible; and
- (e) the structure and process of regulation should be reformed so as to make it efficient, rational and immune to capture.

The Minister for Transport subsequently announced in 2002 the establishment of a new national taxi regulatory office that would operate on a statutory footing.

***Report of Investigation of the Eircell Proposal to locate antennas at Garda sites/masts.***

In July 1998, the Minister requested the Authority to undertake a study and analysis into a proposal submitted by Eircell whereby it would locate mobile phone antennas at 260 Garda sites/masts around the country for a period of 15 years. Of the 260 sites, 223 were included in an agreement which was reached with Esat Digifone in 1997 allowing it access to 418 Garda station sites. The study was to include the competition issues concerning the proposal and the practices to be adopted in granting competing utility operators access to State owned facilities.

The Authority presented its report in August 1998, and it was published the following November. The report described the Garda sites and mobile telephony, and summarised the submissions and oral hearings. It discussed planning issues and the market for mobile telecommunications services. The report concluded that the Garda masts were not an essential facility to enter the mobile telephony market.

Accordingly, the essential facilities doctrine, which provided for the fair and non-discriminatory access of all competitors to the essential facility, should not be applied to the Garda masts. The report recommended that, for a short period, the Garda authorities should not enter into any agreement which had the effect of foreclosing access to the Garda sites to a third operator. The Authority stated that the Eircell proposal would result in the total capacity of the masts being exhausted by Eircell and Esat, thus depriving any other operator of equal access. The period, according to the Authority, needed to be no longer than six months, during the course of which the

third operator should be given an opportunity to form its own proposal for entry to the Garda sites. This would facilitate third operator entry into the mobile phone market. The Authority stated that, after the six month period, the Garda authorities should be free to pursue whatever commercial arrangements they wanted with any provider of mobile telephony services, in order to maximise profit.

The Authority gave its views on access to the Garda sites and its views in general on the practice to be adopted in granting competing utility operator access to State owned facilities, as follows:

- (a) State organisations should be free to enter into commercial transactions with any or all entrants subject to the general principles of competition law;
- (b) State organisations should award access to their facilities to the entrant who offered the most advantageous terms and therefore those organisations should encourage competitive bidding for access to facilities; and
- (c) State organisations should avoid entering into any arrangement with an entrant which would have the effect of restricting its ability to fully exploit the commercial potential of its facilities. It should not therefore, for example, enter into any agreement that prevented it from selling available capacity to any potential bidder or prevented it from making that potential facility available.

### ***The Liquor Licensing Laws***

In January 1997, the Authority decided to undertake a study of the retail drinks market. The terms of reference were to undertake a study and analysis of the liquor licensing laws and other barriers to entry, and their impact on competition in the retail drinks market within the State. In September 1998, the Authority published an interim study on the liquor licensing laws and other barriers to entry and their impact on competition in the retail drinks market.

The report described previous reports on the retail drinks trade and submissions made to the Authority, the liquor licensing laws, the distribution of licences and associated competitive effects, and the effects of the licensing laws on the retail drinks market. The Authority also considered some theoretical insights into entry barriers, and presented a microeconomic analysis of the demand for alcohol product.

The Authority found that the liquor licensing laws, as constituted, were a formidable barrier to entry into the retail drinks market. With limited exceptions, new licences could not be issued and entry was practical in most cases only by purchasing an existing licence which in itself was geographically constrained. In this way, the Authority contended that market entry and exit were linked. The Authority found substantial empirical evidence of the distorting effects of the licensing laws on competition, such as:

- (a) the persistence of a significant price differential (7 – 10%) for a range of alcoholic products (stout, spirits, lager, foreign lager) for on-sales between Dublin and non-Dublin areas controlling for differences in consumer expenditure patterns across regions;
- (b) the non-existence of a stable price differential for alcoholic products for off-sales between Dublin and non-Dublin areas and the existence of cheaper prices for these in Dublin; and
- (c) the non-existence of any significant price differential for fast food meals products between Dublin and non-Dublin areas.

The Authority also found that Dublin had higher demand for alcohol due to disproportionate increases in population, income and demographic mix and that the demand for licences did not keep pace with these increases in demand.

The Authority concluded that all of the restrictions inherent in the system of licensing pubs made it impossible for the market to function efficiently and in the best interests of the consumer. It said that any serious attempt to reform the licensing laws had to address the fundamental problems outlined in its report and recommended the reconstitution of the licensing laws with the following features:

- (a) the repeal of the prohibition on the granting of new licences as contained in Section 2 of the Licensing (Ireland) Act, 1902;
- (b) the repeal of any provisions protecting existing establishments from market entry (such as the “One Mile Rule” as contained in Section 20 of the Intoxicating Liquor Act, 1962);
- (c) the repeal of any provisions granting existing establishments the right to object to market entry based on the effect of such entry on competitors; and
- (d) the retention of only those legal barriers which related to qualitative criteria directly relevant to the social dimension of the sale of alcohol (suitability of

applicant and premises, compliance with fire, health and safety and planning provisions).

The Authority answered particular objections which it anticipated would be made, especially by representatives of incumbents in the trade who benefited from the existing system. It strongly urged that a liberalised entry regime should be put in place.

In December 2000, the Minister for Justice, Equality and Law Reform established the Liquor Licensing Commission, whose remit was to review the liquor licensing system. A representative of the Authority was a member of the Commission, and the Authority made two submissions to the Commission. The first of these, in January 2001, was entitled “Competition Authority Position Paper on the Nature of the Off-Licence and the Method of Access to the Off-Licensed Trade in the Interests of Promoting Competition”. The Authority pointed out that entry into the drinks trade was still practical in most cases only by purchasing an existing licence. Thus market entry and exit remained inextricably linked and barriers to entry in one area were gained at the expense of increased barriers to exit in others. The off-licence trade differed from the on-licence trade in many respects, including differing consumer demands and preferences and differences in supply (including the range and type of beverages available in the on- and off-licence sectors). Entry restrictions were not an effective or proportional way in which to control the consumption of alcohol as they distorted competition, were not geographically neutral, and ultimately might have little or no effect on consumption as they were so indirect. Policy objectives in relation to the sale of alcohol could be better achieved by measures that were far less restrictive of competition. The submission called for the reconstitution of the licensing laws with the following features:

- (a) the repeal of the prohibition on the granting of new licences; and
- (b) the retention and possible enhancement of only those legal barriers to qualitative criteria directly relevant to the social dimension of the sale of alcohol.

In its second submission, in October 2001, the Authority argued that the existing legislative framework restricted competition and at the same time had failed to limit

alcohol consumption. It argued that the effects of the restrictive licensing system were:

- (a) where demand had increased, an increase in the size of pubs to meet it, resulting in the demise of the traditional pub and the emergence of very large drinking establishments;
- (b) where demand had fallen, existing licences had become unprofitable but appeared to have been retained because of their asset value;
- (c) limited consumer choice, quality and value;
- (d) higher margins on the sale of alcohol, thus encouraging retailers to focus more on the sale of alcohol exclusively than on its sale in association with other activities; and
- (e) higher prices for consumers where licences were scarce, resulting in a total cost to consumers in the region of €2,000m.

The submission rejected arguments that the restriction of competition was justified because, by raising prices, it reduced alcohol consumption, pointing out that, if higher prices were desired for policy reasons, direct taxation was more efficient, equitable and effective. It recommended that:

- (a) the licensing laws should be amended to remove the prohibition on granting new licences, thereby allowing the number of licences to be determined according to consumer needs. Somewhat paradoxically, this might actually lead to a fall in the total number of licences;
- (b) the Licensing Acts should be amended to remove the references to the adequacy of existing supply as a criterion for the District Court in deciding whether or not to grant a new licence;
- (c) direct taxation should be used to influence the price of alcohol;
- (d) some fixed proportion of the tax revenues from alcohol should be earmarked for programmes designed to tackle problems associated with the consumption of alcohol;
- (e) the Commission should consider whether targeted taxation was a useful instrument;
- (f) the Commission should examine other policies that reduced demand;
- (g) the Commission should consider measures that would place a greater positive duty or liability on the vendor, especially at the point of sale – for instance, by

- licensing individuals to sell alcohol; through compulsory training in the sale of alcohol; by requiring an accredited qualification in the responsible sale of alcohol; or by increasing the legal liability of vendors;
- (h) the Commission should examine international experience in the use of targeted policies to address social problems at the point of sale; and
  - (i) measures to improve the enforcement of existing laws should be strengthened.

### ***Transport Study***

In June 1999, the Authority commenced a study of the rail and bus passenger transport market, particularly the licensing restrictions and other barriers and restrictions to entry into the market, and their impact and delivery of passengers by intercity rail and buses and by urban buses. In 2000, the Department of Public Enterprise produced “A New Institutional and Regulatory Framework for Public Transport”, on which it invited submissions. The Authority completed its study, and submitted it as a response to the Department’s policy paper. It published a slightly revised and updated version as the Transport Study in June 2001. The study described the industry structure and competition in the public transport sector, it summarised the submissions to the Authority, and described the results of questionnaires sent to a number of private sector bus operating companies. It explored the different regulatory models in the public transport sector, and presented the Authority’s comments on the Department’s policy paper.

The Authority summarised its views on the public transport sector in general, and on the proposals in the policy paper, as follows:

- (a) the Authority considered that the development of the market for road and rail passenger transport in the State had been inhibited by the restrictive regulatory regime imposed by legislation. This legislation, much of which had been explicitly intended to restrict road transport in order to protect the railways, had proved to benefit neither mode. Moreover, it had operated against the public interest. Because of the restrictive nature of the regulation, competition had been limited, and, in some cases, impossible. While the absence of competition had had a negative effect, conversely, the possible benefits of monopoly (in terms, for instance, of service integration) had not been realised;

- (b) the Authority welcomed the proposals of the Department of Public Enterprise for the restructuring and re-regulation of the rail and bus passenger transport market. It considered that these proposals were both timely and constructive. In particular, it welcomed the opportunity for the private sector to participate in the public transport system;
- (c) the Authority believed that regulation should be minimal, proportionate, linked to clearly defined objectives and located as close as possible to the market regulated. It should also be separate from the operation of services. While detailed proposals had only been set out in relation to the Greater Dublin area, regulation of the market outside Dublin was also proposed for the future. It was not clear that any form of restrictions on the licensing of bus operators, other than those required to ensure the safety of passengers, was required in the long-distance market;
- (d) the Authority considered that, if state ownership of companies operating in the transport market was to be continued, the rationale for such ownership should be clearly set out;
- (e) it was recommended that consideration should be given to the horizontal separation of Bus Eireann – for instance, into urban, long-distance and rural services – to avoid the risk or perception of cross-subsidisation;
- (f) the Authority also recommended that the organisation of the school bus service should be re-evaluated with a view to promoting competition, perhaps on a regional basis;
- (g) vertical separation of the railways (i.e. separate organisations for infrastructure and operations) should only be considered if there was a clear possibility of competition developing in the operations sector. In order to test this out, a transitional phase involving pilot projects might be appropriate;
- (h) the franchising model seemed appropriate for the bulk of services in the Greater Dublin area. However, other models might be appropriate, for instance, for the outer suburban or commuter-type routes, and the Authority considered it appropriate that the independent regulatory function should have the flexibility to develop alternative regulatory approaches for different markets, provided that this was carried out in a transparent and non-discriminatory manner;

- (i) the tendering process for franchises needed to be carefully designed in order to maximise the amount of information available to bidders and minimise the possibility of collusion. Passenger transport information had to be made available to all bidders in good time; and
- (j) claims for subsidies should be rigorously evaluated, since experience in other industries had shown that not all such claims were justified.

In 2001, the Department of Public Enterprise produced a consultation paper on the Transport (Railway Infrastructure) Bill, to which the Authority submitted its comments. The Bill proposed the creation of an independent commercial statutory public body, the Railway Procurement Agency (RPA), to provide, or to secure the provision of, railway infrastructure through the Public-Private Partnership approach. The Minister for Public Enterprise would determine the projects to be procured by the RPA. The Bill would allow the RPA to negotiate, sign and manage partnerships for the design, construction, operation, finance and maintenance of rail-based infrastructure. It provided for a statutory process for private-sector participation in infrastructure procurement by extending the right to apply for a Railway Order (currently reserved to CIE only) to the RPA or any person having the consent of the RPA. A public inquiry would be required prior to the making of a Railway Order. The Bill also contained provisions related to rail safety, to specific legal aspects of the on-street operation of light rail and to penalties for various offences.

In its comments, the Authority raised concerns as to the actual and perceived independence of the agency. It pointed out that information flows either from the RPA to CIE or vice versa could have a detrimental effect on the development of competition for partnership projects. Information flowing from CIE towards the RPA might unduly influence the project design so as to favour CIE. Information flowing in the opposite direction might give CIE an unfair advantage in the bidding process. The Authority suggested a statutory requirement for the ring-fencing of the RPA. It also pointed out the importance of ensuring that all possible bidders for a project, including CIE, should start from a “level playing field” as far as technical information about the existing railway infrastructure was concerned. The commercial rationale for the Agency was not clear from the general scheme of the Bill. Some competition concerns could arise from the possession by a single agency of dual quasi-regulatory

and commercial functions in the sector. The Authority also proposed that criteria for the selection of projects should be set out in legislation, as this would increase investor confidence and reduce the possibility of apparent bias in the selection of projects. Overall, the Authority welcomed the setting up of the RPA as a timely and important step in the development of a modern, effective and competitive transportation system in Ireland.

### *The Cartel Immunity Programme*

In December 2001, the Authority, in conjunction with the Director of Public Prosecutions, introduced a “Cartel Immunity Programme”. The introduction of this programme followed on from an extensive consultation process during which a consultation document was published in January 2001, to which submissions were made, and similar type programmes in other jurisdictions were examined.

The Programme stated that the Authority had identified the pursuit of cartels as a top priority, since cartel behaviour was almost inevitably harmful to consumers. Cartels were by their very nature conspiratorial. The participants were secretive and hard-core cartels were notoriously difficult to detect and prosecute successfully. The Programme was intended to encourage self-reporting of unlawful cartels by offenders at the earliest possible stage.

The Programme outlined the policy and procedures involved in applying for immunity from prosecution for criminal offences under the Competition Acts. It set out the roles of the Authority and the DPP when a request for immunity was made. The Authority would recommend immunity to the DPP if specific requirements were satisfied. The impact of corporate immunity on directors, officers and employees of an undertaking was outlined. The immunity process was described, from the initial contact, through the qualified guarantee of immunity and full disclosure, to the immunity agreement. Failure to comply with any of the requirements of the agreement could result in the DPP revoking the immunity agreement. It was stated that information becoming available pursuant to the programme would not be disclosed other than in accordance with the normal practices and procedures pertaining to criminal investigations and prosecutions.

*Casual Trading Act, 1995*

In 2000, the Minister requested the Authority to undertake a study into the implementation by local authorities of the Casual Trading Act, 1995 (Pn 12571). The request arose from concern regarding complaints received from casual traders about the operation of the Act by local authorities. The report of the study was submitted to the Minister in August 2002. The report also examined the effects of the Act on competition in local markets, and whether measures employed by local authorities were necessary for the achievement of public interest objectives such as public order and safety. Market research consultants were engaged to collect data and to survey those most affected by the Act.

The Act was described in the report, and casual trading in the State was examined. The views and perceptions of interested parties were outlined – the Department of Enterprise, Trade and Employment, local authorities, casual traders, permanent businesses and the Gardaí. The report concluded with a legal and economic analysis, and the recommendations of the Authority, as follows:

- (a) the 30 local authorities that have not yet introduced bye-laws under the Casual Trading Act, 1995, should do so without delay;
- (b) local authorities should consult casual traders and other interested parties when introducing or amending bye-laws and making decisions under the Act;
- (c) guidelines should be drawn up at a national level to direct local authorities in implementing the Act;
- (d) the determination of pitch sizes, set by local authorities under the Act, should not act as a barrier to entry for any type of trader; local authorities could designate a number of larger pitches for certain classes of trader;
- (e) fees set under the Act should be based solely on the administrative cost of issuing licences and any costs associated with providing facilities;
- (f) section 6(4) of the Act should be amended to read "...local authorities shall have regard to the facilities and services provided by it to persons engaged in casual trading";
- (g) licences issued under the Act should be allocated on a historical basis or a first-come, first-served basis, with a waiting list operating for pitches that become free;

- (h) the possibility of mutual recognition of licences among the local authorities should be investigated so that an event trader might need to apply only once in full for a licence under the Act;
- (i) local authorities should be required to make available to the public a list of licence fees under the Act, together with a breakdown of the various costs leading to those calculations. This same information should be collated centrally;
- (j) The Act should be amended to enable fees, and amendments to fees, to be challenged in the District Court, with a provision to appeal to the Circuit Court, as are other aspects of bye-laws.

In May 2004, the Minister made an Order in respect of an issue which was not the subject of the Authority's recommendations. These regulations provided that a grower, or a servant or agent of the grower, could sell, without the requirement to obtain a Casual Trading Licence, strawberries, raspberries, blueberries, gooseberries, blackberries, loganberries, tayberries and currants, and potatoes having loose skins and which had been harvested prior to maturity, between 1 May and 30 September each year.

## **SOME OTHER WORK OF THE AUTHORITY**

In 1995, the Authority made a submission to the European Competition Forum on exclusive distribution and purchasing agreements. It pointed out that there was disagreement among economists concerning the desirability or otherwise of vertical restraints, though many favoured assessing each agreement on its merits using a rule of reason approach. Block exemption regulations were not an appropriate means to handle individual cases, and the position of the Commission appeared to be somewhat ambiguous. The Authority described its own approach to vertical agreements, and pointed out that many notified exclusive distribution agreements would not benefit from the EU block exemption. It argued that the EU regulations appeared internally somewhat contradictory. It suggested that the exclusive distribution regulation should be brought more closely into line with prevailing economic thinking, by adopting a more lenient approach.

Telecom Eireann notified a proposed merger, involving the setting up of a joint venture, to the European Commission in 1996. The Commission invited observations on the proposal, and the Authority commented on the jurisdictional issues involved. It also pointed out that the proposed transaction should be viewed in the context of the state of competition in the Irish telecommunications market, which was dominated by a public utility, Telecom Eireann. The Authority described how the introduction of full competition into the Irish market would be delayed by a number of factors.

In 1996 also, the Authority submitted its views on a draft of the Public Utilities Commission Bill to the Department. It was essential that such legislation should not limit the impact of the Competition Acts in public utilities industries, since it was vital that competition law should apply uniformly to all sectors of the economy.

In 1998, the Freedom of Information Act, 1997 came into effect. The Act asserted the right of members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and the right of privacy of individuals. The Authority published a Guide to the functions of, and records held by, the Authority. The Guide outlined the structure and functions of the Authority, details of the services it provided and how they could be availed of, information on classes of

records it held, and information on how to make a request under the Freedom of Information Act. The Guide also set out the rules, procedures, practices, guidelines and precedents used by the Authority.

In 1999, the Authority published its response to the invitation, issued by the Minister for Public Enterprise, to comment on the discussion paper “Governance and Accountability Arrangements in the Regulatory Process”. Regulatory functions of that Department applied particularly in relation to the energy, transport and communications sectors. The response referred to the finding of the Competition and Merger Review Group on the interaction between competition law and sector specific regulation.

The Authority provided its initial reaction to the major provisions of the Gas (Interim) Regulation Bill, 2000, in May 2001. The Authority questioned the wisdom of this interim approach to regulation, as it could lead to regulatory uncertainty or reflect a lack of transparency. A potentially critical flaw in the proposed approach of the Bill was that it contained no obligation in relation to competition in the gas sector. The Authority recommended that there should be a clear statutory obligation on the regulator to act with a view to promoting competition in the gas industry. It also raised a number of other concerns, including the construction of pipelines, third-party access rules, distribution tariffs and the lack of vertical separation of Bord Gáis Éireann.

Synergen was established as a joint venture, 70% owned by the ESB, to generate electricity for that portion of the electricity market which would be open to competition. In 1999, the Minister for Public Enterprise had expressed concern over the proposed Synergen generation plant, with a suggestion that the ESB might be required to sell its interest in the plant. In 2001, the Authority wrote to that Minister expressing its concerns about the state of competition in the electricity sector, and it recommended that the Minister should require the ESB to dispose of its interest. In response, the Minister stated that, in the absence of any definitive finding or ruling by an independent body competent in the field of competition law, the ESB would not be required to sell its interest in Synergen.

In 2001, the Authority submitted its comments on two documents from the Commission for Energy Regulation. The first was entitled “Transmission Infrastructure Agreement Principles Paper”. The Authority considered that the best outcome for the promotion of competition was that which would maximise the independence of Eirgrid, the network operator, from the ESB as the transmission network owner, and its control of the transmission and distribution systems. There should have been an attempt to allow Eirgrid to act as if it were the beneficial asset owner. The second document was the “Draft Directive on Commission Industry Requirements for Infrastructure Agreement”. The Authority considered that the “rules” were sub-optimal and would most likely produce an excessively costly system of contractual relations between the ESB and Eirgrid. The proposed terms of the contractual relationship leaned heavily toward the provider, the ESB, rather than the purchaser, Eirgrid, and the likely outcome would be that new entry into electricity generation would be impeded to the detriment of competition and ultimately the consumer.

The Department of Public Enterprise issued a Draft General Scheme of the Communications Regulation Bill, to which the Authority submitted comments in 2001. The Authority expressed concern that the regulatory framework for telecommunications was undergoing fundamental change at EU level, and that this was a bad time to introduce new legislation in Ireland, as it was likely that it would have to be further changed when the new European framework was completed. It was not clear what criteria would be used to define “markets” and “significant market power”. The Authority also raised queries about the independence and functions of the proposed Commission for Telecommunications Regulation, the circumstances under which the Commission could impose obligations on significant market power operators, the proposed levy on service providers, the specification of public service requirements, and dispute resolution procedures.

The Office of the Director of Telecommunications Regulation issued a consultation paper “Allocation of additional access codes and number ranges for Internet access”, to which the Authority responded in 2001. The Authority noted the Director’s concerns in relation to customer recognition of relevant tariffs, and the importance of consumers’ ability to compare offerings from all operators. The lack of transparency

of pricing models employed in many sectors of the economy, including telecoms, ensured that customer churn rates were below those expected. This had the impact of limiting the degree of price competition as many consumers would not expend the effort required to make comparisons. The Authority expressed concern that the setting of maximum limits on charging under any given access code might act to ensure that all prices converged to this maximum. This might work to erode the competitive process whereby each participant in the market competed for customers vigorously. The Authority suggested that some measures should be taken to assist consumers in comparing the various offerings on the market place on the basis of some normal consumption patterns. Another concern was to ensure that the association of particular tariff regimes with specific access codes should not restrict or discourage service providers from developing new, innovative tariff structures. The Authority suggested that it might be useful to allocate a third access code and number range, besides the two proposed, which could be used for other tariff structures as they developed in the marketplace.

In 2001 also, the Authority made a submission to the Commission for Aviation Regulation in relation to the Consultation Paper on the Maximum Levels of Airport Charges to be levied by an Airport Authority. It pointed out that the complementarity of the airport's offerings and the countervailing power of airlines meant that the potential and incentive for an airport to abuse its monopoly power was limited. Thus there might be no real need for an intrusive regulatory regime, especially where there was a strong body of competition law to police any potential abuses. While there was no explicit requirement that the CAR foster competition in the provision of airport services, many of the choices to be made by the CAR would have implications for competition. Competition concerns could arise *inter alia* in relation to the nature of competition between airports, the potential for competition between terminals in airports, and competition to provide outsourced services. The Authority pointed out that it was well recognised that regulation could often be a poor substitute for competition, where competition was feasible, but there was no clear consensus about which areas within an airport were best provided by a monopoly. The submission also referred to terminals as joint ventures between the airport authority and airlines, the issue of discounts to airlines, the position of low cost carriers, the potential impact

of low-cost airlines on investment choices, and the building of competing terminal infrastructure.

The Authority was represented on a Review Group to consider the then system of statutory regulation governing the pharmacy sector, to which the Authority made a submission in 2001. The Authority considered that the Pharmacy Regulations stifled competition by limiting new entry, thus leading to lower quality and higher prices for consumers. It argued that the 1996 Regulations had acted to protect incumbent pharmacists at the expense of consumers and that the regulations had made it exceptionally difficult for a new pharmacy to obtain a GMS contract, when it was located close to an existing pharmacy. This gave such incumbent pharmacies considerable market power, which allowed them to sustain high prices for consumers, and also prevented them from having to compete on service quality, opening hours, and productivity improvement. Other regulations which limited the ability of pharmacists trained outside the State to open their own pharmacy further protected incumbents, and the submission recommended the removal of such quantitative restrictions, arguing that any regulation should focus on directly improving the quality of service to the consumer.

The Authority sent a detailed submission, also in 2001, to the Minister for Health and Children on the proposals for the statutory registration of certain health and social care professionals. The Authority's general concern was to test the hypothesis that a registration system of the breadth and scope proposed was warranted or necessary at all, and to ensure that any new statutory registration system planned would be transparent, and would enhance the quality of service to consumers without restricting competition in the professions concerned.

In 2001, the Authority commenced a study into competition in a number of professions, including the legal profession. Reports of these studies were published in later years.

In 2002, the Authority raised concerns at EU level about the proposed system of relating significant market power obligations in telecoms to competitive effects

analysis and the impact that this might have on the decisions of national courts in competition cases. Its concerns were taken on board in the final EU recommendation.

The Authority, in conjunction with the ODTR, drafted a joint response in 2002 on the European Commission's Draft Recommendation on Relevant Product and Service Markets within the electronic communications sector. The submission highlighted a number of concerns regarding the implementation of the recommendations.

In 2002, the Authority published a submission made to the CER consultation on the Infrastructure Agreement. Consultations were also held with the CER on other issues, including the conditions attached to the Synergen-Statoil joint venture and proposed amendments to the ESBIE supply licence. The Authority also made a submission to the Department of Communications, the Marine and Natural Resources on the draft Electricity Bill 2002. It stressed that legislative provision was required to allow for meaningful restructuring of the electricity sector, including full vertical separation of the ESB, horizontal restructuring of the ESB's generation activities, the development of an all-Ireland electricity market and the introduction of regulation which favoured new investment interests over incumbent interests.

The Authority made a submission in 2002 regarding the High Level Review of the State commercial ports. It stressed that an efficient and competitive system of ports and port services was crucial to national competitiveness, and recommended the undertaking of a full competitive assessment of the port sector.

The Authority made a submission in 2002 outlining its main concerns with the proposed Bill to establish the Irish Financial Services Regulatory Authority. Reservations were expressed about the industry consultative panels, which, it was felt, might provide an avenue by which the proposed new regulator might be captured, i.e. come to reflect the interests of industry players rather than of consumers.

In 2002, the Authority made a submission to the Health Insurance Authority on the subject of risk equalisation in respect of voluntary health insurance. It considered that it represented a barrier to entry, as it could potentially lead to significant transfers from new entrants to the incumbent. The Authority pointed out, however, that it was

only one of a range of factors which discouraged entry. Also important was the high market share of the former State monopoly, and the role that the Minister played as regulator and the owner of the largest player in the market.

**CONFERENCES ORGANISED**

Competition policy conference, with TCD Economics Department. 1995.

Conference on “The White Paper and the Development of Competition at National and EU Level”, in conjunction with the UCD Faculty of Law. 1999.

Seminar in the Institute of European Affairs concerning a US perspective on criminal enforcement of US antitrust laws, including leniency. 2001.

Lecture on “Competition Policy – driving productivity and growth” by the Financial Secretary to the UK Treasury at the Institute of European Affairs. 2001.

Conference on “The future of competition policy in Ireland”. 2001.

Conference on “Competition in medical markets – prospects for Ireland”. 2002.

Lecture on “Convergence by Choice: the transatlantic policy experience and future progress towards common global norms”, by the General Counsel of the US Federal Trade Commission, at the Institute of European Affairs. 2002.

Conference on the new Merger Regime. 2002.

**VISITS FROM FOREIGN COMPETITION AUTHORITIES**

Visit from Director General of the UK Office of Fair Trading. 1994.

Visit of representatives from the Antitrust Division of the US Department of Justice and from the Federal Trade Commission. 1995.

Visit from the Director of the External Affairs Office of the Japanese Fair Trade Commission. 1995.

Visit from a member of the Japanese Fair Trade Commission. 1996.

Visit from the UK Director General of Fair Trade. 1999.

Visit from the Greek Minister of State for Commerce. 1999.

Visit from the EU Director General for Competition. 1999.

Visit from an official of the Cyprus Commission for the Protection of Competition. 1999.

Hosting of a meeting of Directors General of European Competition Authorities. 2001.

Visit from persons reviewing changes to the UK Office of Fair Trading. 2001.

Visit of representatives from Armenia. 2002.

Visit of representatives from Korea. 2002.

## **TRAINING OF OFFICIALS FROM ABROAD**

Training course for officials of the Hungarian Office for Economic Competition. 1994.

Training course for officials of the Estonian Competition Authority. 1996.

Training course for representatives of the Lithuanian State Competition and Consumer Protection Office. 1998.

Placement of a senior research officer from the Office of Free Competition in Finland. 1998.

Placement of an official of the Australian Competition and Consumer Council. 1999.

Visit by a study group from the Estonian Competition Authority. 2001.

Visit by a study group from the South African Competition Commission. 2001.

Study visit by a member of the staff of the UK Office of Fair Trading. 2001.

Presentation to officials from EU accession countries. 2002.

**MISCELLANEOUS**

Participation by Mr. Massey in an OECD seminar for competition officials from Eastern Europe, Vienna. 1995.

Address by Mr. Massey to the Annual Fordham Conference, New York. 1996.

Publication of “Competition Law and Policy in Ireland”, by Mr. Massey and Ms O’Hare (legal adviser to the Authority), Dublin, Oak Tree Press. 1996.

The Director of Competition Enforcement met representatives of the UK Department of Trade and Industry in 1997 to discuss Irish competition law.

The Authority was represented at a Working Group in Lithuania in 1998 which considered EU block exemptions and their effect on national law.

Visit to the European Court in Luxembourg. 1999.

Authority officials attended a cartel workshop organised by the US Department of Justice in Washington. 1999.

Visit to the Antitrust Division, the Federal Trade Commission and the Federal Communications Commission, Washington. 1999.

Reception to mark the ninth anniversary of the Authority. 2000.

Organisational review of the Authority by Deloitte and Touche, management consultants. 2000.

In 2000, conferences attended included two international cartel workshops in Sweden and in the UK, the Fordham International Antitrust Law and Policy conference in New York, the ALI ABA Conference on Antitrust in the 21<sup>st</sup> Century, and a conference in Maastricht on Current Developments in Competition Law.

An Advisory Panel was established to advise the Authority on legal, policy, management and strategic issues, consisting of Gerald Fitzgerald, Gerard Hogan, Frances Ruane and John Travers. 2001.

In 2001, the Authority was represented at the International Cartels workshop in Canada.

The Authority hosted the second meeting of the European Competition Authorities in Dublin. 2001.

Comments were submitted on aspects of the Competition Bill. 2001.

The Authority was represented on the Liquor Licensing Commission. 2001.

The Authority was represented on the Government's High Level Group on Regulation. 2001.

The Authority was represented on the Pharmacy Review Group. 2001.

Numerous speeches, both at home and abroad, were made by the Chairman, Members and staff of the Authority.

**ENFORCEMENT ACTIVITIES OF THE AUTHORITY, 1996 TO 2002**

Under the 1996 Act, enforcement responsibilities were conferred upon the Authority. It was enabled to receive and investigate complaints, and to institute court proceedings. In the period from 1996 to 2002, the number of complaints received and dealt with was as follows:

Year	Complaints	Closed	Carried Forward
1996	94	42	52
1997	220	156	116
1998	160	181	95
1999	160	101	153
2000	251	64	340
2001	222	135	427
2002	<u>149</u>	<u>329</u>	247
Total	1,256	1,008	

---

Source: Annual Reports.

Note: There is a discrepancy of one complaint between the Reports of 1999 and 2000, which continues to the end of the Table.

The reduction in the number of cases closed in 2000 was due mainly to the high turnover of staff, which impacted especially hard on enforcement activities. In 2001, it was decided to concentrate on the flow of new cases, rather than the stock of files, because of the backlog.

The Authority stated, in the 2001 Report, that it had opened 1,106 complaint files since the 1996 Act came into force, the details being as follows:

Not Competition Acts issue	119
Other	195
RPM	30
Refusal to supply	105
Abuse of dominance	362
Cartel	<u>294</u>
Total	1,105

Note: Again there is a slight discrepancy in the published figures.

## **SEARCHES OF PREMISES**

The Authority had been enabled, under the 1991 Act, to appoint authorised officers who could, on production of a warrant issued by a District Court judge, enter and inspect premises or vehicles and inspect and copy records, and require the giving of information. While such powers were not used in dealing with notifications under the 1991 Act, they were of significant importance when powers of enforcement were conferred on the Authority under the 1996 Act.

The first so-called “dawn raid” was carried out in December 1996 at the headquarters of Opel Ireland and one of its authorised car dealers, regarding pricing policy. Opel agreed to amend its circular to dealers and its advertisements, and no further action was considered necessary. In 1997, searches were carried out in the case of four complaints. There were 12 searches of premises in 1998. In one case, a complaint was referred to the Gardaí alleging that officers were obstructed in the conduct of a search. In two cases, summonses were issued compelling witnesses to appear before the Authority and produce documents.

In 1999, searches were conducted at the premises of eleven wholesalers of beer and soft drinks and at the offices of the Soft Drink and Beer Bottlers Association. Searches were also undertaken in four bakeries regarding the fixing of bread prices. Searches took place, and summonses issued, in respect of several oil companies and their chief executives. Searches took place in respect of eight heating oil distributors in Munster.

Two extensive investigations took place in 2001, one into collusive bid rigging, the other in relation to price fixing concerning an everyday consumer product. The Authority reached an agreement whereby Gardaí would accompany authorised officers on searches. The Cartels Division employed new investigative techniques including surveillance and cooperation with An Garda. 17 search warrants were obtained in 2002.

## MAIN ENFORCEMENT PROCEEDINGS

**Road Hauliers.** In 1997, the Authority was granted an *ex parte* injunction against a number of road hauliers. This was lifted following undertakings given by the defendants, pending a full hearing of the case. The case was heard before the High Court in October 1998. The defendants agreed to a Court declaration that they had engaged in a concerted practice to fix prices for road haulage services to and from Dublin Port between January and June 1997. The defendants also gave undertakings to the Court that they would not engage in price fixing and that they would not engage in the blockading of Dublin Port to achieve any increase in prices for haulage services. The Irish Road Hauliers Association also agreed to an order for costs in favour of the Authority.

**The Irish Travel Agents Association.** The ITAA announced in 1997 that its members would not sell Ryanair tickets unless the company reversed a decision to reduce the commission rates paid to travel agents. The Authority wrote to the ITAA, which agreed to reverse its decision. Following further investigation, the Authority decided in December to institute proceedings against the ITAA. In July 1998, the ITAA gave undertakings to the High Court that it would not take any actions which were designed to encourage ITAA members not to sell Ryanair products. Several individual travel agents also gave undertakings not to boycott Ryanair products in order to increase commissions. The defendants also agreed to pay the Authority's legal costs.

**Irish Veterinary Union.** An investigation was held into allegations that the IVU was engaged in price fixing in respect of fees for compulsory TB tests, and the IVU offices were searched in February 1998. The Authority brought court proceedings against the IVU, and these were settled in October 1998. The IVU gave undertakings that it would not recommend minimum fees for TB and brucellosis testing and for clinical veterinary services. It also undertook to inform its members that specified practices were contrary to the Act. The IVU also agreed to pay the Authority's costs.

**Vintners Federation of Ireland and the Licensed Vintners Association.** As a result of an investigation in 1998, the Authority instituted separate proceedings against the

VFI and the LVA and a number of individual publicans alleging action to increase drink prices by a set amount in 1996 and 1997, and to fix margins in respect of certain alcoholic beverages on an ongoing basis. In December 2003, the LVA gave undertakings in the High Court in relation to allegations concerning price fixing, and the case was settled.

***Milk Price Fixing.*** In early 1998, there was an investigation of allegations that certain parties were involved in arrangements to fix the retail price of milk. Nine searches were made of dairies and supermarket multiples. The Authority referred to the Gardai allegations of obstruction in the course of one search. In December, the Authority decided to refer a number of matters to the DPP recommending criminal prosecutions. It also decided to bring civil proceedings in respect of these and other matters. The proceedings did not come to trial.

***Dairy Merger.*** During the above investigation, the Authority became aware of a proposal by Avonmore Waterford Group to acquire control of Athboy Coop. The Authority sought an interlocutory injunction to prevent the acquisition in November 1998. The court refused to grant the injunction on the balance of convenience.

***Telecom Eireann.*** The Authority received several complaints regarding the activities of Telecom Eireann in 1997 and 1998. It decided that there was possible abuse of dominance in two instances, and it wrote to the company. The Authority issued proceedings in 1999 alleging that Telecom's refusal to grant unbundled access to the local loop constituted an abuse of a dominant position. Due to regulatory changes, the proceedings were discontinued in 2002.

***RTE.*** Following a complaint about its code for advertisements by commercial radio stations, the Authority wrote to RTE in 1998 stating that this constituted a possible abuse of dominance.

***Beer and Soft Drinks.*** In late 1998, an investigation began into the wholesale distribution of packaged beer and soft drinks, following reports that an employee of a wholesaler had alleged price-fixing. Following searches, proceedings were instituted against six wholesalers, and a file was sent to the DPP. Following searches at the

offices of the Soft Drink and Beer Bottlers Association, the Authority decided to institute proceedings against the Association and two wholesalers, and a file was also sent to the DPP. Pending a direction from the DPP to prosecute the matter, the proceedings in the civil case were stayed in 2001.

***Bakeries.*** Following searches in four bakeries regarding the fixing of bread prices in 1999, the Authority decided to institute proceedings.

***Petrol.*** Following searches and summonses, the Authority decided in 1999 to bring a summary criminal prosecution against one of the smaller oil companies. This was in relation to price fixing between Estuary Fuel Ltd and a petrol filling station in Tralee – the first prosecution for price fixing. The case was heard in Limerick in October 2000, and Estuary pleaded guilty to two charges. A fine of £500 was imposed in respect of each of the two charges.

***Milk Prices.*** In 2000, Following a complaint about a blockade at the premises of Natural Dairies in Convoy, Co. Donegal, the Authority was granted an interim order by the High Court to restrain the blockade. The Authority believed that the object of the blockade by a number of farmers was to increase the retail price of own-label milk at Dunnes Stores. While the blockade ended on 15 October, the Authority was granted an Interlocutory Injunction by the High Court the next day restraining farmers from taking further blockade action at the premises. In November, the High Court heard a motion of attachment and committal against a number of named individuals who had participated in the blockade. While the judge commented on the flagrancy of the infringement, a contempt of court, he did not impose fines, but awarded all its costs to the Authority.

***Electricity Supply.*** The Authority presented a paper in 2001 in respect of the Synergen joint venture in an unsuccessful attempt to get the Minister for Public Enterprise to discontinue the involvement of the ESB in the venture.

***Pharmacy.*** The Authority issued a statement in 2002 that the withdrawal of pharmacy services threatened by the Irish Pharmaceutical Union would represent a breach of the Competition Acts, and the threat was not implemented.

## **OTHER ENFORCEMENT ACTIVITIES**

*In 1997*, the Authority prepared and circulated a set of guidelines on detecting collusive tendering. In addition, it received an undertaking that the Construction Industry Federation would discontinue a practice related to tendering. It also dealt with complaints about price maintenance for milk; price setting of hand tools; domestic heating appliances; outdoor advertising billboards; refusal to supply; National Lottery practices; the pricing of natural gas and interconnection charges; liner shipping conferences and inland haulage prices; alleged predatory pricing; the distribution of tickets for the World Equestrian Games; package holiday insurance; Irish Sugar pricing; and holiday accommodation brochures.

Other interventions by the Authority *in 1998* included: the Association of Consulting Engineers in Ireland and tendering to Aer Rianta; terms of supply to retailers by the Examiner newspaper; rental agreements for outdoor advertising; possible collusive tendering on a building project for the Department of Education and Science; Bord Gais Eireann and a combined heat and power plant in Dublin, and other matters; the acquisition by Guinness Ireland Group of a 70% shareholding in United Beverages Holdings (dealt with as a notification); a new contract which the ESB was offering to some larger customers; the Football Association of Ireland and referees; the FAI and the establishment of a Scottish league club in Dublin; ESB contracts of employment; refusal to supply animal feeds and slimming products; refusal by a multiple to sell an issue of a magazine; and a central billing system by a grocery wholesaler.

Other investigations *in 1999* included: a complaint against Aer Lingus by Cityjet; the attitude of the Irish Farmers Association to milk prices charged by Aldi; alleged resale price maintenance by suppliers of sports clothing and equipment; refusal to supply golf shoes because of prices charged by a retailer; arrangement between the Pharmaceutical Society of Ireland and TCD for the training of pharmacists (and private proceedings brought by the Royal College of Surgeons in Ireland); an agreement between UCD and AIB for the exclusive right to provide banking services on the UCD campus at Belfield; and an alleged proposal by Independent Newspapers to acquire The Kingdom Newspaper, which did not proceed.

Other investigations *in 2001* included: supplies of refrigerator equipment; window-screen repair/replacement in cars; refusals to deal; advertisements in an industry magazine; discriminatory pricing; State intervention (National Lottery licences in isolated rural areas; closure of a bookmaker's shop; the Nestor v Bus Eireann High Court action and entry to certain bus routes); regulated sectors (telecommunications, and a court finding that Eircom was not dominant in the mobile phone sector); and consumer inertia in the face of price rises, involving a paper presented by Michael Waterson, University of Warwick, at TCD.

*In 2002*, the Authority issued a brief public statement, in the form of a press release, announcing a decision and providing a brief explanation in several cases – retail newsagents, JNRR, Xtravision and Vodafone. Complaints were made against the selection of agents by the National Lottery, and the procurement procedures of a large insurer. Since the selection procedures were deemed to be transparent, the investigations were closed. Complaints were received about the reduction of margin/commission payable to retailers by Vodafone and Aer Lingus. It was concluded that there was no abuse. An undertaking voluntarily informed the Authority of its proposed acquisition of a small competitor. When the Authority raised a number of concerns, the firm did not proceed with the acquisition.

In several cases *in 2002*, the Authority intervened in complaints about vertical restraints, and supplies were resumed. There were complaints alleging that an Xtravision marketing arrangement with certain small independent film producers was anti-competitive. Xtravision had invested in the production and marketing of these films in return for an exclusive period of advance release of the titles. The Authority concluded that, overall, consumers had benefited from greater availability and choice of titles under this arrangement. A small group of undertakings used an innovative method to sell a service to consumers, with a two-year exclusivity period. The Authority concluded that this was both necessary and proportionate. News International complained that the exclusion of its titles from the Joint National Readership Research Survey breached competition law, and it also excluded certain Irish titles by UK-based newspaper groups. Following discussions, the JNRR agreed to change its criteria and the applications for six additional newspapers were accepted for its 2002 survey.

## **CONTACTS WITH OTHER AUTHORITIES AND THE CARTEL IMMUNITY PROGRAMME**

In 1996, the Director of Competition Enforcement met with officials from the US Antitrust Division, the UK Office of Fair Trading, the Canadian Bureau of Competition and the Swedish Competition Authority.

In order to increase its powers to detect and successfully prosecute cartels, the Authority in 2000 commenced a public consultation process on its proposal to formulate, in cooperation with the DPP, an immunity programme. It hosted a conference entitled “Boosting the Fight Against Criminal Cartels: Transplanting Immunity to Ireland.” Among the speakers were officials from the US Department of Justice, Canada and the UK Office of Fair Trading. The Cartel Immunity Programme was published in December 2001 (Annual Report for 2001 (Pn 11624) Pages 78 – 83).

## **EUROPEAN UNION COMPETITION LAW**

From October 1991, responsibility for attending meetings of the EU Advisory Committee on Restrictive Practices and Dominant Positions, and oral hearings, was divided between the Authority and the Department of Industry and Commerce, depending on the nature of the case before the Committee. The Authority was also represented at annual meetings of Directors General of competition policy.

Attendance at meetings of the Advisory Committee to deal with cases of concentration (mergers) was the responsibility primarily of the Department. On occasion, a member of the Authority acted as Rapporteur for the Opinion of the Advisory Committee.

In 1999, the Authority co-hosted a seminar on the EU White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty. It was represented on a working group on this subject. On two occasions during the year, Authority staff assisted the EU competition officials in the conduct of searches in Ireland.

In 2001, the Authority attended the EU Advisory Committee on Concentrations, the Council Working Group on the Reform of the Merger Regulation and the Working Group on the Modernisation of Enforcement of EU Competition Law.

The work of the Working Group on Modernisation was completed in 2002. The Authority also participated in the Modernisation Advisory Committee and in the European Competition Authority Air Traffic Working Group.

**ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT**

The Authority attended meetings of the OECD Committee on Competition Law and Policy, it was represented on the working parties, it presented an annual report, and it assisted in the examination of reports from other countries.

In 2000, the Authority was involved with the OECD Regulatory Review process, which consisted of various meetings in Dublin and Paris. The Report on Regulatory Reform in Ireland was published in 2001.

In 2002, the Authority attended a roundtable on competition issues in liberalised electricity markets.

## MERGER CONTROL FROM 1978 TO 2002

### INTRODUCTION

Under the 1978 Act, proposed mergers were notified to the Minister, and there was a possible referral to the Examiner of Restrictive Practices for investigation and report, after which the Minister could make an absolute or conditional prohibition Order, or allow the proposal to proceed. No reports were published, and only sketchy details of the referrals were made public, excluding the names of the enterprises involved. These names had to be included in the few Orders made. This first period ended in 1987.

In the second period, under the 1987 Act, notification continued to the Minister, but referrals had to be made to the Fair Trade Commission, after which the Minister could make an Order. Commission reports were still not published, but the names of the enterprises were published when the Commission advertised for submissions on a referred proposal. This period ended in 1991.

In the third period, under the 1991 Act until end-2002, notification was still made to the Minister, but referral was to the Competition Authority. Its reports had to be and were published, excluding confidential material.

The annual reports on mergers published by the Minister were somewhat uninformative, though they have listed the acquiring and target enterprises in cases considered since the 1994 report.

Many mergers were also dealt with from 1991 to 2002 under section 4 of the 1991 Act, including the controversial Guinness/UBH case (decision No. 512).

**ANNUAL MERGER REPORTS BY THE MINISTER**

The Minister was required to publish an annual report of the number and nature of investigations into proposed mergers. These reports were as follows:

1978/79	Prl 9002
1980	Pl 46
1981	Pl 609
1982	Pl 1474
1983	Pl 2574
1984	Pl 2972
1985	Pl 4379
1986	Pl 4784
1987	Pl 5471
1988	Pl 6313
1989	Pl 7802
1990	Pl 8807
1991	Pl 8968
1992	Pl 9747
1993	Pn 0945
1994	Pn 1933
1995	Pn 2442
1996	Pn 3645
1997	Pn 5796
1998	Pn 7385
1999	Pn 9037
2000	Pn 10322
2001	Pn 11780
2002	Pn 12728.

**MERGER NOTIFICATIONS, 1978 TO 2002**

The two following tables show:

- (a) the number of mergers notified to the Minister in each year from 1978 to 2002, the number determined to be outside the scope of the Act, and the number allowed to proceed without conditions; and
- (b) the number of mergers and takeovers notified, analysed according to nationality from 1985 to 2002.

*(a) Merger and Takeover Notifications, 1978 – 2002*

Year	Notified	Outside Act	Allowed to proceed Without conditions
1978/79	45	18	25
1980	40	16	20
1981	55	9	35
1982	47	13	33
1983	59	21	29
1984	78	25	52
1985	65	25	37
1986	75	32	37
1987	85	43	39
1988	107	45	56
1989	125	63	47
1990	126	65	60
1991	137	80	54
1992	142	69	68
1993	115	58	58
1994	124	73	48
1995	123	70	53
1996	171	117	53
1997	201	136	62
1998	233	150	68
1999	276	170	100
2000	319	196	105
2001	302	218	88
2002	357	254	103
<b>TOTAL</b>	<b>3,407</b>	<b>1,966</b>	<b>1,330</b>

Source: Annual Reports on Mergers by the Minister.

Note: The number of notified agreements exceeds the sum of those outside the Act and those allowed to proceed without conditions, for the following reasons:

(a) some proposals were prohibited either absolutely or conditionally;

- (b) some notified proposals were later withdrawn, sometimes after referral, before a decision was reached; and
- (c) there were probably some notified proposals not determined at the end of 2002, when there was a regime change.

*(b) Mergers and Takeovers Analysed According to Nationality, 1985 – 2002*

<u>Year</u>	<u>Irish/Irish</u>	<u>Irish/Non-Irish</u>	<u>Non-Irish/Non-Irish</u>	<u>Non-Irish/ Irish</u>	<u>Total</u>
1985	12	5	11	9	37
1986	11	6	8	12	37
1987	19	1	10	9	39
1988	15	13	11	17	56
1989	14	12	11	10	47
1990	24	7	20	11	62
1991	17	6	18	13	54
1992	34	11	14	9	68
1993	27	12	7	11	57
1994	17	14	12	5	48
1995	17	14	10	12	53
1996	14	17	14	8	53
1997	20	9	25	8	62
1998	11	17	24	17	69
1999	26	10	37	27	100
2000	15	21	43	26	105
2001	19	18	26	25	88
2002	28	9	28	34	99
<b>TOTAL</b>	<b>340</b>	<b>202</b>	<b>329</b>	<b>263</b>	<b>1,134</b>

Source: Annual Reports on Mergers by Minister.

- Notes.
1. Irish/Non-Irish is an Irish enterprise taking over a non-Irish enterprise.
  2. Non-Irish/Non-Irish is a non-Irish enterprise trading in Ireland coming under different non-Irish control.
  3. Non-Irish/Irish is a non-Irish enterprise directly taking over an Irish enterprise.
  4. Discrepancies are as described in the Note to the preceding Table.

**MERGER REFERRALS AND REPORTS NOT PUBLISHED, 1978 – 1987**

Proposed acquisition, in **1979**, of the supermarket and bar business of an Irish company by a foreign-owned company which was long-established in the State. Details of the Examiner's consideration of the proposal were not included in the Annual Report of the Examiner, nor in the Annual Report of the Minister, as with all subsequent referrals up to 1991, because it was considered that the publication of such detail could materially injure the legitimate interests of the enterprises. The Minister allowed the proposal to proceed, on the grounds of employment.

Two proposals were referred to the Examiner during **1980**.

The first proposal concerned the acquisition of an Irish company engaged in the concrete products sector by a UK-based multinational company engaged in the supply of ready-mixed concrete products. The Minister allowed the proposal to proceed.

The second proposal concerned the acquisition of an Irish company involved in the distribution of LPG by the Irish subsidiary of a Dutch-based multinational oil company. The Minister decided that the balance of advantage, particularly insofar as supply was concerned, lay in allowing the take-over to proceed.

During **1981**, five proposals were referred to the Examiner.

The first proposal concerned the acquisition of an Irish publicly-quoted company, engaged principally in the manufacture of matches, but also plastic household products, by the Irish subsidiary of a US company. The Minister decided that the balance of advantage, particularly insofar as the interests of the Irish company's shareholders and employees were concerned, lay in allowing the takeover to proceed.

The second proposal concerned the acquisition by an Irish cooperative society of a wholly-owned subsidiary of another Irish cooperative society engaged principally in the milk supply sector. The Minister allowed the proposal to proceed.

The third proposal involved the acquisition of an Irish publicly-quoted company, engaged principally in the packaging business (Smurfit Investments (Ireland) Ltd), of a privately-owned Irish company (Bedstone Ltd), whose sole asset was the right to

publish “Irish Business” magazine. The Minister decided to prohibit the proposal except on certain conditions, the most important of which was that the purchaser divest itself of the right to publish the magazine involved not later than 30 April 1982. This conditional Order had the term extended until October 1982. Subsequently that year, the Minister decided that circumstances had changed sufficiently to allow him to revoke completely the conditional Order.

The fourth proposal concerned the acquisition by a UK publicly-quoted company, engaged principally in the metal can manufacturing area, of a significant stake in an Irish company involved in similar activities. The Examiner furnished his report, but the notification was withdrawn, and the matter did not receive any further consideration (but see below).

The final proposal related to the acquisition by a UK publicly-quoted company, engaged principally in the engineering sector, of a privately-owned Irish company engaged in similar activities. After the reference, the notification was withdrawn, and the Examiner did not undertake the investigation.

Two proposals were referred to the Examiner in **1982**.

The first proposal concerned the proposed take-over in the metal can manufacturing area, which had been referred to the Examiner in 1982, but which was subsequently withdrawn. The proposal was re-submitted and referred again to the Examiner. The Examiner submitted his report, but the notification was again withdrawn.

The other proposal concerned the acquisition by an Irish publicly-quoted company, engaged principally in the bottling and distribution of stout and beer, the manufacture of mineral water and the distribution of industrial electrical products in the State, of another Irish publicly-quoted company engaged principally in the manufacture and distribution of smoker’s pipes and accessories, and the import and distribution of houseware, hardware and garden equipment and products. The Minister decided that the proposal should be allowed to proceed.

There were no investigations by the Examiner in **1983**.

Two proposals were referred to the Examiner in **1984**.

The first proposal, which was notified in 1983, related to the acquisition by an Irish cinema group of three cinemas in Dublin which were owned by a UK publicly-quoted company, with interests in the leisure and entertainment sector. The Minister allowed the acquisition to proceed.

The second case involved the acquisition by a bank (the Bank of Ireland) of all the voting shares in a building society in the State (the Irish Civil Service Building Society). Following the Examiner's report, the Minister made an Order making the acquisition conditional on the rules of the Society being changed to meet concerns regarding the Society's mutual status. This Order was revoked by Order in 1989. The restrictions imposed on the Society's rules imposed by the conditional Order were lifted, in view of the commencement of certain provisions of the Building Societies Act, 1989.

Two proposals were referred to the Examiner during **1985**.

The first proposal involved the acquisition by an Irish public company, involved in importing, distributing, growing and exporting fresh fruit, flowers and vegetables, of an Irish public company involved in the processing, packing and distribution of vegetables and fruit. The proposal was allowed to proceed.

The second proposal involved the acquisition by the Irish subsidiary of a UK company involved in the retail grocery trade of an Irish private company also involved in the retail grocery sector. The Examiner furnished his report, but the parties subsequently withdrew the notification, and the proposal received no further consideration.

One proposal was referred to the Examiner in **1986**.

It related to the acquisition by an Irish private company involved in the soft drinks and alcoholic beverages trade of a second Irish private company involved in the manufacture and distribution of soft drinks and the distribution of alcoholic beverages. The Minister decided that the proposal should be allowed to proceed.

One proposal was referred to the Examiner in **1987**.

This involved the acquisition by a Swedish enterprise engaged, *inter alia*, in the manufacture of matches of another non-Irish enterprise which owned an Irish company manufacturing similar products. The Minister decided that the proposal should be allowed to proceed.

**MERGER ORDERS, 1978 – 1987**

Proposed Merger or Take-Over Conditional Order, 1981. (S.I. No. 331 of 1981).  
 Smurfit Investments (Ireland) Ltd/Bedstone Ltd. (“Irish Business” magazine).  
 The effect of the Order, made in September 1981, was to prohibit the proposed merger or take-over by Smurfit Investments of Bedstone except on certain conditions, the most important of which was that it divested itself of the right to publish the magazine known as “Irish Business” not later than 30 April 1982. The reason for making the Order was that the proposed merger or take-over would be likely to restrict competition and to restrain the provision of the service of independent comment on business and economic matters.

Proposed Merger or Take-Over Conditional Order, 1982. (S. I. No. 130 of 1982).  
 Smurfit Investments (Ireland) Ltd/Bedstone Ltd.  
 The effect of this second Order was to extend by six months, to 30 October 1982, the period specified for the divestiture specified in the original Order. No reason was given in the Order for this.

Proposed Merger or Take-Over Conditional Order, 1981 (Revocation) Order, 1982.  
 (S. I. No. 317 of 1982). Smurfit Investments (Ireland) Ltd/Bedstone Ltd.  
 The effect of the revocation Order was to permit Smurfit Investments to acquire Bedstone Ltd., and the right to publish “Irish Business” magazine. The reason stated was that the proposed merger or take-over was no longer likely either to restrict competition or to restrain the provision of the service of independent comment on business and economic matters.

Proposed Merger or Take-Over Conditional Order, 1984. (S. I. No. 217 of 1984).  
 Governor and Company of the Bank of Ireland/Irish Civil Service Building Society.  
 The effect of the Order was to prohibit the proposed merger or takeover involving the Bank of Ireland and the Irish Civil Service Building Society except on certain conditions, the most important of which was that the rules of the Irish Civil Service Building Society should be altered in accordance with matters specified in the Schedule to the Order. These matters were changes in the Rules of the Society,

relating to voting rights, capitalisation and directors, and were proposed by the Bank.

The reasons for making the Order were that the Minister considered that:

- (a) but for the Order, the Bank would become the dominant shareholder in the Society:
- (b) such dominance could be detrimental to the interests of the holders of savings shares in the Society; and
- (c) the Order ensured that, if the proposal was effected, the interests of the holders of savings shares in the Society would be protected.

Proposed Merger or Take-Over Conditional Order, 1984 (Revocation) Order, 1989.

(S.I. No. 220 of 1989).

Irish Civil Service Building Society/Bank of Ireland.

The effect of this Order was to lift the restrictions imposed on the rules of the Irish Civil Service Building Society by the 1984 Conditional Order. The reason for making the Order was the commencement of certain provisions of the Building Societies Act, 1989.

It is clear that, in the period from 1978 to 1987, not a single merger or takeover was ultimately prohibited either outright or conditionally.

**MERGERS REFERRED TO COMMISSION AND REPORTS NOT PUBLISHED, 1988 – 1991**

*Steel Company of Ireland and Lister Tubes/Walker Steel*

In 1988, the proposed take-over of the entire share capital of five Irish companies in the Lister Group, a firm engaged in steel stockholding, by the UK company, C. Walker and Sons Ltd., was referred by the Minister to the Commission. This was the first merger referral to the Commission. The Commission's report was not published, as were no reports until the 1991 Act was commenced. The Minister did not make any Order, and the take-over took place.

*Wessel/EB Corporation*

In 1988, a proposal by EB Corporation, a company controlled by Asea Brown Boveri, a Swedish/Swiss company, to increase its shareholding to over 50% in Wessel Industrial Holdings Ltd was referred to the Commission. Wessel was established in Ireland in 1982 and manufactured cable for the telecommunications, automobile, rubber insulation and general wiring sectors. The Minister did not make any Order, and the proposal was allowed to proceed.

*Irish Distillers Group plc*

There were three referrals in 1988 in respect of proposed take-overs of the Irish Distillers Group plc (IDG), the only producer of Irish whiskey and a producer of other spirits. The proposals were made by:

- (a) GC&C Brands Ltd, a joint venture between Gilbeys of Ireland Group Ltd and Cantrell and Cochrane Group Ltd. Gilbeys was a wholly owned subsidiary of Grand Metropolitan Group plc. Allied Lyons owned 50.6% of the shares of C&C, while Guinness Group plc owned the remaining 49.4%. Grand Metropolitan, Allied Lyons and Guinness all had extensive interests in the State, though their head offices were in the UK;
- (b) A re-structured GC&C Brands, then a wholly owned subsidiary of Gilbeys;  
and
- (c) Pernod Ricard Group, a French company involved in the drinks sector.

The Commission transmitted its report on the first proposal to the Minister in August. IDG made a complaint to the EC Commission that the formation of the joint venture company and the subsequent bid for IDG constituted an infringement of Articles 85 and 86 of the Treaty of Rome. The EC Commission issued a statement of objections, which resulted in GC&C negotiating a settlement with the EC and the lapsing of the first bid. The report of the Fair Trade Commission was not acted upon.

A re-structured GC&C made a new bid for IDG. This was referred to the Commission in August, and the report was submitted to the Minister in October. Pernod Ricard announced in September that it had obtained acceptances from IDG shareholders for over 50% of the shares of IDG. The obtaining of the acceptances was subsequently the subject of court actions in Dublin and of investigation by the Takeover Panel in London. This proposal was referred to the Commission, which reported in November.

The Minister decided to allow the Pernod Ricard bid to proceed, subject to three conditions, but to prohibit the GC&C bid. Two Orders were made in November, even though the GC&C proposal was withdrawn before the prohibition Order was made.

### ***Master Meat Group and DJS Meats***

In May 1989, the Minister requested that the Commission investigate the proposal involving the change in control of the Master Meat Group, including the implications of the transfer of ownership of the Group and the disposal of any of the plants. The Group was involved in the meat processing sector. A report was submitted to the Minister in October.

In September 1989, the Minister requested the Commission to investigate the proposal involving the proposed acquisition of the entire issued share capital of DJS Meats Ltd, which owned a meat factory in Carrigans, Co. Donegal, by Anglo Irish Beef Processors Ltd (AIBP). A report was submitted to the Minister in October.

The Minister issued statements in December 1989 on the Master Meat Group takeover. He stated that it was clear from the report of the Commission that effective control over the Group had been exercised by an individual with other substantial

involvement in the meat trade in Ireland. The Minister considered it undesirable and contrary to the common good for this control of the third largest meat processing group to continue. The Minister further stated that he was continuing his examination of the legal means, including the powers available to him under the Mergers Acts, by which this undesirable control could be brought to an end.

The Minister stated in April 1990 that the Commission had concluded that a continuation of the ownership of Master Meat Packers (MMP) by a Liechtenstein company, which was stated to be owned by three foreign investors, and the control of the MMP plants by Mr. Larry Goodman of AIBP, was likely to operate against the common good under the statutory criteria relating to competition and employment. The Commission had also concluded that it would not be against the common good for the Bandon plant of MMP to be acquired by AIBP, provided that the other MMP plants were sold as going concerns to a person or persons independent of AIBP. Regarding DJS, the Commission had concluded that the acquisition by AIBP would not be likely to operate against the common good provided that the Carrigans plant were to be operated as a going concern and the Omagh plant of MMP were not to be owned or operated by AIBP.

In April 1990, the Minister made Orders prohibiting the proposed acquisitions. The prohibitions would cease to have effect when the other MMP plants had been disposed of and when there were no anti-competitive arrangements in existence between named parties. In 1991, the Minister was informed that the conditions of the prohibition Orders had been complied with and that the proposals had been completed. Additional information requested by the Minister regarding compliance with the Orders was still outstanding at the end of 1991.

### ***Walker/British Steel***

In January 1990, the proposed take-over of C. Walker & Sons (Holdings) Ltd by British Steel plc was referred to the Commission. Walker was a UK company with nine Irish operating subsidiaries, primarily involved in steel stockholding, while British Steel was a UK steel manufacturer. A report was submitted in February. The proposal also had to be considered by the EC Commission under the European Coal and Steel Community Treaty. The EC Commission had exclusive powers to deal with

mergers involving products and markets to which that Treaty applied. In this case, there were both Treaty and non-Treaty products involved.

In February, the Minister made an Order prohibiting the acquisition absolutely, pending a decision by the EC Commission. The Commission made a decision in May, authorising the proposed merger subject to specific conditions. The Minister then made an Order revoking the prohibition Order.

### ***Cablelink/Telecom Eireann***

The proposed acquisition of 60% of the issued share capital of Cablelink Ltd by Bord Telecom Eireann Teoranta, and the retention by RTE of 40%, was referred to the Commission in April 1990. Cablelink provided cable television services in Dublin and elsewhere. The report was submitted in May.

The Minister decided not to prohibit the proposal. He stated that, following receipt of the Commission's report, he had sought and received written undertakings from Telecom which, in his view, provided satisfactory assurances in relation to the points identified by the Commission. The main assurances were that Cablelink would be operated at arm's length from Telecom, with separate management, that there would be the optimum level of investment needed to underpin Cablelink's future development and viability, and that access would be provided to the cable network, on a fair and non-discriminatory basis, for providing interactive text services by independent third parties.

### ***R & H Hall/IAWS***

The proposed take-over of R & H Hall plc by IAWS Group was referred to the Commission in June 1990. The products involved were animal feed ingredients. The report was submitted in July.

The Minister decided not to prohibit the proposal, after considering the report and the views of others, including the Department of Agriculture and Food. In order to allay certain concerns, the Minister sought and received written undertakings on five matters from IAWS which, in his view, provided satisfactory assurances in relation to these concerns. These included an undertaking to fully respect the provisions of

proposed new competition legislation relating to abuse of dominance as if these provisions were already applicable in Irish law. The Minister had considered making an Order imposing on IAWS prohibitions on anti-competitive behaviour, but decided against this because preparations for the new legislation were at an advanced stage. The Minister decided, however, to make an Order under the Mergers Act which would require that all future proposed mergers in the imported animal feed sector be notified to him, regardless of the turnover or gross assets of either of the enterprises concerned, because of the sensitive competitive situation in the sector. No such Order was made.

***Eemland Management Services/Maguire and Paterson***

In August 1990, the Minister requested the Commission to investigate the proposal involving the proposed acquisition by Eemland Management Services B.V. (subsequently Swedish Match N.V.) of Maguire and Paterson from Swedish Match A.B. The proposed acquisition was part of a leveraged buy-out of the worldwide shaving, lighters and matches operations from Stora Kopparbergs A.B., the Swedish multinational which had controlled the Maguire and Paterson Group since 1988. The report was submitted in September.

The Minister stated that the Commission had drawn attention to the following points:

- (1) on the basis of information made available during the investigation, it was unclear as to whether the Act should apply in this case as the proposed acquisition appeared to be outside the financial thresholds of the Act;
- (2) even if the Act applied, the non-voting shareholding of 22% by Gillette (Eemland), with no right to Board representation, would appear to leave the offensive feature of the proposal outside the scope of the Act.

The Minister stated that the Commission had come to the conclusion that, because of the complex financing arrangements involved in the leveraged buy-out proposal, which involved Gillette (UK) as a shareholder and creditor of Swedish Match N.V., the proposal would operate against the common good in the Irish wet shave market.

The Commission had noted that the proposals were being critically examined under competition laws in several other countries and by the European Community, where the operations were clearly covered by merger and competition laws. The Commission considered that it would be useful to express strong concern to these authorities.

The Minister accepted the conclusions and recommendations of the Commission, no Order was made, and the Minister announced that he would be conveying his concern to these other authorities. In November 1992, the EC Commission decided that the proposed transaction constituted an infringement of Articles 85 and 86 of the EEC Treaty, it refused an exemption under Article 85(3) of the Treaty, and ordered an end to the infringements (OJ No. L116, p. 21, 12.5.93).

### ***Coal Distribution Merger***

In July 1991, the Minister referred a proposed merger in the coal distribution sector for investigation. This involved two companies who proposed establishing a 50/50 joint venture combining part of the solid fuel business of both companies. The parties decided not to proceed with the merger, and the referral was withdrawn.

**MERGER ORDERS, 1988 – 1991**

Proposed Merger or Take-Over Prohibition Order, 1988. (S.I. No. 301 of 1988).  
GC&C/Irish Distillers.

In prohibiting the take-over by GC&C, the Minister gave his reasons as follows:

- (a) employment in the spirits distilling industry in the State would be reduced;
- (b) the sale of brands and associated facilities would, in present circumstances, prejudice the development of the spirits distilling industry in the State; and
- (c) in view of the number and importance of the brands of Scotch whisky owned or distributed by holding companies of GC&C or subsidiaries of such holding companies, ownership of the Irish whiskey industry by GC&C or holding companies or subsidiaries of such holding companies would restrict competition in the sale of Scotch whisky and Irish whiskey in the State and for the reason specified in sub-paragraph (b) of this paragraph, a sale of brands or associated facilities would not be an appropriate solution.

Proposed Merger or Take-Over Conditional Order, 1988. (S.I. No. 302 of 1988).  
Pernod Ricard/Irish Distillers.

The conditions on which the Minister allowed Pernod Ricard to take over Irish Distillers were:

- (a) that any sale of brands or any associated facilities (not being a merger or take-over) within five years should be subject to the consent of the Minister;
- (b) that no agreement, arrangement or understanding which would prevent, restrict or distort competition in the sale of spirits in the State should be entered into, either directly or indirectly, by Pernod Ricard with GC&C or with or by their subsidiary or holding companies; and
- (c) that the take-over should be effected within 12 months of making the Order.

The reasons given by the Minister for making the Order were that:

- (a) if the take-over was effected without being subject to the conditions specified, competition in the sale of spirits in the State could be so restricted as to operate against the common good; and
- (b) if the take-over was effected subject to the said conditions, it would not operate against the common good; and

- (c) it was necessary, having regard to the exigencies of the common good, to ensure that –
- (i) effective competition in the sale of spirits in the State was maintained; and
  - (ii) transactions referred to in (a) above that could prevent or restrict competition in the sale of spirits in the State, prejudice the development of the spirits distilling industry in the State or otherwise operate against the common good in respect of the scheduled criteria [in the Act], and transactions referred to in (b) above, were prohibited.

Proposed Merger or Take-Over Conditional Order, 1990. (S.I. No. 93 of 1990).

Master Meat Packers/Anglo Irish Beef Processors.

The proposed merger or take-over involved Anglo Irish Beef Processors and the undertaking of Master Meat Packers (Bandon) Ltd. The take-over was prohibited except on specified conditions. The main condition was that AIBP was not able to acquire the shares or assets of Master Meat Packers (Bandon) until the rest of the group was disposed of as a going concern in such a manner that it ceased to be under common control with AIBP. In addition, there was to be no agreement, arrangement or understanding involving AIBP and Master Meats which would affect competition in the purchase of cattle in the State. Following the acquisition of the Bandon plant, Master Meats was not to come under common control with AIBP, and AIBP was not to acquire or control the shares or assets of Master Meats.

The reasons given by the Minister were that competition in the purchase of cattle in the State could be so restricted as to operate against the common good if the take-over were effected without the specified conditions. This would not be the case if the conditions were satisfied.

Proposed Merger or Take-Over Conditional (No. 2) Order, 1990. (S.I. No. 94 of 1990).

DJS Meats Ltd/Anglo Irish Beef Processors.

The proposed take-over of DJS Meats by AIBP was prohibited until Master Meats was disposed of so that it ceased to be under common control with AIBP, and that there was no anti-competitive arrangement between AIBP and Master Meats. This meant that the DJS Meats plant in Carrigans, Co. Donegal could be acquired by AIBP

provided, in particular, that the Master Meats plant in Omagh was not owned or operated by AIBP.

The reasons given by the Minister were that, without the specified conditions, Master Meats and DJS Meats would be under common control, and that this would adversely affect competition in the purchase of cattle in Co. Donegal and adjoining areas so as to operate against the common good. If the conditions were satisfied, the take-over would not have these adverse consequences.

Proposed Merger or Take-Over Prohibition Order, 1990. (S.I. No. 42 of 1990).

British Steel plc/C. Walker and Sons (Holdings) Ltd.

The reasons given for the prohibition Order were that, if the take-over were effected, it would operate against the common good because of adverse effects on competition in certain steel products, on the level of employment in the metals and engineering industries, and on the interests of users of certain steel products for manufacture or construction.

Proposed Merger or Take-Over Prohibition Order, 1990 (Revocation) Order, 1990. (S.I. No. 115 of 1990).

Revocation of British Steel/Walker prohibition Order.

The reasons given for revoking the prohibition Order were that the European Commission had authorised the proposed merger or take-over subject to specified requirements, and the Minister considered that the proposal, insofar as it related to products falling under the ECSC Treaty, could proceed.

**MERGER REPORTS PUBLISHED, 1991 – 2002**

*Report of investigation of the proposal whereby Independent Newspapers plc would increase its shareholding in the Tribune Group from 29.99% to a possible 53.09%.*

1992. (Pl. 8795).

This was the first referral, in February 1992, under the Competition Act, and it was the first report of a merger investigation to be published since merger control was introduced in 1978. The report was submitted in March. The proposal was that Independent Newspapers should be allowed to underwrite a rights issue for the Tribune Group, publisher of the Sunday Tribune newspaper and the Dublin Tribune. The Group was faced with a critical financial situation, and, without a substantial financial injection immediately, it was unlikely to survive.

The Chairman and one member were of the opinion that, in respect of both the market for newspaper sales and that for newspaper advertising, the proposal would be likely to prevent or restrict competition and to restrain trade, and that it would therefore be likely to operate against the common good. There appeared to be no conditions which would ensure effective competition after a takeover which could be adequately monitored. The recommendation was that the Independent Group should not be permitted to purchase the Tribune titles and that the Minister should make an Order prohibiting the notified proposal.

An alternative view was expressed by the other member. The investigation had not disclosed a significant likelihood of anti-competitive or abusive behaviour occurring as a result of the takeover. Should such behaviour occur, the machinery in the Competition Act would be more than adequate to deal with it. In addition, formal undertakings could be obtained from the parties, in relation to the separate operation of Tribune Group from the Independent Group (especially in the marketing area), the strengthening of arrangements relating to editorial independence and the avoidance of abusive practices generally.

In March, 1992, the Minister made an Order which prohibited the proposed increase in the Independent Group's shareholding in the Tribune Group.

***Report of investigation of the proposal whereby Statoil Ireland Ltd would acquire the entire issued share capital of Conoco Ireland Ltd.*** 1996. (Pn 2405).

This proposal was referred to the Authority in December 1995, and the report was transmitted to the Minister in February 1996. The Authority stated that, in considering the effects of the proposal on competition, it was concerned largely with the market for motor fuels and gas oil. The motor fuels market was already highly concentrated, and this would increase considerably following the proposed takeover. Conoco had had a reputation of being a low price operator, while Statoil was seen as a high price operator, and the available price information confirmed these views.

The Authority considered that the merger would reduce competition in the market for motor fuels, would lessen the competitive pressure on the other suppliers, and would reduce the degree of consumer choice by reducing the range of brands available. It would thus operate against the public good. Although the gas oil market was also relatively highly concentrated, there were more suppliers and barriers to entry were lower, and the proposal was unlikely to lead to a restriction in competition. The Authority concluded that it would not be possible to approve the proposal subject to conditions, and it was recommended that the proposal should not be allowed to proceed.

The Minister made an Order in February 1996 prohibiting the takeover absolutely. Statoil lodged an appeal in the High Court against the Order in March. Following the submission of a revised proposal, the prohibition Order was amended in July, prohibiting the merger except on specified conditions. A strengthened Price Display Order for motor fuels was also made.

***Report of investigation of the proposal whereby Unilever Ireland Ltd would acquire the entire issued share capital of Lyons Irish Enterprises Ltd.*** 1996. (Pn 3012).

This proposal was referred to the Authority in May 1996, and the report was submitted in June. The Authority stated that the relevant product market was that for tea, and the market was highly concentrated. The merger as originally proposed would have increased concentration even further, since the market share of Unilever's brand, Liptons Tea, would have been added to that of Lyons Tea. Because of entry barriers, there was little threat of entry to the market, nor much competition from

imports. The Authority considered that there was likely to be an adverse effect on competition, and it recommended that the acquisition, as originally proposed, should not be allowed to proceed.

During the course of the investigation, Unilever decided to withdraw Liptons Tea from the market in the State. It would no longer be an actual competitor, and no increase in concentration would arise. The Chairman and one member questioned whether Unilever, after its withdrawal from the market, could still constitute a potential competitor which might re-enter the market. They considered that this seemed a remote possibility, and so possible re-entry was not likely to act as a constraint on the behaviour of the incumbent firms. The two members considered that the proposal, in the changed circumstances, was not likely to prevent or restrict competition, and they recommended that the proposed acquisition should be allowed to proceed.

The other member disagreed with these views, stating that the proposal by the acquiring firm to withdraw its existing brand from the market was not sufficient for a merger, which was otherwise likely to restrict competition, to be regarded as no longer likely to restrict competition. Where there was already evidence of inadequate competition in a market, a merger between actual or potential competitors posed a high risk that competition would be further diminished. Given the firms involved, the acquisition had to increase the market power of the merged entity, and had to be considered likely to restrict competition. The withdrawal could have been prompted by strategic considerations, i.e. to reduce the risk of the merger being regarded as anti-competitive. In addition, the possibility of Liptons re-entering the market at a later date could not be excluded. The withdrawal of the Lipton brand from the Irish market did not alter the fact that the proposed acquisition would be likely to restrict competition and it should not be allowed to proceed.

The Minister accepted the majority conclusion of the Authority that the proposed acquisition should be allowed to proceed, and no Order was made.

***Report of investigation of the proposal whereby Blockbuster Entertainment (Ireland) Limited would acquire the entire issued share capital of Ardnasillagh Limited (trading within the State as Xtra-Vision Limited).*** 1997. (Pn 3644).

This proposed merger was referred by the Minister in December 1996, and the report was submitted in January 1997. The market was that for the video rental and retail market. The Authority considered that there were no horizontal effects as a result of the merger because the acquirer, Blockbuster, was not active in the Irish market. In respect of the vertical effects, it considered that the structure of the upstream market was competitive, and that, while the structure of the downstream market was more concentrated, barriers to entry to this segment of the market were low. It also considered that foreclosure was not a profit maximising strategy and was not a likely scenario. There would be no appreciable facilitation of effective price collusion. The Authority concluded that the proposed transaction would have little or no effect on competition in the Irish market, and it recommended that the transaction be allowed to proceed without conditions.

The Minister accepted the conclusion that the merger be allowed to proceed, and no Order was made.

***Report of investigation whereby Coillte Teoranta would acquire the majority of the issued share capital of Balcas Limited.*** 1998. (Pn 5168).

The referral was made in January 1998, and the report was transmitted in March. Coillte was a State owned company which operated in the forestry and related sectors. Balcas was a Northern Ireland company which operated sawmills and manufactured and sold timber products, and had subsidiary companies in the State and in Estonia.

A majority of the Authority, three members, stated that Coillte enjoyed a dominant position in the roundwood market, and that there were significant barriers to entry to the market, including restrictions on the import of timber. The Authority considered that Coillte's dominant position would continue, and that any strengthening of that dominance would be sufficient justification for blocking the takeover. It considered that Balcas had alternative sources of supply and could undercut Coillte's prices. The elimination of Balcas as an independent actor would strengthen the dominance of Coillte, and the takeover was likely to restrict competition, and enable Coillte to abuse

its dominant position. The majority recommended that the transaction not be allowed to proceed.

While accepting that Coillte had a dominant position on the Irish market, the Chairman considered that the acquisition of Balcas by Coillte should be approved, subject to a relaxation of the ban on imports of timber. This would promote economic efficiency and trade, and reduce any potential anti-competitive effects of the proposed merger.

The Minister accepted the majority report of the Authority and made an Order prohibiting the merger.

***Report of investigation of the proposal whereby Ladbroke (Ireland) Limited would acquire the whole of the issued share capital of Coral Leisure (Ireland) Limited.***

1998. (Pn 5795).

The Minister referred the proposed acquisition in April 1998, and the Authority transmitted its report in May. The transaction involved principally the off-course betting market in the State. The Authority considered that the market was not concentrated, and that the proposed transaction would have little or no impact on competition. No market power would accrue to the merged entity, and a degree of contestability would remain. The proposed transaction was unlikely to prevent or restrict competition, and the Authority recommended that it be allowed to proceed without conditions.

The Minister accepted this conclusion, and approved the merger.

***Report of investigation of the proposals whereby:***

(a) ***Princes Holdings Limited would acquire the entire issued share capital of Suir Nore Relays Limited, and***

(b) ***Liberty Media AL Inc. would acquire the entire issued share capital of Aringour Limited.***

1999. (Pn 7962)

The proposal was referred in October 1999, and the report of the Authority was transmitted in November. Princes Holdings was the second largest cable company,

and was 50% owned by Independent Newspapers and 50% by Liberty Media Corporation, a US company. Suir Nore was a small cable and MMDS company. Aringour held shares in Cable Management (Ireland) Ltd, which operated several cable and MMDS services.

The Authority considered that the market was that of television transmission (by cable), but it was clear that the telecommunications market was also relevant. In the broadcasting sector, the different cable and MMDS companies did not compete with each other due to regulatory constraints. The Authority considered that, in relation to the television transmission market, the proposed mergers would have no effect on competition. The Authority concluded that the proposals could have a beneficial effect on competition in the telecommunications market. Since the proposals were unlikely to operate against the common good, the Authority recommended that they be allowed to proceed without conditions.

The Minister accepted the Authority's conclusion and approved the mergers.

***Report of the investigation of the proposal whereby GEHE Ireland Limited would acquire the entire issued share capital of Babbington Ltd, Goviltown Limited, Pharmacy O'Riada Holdings Limited and Kilmaloon Limited together with its two subsidiaries Ballygall Pharmacy Limited and John Smith & Son Limited (Unicare). 2002. (Pn 11320).***

In December 2001, the Minister referred the merger between Unicare, a chain of retail pharmacies, and GEHE, a company active in both the retail pharmacy market and in the wholesale pharmacy market. The report was submitted in February 2002.

Although there was some overlap between the two companies' retail pharmacies in some local markets in the Dublin area, the Authority considered that there would still be a significant number of other retail pharmacies in competition with the merged companies' pharmacies, and it concluded that there would be no significant decline in competition in the retail pharmacy sector. Nor would the merger result in GEHE's share of the pharmacy wholesale market permitting it to tie-in a large number of retail pharmacies, and thus potentially preventing new entrants into the wholesaling business, and/or disadvantaging retail pharmacies who did not use GEHE as a

supplier. The Authority recommended that the transaction be allowed to proceed. The Authority also recommended that, given the particular regulatory regime provided for under the Health (Community Pharmacy Contractor Agreement) Regulations, 1996, the Minister should consider making an Order essentially dis-applying the financial thresholds under the Mergers Acts to any acquisition involving pharmacies within a certain radius of each other, while the 1996 Regulations remained in force.

Subsequent to the submission of the report, the 1996 Regulations were revoked, and consequently there were no longer any grounds for making the Order recommended. The Minister decided not to make an Order, and cleared the proposal without conditions.

***Report of investigation of the proposal whereby Solgun Limited, a wholly owned subsidiary of STA Travel (Holdings) PTE Limited, would acquire approximately 88% of the entire issued share capital of USIT World plc. 2002. (Pn 11661).***

In February 2002, the Minister referred a merger between USIT Now, a student travel company based in the State, which had affiliates overseas, with STA Travel, a large travel company with worldwide links. The investigation was complicated by the fact that USIT was in serious financial difficulties, but the report was submitted in April.

After a close study of the complex vertical relationships that governed the supply and distribution of student tickets and travel products, the Authority concluded that the transaction would not seriously lessen competition, and recommended that it be allowed to proceed. This was subject to the recommendation that STA be required to supply certain student travel tickets to other Irish retailers of such tickets for a certain duration under specified terms.

The Minister accepted the recommendation of the Authority, and made an Order granting conditional clearance to the merger.

***Report of investigation of the proposal whereby Maxol Energy Limited would acquire the entire issued share capital of Busselle Limited. 2002. (Pn 12200).***

In August 2002, the Minister referred a merger between Maxol, a company active in oil and petroleum retailing, and Estuary, a company operating in the same general area. The report was submitted in September.

The Authority looked at a number of different markets at both wholesale and retail level. Of particular interest was whether there was significant overlap in some local geographic market in the retail sale of petrol, particularly given the existence of schemes for supplier support of retail stations should they experience financial difficulty. The Authority concluded that the degree of overlap was not sufficient to significantly lessen competition, and it recommended approval of the merger.

The Minister allowed the merger to proceed without conditions.

**MERGER ORDERS, 1991 – 2002**

Proposed Merger or Take-Over Prohibition Order, 1992. (S.I. No. 56 of 1992).

Independent Newspapers plc/Tribune Group.

In March 1992, the Minister made an Order which prohibited the proposed increase in the Independent Group's shareholding in the Tribune Group. The Minister gave the reasons that, if the take-over were effected, it would operate against the common good, and that, in particular, competition in the market for Irish Sunday newspapers and, to a lesser extent, in the markets for all Sunday newspapers and for advertising in all Irish newspapers could be so restricted as to operate against the common good. (The Minister also stated that, should the Tribune cease to operate, the Independent Group should not be permitted to purchase the Tribune titles). An appeal was lodged by the parties against the Minister's Order, but it never came to hearing.

Proposed Merger or Take-Over Prohibition Order, 1996. (S.I. No. 45 of 1996).

Statoil Ireland Ltd/Conoco Ireland Ltd.

In February 1996, the Minister made an Order prohibiting absolutely the proposed merger or take-over involving Statoil and Conoco. The reasons given were that, if the take-over were effected, it would operate against the common good, and that, in particular, competition in the market for motor fuels within the State could be so restricted as to operate against the common good. An appeal was lodged against the Order.

Proposed Merger or Take-Over Prohibition (Amendment) Order, 1996.

(S.I. No. 214 of 1996). Statoil Ireland Ltd/Conoco Ireland Ltd.

Following revisions to the proposals, the Minister amended the Statoil/Conoco prohibition Order in July 1996, prohibiting the merger except on specified conditions. The conditions were that, within 12 months:

- (a) Statoil would sell to Maxol at least:
  - (1) 30 company owned stations with annual sales in 1995 of not less than 44 million litres; and
  - (2) its interest and goodwill in 50 solus or similar agreements with stations (other than company owned stations) having, in aggregate, annual sales of motor fuels in 1995 of not less than 24 million litres;

- (b) Statoil divests itself of not less than 5 company owned stations having, in aggregate, annual sales of motor fuels in 1995 of not less than 1 million litres and ceases the supply of motor fuels to such stations;
- (c) Statoil procures that Statoil divest itself of the entire issued share capital or the entire motor fuels business of Estuary Fuel Ltd;
- (d) Statoil provides satisfactory evidence to the Minister of its having complied with each of the preceding conditions.

The reasons given were:

- (a) if the take-over was effected subject to the conditions, Statoil would not have the largest share of the market in motor fuels in the State. Further, the sale to Maxol would create a greater balance in market shares between the major fuel distributors than would have been the position under the take-over as originally proposed;
- (b) the pricing policies which Statoil, in the supplementary proposal, and Maxol have stated they will pursue in the future were such as to lead the Minister to believe that it was unlikely that the take-over, if effected subject to the conditions, would restrict price competition in the market for motor fuels within the State;
- (c) the Minister considered that the reduction in the number of major motor fuel distributors from six to five which would be a consequence of the take-over was not in itself sufficient reason to continue the absolute prohibition of the take-over;
- (d) the Minister was aware of Conoco's desire to cease carrying on any motor fuel business in the State;
- (e) the Minister considered that the exigencies of the common good did not warrant the continued absolute prohibition of the take-over and that the take-over, if effected subject to the conditions, would be unlikely to operate against the common good.

A new strengthened Price Display Order was made for motor fuels. The High Court proceedings were withdrawn in July 1996.

Proposed Merger or Take-Over Prohibition Order, 1998. (S.I. No. 102 of 1998).

Coillte Teoranta/Balcas Ltd.

The Minister prohibited the proposal whereby Coillte Teoranta would acquire the majority of the issued share capital of Balcas Limited in April 1998.

The reasons were that the Minister considered that, if the takeover were effected, it would operate against the common good, and that, in particular, competition in the market for roundwood within the State could be restricted so as to operate against the common good.

Proposed Merger or Take-Over Conditional Order, 2002. (S.I. No. 187 of 2002).

Solgun Limited/USIT World plc.

The Minister prohibited the takeover except on specified conditions in May 2002.

The first condition was that, for a period of at least two years from the completion of the transaction, the purchaser continue to supply two named organisations with tickets, student identity cards and youth cards, under the same terms and conditions as those that then applied between the parties. The second condition was that the restrictions in the sale agreement on Mr. Gordon Colleary (a director of USIT) should be interpreted narrowly, so that he was precluded only from involvement in a business competing directly with Solgun in the various relevant markets for student and youth travel products.

The reasons were that the Minister considered that the exigencies of the common good did not warrant the absolute prohibition of the take-over, and that the take-over, if effected subject to the conditions, would be unlikely to operate against the common good.

## **OTHER MERGER MATTERS**

A proposal was referred in December 1993 whereby Ractrayle Ltd., which already had a 41.25% shareholding in Suir Nore Relays Ltd., would acquire the remaining shares in the company for Princes Holdings Ltd. Princes Holdings was owned as to 50% each by Independent Newspapers plc and a consortium of US investors. The proposal involved cable and multi-channel television distribution systems. The proposed acquisition was abandoned in January 1994, and the reference was withdrawn.

In August 1997, the Minister referred to the Authority the proposed acquisition of United Beverages Holdings by Guinness Ireland Group. The products involved the manufacture and distribution of soft drinks and the distribution of alcoholic beverages. The referral was withdrawn later in August, because of a technical flaw in the referral, in that it was too late and was therefore invalid. The proposed acquisition was subsequently notified to the Authority under the Competition Act in September.

In June 1998, the Authority, in Decision No. 512, granted a licence to the agreement, subject to certain conditions. These were that Guinness Ireland Group would reduce its shareholding in Cantrell & Cochrane to below 10%; it would relinquish all rights to representation on the board of C&C; and it would waive its first option on C&C shares. The Chairman of the Authority requested the recording of the fact of his dissent to the decision, but no reasons were given for this.

The decision was subsequently appealed by another brewer and three wholesalers, and the parties also applied for a judicial review of the decision. In 1999, the hearings in the High Court were concluded, after 23 days, when the parties to the appeal and the parties to the agreement reached a settlement. The judge ruled that each party should pay its own costs, apart from the costs related to the hearing on the bias issue, where the Authority's costs were to be paid by the appellants. The Authority appealed the ruling on costs to the Supreme Court.

In July 2000, the Minister referred the proposed acquisition by Golden Vale plc of the Northern Ireland dairy business of Express Dairies. Prior to investigation by the Authority, the proposal was withdrawn.

A joint venture agreement, whereby Allied Irish Banks and the Bank of Ireland would establish a joint information technology infrastructure service provider, was notified to the EU Commission in July 2002. The EU merger regulation provides for national jurisdiction at the request of a member state in certain circumstances. The Minister made a request for the case to be referred back to Ireland, on the grounds that the joint venture would have primarily impacted in the Irish market and, accordingly, an examination of the matter by the Irish authorities under Irish merger law would be appropriate. Before the EU Commission had come to a decision, in August, it advised the Department that the parties had withdrawn the notification as they had decided not to proceed with the joint venture.

## **MERGERS UNDER SECTION 4 OF THE 1991 ACT**

Some 54 decisions in respect of mergers were taken under section 4 of the 1991 Act from 1991 to 2002. This figure excludes joint venture agreements and Business Expansion Scheme investment schemes, that is the investment of venture capital to obtain a minority shareholding in a company. The decisions were as follows:

Woodchester Bank Ltd/UDT Bank Ltd. 1992. (Decision No. 6).

ACT Group plc/Kindle Group Ltd. 1992. (No. 8).

Phil Fortune/Budget Travel Ltd. 1992. (No. 9).

GI Corporation/Semiconductor Industries Inc. 1992. (No. 10).

B & D Firestone/Grenfells Ltd and Thoroughbred Promotions and Development Co. 1992. (No. 11).

Scully Tyrrell/Edberg. 1993. (No. 12).

Chemical International Finance/Irish Life Assurance. 1993. (No. 17).

Irish Life Building Society/First National Building Society. 1993. (No. 19).

Dairygold Cooperative Society/Muilleann Ui Luasa and IAWS Group. 1993. (No. 22).

Carroll Catering/Sutcliffe. 1993. (No. 29).

Dairygold Cooperative Society/J. W. Green & Co. 1993. (No. 33).

Viva Travel Dun Laoghaire/Grainne McDonald Travel. 1993. (No. 34).

General Electric Capital Corporation/GPA Group. 1993. (No. 137).

Lee & Co./Musgrave. 1993. (No. 147).

Spring Grove/Conkenner. 1993. (No. 148).

Foreign Exchange Company of Ireland/Rochglen Holdings. 1994. (No. 272).

Rhone Poulenc Ireland/ Shell Chemicals Ireland. 1994. (No. 273).

Sutcliffe Ireland/National Catering. 1994. (No. 275).

Irish Distillers Group/Cooley Distillery. 1994. (No. 285).

Gas & Oil Parts/Heating Replacement Parts and Controls. 1994. (No. 297).

Rohan Construction/Rohcon. 1994. (No. 301).

Barlo/Kingspan. 1994. (No. 302).

Canada Life Assurance Co./Lloyds Abbey Life. 1994. (No. 323).

Underwood/Ye Olde Coopers Inns. 1994. (No. 330).

Educational Building Society/Midland and Western Building Society. 1994. (No. 331).

- Sedgwick Dineen/Legal & Commercial. 1994. (No. 332).
- Doyle/Moffitt. 1994. (No. 333).
- Dairygold Trading/Suttons. 1994. (No. 347).
- Sedgwick Overseas Group/Dineen. 1994. (No. 349).
- Ove Arkil/Tarmak Company. 1994. (No. 350).
- Kantoher Food Products/Carton Brothers. 1994. (No. 352).
- Hickson International/Angus Fine Chemicals. 1994. (No. 353).
- Warner Lambert Ireland/Fraxinor Anstalt. 1994. (No. 370).
- Adsites/David Allen Holdings. 1994. (No. 381).
- Irish Potato Marketing/Donegal Potatoes. 1994. (No. 385).
- Fexco Innovations/BIG Estates. 1995. (No. 405).
- RNH Wood Products/Isotherm Company/AG Ireland. 1995. (No. 406).
- Eureka Ireland Holdings/Celtic International Insurance Co. 1995. (No. 409).
- Azinger/Fizpak Holdings/Others. 1995. (No. 414).
- Sedgwick Group/TSB Group. 1995. (No. 415).
- F.B.H. Distributors/Harty Security. 1995. (No. 444).
- Fuel Distributors/BnM Fuels. 1996. (No. 458).
- Grey Communications Group/Campbell Advertising. 1996. (No. 468).
- Irish Helicopters/Bristow Helicopters. 1996. (No. 469).
- United Utilities/Bronica Ltd. 1996. (No. 476).
- Carne Company Ltd/C. Terry/ P & D Coyne. 1997 (No. 486).
- Statoil/Clare Oil Company. 1998. (No. 490).
- Statoil/Rabbitt Oil Company. 1998. (No. 491).
- Statoil/Shreelawn Oil Company. 1998. (No. 492).
- Statoil/Baldoyle Oil Company. 1998. (No. 493).
- TDI Metro/Metro Poster Advertising Ltd. 1998. (No. 501).
- TDI Metro/Roadshow Advertising Ltd. 1998. (No. 509).
- Guinness Ireland Group/United Beverages Holdings. 1998. (No. 512).
- Irish Life Assurance/Irish Intercontinental Bank. 1998. (No. 525).
- In addition, a merger category certificate was issued in 1997 (Decision No. 489).

There were six refusals to issue a certificate or to grant a licence, as follows:

Irish Distillers Group/Cooley Distillery. 1994. (No. 285).

Sedgwick Dineen/Legal and Commercial. 1994. (No. 332).

Doyle/Moffitt. 1994. (No. 333).

Kantoher Food Products/Carton Brothers. 1994. (No. 352).

Adsites/David Allen Holdings. 1994. (No. 381).

F.B.H. Distributors/Harty Security. 1995. (No. 444).

## **THE COMPETITION AND MERGERS REVIEW GROUP**

In September 1996, the Minister launched the Competition and Mergers Review Group under the Chairmanship of Michael Collins, S.C. Ten members and a Secretary were also appointed. The primary purpose of the Review Group was to make recommendations designed to further improve the competition regime in terms of its legislative provisions and its structures. The terms of reference were:

To review and make recommendations on:

- (a) the mergers legislation in the context of a legislative consolidation;
- (b) the effectiveness of competition legislation and associated regulations;
- (c) cultural matters in the context of the 1991 Act and in particular section 4(2) of the Act; and
- (d) appropriate structures for implementing the above legislation.

The Review Group published a number of discussion documents on the following topics:

- (a) Mergers (July 1998);
- (b) The relevant three recommendations of the report of the Newspaper Commission (February 1999);
- (c) Competition Law (September 1999); and
- (d) The Groceries Order (December 1999).

The Review Group invited and received submissions and comments on the interim recommendations in each of the documents. In the course of its work, the Review Group commissioned a number of studies.

The Final Report of the Review Group was submitted to the Minister in May 2000 (Pn 8487). It contained forty recommendations on a variety of aspects of competition and mergers legislation. The report also recommended certain specific changes to mergers legislation insofar as it related to the media sector.