



Report of the Competition and Mergers Review Group

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Chapter 1 Introduction

1.1 The Competition and Mergers Review Group was established on the 30th of September 1996 by the then Minister for Enterprise and Employment, Mr. Richard Bruton TD under the chairmanship of Michael M. Collins SC.

1.2 The Review Group is, as of the date of this report, made up of the following members:

Chairman:	Mr. Michael M. Collins SC
IBEC:	Mr. Owen Killian Mr. Myles O'Reilly
ISME:	Dr. Robert Berney
ICTU:	Mr. Paul Sweeney
The Bar Council:	Mr. David Barniville BL
The Law Society:	Mr. Gerald FitzGerald
The Consumers Association of Ireland:	Mr. Peter Dargan
Office of the Attorney General:	Mr. Damien Moloney
Economist (UCD):	Mr. Moore McDowell
Department of Enterprise and Employment:	Mr. Barry Harte

- 1.3 Professor Dermot McAleese had been appointed as an original member of the Review Group but was unable to participate in the Review Group's work and was replaced by Mr. Moore McDowell on the 23rd of April 1997. Mr. Arthur Plunkett, representing the Office of the Attorney General was also a member of the Review Group until July 1997 when he was obliged to resign due to his appointment to the Law Reform Commission. He was replaced by Ms. Paula O'Hare from the Office of the Attorney General and she in turn was replaced in August 1999 by Mr. Damien Moloney. The original ISME nominee to the Review Group was Mr. Eoghan Hynes who resigned from the Review Group in July 1999 and was replaced by Dr. Robert Berney.
- 1.4 The Group has from time to time had four different Secretaries - Dermot Sheridan, Michael Beagon, Dominic McBride and Grace O'Regan. The Review Group wishes to thank each of the four Secretaries to the Group for their efficiency and valuable contributions to the working of the Group.
- 1.5 The terms of reference of the Review Group were:

“To review and make recommendations on:

- The mergers legislation in the context of a legislative consolidation.
- The effectiveness of competition legislation and associated regulations.
- Cultural matters in the context of the 1991 Act and in particular Section 4(2) of that Act.
- Appropriate structures for implementing the above legislation.

The Group may commission detailed sectoral studies as required and will also, in its work, review the evolution of competition policy at EU and global level.”

- 1.6 The Review Group understood the reference to associated regulations to be a reference in particular to the Groceries Order. The Review Group considered the extent to which its terms of reference were intended to include a review of the application of competition law to the State sector. The Chairman of the Review Group clarified with the then Minister that the terms of reference did not require the Review Group to undertake a consideration of the appropriate course of action to adopt in relation to the State sector but that the Review Group should feel free to indicate such areas of concern in the relationship between the State and competition law as it thought fit.
- 1.7 The Review Group placed advertisements in the national newspapers inviting submissions on matters relevant to its terms of reference. Early on in its work, the Review Group decided that it would proceed by means of publishing discussion documents on various topics containing draft or interim recommendations on which further submissions would be sought before finalising its recommendations.
- 1.8 In addition, at the end of October 1997 the Tánaiste and Minister for Enterprise, Trade and Employment referred to the Review Group three specific recommendations out of the sixteen recommendations made by the Commission on the Newspaper Industry (“the Newspaper Commission”) which reported to the Minister for Enterprise and Employment on the 24th of June 1996. The three recommendations to which the Tánaiste referred were recommendations 1, 2 and 10 of the Newspaper Commission. The Tánaiste requested that the Group “would take these recommendations into account as appropriate in your report.”
- 1.9 The Review Group published four discussion documents on the following topics:
- Mergers (July 1998)
 - The relevant three recommendations of the report of the Newspaper Commission (February 1999)
 - Competition Law (September 1999)

- The Groceries Order (December 1999)

1.10 In relation to each of the discussion documents, the Review Group invited and received submissions and comments on the interim recommendations.

1.11 A list of the persons who made submissions to the Review Group are set out in Appendix 1 of this report.

1.12 In addition, in the course of its work, the Review Group commissioned a number of studies:

- A study on the effects and perceptions of competition legislation carried out by the Economic and Social Research Institute.
- A study of the views of law firms as to the general level of awareness of competition law issues and anticompetitive behaviour conducted by the Market Research Bureau of Ireland.
- A report on deregulation, increased competition and consumer welfare prepared by Dr. Bernadette Andreosso O'Callaghan of the University of Limerick.
- A report on the economic impact of the 1987 Groceries Order prepared by DKM Economic Consultants Limited.

1.13 The Review Group also appointed as advisors to the Review Group Ms. Eileen Barrington BL, Mr. Gerard Hogan SC and Mr. Vincent Power, solicitor. Both the advisors and certain members of the Review Group prepared a variety of internal studies, submissions, memoranda and briefing documents from time to time.

1.14 Certain members of the Review Group also met from time to time with personnel from different government departments, other state institutions, administrative agencies, and others. At the invitation of the Oireachtas Joint

Committee on Enterprise and Small Business, members of the Review Group met with the Joint Committee in relation to the issue of the Groceries Order. At the invitation of the Competition Policy Section of the Organisation for Economic Cooperation and Development, members of the Review Group also attended a meeting of the OECD Competition Policy Committee for the purpose of discussing the Review Group's Discussion Paper on competition law.

1.15 The Chairman wishes to thank all of his colleagues on the Review Group for their many and varied contributions to the active and always informative discussions within the Review Group. Insofar as the drafting of the discussion documents and this report are concerned, the Chairman wishes to acknowledge in particular the contribution of Mr. Gerald FitzGerald to mergers and the whole topic of competition law and the State; the contribution of Ms. Eileen Barrington to mergers and newspapers; the contribution of Mr. Vincent Power to newspapers; and the contribution of Mr. Moore McDowell and Mr. Myles O'Reilly to the Groceries Order. Special thanks are also due to Mr. Gerard Hogan SC for advice on a variety of constitutional law related matters and to Mr. Peter Charleton SC who gave very helpful advice in relation to issues of criminal law and evidence. The Chairman also wishes to particularly thank his own secretary, Ms. Máire McLoughlin who typed the drafts and redrafts of three of the four discussion documents and the greater part of this report. Finally, he also wishes to record his appreciation of the work done by Ms. Julitta Clancy in preparing the index, table of cases and statutes which covers both this report and the four discussion documents.

1.16 While most of the recommendations in this report are unanimous recommendations of the Review Group, there are some recommendations to which only a majority subscribe. The differences of view are summarised in the discussion without attribution to any individual member. It follows that, except where unanimity is indicated, it cannot be assumed that individual members endorse particular views or recommendations.

Chapter 2 The Shape of Reform

- 2.1 Belmullet is an unlikely place to start a revolution. But when the Competition Authority decided that the first certificate it would ever issue under the Competition Act 1991 would relate to an agreement whereby one partner sold his interest in a television sale and repair business in the town of Belmullet to the other partner and undertook not to compete directly with the purchaser for three years within a radius of twenty miles of Belmullet, the Authority laid down from the start that notwithstanding the views of both the European Court of Justice¹ and the European Commission² the Authority did not believe in an interpretation of Section 4 which depended on an implicit *de minimis* exception.³ Thus did the homegrown version of some of the more exotic concepts derived from the Treaty of Rome begin.
- 2.2 It was however a revolution almost choked at birth by paper. The requirement that parties seeking clearance for pre-1991 agreements had to notify them to the Authority by 30 September 1992 caused the number of notifications to jump from 14 in 1991 to 1,159 in 1992. The vast majority of such notifications concerned relatively innocuous agreements and the Competition Authority itself had no powers to bring enforcement proceedings against anybody. Its function was largely reactive and its agenda effectively limited by the agenda of the parties who chose to put their agreements before it.
- 2.3 The amending Act of 1996 rescued the Competition Authority by giving it the necessary teeth of enforcement powers. But it took the further radical step of

¹ *Volk v Vervaecke* (1969) ECR 295.

² Notice on Agreements of Minor Importance, 1986 (OJ C 231, 12th September 1986 page 2).

³ “Given the size and distribution of the population in Ireland it is possible that a number of relatively small undertakings could, by acting together, prevent, restrict or distort competition in a part of the State. The exclusion of small undertakings from the provisions of the Act could deny consumers in part of the State the protection against anti-competitive activities which the Act provides. The present agreement cannot, therefore, be regarded as outside the scope of the Act on the grounds that it concerns undertakings which are so small that they cannot have any significant effect on competition.” Competition Authority Decision number 1, *Nallen-O’Toole (Belmullet)*, 2nd April 1992.

making breaches of the competition legislation criminal offences punishable in certain circumstances by fines of up to £3m or 10% of the undertaking's turnover or jail sentences of up to two years, or both. The criminalisation of such offences is unusual in a European context although not unique. There are some parallels in a small number of other EU Member States and some (although not all) infringements under US antitrust law are criminal offences punishable not only by jail sentences but by increasingly massive fines.

2.4 Fines were at the heart of the problem. Effective sanctions are essential to motivate enforcers, to deter would-be offenders and to create a culture where the ambiguity in a morally ambiguous crime is clarified. The relative lack of understanding on the part of business as to what precisely constituted a contravention of the Competition Acts led to the apprehension of a vicious circle. It seemed to some to be wrong that the boundaries of lawfulness should be so inherently complex as might inadvertently put the undertaking and its staff in the same category as those convicted of murder, arson and rape. Yet without draconian sanctions the learning curve in relation to the boundaries of permissible behaviour would always remain in the foothills. A specialist administrative authority with the power to impose fines would seem an obvious institutional structure but the constitutional constraints on the administration of justice by anybody other than courts ruled out such an administrative solution. Hence the criminalisation of competition law infringements in 1996.

2.5 Competition law is curious in that its objective tends to be chaos rather than order. The Austrian economist, Josef Schumpeter once famously characterised capitalism as "a gale of creative destruction". The object of competition is not to restrain the winners from the winning post. It is not even to necessarily ensure that the competition is fair. (That would involve, in effect, a redistribution of assets amongst the competitors accompanied by an instruction to start the race again). Competition law is about allowing parties to compete, to surge one past the other or to gain significant advantage and to reap the appropriate awards, curtailed only by a constraint against conspiring with others (usually one's competitors) to the disadvantage of the ultimate consumer and a

constraint on using one's own size beyond a critical mass to harm or eliminate one's competitors.

- 2.6 This, of course, is where "fairness" creeps back into the argument once the debate is conducted in subjective terms such as dominance and abuse. This in turn reflects the political, democratic and cultural values that are inherent in our concept of competition law and the economic model in which freedom to trade is the mechanism for enhancing overall efficiency and achieving an optimal allocation of resources.
- 2.7 It is not for nothing that the science of economics has traditionally been referred to by that elegantly antique phrase, political economy. The growth of democracy and concern for individual liberty over the past few centuries has its parallel in an economic model where individuals are free to trade, to acquire private property, to expand their business by acumen and hard work and to acquire other undertakings. Provided there are still sufficient players in the market competing with each other, market prices by and large fulfil the function derived from the economic model of perfect competition and lead to a more efficient allocation of resources.⁴ It is when individual freedom to trade leads to an aggregation of private power that the dilemma arises, because such a private power may adversely affect the interests of other players in the

⁴ Whether this is an optimal allocation of resources depends in part upon one's definition of optimality and in part upon whether the issue is judged by reference to a given initial allocation of resources or whether competition law should be tempered by forms of redistribution which serve social goals other than efficiency. See, for example, Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 *University of Pennsylvania Law Review* 1076 (1979). Professor Schwartz emphasises an interpretation of antitrust policy which discourages the formation of huge capitalistic enterprises in order to prevent loss of individual freedom and economic opportunity. See also Barnes, *Revolutionary Antitrust: Efficiency Ideology and Democracy* 58 *University of Cincinnati Law Review* 59 (1989) : "The word 'competition' presents particular difficulties, however, because it can be interpreted to apply only to characteristics of a particular market's production of goods and services, or to characteristics of the economy's allocation of resources across the supply of all products, or to characteristics of a society whose products are produced by a capitalist economy. The statutory context does not plainly limit the statute's application to satisfaction of the economic needs of consumers or clearly extend it to sheltering small, independent entrepreneurs. In a democracy, the obligation of courts and administrative enforcement agents is to interpret the language in a fashion consistent with the intent of Congress, relying on the express motivations of Congress and the apparent will of the majority. There is legitimate disagreement about the priority of goals and whether antitrust law is the appropriate vehicle for reaching goals other than economic efficiency. But relying on efficiency analysis

marketplace and the consumer. Equally, the response (some form of public interference whether through competition law, merger control or public regulation) itself faces the dilemma that it may become too invasive, too limiting of individual freedom and ultimately self-defeating.

- 2.8 Attempting to achieve a balance between these factors is what reform in this area is about. Part of that debate about balance can be seen in the debate between the Chicago School and Harvard School economists which was discussed in the Review Group's Discussion Paper on competition law.⁵ In the European context, this debate has been coloured by the history of war in Europe. German competition policy in the 1950's was heavily influenced by the Freiburg School which was concerned to put in place institutional structures and public mechanisms to prevent the sort of alliance between private and public power which led to the appalling nightmare of Nazism.⁶ At the same time, European countries began to move in the direction of economic

automatically forecloses consideration of alternative goals that have traditionally been part of the antitrust equation." (page 65).

⁵ See chapter 2 ("Economic Objectives of Competition Policy") of the Discussion Document (September, 1999).

⁶ The Havana Charter of 1945 which provided for the International Trade Organisation contained an international antitrust law which was not however, for the most part, put into force. The influence of the Faculty of Economics of Freiburg University on German and ultimately Community competition law is well told in Sullivan, *On the Growth of the Antitrust Idea*, (1998) 16 Berkeley Journal of International Law 197 Sullivan comments: "*Antitrust, a transplant from a failed international treaty forced on a defeated nation by an occupying power, has thrived in Germany to a remarkable degree...Though less directly than the German law, EC antitrust can also be traced to the Havana Charter and, in a sense, to the American tradition. Indeed, because Havana Charter antitrust can be viewed as aiming towards widening international integration through trade, EC antitrust has a special relationship to the Havana Charter tradition. The basic goal of the Treaty of Rome is European market integration, and the EC antitrust law is put explicitly to the service of that goal. It must be recognised, nevertheless, that there is a great deal that is not known about the genesis of EC antitrust or about the forces that influenced its early development. While some suspect a strong German influence simply because of the signatory parties, only Germany had a strong antitrust tradition. Other see the United States as influencing the Treaty of Rome at least in this respect. There is also a functional explanation for Articles [81] and [82]. A commitment was being made to assist Europe economically. If the signers were to rely on the dirigiste tradition which is strong, for example, in France, and anticipate unifying Europe through industrial policy, they would have forced upon themselves an impossible task of working harmoniously to resolve planning issues in which their respective national interest might often collide. Alternatively, they agreed to unleash the more automatic forces of competitive markets to start the work of integration. Therefore, antitrust in the United States, in Germany and in the EC is certainly one genus and may fairly be described as one species. In all three systems the basic underlying commitment is to maintain competition in order to attain and protect important social goals for the economy. For all three systems the basic concept, competition, has the same essential meaning: competitive commercial and industrial*

integration, not particularly because of any view they had about the relationship between competition and allocative efficiency, but in an attempt to prevent war breaking out again and to lay the foundations for the economic recovery of Europe. The first of the treaties which formed part of this process was the Treaty establishing the European Coal and Steel Community (the “ECSC Treaty”) between France, Germany, Italy, Belgium, The Netherlands and Luxembourg, which was signed in Paris on the 18th of April 1951. The impact of two world wars on a generation of politicians who signed this Treaty is apparent from the words in which they expressed their purpose:

“...to substitute for age - old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundation for institutions which will give direction to a destiny henceforward shared”⁷

What we now call the European Community Treaty (the “EC Treaty”) which was signed in Rome on the 25th of March 1957 continued to reflect its political dimension and recorded the determination of the signatories “to lay the foundations of an ever closer union among the peoples of Europe”.⁸

- 2.9 As outlined in the Review Group’s discussion document on competition law⁹, the competition provisions of the Treaty of Rome are not goals in themselves but are tools to serve the greater political goal of economic and, ultimately, political integration. Thus, agreements or practices will not necessarily be deemed contrary to the competition rules of the Treaty unless there is an appreciable effect on competition generally in a significant part of the Community such as would impede the attainment of the objective of a single market. This is a political dynamic which is not present in the Irish competition rules, notwithstanding that the wording of the Irish Act is virtually identical to the wording of the relevant articles of the EC Treaty, since the Irish legislation

conduct that constrains and reduces the economic power exercised by any single firm or combination of firms.” (211, 226 - 227).

⁷ Preamble to the ECSC Treaty.

⁸ EC Treaty, first preamble.

falls to be interpreted in accordance with the standard rules of interpretation of domestic legislation. And yet, the European political dynamic still has an influence because the preamble to the Irish Act expressly provides for an analogy between the Irish competition rules and the Treaty rules on competition.

- 2.10 In a curious way therefore, the more purist concept of competition which emerges from the Irish legislation is, in one sense at least, more akin to US antitrust than is Community competition law itself notwithstanding the literal parallels between the wording of Irish and Community competition law. Community competition law as applied by the European Commission still tends to reflect the European concept of the state as having a significant role in restraining the exercise of private power as compared with the greater premium which US law places on individual freedom.

“This European itch to regulate, or at least reluctance to let markets self-correct explains many differences between EC and US antitrust law and policy - for example, the EC resort to block exemptions and the inclusion of non-competition policy objectives in antitrust law, such as ‘industrial policy’, or social and regional policies. Another important example concerns abusive or monopolistic behaviour by dominant firms where the European itch to regulate can also be seen in the EC’s broader and stricter application of its antitrust laws to dominant firm behaviour under Article [82] as compared with Section 2 of the Sherman Act. The difference in scope between Article [82] and Section 2 rests on the European concern with protecting trading partners that are ‘dependent’ on dominant firms, even where this concern conflicts with consumer welfare considerations. In other words, there is a strong tendency under Article [82] (as well as under the EC Merger Regulation) to protect competitors and not simply competition.”¹⁰

⁹ Chapter 4 (“Particular Issues arising from the Relationship between EU and Irish Competition Law”).

¹⁰ Hawk, Book Review: Giuliano Amato, *Antitrust and the Bounds of Power* (1997), 21 *Fordham International Law Journal* 1670 (1998). Hawk goes on: “*This tendency to protect competitors or at least to be unduly sensitive towards effect on competitors as opposed to effect on consumers and consumer welfare, can also be seen in the Commission’s occasionally perverse treatment of efficiencies under the EEC Merger Regulation. As Professor Amato points out, the Commission in some cases appears to take the extreme that greater efficiency is not a positive factor in reviewing mergers but a negative one and thus has protected consumers not because of market foreclosure and the associated restriction of output but out of a concern for*

- 2.11 As will be apparent from Chapter 2 of the Discussion Paper on competition law, most members of the Review Group favour an approach to competition law and policy which emphasises the role of economic efficiency as one of the goals of competition policy without going so far as the pure Chicago School analysis which would define consumer welfare exclusively in terms of economic efficiency.
- 2.12 The political dimension to the debate about economic power surfaces in another complex fashion in the guise of the State role in regulated industries. Regulated utilities and the move to privatise State-owned concerns (some of whom may not conform to the classic definition of a utility) reflect the shift that is taking place at both European and Irish levels away from a belief in the State as the ultimate solution and more towards an economic concept of freedom in a liberal democracy. The appropriate interaction between competition law, the State and regulated industries is as yet ill-defined and this report makes some attempt to give guidance in this area.
- 2.13 Merger control represents yet another manifestation of the tension between the freedom to accumulate and a concern about the private concentration of power. Unlike many of the practices or agreements which are the traditional subject matter of competition law, mergers and acquisitions are generally more benign in principle. In many cases, mergers yield enormous benefits by allocating investment capital to its most productive use and keeping the management of potential targets alert. If a company's management is not managing the assets in the most efficient way, rational shareholders will be pleased at the prospect of a merger or acquisition which replaces old management with new and which may enable the costs of operation to be reduced. Acquisitions also serve the purpose of enabling persons with innovative ideas but who lack the capital to exploit them to avail of the capital resources of much larger companies who in turn benefit from the innovation and flair of the smaller entrepreneur.

maintaining pluralism and defending the right to sell to small producers currently on the

- 2.14 Concerns about mergers spring from the same sort of concerns that underpin concerns about agreements between competitors. If a market becomes too concentrated, the level of competition between the players in that market may diminish. In the Irish context, one particular case has given rise to a concern as to how best to deal with an acquisition by a large, possibly dominant, firm of a much smaller competitor in circumstances where the competitor is so small that the transaction would not normally be of sufficient size to warrant scrutiny under merger control legislation. Nonetheless, such creeping acquisitions may ultimately stifle competition in a particular market.
- 2.15 Throughout all of these issues, any reform must never lose sight of the necessity for any institutional or legislative structure to both be and be seen to be fair. Fair and readily understandable procedures, the opportunity to make one's point, the right to be told why one has lost and the possibility of some form of appeal are features which must be characteristic of any structure of competition and merger control if all the participants in the process are to have confidence in it and are prepared to live with their disappointments.
- 2.16 As was pointed out by the Review Group in its first Discussion Document on Mergers¹¹:

*“There is no such thing as the ‘right answer’, only practical solutions of varying degrees of ‘rightness’, depending on one’s perspective. The object of the Group is the modest one of formulating recommendations which address issues which have been brought to the Group’s attention, which are capable of implementation, which do not involve change merely for the sake of change and which may be of assistance to those entrusted with the never ending task of reform”.*¹²

- 2.17 The complexity of these issues springs not only from the complexities inherent in topics such as law and economics but from the almost unique interaction which occurs in this area between law, economics and politics. As the Review

market.”

¹¹ July 1998.

¹² Discussion Document on Mergers, page 3.

Group noted in its discussion paper on the Newspaper Commission recommendations, there is no policy solution which solves all of these problems, which leaves no contradictions or unresolved issues. We do badly to look for sweeping, ideologically pure, universal solutions. The better course may be to look for good, if somewhat second best solutions.¹³

- 2.18 Insofar as regulators, administrative agencies, politicians or even review groups may begin to think that they have found the right answers, it is salutary to recall the words of Adam Smith:

“The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with the most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.”¹⁴

¹³ See Discussion Paper on Some Recommendations of the Newspaper Commission, page 54 quoting from Weinberg, *Broadcasting and Speech*, (1993) 81 California Law Review 1103.

¹⁴ Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) (Modern Library edition 1937, page 423).

Chapter 3 The Relationship between National and Community Competition Law

3.1 Introduction

3.1.1 As noted in the Review Group's Discussion Document on Competition Law,¹⁵ Community competition law is a fundamental backdrop to any discussion of national competition law. Ultimately any national competition law must be both consistent with and accommodate Community competition law. The pace of reform at Community level is increasing. Since January 1998, full function co-operative joint ventures which had previously been dealt with as part of competition law under Regulation 17¹⁶ are now dealt with under the Merger Regulation as revised.¹⁷ Secondly, Article 4(2) of Regulation 17 was amended in June 1999 with the result that a wide variety of vertical agreements will no longer require notification in order to obtain an exemption under Article 81(3). This reflects the increasing perception that vertical agreements, in their nature, have less potential to be harmful to competition than horizontal agreements. The Commission has also proposed a block exemption which would exempt a wide variety of vertical restraints which might otherwise have required notification. Perhaps most significantly of all, the Commission has made a series of proposals, some of them quite radical, in the White Paper on the Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty. In its Discussion Document, the Review Group noted in particular that the Commission proposed to switch to a directly applicable exemption system under which national courts or authorities (as the case may be) would decide on the compatibility of agreements with Article 81. The current system of notification to the Commission would thus, for the most part, be swept away.

¹⁵ Proposals for Discussion in Relation to Competition Law, September, 1999

¹⁶ Council Regulation Number 17/62.

¹⁷ Council Regulation Number 1061/89 (30th December, 1989).

3.1.2 The proposals in the White Paper have been the subject of considerable comment, much of it since the Review Group published its Discussion Document. A consultation process is currently under way and the final form of the proposals will no doubt be both amended and elaborated upon before any change is made. It seems unlikely that any such change will be implemented before 2003 at the earliest. For these reasons, the draft proposals made by the Group were made in the first instance in the context of the present regime but the Group pointed out that it would nonetheless be foolish to ignore the clear wishes of the Commission as stated in the White Paper.¹⁸ It is thus proposed to examine in somewhat more detail the impact which proposals like those in the White Paper, if adopted, might have on the structure of Irish competition law.

¹⁸ Discussion Document, page 53.

3.2 The White Paper Proposals

3.2.1 The White Paper proposals are by now well known. For present purposes, the essential points are as follows.

- Instead of notifications being made to the Commission with a view to obtaining a negative clearance or an exemption, national courts or authorities, before which the applicability of Article 81(1) was invoked, would also consider Article 81(3) in deciding whether or not to prohibit the agreement etc. in question.
- Agreements or restrictive practices which meet the conditions of Article 81(3) would be valid. Insofar as national competition authorities do not already have the power to apply and enforce Community competition law, such authorities should be given this power.
- A new type of block exemption regulation, which will not be based on a detailed account of prohibited clauses in an agreement, but which will provide a general exemption for all agreements and all clauses in a given category subject only to a list of prohibited restrictions (“blacklisted clauses”) and a restriction of the benefit of the general exemption through a market share threshold criterion.¹⁹
- The Commission would thus be freed to concentrate on taking action against the most serious infringements.

¹⁹ “The use of market share thresholds will allow the Commission to eliminate the straitjacket effect of the current regulations and to cover the vast majority of agreements, and in particular those concluded by small and medium sized undertakings.” White Paper, paragraph 78.

- It is proposed that the Commission would adopt guidelines and individual decisions to clarify the scope of application of Articles 81(1) and 81(3) outside the block exemptions.
- The prior authorisation requirement will be retained for partial-function production joint ventures.²⁰ The Merger Regulation would be extended to include partial-function production joint ventures.
- The Commission would continue to have exclusive responsibility for regulations, notices, guidelines etc. and would act “*whenever necessary in order to ensure consistency and uniformity in the application of the competition rules*”.²¹
- National legislation would be unable to prohibit or vary the effects of agreements exempted by Community regulation.
- The Commission would retain the right to issue “*prohibition decisions*” in “*individual cases*” which “*would be great importance as precedents*”.²²
- The Commission would make provision for a procedure whereby it would note commitments entered into by the parties in respect of a given agreement and would render such commitments binding.

²⁰ “Operations of this kind generally require substantial investment and far reaching integration of operations, which makes it difficult to unravel them afterwards at the behest of a Competition Authority. For this particular category of transaction, therefore, effective supervision would probably be better served by a system of compulsory prior notification.” White Paper, paragraph 79.

²¹ White Paper, paragraph 84.

²² White Paper, paragraph 87. The White Paper goes on to say that the Commission should “*nevertheless be able to adopt individual decisions that are not prohibition decisions*” and, with a view to giving the market guidance with regard to restrictions in certain agreements, “*positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest*” which decisions would be to the effect that the agreement is compatible with Article 81 as a whole. These “*positive decisions*” would “*be of a declaratory nature and would have the same legal effect as negative clearance decisions have as present*”. White Paper, paragraphs 88 and 89.

- The Commission envisages that all the national competition authorities would work closely together and should be in a position to pass files from one national competition authority to another (including any confidential information) “*that might be used in procedures for infringement of the Community competition rules*”.²³
- National authorities would have to be able to withdraw the benefit of a block exemption if their own territory, or part of it, constituted a separate market.
- A number of proposals, based on what might be termed rational co-operation, are discussed with a view to eliminating inconsistent decisions or procedures as between national competition authorities and the Commission or between national courts and the Commission.
- Procedures to improve the exchange of information and co-operation between national competition authorities, courts and the Commission are proposed including an obligation on national competition authorities to inform the Commission of cases in which national competition authorities propose to apply Articles 81 and 82.
- National courts would have to inform the Commission of cases in which Articles 81 and 82 are involved and the Commission would be allowed, with the leave of the Court, to intervene in judicial proceedings as an *amicus curiae*.
- The Commission reserves the right to take the case out of the jurisdiction of a national competition authority.
- It is proposed to strengthen the Commission’s powers of inquiry.

²³ White Paper, paragraph 92.

- 3.2.2 It can be seen therefore that it is an over-simplification to suggest that the application and interpretation of Article 81 will now become exclusively a matter for national courts and national authorities (subject to references to the European Court of Justice) or to suggest that there will no longer be any scope for the Commission to grant any form of exemption.²⁴ In particular, the negative clearance seems to live on in the guise of a “positive decision”.
- 3.2.3 There is widespread agreement that reform of the existing notification system is needed. The Commission itself argues for this partly on the basis that it should be freed from the burden of a flood of notifications, many of which are comparatively innocuous, and that it should concentrate its resources on investigation and enforcement. There is broad agreement with this policy objective although some commentators have questioned if the burden of notifications is in fact as great as the Commission maintains. Since 1989, the annual number of notifications to the Commission under Article 81 has varied between 210 and 230. In recent years there have, in fact, been more notifications under the Merger Regulation which notifications have, for the most part, been dealt with speedily and efficiently. Whatever the merit of the Commission’s concern about its own administrative burden, there does nonetheless appear to be widespread agreement that the principles of what might be termed self-assessment and decentralisation have much to commend them. But reservations have been expressed, principally in relation to the apprehension that the proposals will diminish legal certainty and will decrease the uniform application of Community competition law, especially with the advent of new member states, many of whom have little or no competition culture and some of which come from a background of command economies. Since some of these concerns are relevant both to the appropriate response to the proposals in an Irish context, and to the structure of the national system of

²⁴ In the observations made to the Commission on the White Paper, some Member States have expressed the view that the Commission’s proposed power to give “positive decisions” is difficult to reconcile with a legal exception system. Five Member States are of the view that national competition authorities should have a more general right to adopt positive decisions whereas four Member States are explicitly against a right for national authorities to adopt positive decisions. Two Member States consider that it is difficult to distinguish positive decisions from other types of decisions such as rejection of complaints that may be based on Article 81(3). See the Commission’s *Summary of Observations Received on the White Paper*, paragraph 4.4, page 11.

competition regulation and enforcement, the basic concerns are summarised below.

3.3 Concerns about the White Paper

3.3.1 The Commission's proposals have attracted criticism on the grounds

- that they open the way to potentially conflicting interpretations of Community law as between different national courts and authorities;
- that a national court is not a suitable forum for arguing the economic issues which arise, particularly in adversarial systems;
- that the type of decentralisation envisaged will lead to conflicts of jurisdiction;
- that the inability to notify and obtain an exemption or even a comfort letter removes a vital ingredient of legal certainty that currently exists; and
- that the Commission's proposals in relation to investigations do not pay sufficient attention to the necessity for fairness and due process and may even be in breach of the European Convention on Human Rights.²⁵

3.3.2 It is proposed to discuss these concerns under the general headings of legal certainty and the risk of a lack of uniform application of Community law.

Legal Certainty

3.3.3 The reluctance of the Commission to adopt a "rule of reason" interpretation to Article 81(1)²⁶ has meant that a vast range of agreements etc. which may have no particular anti-competitive consequences, nonetheless technically violate

²⁵ The Commission published a summary of the observations it received on the White Paper in February 2000.

²⁶ See Discussion Document pages 55-56 and pages 106-111. See also Section 3.9 of this Report.

Article 81(1). This uncertainty can be resolved by notifying the agreement in question to the Commission and obtaining the certainty which flows from either a negative clearance or an exemption under Article 81(3). It is argued that if this facility is taken away, then undertakings will be thrown back to an even greater extent on the advice from their lawyers where the mind which now has to be second guessed is not that of the Commission, with its relatively uniform and predictable approach, but rather that of individual judges in national courts.²⁷ It is argued that this level of uncertainty as to outcome is compounded by the risks and uncertainties which are attached to litigation in general, allied to the fact that unlike the notification system, a system which throws the resolution of these issues into the litigation machinery puts the ultimate loser at the risk of a substantial award of costs.

3.3.4 While the Commission argues that the body of case law which has been built up by the European Court of Justice allied to the Commission's own decisions creates a body of settled law, which should be capable of reasonably predictable application, the fact remains that the level of European jurisprudence in this area cannot begin to compare with, say, the extensive US jurisprudence in the field of anti-trust and that while the basic principles are quite clear, their application in individual cases remains problematic.

3.3.5 The proposed changes in relation to block exemptions also means that the precedent value of certain aspects of the old system may be limited. The Commission argues that under the current system, undertakings can block private actions before national courts and national competition authorities by referring agreements etc. in dispute to the Commission and thus inhibiting the speedy and effective enforcement of Community law. However, the Commission's own statistics as shown in its Annual Competition Report,

²⁷ Of the thirteen Member States who submitted observations to the Commission on the White Paper, eleven were explicitly in favour of decentralisation to national courts whereas two members were opposed. On the other hand, a significant majority of the responding companies and associations was opposed to decentralisation to national courts. The main concern with regard to decentralisation to national courts is their ability to apply Article 81(3) in a coherent and consistent manner. See Commission's *Summary of Observations on White Paper*, paragraphs 5.1 and 5.2, pages 13-15.

indicate that references to the Commission with a view to blocking private actions before national courts or authorities are comparatively rare.

3.3.6 Furthermore, a striking feature of the whole system of notification is the comparatively low number of notifications to the Commission and the very much smaller number of actual decisions issued by the Commission on foot of such notifications. Since 1979, there have been only 86 specific exemption decisions. Quite why this is so is not clear. It seems that the Commission has adopted a policy of only giving specific decisions on exemptions where it considers that there is a fundamental point at issue and where the decision will therefore, in the view of the Commission, have a profound precedent value. The Commission's concern to be "right" in such circumstances has meant that exemption decisions may only be issued some years after the original notification is made. This contrasts, for example, with the Commission's speed of operation under the Merger Regulation where it deals with an even greater number of notified mergers and gives decisions effectively and speedily and in a way which has met with general approval. The difference in the approach to notifications under Article 81 therefore seems not to much a consequence of some incapacity in the Commission itself but rather a deliberate policy approach to the question of exemptions.

3.3.7 The practical approach, which the Commission has adopted to most notifications seeking exemptions, is the "comfort letter" procedure, a procedure which has no particular legal basis but which suffices unto the purpose, by virtue of the authority of and respect for the Commission's views in this area. The comfort letter thus lives in a shadowland somewhere between legal and moral authority.²⁸

²⁸ *"The best reasons for notifying was therefore not to avoid fines, but to obtain a tactical advantage in the event that the other contracting party chose to try and evade its contractual obligations by arguing that EU competition law prohibited the deal. Thus, filing a notification which provoked no hostile reaction from DG IV was a means of attaining the moral higher ground in the event that a controversy arose. Most who notified did not hope to receive an exemption (unless they had been badly advised), and probably hoped not to receive an exemption, as this would only be accorded after commercially painful concessions. The sagacious notified in the hope that they would receive no reaction whatever. Thus notification was a means of perpetuating and protecting from challenges to agreements, rather than a means for the ultra-scrupulous of obtaining legal certainty."* Forrester, *Modernisation of EC*

3.3.8 The virtues of certainty under the notification system can therefore be over emphasised. Comfort letters give a high degree of comfort but fall short of certainty. Even Commission decisions on negative clearance or exemptions are not in themselves binding on national courts which may still decide that, notwithstanding a Commission exemption for a particular agreement, it is still prohibited under Article 81(1) or under any corresponding provision of national law (such as Section 4 of the Competition Act 1991) subject however to the duty of “sincere co-operation” between national courts and the Commission²⁹. The authority and expertise of the Commission in this area is such, however, that cases where national courts have given decisions directly contrary to Commission decisions are rare. The converse case is not quite so rare. A question argued before the European Court of Justice on the 15th of March 2000, consequent upon a reference from the Supreme Court of Ireland, was a question related to the fact that the Commission gave a decision in the dispute between HB Ice Cream and Masterfoods, concerning freezer cabinet exclusivity in Ireland which was directly contrary to a previous decision of the Irish High Court on the same issue. One of the questions referred by the Supreme Court was whether the duty of sincere co-operation between the Commission and national court required the Supreme Court to stay the appeal before it pending the appeal from the Commission decision to the CFI and ultimately to the ECJ.³⁰

3.3.9 A further curious feature of the Commission’s White Paper proposals is the relatively unclear description of circumstances under which the Commission will still reserve unto itself the right to take certain types of decisions. First, the White Paper speaks of ending the “*notification and authorisation system*”.³¹ The term “notification” is generally used in connection with a notification seeking an exemption under Article 81(3). If a negative clearance is sought, this is generally referred to as an “application” for a negative clearance. Thus,

Competition Law, 26th Annual Conference Fordham Corporate Law Institute, paper delivered 14th and 15th October, 1999, pp. 7-8.

²⁹ *Commission -v- Greece* (1989) ECR 2965 at 2984.

³⁰ *Masterfoods Limited v HB Ice Cream Limited* (1993) ILRM 145. The Advocate General is due to give his opinion on 16th May 2000.

³¹ White Paper, para 75.

while proposing to do away with the system of notifications seeking exemptions, it is not clear if the Commission envisages that parties to an agreement could still apply for a negative clearance.

3.3.10 Secondly, the Commission makes reference to a proposal that “*it should nevertheless be able to adopt individual decisions that are not prohibition decisions*” which would only be taken in exceptional cases where a transaction raises a new question and where it is necessary to provide the market with guidance.³² This seems to echo the language which the Commission uses in its current forms of application for negative clearance which state that the Commission only gives a negative clearance decision where an important problem of interpretation has to be solved.

3.3.11 Thirdly, the Commission seems to contemplate that it would make provision in the new regulation which would apply Articles 81 and 82 for “*a new kind of individual decision, subject to the ordinary publication requirements, in which the Commission would take note of the commitments entered into by the parties and render them binding.*”³³

3.3.12 Thus, it appears that the Commission contemplates three types of decisions under the system proposed in the White Paper - negative decisions, positive decisions and conditional decisions. Positive decisions are stated to have the same legal effect as negative clearance decisions³⁴. Since such decisions are not binding on national courts or national authorities, the potential for conflict and uncertainty remains. Negative decisions are decisions prohibiting certain practices and the Commission states that “*the number of individual prohibition decisions can be expected to increase substantially.*”³⁵ Conditional decisions are those incorporating commitments as binding commitments although the procedure and the circumstances under which such commitments would come to be offered to the Commission are not clear. Comfort letters, while

³² White Paper, para 88.

³³ White Paper, para 90.

³⁴ White Paper, para 89.

³⁵ White Paper, para 87.

mentioned in the White Paper, are not discussed as part of the new system and no role seems to be envisaged for them.

- 3.3.13 It is for reasons such as this that some commentators have both suggested that the White Paper does continue to envisage some form of limited notification system whose details have not yet been spelt out and have criticised the proposals as contributing substantially to uncertainty.³⁶

Risk to Uniform Application of Community Law

- 3.3.14 Inherent in the decentralisation proposal of the White Paper is the notion that national courts and national competition authorities must take much greater responsibility for directly enforcing Community competition law. The Commission clearly sees the courts in particular as having a crucial role in this regard, not least because national courts (unlike national competition authorities) can refer questions of interpretation of Community legislation to the European Court of Justice under Article 234 (ex177) of the Treaty. The Commission clearly sees this as the mechanism by which the risk of divergent

³⁶ See, for example, Siragusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*, Fordham Corporate Law Institute, 26th Annual Conference, paper delivered 15th/16th of October 1999: “*The White Paper does not seem to exclude the possibility that the Commission could still decide on difficult cases that contain problems not previously decided on if it becomes aware of them (in whatever way). However, for undertakings that are faced with significant financial exposure, the mere possibility of the Commission’s intervention if the case is deemed sufficiently ‘novel’ (or high profile) is simply not sufficient. Companies need a minimum degree of legal certainty, which they can find only if there is a procedure through which they can trust that the Commission will take a view on their agreement, and do so within a reasonable time frame. Otherwise, uncertain whether they will be able to obtain a binding decision by the Commission, companies might be induced to give up their agreement or try to fit it into the straitjacket of existing case law or block exemptions. That cannot be the purpose of a reform of the system.*” p.12-13. A similar view is taken by Forrester: “*It seems to me that a well functioning notification system confers benefits on both the Competition Authority and the private party. The problem in Brussels is, I submit, not the concept of a notification system but the fact that the existing system does not function rationally. Too many notifications are called for by the current interpretation of Article[81(1)]; too many trivial matters are therefore notified, out of needless fear of being fined; some notifications are recommended with a view to earning fees for their drafting; the exemption procedure is ridiculously burdensome as a response to a simple request for guidance; and silence by the Commission is falsely represented as proving official approval. Deadlines would cure many of these problems. However, it should be noted that if we are designing a new regulatory map, nothing requires that the Commission itself handle every notification. It could send notifications for consideration to an appropriate National Authority, or it could send the notification back as raising no significant competition law issues; or it could respond within two months or within four months, depending on the difficulty of the matter.*” Forrester, *op.cit.*, p.23-24.

interpretations of Community competition law can be minimised. Thus, in a speech given to a meeting of the Committee on Economic and Monetary Affairs of the European Parliament on the 11th of January, 2000, the European Commissioner for Competition Policy, Mario Monti, stated:

“The Commission as guardian of the Treaty considers that it is of the utmost importance to ensure that the reform of competition rules does not lead to a renationalisation of competition policy. Its proposal should in fact lead to the opposite. It will reduce the application of national competition laws and promote the application of one set of rules in the whole Community: EC competition law. The risk of inconsistent application of that set of rules in a system of parallel competences can be solved by appropriate means. It is clear however that the application of one set of rules is a better guarantee for a uniform application than the parallel enforcement of fifteen different national standards.

As regards national courts, the proposal brings Article 81 in line with other areas of law where national courts play an essential role in enforcement, always however under the control and supervision of the Court of Justice. The EC Competition rules entail individual rights which can only be efficiently protected by courts, and not by competition authorities.”

3.3.15 However “the appropriate means” to prevent inconsistent application of Community law are not spelled out anywhere (other than the Article 234 procedure). The reality is that different member states have different legal systems, some of which may be more suitable than others to the type of economic inquiry contemplated by the decentralisation proposal. Member states have, in truth, different approaches to competition policy and place a different value on competition law as compared one with the other. The level of knowledge of competition law among judges varies considerably not only as between judges in different member states, but even between judges in any single given member state. These difficulties are compounded by the arrival of new member states, many of whom have little or no tradition of the sort of economic values reflected in Community competition law.³⁷

³⁷ See generally Fingleton, Fox, Nevin and Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research (1996). This book is

3.3.16 To minimise this risk of potentially inconsistent decisions as between the Commission and a national competition authority, the White Paper proposes a variety of somewhat informal co-operation procedures which may be briefly summarised as follows.

- An obligation on national competition authorities to keep the Commission informed of on-going cases;
- The issue by the Commission of guidance in the form of the various decisions which it contemplates it will be able to give in the new system;
- The reservation to the Commission of the right to withdraw cases from national competition authorities where appropriate;
- Participation by the Commission in proceedings before the European Court of Justice on foot of a reference from a National Court.
- Intervention by the Commission as *amicus curiae* in national court proceedings.

3.3.17 There is no doubt that such procedures will be helpful and will assist in minimising conflicts that may otherwise arise (although one can readily envisage difficulties with the suggestion that the Commission would get involved in private litigation at national level). But a number of commentators have pointed out that such procedures in themselves cannot resolve some of the conflicts which will inevitably arise, particularly in the case of transactions with significant cross-border effects. One or more of the parties to a given agreement may choose to notify the agreement to their own competition authority where such a notification procedure remains a feature of national law.

a revised edition of a report commissioned by the Directorate General for Economic and Financial Affairs (DG II) of the European Commission although it is not an official publication of the Commission.

Alternatively, the legality of the agreement may be tested before national competition authorities (where the national system permits a national competition authority to play that kind of judicial role) or before national courts. These authorities and courts in different jurisdictions may well give different decisions on the same agreement. Or, different authorities may sanction the agreement with different conditions attached. Decisions of national competition authorities are only binding within their own national boundaries, and since, national competition authorities are not a court or tribunal within the meaning of Article 234, the reconciliation mechanism afforded by a reference to the European Court of Justice is not available. In jurisdictions where appeals are possible from national competition authorities to either an appeal tribunal or a court (from which references to the European Court of Justice may then be possible), an agreement may get enmeshed in a variety of different procedures in different jurisdictions, some of which may take several years. When parties are contemplating making notifications to competition authorities (if and insofar as such procedures still remain a feature of national laws) or if parties are contemplating issuing proceedings in relation to an agreement etc. in a court, they will inevitably engage in “forum shopping” in an effort to pick the authority or court they think will be most favourable to their point of view.

3.3.18 While the White Paper mentions the possibility of conflict between national competition authorities and the Commission, it contains little if any discussion of the problems sketched above in relation of the possibility of conflicts between different national competition authorities and between the decisions of courts in different jurisdictions.

3.3.19 If decentralisation is to work, a solution to these problems will undoubtedly have to be found. In particular, a set of jurisdictional rules will have to be devised, some of which are already in place in the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (“the Brussels Convention”). The Brussels Convention provides a series of rules in relation to different types of actions as to which court is the appropriate court to have jurisdiction over the dispute. Assuming a court does

have jurisdiction over the dispute, then the court before which the proceedings are first issued is the court which then obtains exclusive jurisdiction over the dispute, notwithstanding that another court in another jurisdiction might equally have had jurisdiction if the proceedings had come before that court earlier in time. This rule only applies to actions between the same parties. Thus, a particular agreement might be challenged in a German court by a German competitor adversely affected by it and the same agreement might be challenged in an Irish court by an Irish competitor also adversely affected by it. Since those proceedings would involve different parties, neither court would have exclusive jurisdiction. Although the Brussels Convention does give a discretion to national courts to stay proceedings before them pending the outcome of hearings in related matters in another country (so that the Irish court might, in its discretion stay the proceedings before it pending the outcome of the German proceedings), this is entirely a matter for the discretion of the court and there can be no assurance that either court will stay its own proceedings pending the decision from the other court.

3.3.20 The solution to such problems are matters beyond the remit of the Review Group as they can only be resolved at Community level.³⁸ However, this brief

³⁸ The papers delivered at the Fordham Corporate Law Institute's 26th Annual Conference on International Anti-trust Law and Policy in October 1999 contain a number of interesting suggestions in this regard. See in particular Kon, *The Commission's White Paper on Modernisation: The Need for Procedural Harmonisation*: ("The conversion of the Commission to decentralised enforcement should not mask the very serious difficulties and obstacles to effective direct application of Article 81 by the national courts. Litigating competition law before national courts can be a harrowing process, which (based on experience before most EU national courts) does not generally provide an effective means for protecting individual rights" (p.5); Forrester, *op. cit.*: ("The Commission appears to consider that since it can always intervene to prohibit agreements subject only to the principle of *res judicata* that applies to the dispute between the parties themselves, the risk of fragmentation and diversity of outcome can be reduced. I have to say that I doubt the Commission could avoid that risk without expending huge amounts of time, monitoring national cases so closely that it has insufficient resources to pursue the big problems it wishes to concentrate on" (p.35); Braakman, *The Application of the Modernised Rules Implementing Articles 81 and 82 EC Treaty in Injunction Proceedings: Problems and Possible Solutions*; Mersing, *The Modernisation of EC Competition Law - the Need for a Common Competition Culture*: ("The decentralisation of the enforcement of EC competition law, and the creation of what could be called a 'two tier system' has to include rules providing for a clear allocation of cases between the Commission and national competition authorities. The present guidelines in the Co-operation Notice, although based in theory on a straightforward notion of 'the centre of gravity', are inadequate when it comes to ensuring a sufficient degree of legal certainty in terms of case allocation....Ultimately, in a system where national competition laws already have or may be assumed to become harmonised with the EC rules, the objective of rules for allocation of cases should be not only the allocation itself, but should also provide some kind of one-stop-shop

sketch of some of the problems which commentators have perceived with the White Paper proposals should not disguise the fact that the Commission's willingness to give up its exclusive right to grant exemptions under Article 81(3) has been generally welcomed as has the proposed shift to a directly applicable system in principle. But what the final shape of reform will be is impossible to say at present. The extent to which some form of notification to the Commission (whether for something equivalent to negative clearances or otherwise) will remain a feature of the system is unclear. The particular solutions which may be adopted to the various problems outlined above will have significant repercussions for the structure of national competition law and the role of national competition authorities. The final outcome of the process of dialogue and debate currently going on at Community level is likely to be at least three years away. For this reason, the Review Group remains of the view that it should approach its task on basis of the system as it currently exists but at the same time having regard to the likely impact of a shift to a decentralised and directly applicable system of Community competition law. Such a shift would have implications in particular for the respective roles, functions, competencies and jurisdiction of the High Court and the Competition Authority. The Review Group has taken these issues into account in the formulation of its final recommendations.

principle which could simplify the number of competition law systems applicable to a given subject matter. As a minimum, such rules for allocation should introduce the one-stop-shop principle in respect of those cases being allocated so as to exclude the simultaneous application of national competition law" (p.21-23). Siragusa, A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules (suggesting an option of voluntary notification and suggesting that complaints should be lodged with the Commission who would then allocate them to the national competition authority it thought best fitted for the problem); Wolf, Comment on the White Paper on the Reform of EC Competition Law (a highly critical commentary from the President of the Bundeskartellamt questioning as to why the Commission cannot deal with the two hundred or so notifications it receives each year and stressing the value of certainty in a notification/exemption system).

3.4 The Extent to which the Competition Authority should be Empowered to Apply Articles 81 and 82 of the Treaty

3.4.1 The Review Group's interim recommendation was as follows:

Interim recommendation: The Competition Acts 1991-1996 should be amended so as to empower the Competition Authority to apply any rules of Community law which form part of Community competition law insofar as such rules, as a matter of Community law may be applied by a national authority.

3.4.2 The arguments for and against this recommendation were summarised in particular on pages 61-71 of the Discussion Document on Competition Law. The arguments in favour of the recommendation revolved, in particular, around the necessity to bring national competition law, policy and procedure as closely in line with Community principles as possible and to minimise potential conflicts between national decision and decisions at Community level.

3.4.3 In the submissions made to the Review Group consequent on the publication of its Discussion Document on Competition Law, no party has argued against this recommendation and a number have supported it.³⁹

3.4.4 It is also clear that if the fundamentals of the White Paper proposals are adopted, then insofar as the Competition Authority is given any adjudicatory role (as well as its enforcement role), it must be empowered to apply

³⁹ The Competition Authority have commented that they disagree with the Review Group's "*interpretation*" but the point is not pursued in the text of the Competition Authority's submission to which this comment is related. It may be that the Competition Authority is making a point, with which the Review Group agrees, that if the notification/authorisation system is dismantled at Community level to a greater or lesser extent, the role of the Competition Authority itself in directly applying Community law may be altered. This point is explored further in the text.

Community law. The White Paper itself expressly proposes this.⁴⁰ This point has being echoed with approval by a number of commentators.⁴¹

3.4.5 The Review Group thus makes the following recommendation.

Recommendation: The Competition Acts 1991-1996 should be amended so as to empower the Competition Authority to apply any rules of Community law which form part of Community competition law insofar as such rules, as a matter of Community law, may be applied by a national authority.

⁴⁰ “To allow the role of the national authorities to be strengthened in this way, Regulation No.17 would have to be amended to remove the monopoly of exemption and to make it quite clear that any authority considering a case of application of Article [81] must consider that the tests for exemption are satisfied. If this reform is really to improve the application of the competition rules, the seven member states that have not yet done so will have to empower their competition authorities to apply Community law.” White Paper, paragraph 94.

⁴¹ See, for example, Mersing, *op.cit.*, p.16-17 emphasising that national competition authorities should be trusted with the powers to apply Articles 81 and 82 in order to create consistency and legal certainty and to minimise forum shopping. John Temple Lang has consistently advocated the giving to national authorities the power to directly apply Community law. See Discussion Document, p.61-64. Note however that a number of the submissions from industry and lawyers made to the Commission on the White Paper expressed doubts as to the capacity of national authorities to apply Community law, considering that decentralisation will lead to a re-nationalisation of competition law because national authorities will take national interest into account. The parties who made this point expressed a fear that national authorities are less independent than the Commission and are more sensitive to political pressure. They stress the lack of resources of some of the authorities and the translation problems that will emerge in the network. See Commission’s *Summary of Observations on the White Paper*, paragraph 6.1, point 1, page 18.

3.5 The Role of the Competition Authority and the Courts in the Event of a Directly Applicable System Being Adopted

- 3.5.1 The Review Group considers it worthwhile to discuss the likely consequences for the respective responsibilities of the Competition Authority and the courts in the event that a directly applicable system, along the lines of the White Paper, is adopted. Its recommendations in this context are only in the nature of principles to be considered since the precise form of legislative response to the ultimate introduction of any directly applicable system will depend on both the principle and detail of such system in its final form.
- 3.5.2 Let us assume that the notification/exemption system currently operated through Regulation 17 is abolished at Community level. It is true that it may still be possible to apply to the Commission for a negative clearance in relation to an agreement etc. It would also seem, from the discussion in the White Paper, that it may be possible to make some sort of notification or application to the Commission in relation to agreements which raise very fundamental points of law or policy, although it is not clear how such a process would function. For the purpose of the present discussion however, the possibility of some form of notification or application to the Commission continuing to subsist is disregarded. This at least has the benefit of putting the issues which arise in relation to the appropriate Irish legislative response in its starkest form.
- 3.5.3 The fundamental source of difficulty in formulating an appropriate legislative response is the constitutional requirement that justice be administered only in courts.⁴² However, it is permissible for bodies which are not courts to exercise limited functions and powers of a judicial nature in matters other than criminal matters. Thus, Article 37.1 of the Constitution provides:

⁴² Article 34.1 of the Constitution of Ireland.

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such a person or such a body or persons is not a judge or a court appointed or established as such under this Constitution.”

3.5.4 The instinctive reaction to a fundamental change in the structure of Community competition law is to mirror that change as a matter of domestic legislation. The Competition Act 1991, although a “*stand alone*” piece of domestic legislation is nonetheless expressly stated in the recital to be enacted “*by analogy*” with what are now Articles 81 and 82 of the Treaty and to a very large extent, Irish courts have interpreted Sections 4 and 5 in accordance with the jurisprudence of the European Court of Justice in relation to Articles 81 and 82⁴³.

3.5.5 It is, of course, currently the case that certificates from the Competition Authority that Section 4 does not apply - the domestic equivalent to negative clearances - are administrative decisions which are not binding on the court. For example, if the court concludes that an agreement is in fact in breach of section 4(1), any certificate issued by the Competition Authority to the contrary ceases to have effect from the date of the court order.⁴⁴ A licence on the other hand has a more independent existence in that while it is in force, it permits the doing of acts which would otherwise be prohibited and void under Section 4(1).⁴⁵ Thus, the notification/licence system currently operative in relation to the Competition Authority (and the Authority’s power to issue category licences) serves the function of enabling a broad range of issues of compatibility of agreements with competition law to be resolved without

⁴³ The decision of Keane J in *Masterfoods Ltd v HB Ice Cream Ltd* (1993) ILRM 145 more expressly adopts a “*rule of reason*” analysis in relation to Section 4 than the European Court of Justice has done in relation to Article 81. However, this seems to be a largely a difference of terminology rather than substance in that the European Court of Justice has increasingly adopted, for all practical purposes, a rule of reason approach to Article 81 even though this has been resisted by the Commission in the past. See, for example, *Pronuptia de Paris -v- Schillgalis* (1986) ECR 353; *Gottrup Klim* (1994) I ECR 5641. It is perhaps ironic that the White Paper proposals can be regarded as the ultimate endorsement of a rule of reason approach to Article 81 as a whole.

⁴⁴ Section 6(5)(a) of the Competition Act 1991.

⁴⁵ Section 4(3)(a) of the 1991 Act.

recourse to the courts and to be resolved by a body, which, by definition, has a specialised expertise not necessarily possessed by the court.

3.5.6 The body of decisions and category licences issued by the Competition Authority in themselves form a valuable precedent and guide for businesses as to what is and is not likely to be acceptable from the perception of competition law. As noted above in relation to the discussion on the White Paper, a notification system also has the benefit of providing a mechanism by which parties to an agreement can achieve at least relative certainty that their agreements are valid and unlikely to be upset by court actions taken by competitors or others (or indeed one of the other parties to the agreement who may wish to renege on it). The benefits of such a system should not therefore be lightly dismissed.

3.5.7 On the other hand, the number of notifications to the Competition Authority has declined in recent years, as noted in the Review Group's Discussion Document on Competition Law.⁴⁶ The notification obligation can never be in itself a mechanism for the enforcement of competition law since agreements which constitute the most serious breaches of competition law (cartels and price fixing) will almost certainly not be notified. Some commentators have also argued that to retain a national notification system, if such a system is abolished at Community level, only presents a further obstacle to the uniform application of Community law. Thus, Mersing comments:

"It is possible that some Member States might be tempted to abandon the EC-conformity and e.g. maintain the notification system in the old form. It is, however, difficult to say anything positive about such a model. First, it would be a paradox that the outdated EC notification system could get a "life after death" in the national competition laws - modelled on EC law. Second, such a model would remove the national law from EC competition law, which would be completely out of step with the prevailing trend towards EC conformity in this field. Third, the creation of such a two track system would not only complicate, the competition law systems instead of modernising and simplifying them; it will

⁴⁶ See p.47.

*also provide room for legal uncertainty and inconsistencies in the application of the decentralised EC competition law.*⁴⁷

3.5.8 Although this seems to the Review Group to have considerably force (on the assumption that the debate about the merits of the notification system at Community level is won by its opponents)⁴⁸ in the Irish context, the scrutiny of the compatibility of agreements with Section 4 would then shift exclusively to the courts. This highlights the question of whether the court is in fact the best forum for the resolution of these disputes. Most judges would probably answer this question in the negative. With some exceptions, judges for the most part do not have a professional training in economics or other disciplines relevant to the type of evaluation and micro-economic arguments involved in assessing agreements from a competition law perspective. Courts are on more familiar territory when dealing with questions of procedural fairness and due process in the procedures carried out by an administrative body such as the Competition Authority (as distinct from evaluating the substantive merits of the points at issue although courts in practice are often called upon to do just that under the guise of tests such as “reasonableness” or “irrationality”). The requirement for facts to be proved in civil matters on the balance of probabilities, in accordance with rules of evidence, which were designed to filter out unreliable evidence in much simpler types of disputes, makes the process more difficult and lengthy before a court, through no fault of either the lawyers or the judges. There is therefore a strong argument for saying that

⁴⁷ Mersing, *op.cit.*, p.19-20.

⁴⁸ Note in particular that Siragusa argues that decentralisation and the introduction of a directly applicable system is not in fact inconsistent with a continuing option to voluntarily notify agreements when guidance is needed from a national Competition Authority (or the Commission) as to the compatibility of an agreement with Article 81. “*There will continue to be cases in which undertakings have a legitimate interest in obtaining legal certainty about their agreements if they do not fall into any of the clear categories defined by block exemptions or Commission decisions and require significant investments or are expected to attract strong complaints. Companies must have the option of notifying these agreements and the Commission should be obliged to deal with them in a reasonable time frame. In the case of production joint ventures the Commission itself recognises that the fact that an agreement is the basis for significant investments may require that there be option to notify to have its validity examined ex ante.*” Siragusa, *op.cit.*, p.19-20, referring to the White Paper, para. 79.

disputes of this nature should be resolved by a specialist body rather than a court.⁴⁹

3.5.9 For these sort of reasons, the UK Competition Act 1998 leaves the substantive decision making at one level below the court with a right of appeal to the court only on a point of law. Thus, the Director General of Fair Trading (“the Director”) can carry out an investigation as to whether there has been a breach of the UK Competition Act and can impose penalties for infringement. There is however a right of appeal from the Director’s decision to the body now known as the Competition Commission.⁵⁰ The President of the Competition Commission will appoint certain members of the Commission to hear the appeal, which members then sit as the “Competition Commission Appeal Tribunal”. The Chairperson of the Tribunal must be a lawyer and the other members will have other relevant experience and expertise. The Competition Commission Appeal Tribunal then rehears the case entirely on its merits and must give a reasoned decision which is published. Its decisions are enforceable as if they were decisions of the Director. The only further right of appeal is to the UK Court of Appeal on points of law and on the levels of the penalty.

3.5.10 There are certain attractions in such a system although the multi-layered structure can be cumbersome. However, consideration could be given to constituting the Competition Authority as the body which would adjudicate upon complaints of a breach of Section 4 or 5 of the Competition Act 1991.⁵¹ If, as recommended above, the Competition Authority was empowered to apply Articles 81 and 82, then the case could be made before the Competition Authority on the basis of Community as well as national law. Instead of criminal penalties, the Competition Authority would impose fines. One might then envisage an appeal to the High Court from the decision of the Competition Authority only on points of law and the amount of the fines (as

⁴⁹ Such bodies already exist in other fields - for example, the Employment Appeals Tribunal. Some of the problems referred to in this paragraph are discussed in Chapter 4 of this Report.

⁵⁰ The successor to the UK Monopolies and Merger Commission.

well as, of course, any challenge to the fairness of the procedure carried out by the Competition Authority by way of judicial review).

- 3.5.11 The difficulty, of course, with such a model, is its compatibility with the Constitution. The first casualty would be the criminal sanctions. Since there is no possibility (bar constitutional amendment) of any body other than a court making a finding of criminal conduct against any party, the Competition Authority could not be given the adjudicatory function under discussion.
- 3.5.12 If one was to assume that the criminal sanctions were removed, there is then the possibility that such an adjudicatory function could be constitutionally justified as being the exercise of a judicial power of a limited nature within the meaning of Article of 37.1 of the Constitution. Whether, however, it would in truth be a judicial power of a “limited nature” is open to question, bearing in mind the very substantial fines that the Competition Authority would (on this model) be empowered to impose. Indeed, the very existence of those fines might be sufficient to characterise the process as criminal in nature even if it was not so expressly described. On the other hand, if the Competition Authority merely recommended a fine and an application had to be made to court to actually fix and impose the fine, the Constitutional difficulty might be eased.
- 3.5.13 A possible solution to these difficulties might be to permit the Competition Authority to receive evidence and submissions, if necessary hear witnesses (and have them examined and cross-examined and so forth) and to then adjudicate on the facts of the case which facts would then be published in the form of a written report. This report would then be transmitted to the High Court which would then hear the argument on behalf of the parties as to whether or not the facts, as found by the Competition Authority, amounted to a breach of Sections 4 or 5 (or Articles 81 or 82) and if so, what the appropriate remedy should be. In that context, there might have to be

⁵¹ In Chapter 4 a modified version of this structure is recommended albeit on an optional basis to surmount the constitutional difficulties in giving an adjudicatory vote to the Competition Authority.

significant evidence in relation to the quantum of damages. However, there would be nothing unusual or unfamiliar to the court about such an assessment.

- 3.5.14 Of course, under any such system, the Competition Authority could not retain a role as an enforcement agency and the enforcement of competition law would have to be carried out by a separate agency or perhaps by a single Director of Competition Enforcement, who would be entirely independent of the Competition Authority and who would have his or her own staff and resources.⁵²
- 3.5.15 The alternative is to leave the criminal sanctions in place, leave the Competition Authority with its enforcement role and leave all issues of a breach of Sections 4 and 5 (or Articles 81 or 82) to be decided by the courts in the ordinary way. The Competition Authority would be simply freed of the burden of dealing with notifications under Section 4 and could further concentrate its energies on enforcement.
- 3.5.16 The prospect of having all such matters in front of the court may not be as dismaying as it might first seem. First, despite the fact that many judges lack specialised knowledge or experience of economics and competition law, that is inevitably true in a wide variety of disputes upon which judges are called upon to adjudicate. Cases of medical negligence, industrial accidents, patents and trademarks, environmental pollution, telecommunications and so forth often involve very highly specialised expert evidence which lawyers and judges have to master. A perusal of the law reports will disclose what at times is an impressive grasp of the very complex technical material by a judge. In the field of competition law itself, the comparatively few cases that have come before the courts have shown the judges are well able to grasp and deal with the issues involved. An enhanced use of existing court procedures such as the notice to admit facts, notice to admit documents and serving of interrogatories can go a long way in a complex case to eliminating evidential difficulties and shortening the length of the hearing. In addition, some recommendations are

made later in this report in relation to an amendment to the rules of evidence and the use of assessors in relation to competition law cases.

3.5.17 The concern remains however that whatever changes may be made to procedural rules or the rules of evidence, however lucid the expert testimony and however focused and knowledgeable the judge, the very nature of the type of decision which has to be made under section 4 or Article 81 is inherently unsuitable for decision by a court. Agreements fall to be analysed not by reference to the meaning of words used or by a consideration of alleged misrepresentations which induced the parties to enter into the agreement or by reference to some feature which is alleged to invalidate the entirety of the agreement, all of which are typical legal issues with which judges are familiar. Instead, judges will be asked to decide whether or not the agreement in question contributes to improving the production or distribution of goods; or whether the agreement promotes technical or economic progress or whether it allows consumers a fair share of the resulting benefit but nonetheless does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.⁵³

3.5.18 Empowering the Competition Authority to apply Community law (and thus, for example, to adjudicate on a notification as to whether or not the agreement conformed to the criteria for exemption in Article 81(3)) will not in itself produce any particularly radical change in practice in the Irish context. Actions for breaches of sections 4 and 5 will still have to be taken in courts. But a much more curious situation will arise if the White Paper proposals are adopted and if regulation 17/62 is amended so as to require Member States to empower their national competition authorities to apply Community Law. If, simultaneously, the notification/exemption system is abolished, then presumably the Competition Authority will be put in a position to adjudicate upon the question of whether a breach of Article 81 or 82 has occurred in any particular case. Furthermore, it may be entitled to adjudicate upon such issues

⁵² Equally, of course, the Competition Authority could be given the enforcement role and the adjudicatory function given to a new body, a type of Competition Tribunal.

⁵³ Article 81(3).

in a way which will bind the parties i.e. determine their rights (rather than having to go to court to do this). Normally, of course, this would give rise to a constitutional difficulty because the administration of justice can only be carried out by courts. But if in fact the empowerment of the Competition Authority to directly apply Community Law combined with the abolition of the notification/exemption system was a necessary consequence of whatever Commission regulation might be introduced to replace regulation 17, then it is arguable that the constitutional recognition of the primacy of Community law means that the exercise of any such adjudicatory function by the Competition Authority would no longer present a constitutional problem.

“Article 29.4.3 [of the Constitution] authorises Irish measures which would otherwise be unconstitutional if they are ‘necessitated by the obligations of membership of the Communities.’ This must mean (and was certainly intended to mean) necessitated objectively by the obligations of membership as determined by Community law.’ In other words, it enables the Irish authorities to do everything which Community law, correctly interpreted, might oblige them to do, but did not otherwise exempt them from the duty to respect the 1937 Constitution. It cannot be interpreted as meaning ‘necessitated by the obligations of membership of the Communities as ultimately judged subjectively by the Irish courts.’ It should not be misinterpreted in this way merely because of a fear that some day the two legal systems will conflict, and the Irish courts want to have the last word if that happens. In other words, Article 29.4.3 is a renvoi from the Constitution of Ireland to the constitutional law of the Community, and in particular to Article 5 [now 10]. To interpret Article 29.4.3, a reference to Luxembourg under Article [234] might be necessary.”⁵⁴

3.5.19 Where the constitutional uncertainty arises is whether a particular provision can be said to be “necessitated” by membership of the Community (as distinct from merely facilitating some aspect of membership or Community law). That issue can only be analysed properly when the replacement regulation for regulation 17 is ultimately published. But assuming that the giving of the power to apply Community Law to the Competition Authority is a matter

⁵⁴ John Temple Lang, *The Widening Scope of Constitutional Law* in Curtin and O’Keefe (eds.), *Constitutional Adjudication in European Community and National Law; Essays for the Honourable Mr. Justice TF O’Higgins* (1992), page 231.

which is necessitated by the obligations of membership of the Community and if the replacement for regulation 17 requires that national competition authorities should thus be able to adjudicate upon whether breaches of Articles 81 or 82 have occurred, then it would seem that the constitutional objection to the exercise of such a judicial power by the Competition Authority might well fall away.⁵⁵

3.5.20 On the other hand, while this might be true for the determination of whether a breach of Article 81 or 82 had occurred, it might not follow that the Competition Authority would be entitled to award damages (or even perhaps injunctions) because the granting of such remedies by the Competition Authority may not necessarily follow as a necessary consequence of the new regulation. Furthermore, it seems unlikely that it could be regarded as a necessary consequence of membership of the Community, no matter what powers are given to the Competition Authority to apply Articles 81 and 82, that the Competition Authority could necessarily have the power to convict persons of criminal offences since there is no concept of a criminal offence under Community Law (notwithstanding the penal nature of the fines which the Commission can impose which may require that procedures be adopted which give the sort of safeguards that one sometimes only finds in criminal law).

3.5.21 Another curious consequence which would flow from such a situation is that while the Competition Authority would be competent to adjudicate upon breaches of Articles 81 and 82, the point about the supremacy of Community Law would have no application to the interpretation of the Competition Act and so breaches of sections 4 and 5 would still have to be litigated in court. The relationship between the Competition Authority and the court would be further complicated by the role of the court in hearing appeals from decisions of the Competition Authority whether on points of law or otherwise or hearing applications for judicial review of decisions of the Competition Authority. It

⁵⁵ A thoughtful and incisive analysis of this type of issue can be found in Phelan, *Revolt or Revolution; the Constitutional Boundaries of the European Community* (1997) and in particular chapter 27 entitled "European Community Law in Irish Constitutional Law".

can be seen therefore that the White Paper proposals could produce an exceedingly complicated and tangled relationship between the Competition Authority and the national courts the solution to which cannot be productively analysed at this stage when neither the final shape nor the details of the ultimate reform of Community Law in this area are known.

- 3.5.22 One submission to the Review Group made the point that insofar as the notification system to the Commission may be abolished,⁵⁶ it may not automatically follow that the same approach should be adopted at national level. It was submitted to the Review Group that the present structure of the notification system is not of great practical value given that it affords no immunity to the notifying parties (bar a certain protection against damages) and imposes no time limits during which the Competition Authority must make its decision. That, it was submitted, may be one of the reasons why the number of notifications has declined in recent years although another welcome factor is, of course, the Competition Authority's publication of a number of category licences and certificates.
- 3.5.23 The point has however been made to the Review Group that even if changes are made at Community level which devolve more responsibility for the interpretation and enforcement of Community competition law to the national authorities, there may still be advantages in having a notification procedure under national law which would allow the Competition Authority to clarify, by means of its own decisions, the application of the law in individual cases.
- 3.5.24 It has been submitted to the Review Group that if the notification system under the Competition Acts were to be abolished, the Competition Authority should be encouraged (if necessary by legislative provision) to publish guidelines, studies and opinions as a means of communicating its views regarding the application of Irish competition law in relation to specific cases.

⁵⁶ It will be recalled that the White Paper proposals do not necessarily envisage the abolition of applications for negative clearance.

- 3.5.25 A frequent theme in the observations made to the Commission on the White Paper is that the Commission as a public service body has a duty to provide guidance to undertakings. In a resolution adopted by the European Parliament on the 18th January 2000⁵⁷ the European Parliament stated that in cases where clarification is in the general interest, it should remain possible for undertakings to obtain advance clarification from the Commission, inter alia by means of reasoned opinions although the procedure should be confined to exceptional cases in which doubts need to be solved. Many observations made the point that opinions should be issued in cases that raise difficult competition issues, particularly where large investments are involved.⁵⁸
- 3.5.26 There is clearly a tension between the desire to have a national law system which closely corresponds with and mirrors whatever may be the system adopted at Community level and the uncertainty which is produced by the lack of any mechanism by which undertakings can ascertain the validity of their agreements short of litigation. Judge John Cooke has recently expressed the point thus:

*“Two companies may conclude a contract with a restrictive effect but in the belief that they meet the conditions for exemption under Article 81(3). Whether they are correct in this belief may not become apparent until the contract has been in operation for several years and some disgruntled competitor decides to sue them in court or complain to the Competition Authority. In the meantime, the sword of invalidity hangs over their contract and there appears to be little they can do in the absence of a notification procedure to clarify their position except to fortify themselves with the advice of a reliable lawyer ...”*⁵⁹

- 3.5.27 As noted in the Review Group’s Discussion Document on Competition Law, the Review Group considers that the Competition Authority has a vital

⁵⁷ The Von Wogau Report.

⁵⁸ Commission’s *Summary of Observations Received on the White Paper*, paragraph 4.6, pages 12-13.

⁵⁹ Cooke, *Judicial Review of Competition Rulings: the Approach of the European Courts*, paper presented to the Faculty of Law, UCD/Competition Authority Conference on the White Paper and the development of competition at national and EU level, 12th November 1999, page 11. Judge Cooke is a judge of the Court of First Instance of the Community but the views he expressed in the paper were personal views.

function to perform in the advocacy of competition and the raising of public awareness of competition law and policy issues. The issue as to whether the notification system should in fact be abolished at Community level is, of course, part of the debate which has been sparked by the White Paper. While most members of the Review Group favour the White Paper proposals in this respect, provided adequate solutions are devised to the problems of legal certainty and the risk of a lack of uniform application of Community law, recommendations as to the future shape of Community law (as distinct from national law) are beyond the remit of the Review Group.

3.5.28 Thus, if at the time proposals along the lines of the White Paper are ultimately adopted by the Commission and the question arises as to the appropriate Irish legislative response, it seems to the Review Group that the response will be influenced by the extent to which, at that time, the Oireachtas is still of the view that breaches of the Competition Acts should be criminal offences; whether the enforcement function should remain with the Competition Authority; and the extent to which adjudicatory functions could be given to the Competition Authority. In any event, the recommendation made in this report, that a small panel of High Court judges be designated to deal with competition law cases who would thus build up the necessary expertise will be of particular importance. The success or otherwise of the elective hearing procedure before the Competition Authority which is the subject of a later recommendation of this Report will also influence the appropriate legislative response.

3.5.29 The Review Group thus recommends as follows.

Recommendation: The Review Group is of the view that it is premature to attempt to anticipate the ultimate form which the White Paper proposals may take and it is still less useful to attempt to formulate with any precision the appropriate national legislative response. The purpose of this recommendation is merely to indicate the sort of issues which the Review Group considers will be among the relevant issues to consider at the time. If the European

Commission replaces Regulation 17 to give effect to the type of decentralised directly applicable system contemplated by the Commission's White Paper on the Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty and if it requires Member States to empower national competition authorities to apply Community law, the following matters will need to be discussed.

1. Consideration should be given to constituting the Competition Authority as an adjudicatory body to hear and adjudicate upon complaints of a breach of Sections 4 and 5 of the Competition Act 1991 (as amended) and/or Articles 81 and 82 of the EC Treaty, within constitutional limits.
2. In that context, and with a view to ensuring that breaches of national and Community Law can be dealt with in a common procedure, and having regard to the constitutional limitations in entrusting an adjudicatory function in respect of national law to the Competition Authority, consideration should be given to the replacement of criminal sanctions with a system whereby the Competition Authority would recommend fines which would however be finally determined by the court. In that context, the function of the enforcement of competition law should be entrusted to a Director of Competition Law Enforcement, who would be entirely independent of the Competition Authority.
3. Consideration should be given to an alternative model of confining the adjudicatory function of the Competition Authority to ascertaining the facts, to be embodied in a report to be transmitted to the High Court, which would then decide upon the issue of whether any breach of the legislation had occurred and the consequences thereof.
4. If the Competition Authority can be satisfactorily reconstituted as an adjudicatory body in respect of national competition law, consideration should be given to abolishing the existing function of the Competition Authority in granting licences under Section 4 of the Competition Act 1991 to the extent and in accordance with changes made to the notification/exemption system currently operative under Regulation 17 at Community level.

3.6 Whether, in the case where an exemption or negative clearance (as the case may be) is granted by the Commission under Article 81, there should be any need to apply to the Competition Authority for a licence or certificate (as the case may be) under the Competition Act in relation to the agreement, decision, or practice in question.

3.6.1 The Review Group's interim recommendation in this respect was as follows.

Interim recommendation: The Competition Acts 1991-1996 should be amended to provide that any agreement, decision or concerted practice which might otherwise constitute a breach of Section 4(1) would be conclusively presumed not to be in breach of Section 4(1) if the agreement, decision or concerted practice in question came within the terms and conditions of any individual or block exemption which might be granted by the European Commission pursuant to Article 81(3) and that such an agreement, decision or concerted practice (as the case may be) need not be notified to the Competition Authority for so long as the Commission exemption in question remained in force and effect. Where there is or has been in force an exemption pursuant to Article 81(3) of the Treaty in relation to any agreement, decision or concerted practice and such exemption remains in force, a claimant would not be entitled to damages for any alleged breach of Section 4(1) of the Competition Act 1991 for any period when the exemption in question was in force and applicable to the agreement, decision or concerted practice in question.

3.6.2 The reasons for this recommendation are discussed in detail in the Discussion Document at pages 71-88. The main purpose behind the recommendation was again to harmonise as closely as possible national and Community competition law and to eliminate any real or perceived need for dual notification to both the Competition Authority and to the Commission. In particular, the Review Group was of the view that where an agreement benefited from an individual or

block exemption at Community level, the agreement in question should not be prohibited as a matter of national law. The Review Group did however point to the distinction between individual and block exemptions and expressed the view that there was much to be said for a proposal under which an agreement which benefited from an individual exemption at Community level would be immune from attack under the Competition Act 1991, but an agreement which only benefited from a block exemption (and to that extent had not been the subject of individual scrutiny) should continue to be at risk of attack under the Competition Act.

3.6.3 In the submissions received by the Review Group on this proposal, two separate views were expressed. One view was critical of the proposal for a number of reasons. First, it was suggested that a party was likely to obtain a licence more speedily from the Competition Authority than it would obtain an exemption from the Commission. This is almost certainly true but does not appear to the Review Group to be relevant to the interim recommendation. The interim recommendation is concerned with the case where, for whatever reason and by whatever process, the Commission has decided to issue an individual or a block exemption. If the agreement benefits from such an exemption, all the recommendation is proposing is that it would be unnecessary to seek in addition a licence from the Competition Authority. There is nothing in the recommendation to stop any interested party from applying to the Competition Authority for a licence where there was no Community exemption in existence.

3.6.4 The second criticism made was that the proposal seemed to be somewhat at odds with the concept of subsidiarity which provides that the Commission should only take action if and only in so far as the proposed action cannot be sufficiently achieved by the Member State and that the proposed recommendation was effectively arguing for greater centralisation at a time when the Commission is proposing decentralisation on the grounds that national authorities are better placed to assess circumstances in their domestic markets than the Commission.

- 3.6.5 The Review Group believes that this comment again misses the point for the same reason as outlined above. The recommendation put forward by the Review Group says nothing about the circumstances under which the Commission should or should not grant an individual or block exemption. Nor does it argue that such an exemption is in some way preferable to a national licence. Nor does it argue that parties should have a preference to notify to the Commission rather than to the Competition Authority. The interim recommendation is dealing with precisely the opposite situation i.e. where a Commission exemption is already in existence and whether such exemption should be conclusively presumed to remove the possibility of the agreement infringing Section 4 of the Competition Act 1991.
- 3.6.6 Finally, it was suggested that this recommendation would no longer be relevant if the Commission's proposals in the White Paper were adopted. For the reasons discussed above the Review Group agrees that this may be so, subject to the caveat that it is not clear as to the extent to which the notification/exemption system will in fact be swept away in its entirety at Community level. In any event, whether the notification/licence system under the Competition Act is abolished consequent upon the introduction of some form of decentralised directly applicable Community system depends at least in part on whether at that time an adjudicatory function of a limited judicial nature can be given to the Competition Authority. In that event, the notification system at national level would probably be abolished, as discussed above. Until that happens however, the issue remains relevant.
- 3.6.7 Another submission welcomed the interim recommendation as a realistic and practical proposal which would simplify the system, reduce costs and provide certainty. This submission also took up the Review Group's invitation to comment on whether the recommendation should be modified on the basis of the distinction between an individual and a block exemption. It was pointed out that there may be situations where agreements exempted under Community law could nonetheless have anti-competitive effects in Ireland or some part of Ireland. It was suggested that a block exemption might not anticipate certain local anti-competitive effects arising from a particular agreement. To that

extent, it was proposed that while the Competition Authority should not be permitted to prohibit an agreement which benefited from a block exemption, it should be permitted to apply more onerous conditions than those contained in the block exemption, which more onerous conditions would have to be justified with reference to some particular features of the Irish market.

3.6.8 It will be apparent from the Discussion Document that the Review Group was itself conscious of the force of this type of suggestion. Having considered the matter further, the Review Group believes that the point about agreements having a potentially anti-competitive effect at local level, even where it has no such effects at Community level, is well made. Insofar as individual exemptions are concerned, the Review Group has modified its interim recommendation to provide that it is only agreements which benefit from an exemption at Community level (and not block exemptions) that are presumed not to be in breach of Section 4 of the Competition Act. Even then, the Review Group considers that the Competition Authority should have the power to disapply this presumption i.e. that the Competition Authority would be entitled to notify the parties to the agreement, the subject of the individual exemption, that it does not necessarily consider that the agreement complies with the criteria set out in Section 4(2). Once the Competition Authority has served such a notice, then the agreement will not enjoy any presumption that it is in conformity with Section 4 merely by virtue of the fact that it comes within the individual exemption. The parties can then choose to notify the agreement to the Competition Authority if they wish and make submissions to the Competition Authority as to why the criteria set out in Section 4(2) are in fact satisfied so that a licence should be granted by the Competition Authority. Alternatively, of course, the parties might do nothing and take their chances, so to speak, as to whether there might be any subsequent action against them for breach of Section 4.

3.6.9 Insofar as agreements which might appear to benefit from block exemptions are concerned, the Review Group, while sympathetic to the suggestion that the Competition Authority should not be able to actually prohibit such an agreement but should be confined to imposing more onerous terms, nonetheless

considers that this may be an unnecessary refinement in that the Competition Authority could, if it wished, effectively prohibit the agreement by the imposition of sufficiently onerous terms. On balance therefore, the Review Group favours a proposal whereby an agreement, which may appear to benefit from a block exemption, can continue to be assessed by reference to Section 4 and that insofar as any of the parties to the agreement should notify the agreement to the Competition Authority, the Competition Authority should be free to take its own view on the matter including, of course, taking into account the block exemptions.⁶⁰

Recommendation:

- (a) The Competition Acts 1991-1996 should be amended to provide that any agreement, decision or concerted practice which might otherwise constitute a breach of Section 4(1) would not be in breach of Section 4(1) if the agreement, decision or concerted practice in question came within the terms and conditions of any individual exemption which might be granted by the European Commission pursuant to Article 81(3) and that such an agreement, decision or concerted practice (as the case may be) need not be notified to the Competition Authority for so long as the Commission exemption in question remains in force and effect; provided however that the Competition Authority should be given express power to serve a notice on the parties to the agreement the subject of the individual exemption to the effect that the Competition Authority does not necessarily consider that the agreement satisfies the criteria for a licence set out in Section 4(2) of the Competition Act 1991. If the Competition Authority should serve such a notice on the parties on the agreement in question, then from the date of service of

⁶⁰ It should be noted that this preservation of the possibility of invalidating an agreement under national law notwithstanding that it has been exempted in some fashion under community law is contrary to what the Commission is proposing in the White Paper. The Commission state: “Given the importance of legislation in the new directly applicable exception system, legal certainty for undertakings demands that an agreement exempted by a block exemption should not then be held contrary to national laws. This can be achieved by invoking Article 87(2)(e): a community regulation should be enacted to prevent national legislation from prohibiting or varying the effects of agreements exempted by Community regulation.” White Paper paragraph 85.

such notice the agreement would not enjoy any presumption that it was in conformity with the criteria set out in Section 4(2). Nothing in this recommendation is intended to prohibit the Competition Authority or a court from taking account of the fact that the agreement in question benefits from an individual exemption at Community level.

- (b) Where there is or has been in force an individual exemption pursuant to Article 81(3) of the Treaty in relation to any agreement, decision or concerted practice and such exemption remains in force, a claimant would not be entitled to damages for any alleged breach of Section 4(1) of the Competition Act 1991 for any period when the exemption in question was in force and applicable to the agreement, decision or concerted practice in question save that in the event of the Competition Authority serving a notice as referred to in paragraph (a) above such immunity from damages would exist only for the period up to the date of service of such a notice.
- (c) Insofar as any agreement, decision or concerted practice might appear to benefit from any block exemption which might be granted by the European Commission pursuant to Article 81(3) or otherwise, such agreement, decision or concerted practice would not on that account only be presumed to be in conformity with Section 4(1). Nothing in this recommendation is intended to prevent the Competition Authority or a court from taking account of the fact that the agreement in question benefits from a block exemption at Community level.

3.7 Whether the Competition Authority should have power to grant a certificate that an agreement, decision or practice does not contravene Section 5 of the Competition Act, 1991 to reflect a similar power currently vested in the European Commission in relation to Article 82

3.7.1 The Review Group's interim recommendation was as follows.

Interim recommendation: Section 4(4) of the Competition Act 1991 should be amended so as to enable the Competition Authority to certify that an agreement, decision or concerted practice notified to it under Section 7 of the Competition Act 1991, does not offend against either Section 4(1) or Section 5 of the Competition Act 1991.

3.7.2 The purpose behind this recommendation was to fill a small gap where there appeared to be an unnecessary discrepancy between the Commission's powers to grant a negative clearance and the Competition Authority's analogous power to give a certificate that there is no breach of Section 4(1). The Commission has the power under Article 2 of Regulation 17/62 to give a negative clearance not only in respect of agreements etc. (in relation to Article 81(1)) but also in relation to circumstances or transactions which might be argued to constitute an abuse of dominant position contrary to Article 82 of the Treaty. Under the existing Irish legislation, the Competition Authority has no power to give a certificate that a particular transaction or set of circumstances do not constitute an abuse of a dominant position.⁶¹ It was felt by the Review Group that the Competition Authority should be given this power.

3.7.3 The circumstances where this will arise are likely to be rare as noted by the Review Group in its discussion on the point.⁶²

⁶¹ See generally, *Donovan v. ESB* (1994) 2 I.R. 305.

⁶² Page 92 of Discussion Document.

3.7.4 One of the submissions to the Review Group on this point disagreed with this recommendation on the basis that it is misguided to suggest that the Competition Authority should consider whether agreements which are notified to it under Section 4 also contravene Section 5. This criticism may spring from a misunderstanding of the point the Review Group was trying to make due perhaps, in fairness, to some confusion in the wording of the interim recommendation itself. When the Competition Authority considers an agreement, which is notified to it for a licence under Section 4, it considers the balance between any anti-competitive aspects of the agreement and the beneficial consequences of the agreement. If and insofar as the agreement might also be regarded as an abuse of a dominant position⁶³ it was submitted on behalf of the Competition Authority in *MJ Gleeson -v- The Competition Authority* that in considering the criteria which fall to be considered under Section 4, the Competition Authority would inevitably consider any anti-competitive aspects which might arise, whether those anti-competitive aspects might be characterised as an abuse of a dominant position or otherwise. It was said that there was no necessity to expressly mention Section 5 in its deliberations and that indeed it might be wrong for the Competition Authority to do so given that the licence application was brought under Section 4.

3.7.5 While the High Court gave an interim ruling that the Competition Authority should have expressly considered the matter under Section 5, this is not the point of the Review Group's recommendation. The Review Group is addressing an entirely different situation, namely the possibility that somebody might wish to approach the Competition Authority with a view to getting an opinion that a particular course of action which it was contemplating would not constitute an abuse of a dominant position. One might envisage a situation where a party with an allegedly dominant position in a particular market might propose to refuse to supply somebody with certain products. It might have very good reasons for doing so and the circumstances might be such that such a refusal to supply would not in fact

⁶³ As was the allegation in the case of *MJ Gleeson and others v the Competition Authority*, where it was alleged by the plaintiffs that the acquisition by Guinness of a wholesale drinks

constitute an abuse of dominant position. However, rather than risk High Court litigation on the point, the party in the dominant position might instead apply to the Competition Authority and ask it to express its opinion on the point.

3.7.6 At present, such a party cannot do this even though it could ask the European Commission to express such an opinion i.e. to grant a negative clearance in relation to the conduct which might otherwise be perceived as an abuse of a dominant position.

3.7.7 The submission opposing this recommendation also made the point that Section 5 concerns unilateral conduct, not agreements. The Review Group does not consider that this is correct. Abuse of a dominant position may well (and perhaps commonly does) involve unilateral conduct but an agreement can also constitute an abuse of a dominant position depending on the circumstances. Acquisitions of small competitors by dominant players in a market place can be an example. What was unusual about the *MJ Gleeson* case was not that an acquisition might possibly be an abuse of a dominant position but that the matter fell to be dealt with under the Competition Act at all instead of being dealt with under the Mergers legislation.⁶⁴

3.7.8 The Review Group considers, however, that the reference in its interim recommendation to Section 4(4) and Section 7 is confusing. Section 4(4) is concerned with the Authority certifying that an agreement does not infringe Section 4. What the Review Group intended was that a similar provision should be included in the legislation which would enable the Competition Authority to certify that a particular course of conduct (which might or might not include an agreement) does not offend against Section 5(1). For such an amendment to be located in Section 4(4) would however be confusing and the Review Group considers that the recommendation should be reworded to eliminate this confusion.

distributor, which agreement was subsequently notified to the Competition Authority for a licence, was itself an abuse of a dominant position.

3.7.9 Another submission to the Review Group while favouring the idea of a party being able to request a certificate that particular conduct did not constitute a breach of Section 5(1) on the basis that such a provision would bring Irish competition law into line with Community law, was of the view that the Authority should be empowered to say, when granting a licence under Section 4 in respect of an agreement etc., that the agreement, decision or concerted practice notified to it, does not in itself constitute an abuse of a dominant position. The Review Group considers that this point would be adequately met if the amendment made clear that the conduct, which might otherwise constitute an abuse of a dominant position could also include an agreement.

3.7.10 Accordingly, the Review Group makes the following recommendation.

Recommendation: The Competition Act 1991 should be amended so as to enable the Competition Authority to certify that in its opinion, on the basis of the facts in its possession, any specified course of conduct, agreement or transaction (whether actual or proposed) does not offend against Section 5(1). It should further be provided that such a certificate may only be issued on application to the Competition Authority by one or more of the parties who has entered into or is proposing to enter into the course of conduct, agreement or transaction in question.

⁶⁴ This was because of an administrative error which meant that the agreement could not be considered under the Mergers legislation.

3.8 Whether the Competition Authority should be designated as the enforcement authority for the purposes of Article 81 and 82 or the competent authority for the purposes of Articles 84 and 85 and Regulation 17/62

3.8.1 The Review Group's interim recommendation in this respect was as follows.

Interim recommendation: The EC (Rules on Competition) Regulations 1993 Statutory Instrument No.142 of 1993 should be amended so as to provide that the Competition Authority (rather than the Minister) shall be the competent authority for the purpose of Council Regulations of 1962 and the Council Regulation of 1989. In the event of a separate Competition Enforcement Agency being set up, any notices or information relevant to the performance by the Competition Enforcement Agency of its functions received by the Competition Authority (including in particular any notice received from the Commission of any investigation proposed to be carried out by the Commission pursuant to Article 14 of Regulation 17/62), should be transmitted forthwith from the Competition Authority to the Competition Enforcement Agency.

3.8.2 All persons who made submissions and who commented upon this proposal agreed with it. One person submitted that the second part of the recommendation was unnecessary given that the Review Group was not recommending a separate Competition Enforcement Agency. The Review Group agrees with this.

3.8.3 Another comment made by another party was that the Minister, rather than the Competition Authority, should be the designated competent authority for the purpose of the Merger Regulation of 1989. This also appears to be correct in light of the fact that the Review Group's recommendations on mergers leave the ultimate decision on mergers with the Minister. The Review Group is concerned however that the advantages of the present system whereby

representatives of the Department and representatives of the Competition Authority can both attend the relevant Commission committees should not be lost. The Review Group sees no reason why both the Competition Authority and the Minister could not be jointly designated as the competent authority for the purposes of the Merger Regulation, particularly in light of the fact that one of the recommendations of the Review Group is that merger notifications should be made in the first instance to the Competition Authority who would make a recommendation based on competition criteria but where the Minister would be free to differ with that recommendation on various public policy grounds.

3.8.4 Accordingly, the Review Group makes the following recommendation.

Recommendation: The EC (Rules on Competition) Regulations 1993 (Statutory Instrument No.142 of 1993) should be amended so as to provide that the Competition Authority (rather than the Minister) shall be the competent authority for the purpose of Council Regulations 17/62 and that both the Competition Authority and the Minister should jointly be the competent authority for the purposes of Council Regulation 4064/89.

3.9 Whether the rule of reason interpretation of Section 4 should be expressly adopted in legislation

3.9.1 The interim recommendation made by the Review Group was as follows.

Recommendation: While in favour of the application of rule of reason analysis, the Review Group does not consider it necessary to expressly adopt such an approach by way of legislative amendment. However, if the proposals in the Commission White Paper are adopted, and in particular the proposal that instead of the current system of notifications, Article 81(1) should only apply where, in effect, an Article 85(3) exemption would not apply, it may be appropriate to amend Section 4 to reflect any such changes in EC competition law.

3.9.2 The “rule of reason” analysis of Section 4(1) or of Article 81(1) is something which the Review Group strongly favours. No submission to the Review Group opposed this approach. Traditionally, the Commission resisted such an interpretation. Under the Commission’s interpretation, once the agreement etc. had any form of distorting effect on competition, there was a violation on Article 81(1) and the Commission had the exclusive competence to grant an exemption on Article 81(3). Such an interpretation meant that the Commission retained virtual full control over what agreements were or were not compatible with Article 81 (subject, of course, to the right of appeal from Commission decisions to the Court of First Instance and the European Court of Justice). The emphasis which the “rule of reason” approach places on the necessary economic analysis at the stage of investigating whether there is any breach of Article 81(1) means that many agreements, which may at first sight appear to have an effect on competition, may nonetheless not be in breach of Article 81(1), and the question of an exemption under Article 81(3) does not therefore arise.

- 3.9.3 As the Review Group pointed out in its Discussion Document on Competition Law, both the European Court of Justice and the Court of First Instance were, in the past, much more prepared to adopt a rule of reason approach without using that terminology, which means that the courts themselves have tended to shift the economic appraisal of agreements away from Article 81(3) towards Article 81(1).⁶⁵
- 3.9.4 The High Court has held that this is the correct approach to the interpretation of Section 4⁶⁶ and the Competition Authority has likewise generally adopted this approach.
- 3.9.5 As noted by the Review Group in its Discussion Document on Competition Law, the White Paper proposals, if implemented, would take an agreement out of the Article 81(1) prohibition entirely if the agreement met the criteria set out in Article 81(3). In other words, the Commission's White Paper proposals can be seen as the rule of reason approach applied to Article 81 as a whole.
- 3.9.6 The Review Group remains of the view that there is no necessity to adopt the rule of reason approach by way of legislative amendment and that the development of this approach through the jurisprudence of the High Court and the Supreme Court as informed by Community law precedents is the appropriate way for the law to develop in this area. Accordingly, the Review Group is not putting forward any recommendation for change in this area.

⁶⁵ See Discussion Document page 107-110.

⁶⁶ *Masterfoods Ltd v HB Ice Cream Ltd* (1993) ILRM 145

Chapter 4 The Enforcement of Competition Law

4.1 Introduction

4.1.1 Improving the effective enforcement of competition law is, in the view of the Review Group, the single most important policy objective in the field of Irish Competition Law⁶⁷. Prior to Ireland's accession to what was then known as the EEC in 1972, competition law was an almost unknown concept in Ireland. Such regulatory constraints as there were on the type of behaviour that would today be regarded as anti-competitive took the form of specific Ministerial intervention through the operation of the Restrictive Practices Acts and price control legislation. Even after Community law became an integral part of the Irish legal landscape, competition law made comparatively little impact on Irish commercial life. There is no doubt that the enactment of the Competition Act 1991 did much to raise the profile of competition law in this jurisdiction, a profile raised further by the 1996 Act which entrusted the enforcement function to the Competition Authority⁶⁸ and introduced criminal sanctions for breaches of the Competition legislation.

4.1.2 The creation of a competition culture where both businesses and consumers understand the benefits of competition law and the vices of transgressions of that law is critical if the necessary shift is to take place in both the mind set and the actions of commercial undertakings. One of the most significant ways in which such a competition culture can be fostered is through the effective enforcement of competition law, creating a sense in consumers (including commercial purchasers of inputs) that a remedy is available if they are harmed by anti-competitive conduct, and a real apprehension of sanctions in the minds of those engaged in such conduct. The Review Group has thus given

⁶⁷ In its Discussion Document on Competition Law the Review Group has made the point that it is important to extend the reach of competition law to areas and sectors where it has traditionally been weak (particularly the State Sector). See p.121 of the Discussion Document.

⁶⁸ In addition to the Minister who had an enforcement power under the 1991 Act.

consideration to ways in which competition law might be more effectively enforced.

4.2 The Competition Authority's Enforcement Priorities

4.2.1 There is widespread agreement on the forms of commercial conduct which are deemed most harmful from a competition policy point of perspective. Cartels and pricing fixing head the list. In its Discussion Document, the Review Group noted that the Competition Authority has issued Enforcement Guidelines in which it specifies the type of conduct most likely to attract criminal prosecutions. The priorities, as reflected in the Guidelines are:

- pricing-fixing;
- agreements to limit production;
- agreements to stay out of markets;
- agreements to refuse to deal with third parties;
- agreements to divide sources of supply with competitors.⁶⁹

4.2.2 Every Competition Agency in the world targets what is sometimes referred to as “hard core cartel” conduct as a main priority which term is taken to include horizontal price fixing, bid rigging and various schemes of market allocation, whether by product, territory or customer.⁷⁰ The Review Group considers that the Competition Authority might usefully revise its enforcement guidelines and make more clear that cartels and price-fixing are the top priorities in accordance with international trends.

⁶⁹ See Discussion Document, page 170.

⁷⁰ See Clark, *Competition Law - What are the Priorities?*, Paper presented to Faculty of Law, UCD/Competition Authority Conference on “*The White Paper and the Development of Competition at National and EU Level*”, 12th November, 1999, p.2. Mr. Clark is a consultant to the OECD. “*Although there are several statutes, such as section 3 of the Robinson-Patman Act, which criminalize different types of conduct, in practice the Division will institute criminal proceedings only for suspected hard core violations of the Sherman Act - price fixing, bid rigging, horizontal customer and territorial allocations - what in competition law we call*

4.2.3 The recent successes of the US Antitrust Division of the Department of Justice illustrate how successful prosecutions can raise public awareness of the evils of such anti-competitive conduct. One commentator has expressed it thus:

“Despite the headlines trumpeting the anti-trust battles of Microsoft and Intel and the merger explosion of the mid-1990’s, the most significant and enduring antitrust enforcement initiative of this era will be the aggressive criminal enforcement of international cartels by the Antitrust Division of the US Department of Justice (“Division”). The Antitrust Division leadership heralds the detection and criminal prosecution of international cartels as its highest enforcement priority. And why not? The sheer size of the international markets make these investigations irresistible. The Division’s success in major prosecutions and the size of the corporate sentences obtained have gained the attention and respect of corporate executives around the world. The Division has seized every opportunity to extend, or at least stretch the territorial reach of the US anti-trust laws and has conducted its investigations with the cooperation of governments around the world. The prospect of European and Asian citizens co-operating in US criminal investigations and submitting to the jurisdiction of the US courts was unthinkable five years ago. Today, rather than declining the Division’s invitation to participate in anti-trust enforcement proceedings, these individuals agreed to provide testimony in US courts in exchange for lenient treatment by US anti-trust enforcement and immigration authorities.”⁷¹

‘cartel’ behaviour.” Victor, *Jurisdiction and Enforcement: The Growth of International Criminal Antitrust Enforcement* (1998) 6 *George Mason Law Review* 493.

⁷¹ Klawiter, *Criminal Antitrust Comes to the Global Market* (1998) 13 *St. John’s Journal of Legal Commentary* 201. The author also comments: “The defining moment that brought international cartels to the center stage of US Antitrust Enforcement was the public disclosure of the FBI investigation of the Archer-Daniels-Midland Company (“ADM”). The bizarre, tabloid-like tale of ADM senior executive Mark Whiteacre’s participation in the undercover investigation and the morality play that was subsequently presented in a Chicago court room will alter forever the antitrust enforcement landscape. The investigations and convictions in the lysine and citric acid markets resulted in roughly \$200m in fines against companies and individuals on three continents and a rare antitrust criminal trial with an international audience that resulted in the conviction of the high-level ADM officials” (p.203). In *United States v Nippon Paper Industries* 109 F. 3d 1, 4 (First Circuit, 1997), cert. denied 118 S. Ct. 685 (1998), the US Court of Appeals for the First Circuit decided that a Japanese Corporation could be found criminally liable for violating the US antitrust laws even though the company had no operations or personnel in the United States and the alleged price fixing activities occurred completely outside the United States.

4.2.4 Naturally, the focus of national competition authorities tends to be on cartels that operate within the jurisdiction of the national competition authority. Pure export cartels on the other hand, which are directed exclusively at foreign markets, tend to be ignored by national competition authorities. In the long run, this is a counter-productive policy because each competition authority must rely upon other competition authorities to take action against cartels operating within their jurisdiction, even where the adverse effects are felt abroad.

“If there is one fundamental precept among national competition systems, it is a rule against cartels. If there is one common exception to that rule, it is the export cartel. Even the most vigorous competition law enforcers accept a cartel affecting only foreign markets as either a good thing, a bad thing with statutory authorisation, something regrettably beyond its jurisdiction, or somebody else’s problem. This kind of attitude is poison for the future progress of free trade and regional integration. If new trade partners perceive lowering trade barriers as an invitation for mercantilistic rent-seeking, hard won agreements will quickly collapse.”⁷²

4.2.5 An important ingredient in the success of the US Department of Justice actions against cartels has been what is sometimes described as its amnesty or leniency policy. One of the fundamental difficulties of bringing proceedings or prosecuting in respect of cartel behaviour is that such activity by its nature tends to be secret. The participants in the cartel rarely keep minutes of their meetings. A case sometimes has to be built on evidential fragments as mundane as jottings on the back of an envelope to even prove that certain persons met in the same room on a certain occasion.⁷³

4.2.6 To get around these sort of problems, the leniency policy offers incentives to members of the cartel to come forward with the necessary information which will enable the other members to be prosecuted. The certainty and extent of

⁷² Waller, *The Internationalization of Antitrust Enforcement* (1997) 77 Boston University Law Review 343 at 397. The author acknowledges that the ultimate solution to this type of problem is a diplomatic solution under which multi-lateral no-cartel agreements are negotiated between different nations. See more generally, Gerber, *Europe and the Globalisation of Antitrust Law* (1999) 14 Connecticut Journal of International Law 15.

⁷³ The Review Group makes a recommendation later in this report in relation to the rules of evidence governing the prosecution of competition law offences.

immunity from prosecution depends upon the stage at which the informer comes forward. If the corporation comes forward before any investigation into the cartel at all has begun and provides frank disclosure of the anti-competitive activity, then immunity from prosecution is virtually guaranteed.⁷⁴ If the corporation comes forward at the stage at which an investigation has begun and is the first to come forward, then immunity from suit may also be available albeit on certain conditions and with a lesser degree of certainty. Thus, when an investigation is announced by the Division, the issue for the cartel members and their lawyers may not so much as to whether or not to go to the Division but rather who can get there first.

4.2.7 Whether or not such a policy should be adopted in this jurisdiction is, in the view of the Review Group, very much a matter of policy for the Competition Authority and not a matter for a specific recommendation from the Review Group. Attention is drawn to this feature of US antitrust policy however as an illustration of both the difficulties which the Competition Authority can face in bringing successful actions against activities such as cartels and price fixing and as an example of at least one solution that appears to have had some success in the US.

4.2.8 The Competition Authority itself has from time to time stated its own enforcement priorities. Thus, in the Competition Authority's Annual Report for 1996 it stated:

"...the Authority's priority is to pursue investigations into allegations of price fixing and other 'hard core' cartel type activities, resale price maintenance and abuses of dominance."

4.2.9 The Director of Competition Enforcement has recently summarised the Authority's activity in this area as follows:

"The priority given to tackling 'hard core' cartels is reflected in the Authority's enforcement actions. Over the past two and a half years the Authority has instituted

⁷⁴ There are in fact a number of conditions which have to be compiled with by the corporation which are set out in detail in the US Department of Justice's statement of its corporate leniency policy.

proceedings in a total of eight cases involving five trade associations, one professional association and more than thirty separate undertakings alleging price fixing. To date in three cases the parties concerned furnished undertakings to the Court to discontinue certain practices. The remaining cases have yet to be heard. Within the past twelve months files on three cases have been referred to the Director of Public Prosecutions with a recommendation that criminal prosecutions be brought against certain parties. There are currently a number of major investigations under way into alleged cartel behaviour. The high level of complaints alleging cartels received by the Authority since the passage of the 1996 Act indicate that, to coin a phrase used by our US counterparts 'we are operating in a target rich environment' ”⁷⁵.

- 4.2.10 The Review Group agrees with the priority which the Competition Authority has given to this type of activity. In particular, because of the difficulty of assembling the necessary evidence which will be admissible in court proceedings, public enforcement of competition law by the Competition Authority in this area is particularly appropriate in that private individuals or firms may simply lack the resources, will-power or evidence to successfully attack such behaviour.
- 4.2.11 Aside from what might be described as the more routine competition law issues of horizontal agreements which may have anti-competitive effects (and to a lesser extent, vertical agreements which are in general more benign in their consequences) the Review Group believes that the Competition Authority has an important role in ensuring that recently deregulated companies fully respect the necessity to comply with Competition Acts and Articles 81 and 82 of the Treaty. Precisely because of the monopoly or quasi-monopoly background from which such deregulated companies come, it is sometimes difficult for those companies to make the transition to embracing the competition culture referred to above. Insofar as regulators are appointed in relation to such industries, regulators obviously have a role in this regard. But as will be apparent from the recommendations in this report on the relationship between regulators and the Competition Authority, the Review

⁷⁵ Massey, *Tackling the 'Cosy Cartels'*; *The Competition Authority's Enforcement Priorities*, Paper presented to UCD Faculty of Law/Competition Authority Conference on "The White Paper and the Development of Competition at National and EU Level", 12th November 1999.

Group believes that such deregulated companies must be subject to the full scrutiny of the Competition Acts and that the Competition Authority must have both the power and the responsibility for the enforcement of competition law against such companies where necessary.

- 4.2.12 Although not strictly an enforcement function, the Review Group also believes that as part of its essential competition advocacy role, the Competition Authority can make an extremely useful contribution in commenting on the possible anti-competitive consequences of proposed legislation and in conducting studies in relation to various forms of state licensing regimes which confer quasi-monopoly protection upon licence holders in different sectors of the economy. The Review Group's recommendations in this regard are set out later in this report.

4.3 Whether Criminal Sanctions Should be Retained

4.3.1 The Review Group's interim recommendation on this topic was as follows:

Interim Recommendation: The Review Group considers that breaches of the Competition Acts 1991-1996 should continue to be criminal offences and that the Director of Public Prosecutions should have available to him whatever resources and expertise are necessary for the efficient prosecution of such offences.

4.3.2 This topic has continued to provoke controversy. A speaker at a conference on the Review Group's Discussion Document outlined the difficulties created by the criminalisation of this type of commercial conduct.⁷⁶ However, none of the submissions actually made to the Review Group subsequent to the publication of the Discussion Document disagreed with the interim recommendation. One submission supported it so strongly that in effect it criticised the Review Group for even having listed the arguments against criminal sanctions.

4.3.3 It is idle to pretend that there are not problems associated with the criminalisation of anti-competitive conduct. The extent to which civil enforcement may be inhibited in an individual case by the threat of criminal prosecution arising out of the same facts is a concern.⁷⁷ Courts tend to take the view that judges can properly instruct and charge juries so as to safeguard the accused from any prejudice which might be caused by civil proceedings.

⁷⁶ Cregan, *Reforms Affecting the Courts*, Paper delivered to a conference organised by Competition Press on the Review Group's Discussion Document, 1st October 1999: "*I am of the view that the Competition Act offences should be decriminalised immediately. Indeed they should never have been made criminal offences in the first place ... It is wrong in principle to make offences such as these criminal offences ... The criminalisation of competition law is hindering and will continue to hinder attempts at civil enforcement of competition ... The wording of the criminal law offences and defence is so absurd, byzantine and complex that I would say it is probably impossible to understand, let alone achieve a conviction under them ...*"

However, there is a separate concern which arises where civil proceedings by the Competition Authority may take place before a criminal prosecution. To defend themselves properly in the civil proceedings, the defendants may in practice have little choice but to call witnesses who will then give sworn evidence and can be subject to cross examination on behalf of the Competition Authority. Since such witnesses have been called by the defendants themselves and not under any compulsion, there seems no reason in principle why the evidence which they give in the civil proceedings cannot be used subsequently by the relevant prosecuting authority (the Competition Authority itself or the Director of Public Prosecutions, depending on the circumstances.) This puts the accused in the criminal prosecution at two disadvantages to which an accused is not normally subject.

4.3.4 First, it gives the Competition Authority the opportunity to elicit admissions or other relevant statements from the accused or witnesses on its behalf in civil proceedings. It would appear, on the current state of Irish law, that such statements or admissions may well be admissible in any subsequent criminal proceedings on the basis that they have not been procured by any form of executive or statutory compulsion.⁷⁸ Whether or not what may be a form of de facto compulsion namely where a defendant is faced with the invidious choice of defending himself by giving evidence in the civil proceedings or having an injunction granted against him restraining him from carrying on some aspect of his business that he believes to be legitimate and lawful will constitute the sort of compulsion which would render the evidence given in the civil proceedings inadmissible in any subsequent criminal prosecution remains to be seen.

4.3.5 Secondly, one of the basic rights of an accused in the context of a criminal investigation is the right to silence and the privilege against self - incrimination. The accused is not obliged to say anything to the prosecution, is not obliged to furnish any statement and cannot be compelled to give

⁷⁷ See the Discussion Document on Competition Law p.170-171.

⁷⁸ This topic is discussed further in this chapter in the context of potential changes to the law of evidence.

evidence at his own trial. However, a civil action by the Competition Authority in the context where a criminal prosecution is under contemplation or pending may, in a very practical sense, take away the accused's rights in this respect since the accused will be forced to defend himself in the civil proceedings on what may be the identical issues and identical facts which will feature in a criminal prosecution if he wishes to avoid the possibility or the probability of orders being made against him in the civil proceedings such as declarations and injunctions.

4.3.6 There is also the point that putting a party who is the subject of a criminal investigation or a pending criminal prosecution in this position may well be an infringement of article 6(1) of the European Convention on Human Rights which entitles everyone to a fair and public hearing by an independent and impartial tribunal established by law "in the determination of his civil rights and obligations or of any criminal charge against him." It has been held that in the context of a criminal charge, the right to a fair hearing includes the right to remain silent and not to contribute to incriminating himself.⁷⁹ There is also the point made in Chapter 3 of this Report in relation to the manner in which the direct application of Article 81 might be dealt with if proposals like those outlined in the White Paper were ultimately adopted. For so long as breaches of the competition legislation remain criminal offences, there is no realistic possibility of the Competition Authority being asked to exercise a full adjudicatory role on issues of national law. If it becomes necessary or appropriate to give the Competition Authority such an adjudicatory role, the continued retention of criminal sanctions must be evaluated in that context.⁸⁰

4.3.7 Nonetheless, the Review Group remains of the view that the criminal sanctions should be left in place. The principal reason, as explained in the Discussion Document, is the necessity to create an effective deterrent against breaches of the competition legislation. In almost every jurisdiction where competition law has been successfully enforced, there has been at least the

⁷⁹ See the discussion below in this chapter in relation to the privilege against self-incrimination.

⁸⁰ This Report does make a recommendation that a form of adjudicatory role and a power to impose fines be given to the Competition Authority on an elective basis (see section 4.4).

possibility of imposing fines which act as a deterrent. For reasons explained in the Discussion Document,⁸¹ it is not constitutionally permissible for the Competition Authority to impose fines and penalties for breaches of competition law (notwithstanding that the power of the Revenue Commissioners to impose fines in respect of breaches of Revenue laws has been upheld as constitutional). In such circumstances, there seems little option but to retain criminal sanctions and the fines which would follow successful prosecutions, in order to create the necessary deterrent effect.

- 4.3.8 A possible alternative is the adoption of the US concept of treble damages as an incentive to private enforcement. Indeed, in the food and feed additives cases successfully prosecuted by the US Department of Justice in 1996 and 1997, the Antitrust Division for the first time invoked a new statutory provision which extended the maximum fines to the greater of either twice the gross gain made by the offending parties or twice the gross loss suffered by virtue of the offending conduct. This enabled the fine to exceed the maximum limit under the Sherman Act of \$10 million.

“Because of the substantial amount of commerce involved in these cases - almost \$2 billion - the Antitrust Division saw the opportunity to ‘make the punishment fit the crime’, a feat that could not be accomplished by imposing only the Sherman Act’s maximum fine of \$10 million. Empowered by the strength of its extensive tape and testimony evidence, the Antitrust Division for the first time under the current sentencing statute invoked the alternative sentencing provision of 18 U.S.C. 3571(d)(1998) to calculate the applicable fine in an antitrust case. That provision authorises a maximum fine based on twice the gain derived from the unlawful conduct or at twice the loss by persons, other than the defendant, as a result of the unlawful conduct. Since its success in invoking this provision in the food and feed additives case, the Division has effectively sought to make the ‘twice the gain, twice the loss’ standard the new norm in antitrust cases. The potential impact of the future use of section 3571(d) in criminal antitrust cases is enormous. Under the U.S. Sentencing Guidelines, for example, virtually any company whose sales during the alleged antitrust conspiracy exceeded \$25 million could now

⁸¹

See p.142-144

*face a fine above the current statutory maximum of \$10 million.”*⁸²

- 4.3.9 The Review Group did consider the possibility of introducing a treble damages provision as both a deterrent to breaches of the law and as giving private plaintiffs a powerful financial incentive to enforce competition law. However, as pointed out in the Discussion Document⁸³ such a provision is alien to the concept of damages in this jurisdiction as essentially compensatory and might merely serve to encourage vexatious, oppressive and potentially wasteful litigation. In any event, the Court can award exemplary damage under section 6(3)(b) of the Competition Act 1991 in appropriate cases.
- 4.3.10 The Review Group therefore considers that from the point of view of deterrence criminal sanctions⁸⁴ are the preferable option. The Competition Authority also favours the retention of the criminal sanctions.

*“The Authority, however, became concerned that firms engaging in serious anti-competitive behaviour might believe that, if caught, the worst that would happen would be that they would be obliged to come into court and give undertakings to discontinue certain practices. The Authority believes and evidence from other countries supports this belief, that firms will not be deterred from engaging in ‘hard core’ cartels unless they believe they are likely to face severe penalties for so doing. As a result the Authority has decided over the past few months to follow the practice set out in its Enforcement Guidelines and recommend criminal prosecutions where it has evidence of such activity”.*⁸⁵

- 4.3.11 In support of its recommendation, the Review Group also draws attention to the following matters.
- 4.3.12 Ireland is not in fact unique in the European Union in attaching criminal sanctions to breaches of competition law. So far as the Review Group can

⁸² Klawiter, *op.cit.*, p.205

⁸³ p.166-167

⁸⁴ Or, where constitutionally possible, a system of fines and penalties imposed by the Competition Authority.

ascertain, it appears that Austria, France and the Netherlands provide criminal sanctions for restrictive practices and abuse of a dominant position.⁸⁶

4.3.13 The power of the Commission to impose fines in respect of breaches of Articles 81 and 82 gives a distinctly criminal flavour to such breaches. The case law of the European Court of Human Rights seems to confirm that a provision whereby large financial penalties can be imposed is criminal in nature.⁸⁷ Both Advocate General Vesterdorf in his opinion in *Rhone-Poulenc Commission*⁸⁸ and Advocate General Darmon in *Woodpulp*⁸⁹ have expressed the view that Commission decisions imposing fines in competition cases are manifestly of a penal nature.⁹⁰

4.3.14 Furthermore, at the invitation of the Competition Law and Policy Committee of the Organisation for Co-operation and Development (OECD), some members of the Review Group attended a meeting of the OECD Committee which discussed the Review Group's Discussion Document on Competition Law. The question of criminal sanctions was one of the issues debated and the relevant members of the Review Group were struck by the very large measure of agreement among the delegates that criminal sanctions were necessary in a system which does not otherwise allow for the imposition of fines or penalties.

⁸⁵ Massey, *op.cit.*, p.8.

⁸⁶ In Austria, imprisonment and/or criminal fines may be imposed against members of a cartel, organ or tacit agent of a cartel or cartel members. "Entrepreneurs" of a cartel are to be held liable for fines jointly with the convicted person. Kartellgestznovelle, 129, 136 (1993). In France, individuals whose acts are crucial to the conception, organisation and implementation of prohibited practices may be subject to criminal penalties. Ordinance du 1 December 1986, Article 17. In the Netherlands, if the Minister of Economic Affairs has found a dominant position to be contrary to the general interest and a Royal Decree is issued prohibiting or obliging certain conduct, a violation is subject to criminal penalties. See Hawk and Laudati, *Antitrust Federalism in the United States and Decentralisation of Competition Law Enforcement in the European Union: A Comparison*, (1996) 20 Fordham International Law Journal 18 at 34-35.

⁸⁷ See, for example, *Bendenoun v France*, 24th February, 1994, A284(1994), EHRR 18, 54.

⁸⁸ (1992) ECR II-0867(CFI).

⁸⁹ (1985) 3 C.M.L.R. 474.

⁹⁰ For useful summary of the law in this area, see Forester, *Modernisation of EC Competition Law*, Paper presented to the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law and Policy, 14th and 15th October 1999, p.61-67.

4.3.15 If however the criminal sanctions are retained, then the very real problem of the potential unfairness of civil proceedings in advance of a criminal prosecution has to be addressed. Even if the jurisprudence in this area were to develop such that evidence given by the defendant in civil proceedings was regarded as having been given under a sufficient degree of economic compulsion that the evidence should not be admissible for any purpose in the criminal proceedings or even if a statutory amendment were introduced to this effect, the point would still remain that the Competition Authority or the Director of Public Prosecutions would have the benefit of the knowledge derived from the evidence given by the accused or witnesses on its behalf in the civil proceedings, which knowledge and information might lead the prosecution toward the procuring of evidence for the purpose of the criminal prosecution which it might not otherwise have procured. In other words, unless it was clarified either by judicial interpretation or by statutory amendment that evidence procured following a chain of enquiries set in motion by the evidence given in the civil action was not admissible in any criminal prosecution, the potential infringement of the accused's right to silence and privilege against self incrimination remains.⁹¹

4.3.16 These issues are part of a wider debate in relation to the rules governing the admissibility of evidence in criminal trials. Although this report does recommend some changes in the law of evidence specifically in the context of the prosecution of competition law offences, the Review Group in principle is reluctant to attempt to establish too many differences between the rules of evidence applicable to the prosecution of competition law offences and those applicable to more traditional criminal offences. The rules governing the admissibility of evidence have been devised over the years to reflect a careful balance between the social desirability of convicting the guilty and the paramount rights of the accused not to be put in peril of his liberty or suffer other sanctions unless the prosecution satisfy the burden of establishing his guilt beyond a reasonable doubt. Instead, the Review Group recommends that the Competition Authority should adopt a general policy that where it appears

⁹¹ See the further discussion of this issue in Section 4.5 below.

to either the Director or the Competition Authority that a criminal prosecution may be appropriate, then the Competition Authority should not commence any civil proceedings in respect of the matter in question until it is either decided definitively that it will not itself bring a criminal prosecution or will not refer the matter to the Director of Public Prosecutions, or alternatively, until such time as the criminal prosecution has been finally determined. Clearly there could be exceptions to this policy.

4.3.17 Accordingly, the Review Group recommends as follows.

<p><u>Recommendation:</u> The Review Group recommends that</p> <ul style="list-style-type: none">(a) breaches of the Competition Acts 1991-1996 should continue to be criminal offences,(b) the Director of Public Prosecutions should have available to him whatever resources and expertise are necessary for the efficient prosecution of such offences; and(c) the Competition Authority should adopt a general policy that if it is considering a criminal prosecution against one or more persons or is considering referring the matter to the Director of Public Prosecutions with a view to a prosecution on indictment, the Competition Authority should not commence any civil proceedings against the parties concerned until such time as it either decides that criminal proceedings are not appropriate or until the criminal proceedings are finally determined, save in exceptional circumstances.
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4.4 The Enforcement Role of the Competition Authority

4.4.1 The Review Group had made the following interim recommendation.

Interim Recommendation: The Review Group considers that the power to bring civil proceedings for breaches of the Competition Acts and the power to bring summary proceedings for offences under the Competition Acts, currently vested in the Minister or the Authority, should be vested in the Minister or the Director of Competition Enforcement where, before commencing any such proceedings, the Director would be obliged to consult with the other members of the Competition Authority. Alternatively, the Director would be obliged to obtain the consent of the other members of the Competition Authority before commencing such proceedings. To enhance both the perception and the reality of the Director's independence, the Group considers that the Director should not participate in any adjudication on applications for certificates or licences which may be made to the Competition Authority.

4.4.2 The primary issue which arises in this context is whether or not there is any undesirable conflict of functions (or undesirable perception of conflict) between the enforcement role of the Competition Authority and the various other functions carried out or which it is envisaged will be carried out by the Competition Authority on foot of the recommendations in this report. To that extent, some of the recommendations are interdependent on each other. For example, if the Competition Authority is to retain the enforcement function itself, then the Competition Authority cannot be given the final adjudicatory role discussed in Chapter 3 above even assuming the other problems about creating a body other than a court to exercise such an adjudicatory role were overcome.

4.4.3 Taking account of the other recommendations made later in this Report, the essential functions of the Competition Authority, if the recommendations in this report were adopted, could be summarised as follows.

- Enforcement function;
- Mergers review;
- Grant of certificates/licences;⁹²
- Draft legislation review function;
- Advocacy function;
- Conduct of sectoral or other studies.

4.4.4 The question is whether the enforcement function is in conflict with or might be perceived (from the perspective of fairness and due process) to be in conflict with any of the other functions.

4.4.5 Some members of the Review Group did have concerns on this issue. One of the submissions made to the Review Group consequent upon the publication of the Discussion Document was that the Director of Competition Enforcement should not participate in the adjudicatory functions in relation to the grant of certificates or licenses or in the process of Merger Reviews. In support of this argument, it was submitted that it is inappropriate or even dangerous to fairness and due process that information should be furnished to the Competition Authority (whether on foot of a notification or in the context of a mergers application) which might bear directly or indirectly on a potential civil or criminal action which the Authority might be contemplating against

⁹² While this will continue to be a function of the Competition Authority for the next two or three years, this function may cease to be relevant if proposals along the lines of the White Paper were to be introduced. On the other hand, the adoption of the White Paper proposals might create a sharper conflict in that the Competition Authority might find an adjudicatory function thrust upon it. See Chapter 3 above.

one or more of the parties to the transaction the subject of the reference to the Competition Authority. Even if the information contained in, say, a merger notification was not in itself directly relevant to a criminal prosecution that the Competition Authority might be considering against one or more of the parties to the merger notification, there is the danger that the process might be flawed from the perspective of natural and constitutional justice in that the parties to the merger notification might, at minimum, have a reasonable perception that the fact that one or more of them was being investigated with a view to a possible criminal prosecution by the Competition Authority might predispose the Competition Authority against recommending approval of the merger notified to it or granting a licence or certificate in respect of the transaction notified to it.⁹³

4.4.6 While it was not suggested that one would have to go so far as to create a separate enforcement agency to deal with the problem, the point was made that some element of separation of function was desirable for the reason given.

4.4.7 The Competition Authority itself has stated that it does not believe that notifications provide a vital flow of information to the Authority. However, it has pointed out that it is not uncommon for the same arrangements to be

⁹³ Decisions can be set aside as being tainted by bias in two quite separate situations. One is where there is some evidence of actual bias on the part of the decision maker e.g. some element of prejudgment which becomes apparent from statements the decision maker may have made outside the hearing process or even from statements he makes during the hearing process. Cases of actual bias are very rare. The other type of bias is what is sometimes referred to as “apparent bias” or “objective bias” meaning that there is some feature involving the decision maker from which a reasonable onlooker would consider that there is at least the possibility that the decision maker is biased (even if he or she is not in fact biased). If the decision maker has some financial interest in the issue he is called upon to decide, then as a matter of law, it is conclusively presumed that his decision cannot stand (because even if he does not allow himself to be influenced by that personal interest, the risk of bias and unfairness is so manifest that nobody could have confidence that the decision was fairly reached). Other factors such as prejudgment, some family or other connection with the party and so forth may also give rise to a reasonable apprehension that the decision maker may be biased, depending on the circumstances. Equally, even if the decision maker has no such prior connections or has expressed no prejudgment, he may, by his conduct during the hearing or statements made during the hearing, manifest a predisposition towards one or other party such that his decision may not withstand scrutiny. This latter situation may or may not be properly characterised as “bias” but the principle seems to be the same. These issues have been raised in the case of *Orange Communications Limited -v- Director of Telecommunications* where the decision of the Supreme Court on the appeal from the High Court decision is pending at time of writing.

simultaneously the subject of a notification and a complaint and has remarked that by the time an agreement is notified, an investigation may already be underway. This is precisely the concern of those who feel that it is undesirable that the Competition Authority should in such circumstances retain the enforcement function. The Competition Authority however draws attention to the possibility that if a transaction the subject of a notification (or, presumably, a mergers application) was dealt with by the Competition Authority and if the same transaction were looked at by a separate enforcement agency, the possibility of inconsistent decisions would arise.

- 4.4.8 The possibility of such inconsistency is, of course, already present in the law in that the Competition Authority could, for example, grant a certificate or licence in respect of a particular transaction and yet the Court might hold that the transaction was in breach of Section 4 or 5 (as the case may be). Such conflicts are likely to be rare and it is certainly true that the design of any institutional structure should be careful to minimise the possibility of such inconsistencies as far as possible.
- 4.4.9 The suggestion in the interim recommendation that the Director would not participate in any adjudication on applications for certificates or licences was an attempt to meet these types of concerns. Although this particular suggestion has not been the subject of any adverse comment, the Review Group itself, on reflection, feels that insofar as the conflicts issue is a problem, merely requiring the Director not to participate in the adjudicatory process is not necessarily a full answer to the problem. The decision to take action is ultimately a decision for the Competition Authority on the recommendation of the Director and the information given to the Competition Authority in the context of an application for a certificate or licence or in the context of a mergers application would presumably be available to the Director as a member of the Authority irrespective of whether or not he participated in the adjudicatory process itself.
- 4.4.10 While retaining a concern about the possibility of procedural unfairness or at least the perception of procedural unfairness, the Review Group ultimately

considered that such concerns are not sufficiently strong to warrant the creation of a separate enforcement agency. Such a separate agency (or a separate Directorate) would, as the Competition Authority has pointed out, create a further risk of inconsistency of approach between the Competition Authority and such enforcement agency. The Competition Authority through its various functions has accumulated and will continue to accumulate significant knowledge of how the economy operates and how various sectors and industries within the economy operate. That combined knowledge is useful in deciding on enforcement priorities and in deciding on individual actions to be taken.

4.4.11 But the point remains that, in the words of the Competition Authority, it is “*not uncommon*” that an arrangement may be simultaneously the subject of a notification and a complaint. If the recommendation that mergers are notified to the Competition Authority in the first instance is adopted, then the problem of conflict and possible prejudice or the appearance of prejudice will increase.

4.4.12 The Review Group gave very careful consideration to how this problem might be eliminated or how its potential seriousness might be significantly reduced. The Review Group is not satisfied that its own interim recommendation that the Director not participate in adjudicatory functions of the Competition Authority goes far enough to meet these concerns in any meaningful way. A separate although related issue is the desirability, so far as possible, to give the Competition Authority itself some form of function to adjudicate on whether or not beaches of competition law have occurred and to give it the power to impose fines if there was some way of overcoming the constitutional difficulty in the way of such a proposal. If, however, the Competition Authority were to play such an adjudicatory role, the necessity for the separation of the enforcement side from what might be termed the regulatory or adjudicatory side of the Competition Authority’s work becomes more marked. The Review Group considers however that insofar as it is possible to give an adjudicatory role and the power to impose fines to the Competition Authority, this would be an enormously significant contribution to the

effective enforcement of competition law and would at least reduce the number of occasions upon which such issues fall to be decided by courts.

4.4.13 Accordingly, the Review Group has devised the following model (based in part on a model contained in section 74 of the Investment Intermediaries Act 1995). It is proposed that the Director of Competition Enforcement should be reconstituted as an officer but not as a member of the Competition Authority. The staff available to the Director should not be engaged in any aspect of the Competition Authority's work bar investigation and enforcement. The Director's principal function would be to carry out investigations into possible breaches of the Competition Acts (whether on his own initiative, whether on foot of complaints made to him or whether on the instructions of the Competition Authority itself). If the Director decided that he had assembled enough evidence to establish that a breach of the Competition Acts had occurred, two alternative courses of action would then be open to him. First, he could make a report to the Chairman of the Competition Authority setting out his findings and conclusions and recommending that the Competition Authority bring civil proceedings or summary criminal proceedings or refer the papers to the Director of Public Prosecutions with a view to a prosecution on indictment. The decision to take any of those courses of action or to take no course of action would be a decision for the Competition Authority itself and the Director would not be involved in that decision beyond having made his report and recommendation to the Competition Authority. If the Competition Authority did decide to bring court proceedings itself (whether civil or criminal), the Director would then be entrusted with the task of bringing those proceedings in the name of the Competition Authority while remaining subject to the direction of the Competition Authority. Thus, if civil proceedings were brought and if, say, the defendants offered to settle the proceedings by proffering certain undertakings as to their future conduct, it would ultimately be a matter for the Competition Authority and not the Director to decide whether those undertakings were satisfactory or not. However, the Director would have the day to day responsibility for the management of the case, subject to the overall direction of the Chairman and the Authority.

4.4.14 In the alternative to making a report to the Competition Authority however, under the proposed model the Director would (in cases where he would otherwise recommend criminal proceedings) be entitled to offer the parties concerned the option of a hearing before the Competition Authority. The Director would notify them that he is considering making a report to the Competition Authority recommending that criminal proceedings be taken against them but informing them that if they so request within a particular period (say, twenty one days) that the matter be heard before the Competition Authority, then this is what will happen. If all of the parties concerned so request the Director, the Director will then notify the Chairman of the Competition Authority that there is to be a hearing and the Chairman will nominate a panel of no less than three members of the Competition Authority to adjudicate upon the matter. The Chairman may think it proper to request the Minister to appoint one or more temporary members to the Competition Authority for the purpose of such a hearing. This might arise not only where it was not possible to assemble a panel of three members of the Authority (who might be ruled out because of conflicts of interest, illness or other reasons) but also because it may well be desirable because somebody such as an experienced senior counsel form part of the panel which will determine the matter. This is partly because the panel will be called upon to adjudicate not only on the substantive issues of competition law but also on the host of procedural issues which will arise such as the admissibility of evidence which arise in the course of court proceedings.⁹⁴

4.4.15 The Review Group considers that when the Director offers this option to the parties, he should specify with considerable detail the particular allegations which are made against the parties (i.e. not merely that it is alleged that there

⁹⁴ An alternative is that the panel of the Competition Authority could sit with one or more legal assessors who would be in the nature of legal advisors to the panel. It would be important, in order to comply with the principles of natural and constitutional justice, that any views expressed by the legal assessors on any points of law be made known to the parties and that the parties be given an opportunity to make such submissions to the panel on the views of the legal assessor as the parties think fit. The legal principles applicable to the use of assessors are discussed further in Section 4.5 below in the reverse context i.e. where experts such as economists may sit as assessors advising a High Court judge in the course of a hearing.

has been a breach of section 4 or 5 but that an outline of the essential case should be given to the parties). The Director should also indicate what form of criminal prosecution he will recommend to the Competition Authority if the parties do not elect for a hearing before the Competition Authority. Finally, the Director should tell the parties the sort of fine which he will ask the Competition Authority to impose if he is successful in establishing his allegations. The reason for this is so that the parties concerned can make a proper and informed decision as to whether they should go for the hearing before the Competition Authority (“the elective hearing”) or whether they are better off allowing the Director to make his recommendation to the Competition Authority and taking their chances, so to speak, in any subsequent court proceedings.

- 4.4.16 In the case where parties opt for the elective hearing, it is proposed that the Competition Authority would then have the power to impose fines on the parties to the same level as the fines which are provided for by way of criminal sanctions in the legislation. The Competition Authority however would not have any other power to provide any particular remedy i.e. it would not have a power to grant injunctions and would not have the power to order costs to be paid. The reason for this is that the Review Group sees the elective hearing as a form of administrative substitute for a criminal prosecution before the court. In a criminal prosecution, the only sanctions are fines or a jail sentence and the costs of the proceedings are not awarded against a person who is found guilty. In an attempt to mirror that type of procedure in the form of the elective hearing, the Review Group considers that the standard of proof should be the criminal standard of proof although it recommends that the rules of evidence to be applied by the Competition Authority should be the normal court rules of evidence modified however by the recommendations made in this report in relation to the law of evidence. This means, for example, that the Competition Authority would be entitled to regard a wide variety of documentation as, in effect, self proving and evidence of the truth of what is contained in the document unless evidence to the contrary is produced.

4.4.17 Furthermore, while the Competition Authority has its various powers of investigation, searches on foot of a search warrant, and so forth, it is not proposed that the Competition Authority in an elective hearing would have the power to order discovery as such in the sense in which discovery can be ordered by a court in civil proceeding. Again the reason is that the Director must build his case and assemble the evidence in the same way that the Gardai must build their case and assemble the evidence for the purpose of a criminal prosecution. This does not involve an obligation on the accused to make discovery of documents which may potentially incriminate him. Furthermore, while it can be argued with considerable force that this type of enforcement would be much more effective if the Director could apply to the Competition Authority for a discovery order against the Respondents to the proceedings, the level of fines which can be imposed by the Competition Authority are, in the view of the Review Group, sufficiently severe that the parties accused of a breach of the Competition Acts should not be in a worse position on the discovery question than they would be in criminal proceedings.

4.4.18 Just as the prosecution in a criminal case must furnish the defence with the evidence available to the prosecution in advance of the trial (including evidence which is favourable for the defence as well as favourable for the prosecution), the Review Group considers that where the parties opt for the elective hearing, the Director should furnish to the parties well in advance of the hearing all documents available to him and statements of all witnesses in relation to the matter save for legally privileged documents. If the persons against whom the allegations are made wish to dispute the claim of privilege, it seems inappropriate that this issue would be resolved by the Competition Authority since it will be exercising an adjudicatory function on the merits of the matter and should not therefore be put in a position where it may get sight of documents which may be properly privileged. It is suggested therefore that any such issue of privilege be resolved by means of a summary application to the High Court. While the exact procedure to be adopted is a matter for the Superior Courts Rules Committee, it seems to the Review Group that a simple procedure would be to provide that the party wishing to challenge the privilege claimed by the Director could issue an originating notice of motion

returnable to the High Court on the ordinary four days notice and grounded upon affidavit. The Director could respond upon affidavit as he saw fit and the issue would then be decided by the High Court in the ordinary way which, for issues of this nature, normally means within a few weeks of the motion having been issued. Both parties would have a right of appeal to the Supreme Court in the ordinary way and the current practice in the Supreme Court is that short appeals of this nature can be listed before the Supreme Court very quickly.

4.4.19 The Competition Authority will not have the power to impose a jail sentence and this may represent a reason as to why persons will opt for an elective hearing rather than run the risk of a criminal prosecution. Furthermore, the Competition Authority hearings may be in private which may be a further inducement to parties to opt for the elective hearing.

4.4.20 Of course, in order that this model should be in accordance with the provisions of the Constitution, it is not possible to give the Competition Authority a power to enforce any fine which it can impose. The Review Group did consider following that part of the model contained in section 4 of the Investment Intermediaries Act 1995 which would involve the parties having a full right of appeal to the High Court against any decision of the panel of the Competition Authority. This would be a full de novo appeal where the burden of proof would rest upon the Director.

4.4.21 However, the Review Group had considerable concerns that in such a model, the High Court would be asked, in effect, to impose what are the prescribed sanctions insofar as fines are concerned for criminal offences without having followed the procedures of a criminal prosecution and all the safeguards for the accused which are involved in that procedure.⁹⁵ The Review Group was

⁹⁵ It appears that the various breaches of the Investment Intermediaries Act 1995 which can be the subject of a somewhat similar procedure under that Act are not in themselves criminal offences although there is provision for the High Court to impose a fine of up to £500,000 in respect of such breaches. Other breaches of the Act are specified as criminal offences which can be prosecuted summarily or on indictment (compare section 74(2) with section 79(1) of the Investment Intermediaries Act 1995).

advised that such a model was likely to be very suspect from a constitutional law perspective.

4.4.22 Accordingly, the Review Group recommends that if any of the parties who have opted for the elective hearing do not pay any fine which may be ordered by the Competition Authority within the specified or agreed time period, no sanction as such will follow for such failure bar the fact that the Competition Authority will then be free to bring a prosecution against the party concerned either by way of summary prosecution or on indictment. In other words, this is the one case where the Competition Authority itself can proceed to prosecute on indictment rather than referring the matter to the Director of Public Prosecutions and leaving it to his discretion as to whether or not there will be a prosecution. Of course, in the event of such a prosecution by the Competition Authority, the Competition Authority's own decision on the elective hearing will have no standing and that decision should not be admissible in the criminal proceedings where the ordinary rules of evidence (as amended by the recommendations in this Report if those recommendations are adopted) would apply.⁹⁶

4.4.23 Any person who pays the fine which is directed by the Competition Authority following a decision on the elective hearing will then be guaranteed immunity from criminal prosecution in respect of the matters upon which the

⁹⁶ It may be objected that this only partly meets the concern expressed in Section 4.3 above as to the undesirability of the Competition Authority having the opportunity to hear the evidence and cross examine the accused or witnesses on behalf of the accused prior to a criminal prosecution. However, the Review Group recommendation excludes any evidence which is given before the panel in the elective hearing from any subsequent criminal prosecutions. It is true that the Director and the Competition Authority may be alerted to a chain of enquiry by virtue of the elective hearing which may enable them to procure some other helpful information for the purpose of the subsequent criminal prosecution. It would be possible to introduce an amendment to the effect that evidence procured as a result of such a chain of enquiry should not be admissible in the criminal prosecution. However, on balance, the Review Group felt that this was probably unnecessary given that the hearing for the panel of the Competition Authority is an elective hearing to which the parties voluntarily submit. If they wish to preserve their position to the maximum extent in the context of a potential criminal prosecution, they are at liberty to decline the offer of the elective hearing. The Review Group thus considered that the possibility that the Competition Authority might learn something useful from an elective hearing for the purpose of any subsequent criminal prosecution (where the party fails to pay the fine) was not unreasonable in the circumstances and having regard to the fact that the evidence actually given during the elective hearing will not in itself be admissible in any criminal prosecution.

Competition Authority has adjudicated. This, of course, would also apply where the party concerned was found innocent of any wrongdoing by the Competition Authority. However, the Review Group considers that the Competition Authority should still retain the power to apply to court by way of civil proceedings for a declaration or an injunction where appropriate. For example, it is possible that a party might be found by the Competition Authority to be in breach of the Competition Act in some way, might be fined, might pay the fine, and might yet continue with the activity of which complaint had been made. Insofar as fresh breaches of the Act are concerned, it would, of course, be open to the Director to start the procedure all over again which might lead to another fine in respect of new breaches of the Act. But it seems to the Review Group desirable to preserve the option whereby the Director might decide not to go for the elective hearing and instead make a report to the Competition Authority recommending that the Competition Authority apply for an injunction to stop the behaviour in question. In any such application for an injunction by the Competition Authority, the Review Group considers that the decision of the panel of the Competition Authority should be admissible in the civil proceedings as evidence (a) of the facts set out in the panel's decision without further proof unless evidence is produced in court to show that those facts are otherwise and (b) of the opinion of the panel in relation to any matter contained in the report. This is a relatively common provision in relation to similar type reports.⁹⁷

- 4.4.24 Furthermore, in the event of further breaches of the Act (following the matters the subject of the elective hearing) the Director might recommend that a criminal prosecution be brought by the Competition Authority or that the Competition Authority refer the papers to the Director of Public Prosecution. This would not run contrary to the immunity which the party gets from criminal prosecution by paying the fine imposed by the Competition Authority because that immunity is in respect of the matters which were the subject of the hearing before the Competition Authority. What is now under discussion is new activities on the part of the person or persons concerned

⁹⁷ See, for example, section 22 of the Companies Act 1990 in relation to reports of an inspector

which constitute a breach of the Acts and which are therefore subject to the full range of options open to the Director and the Competition Authority. For the avoidance of doubt, it should be clear that if the Competition Authority decides that a criminal prosecution should be brought because of some fresh repeated breach of the Act even following a fine imposed by the Competition Authority, the Competition Authority itself can still only prosecute in a summary manner and a prosecution on indictment must be brought by the Director of Public Prosecutions. The only circumstance where the Review Group is suggesting that the Competition Authority itself have the power to prosecute on indictment is where a party fails to pay a fine which the Competition Authority has directed it to pay following the elective hearing. Such a prosecution on indictment would then be in respect of the same matters which were the subject of the elective hearing.

- 4.4.25 While the Review Group considers that in principle it is desirable that the Competition Authority should publish its decisions following such elective hearings (subject to the right to block out sensitive commercial information or trade secrets) the Review Group was also conscious of the potential prejudicial effect of such decisions on the rights of the accused in the event of any subsequent criminal prosecution whether at the hands of the Competition Authority or the Director of Public Prosecutions notwithstanding that such decisions could not be used in the criminal proceedings. Thus the Review Group recommends that where the Competition Authority is still considering the possibility of a criminal prosecution (or considering referring the papers to the Director of Public Prosecutions) any decision of the Competition Authority following an elective hearing should not be published and the contents of the decision should not be made public. If a decision is taken by the appropriate prosecuting authority that there will not be a criminal prosecution, the Competition Authority would then be free to publish the panel's decision. Otherwise, such publication should be delayed until the final determination of the criminal proceedings.

appointed to investigate certain matters in relation to companies.

4.4.26 Later in this report, a recommendation is made that so far as possible, competition law cases should be heard by specialist judges of the High Court.⁹⁸ It seemed to the Review Group to be logical that if it was recommending that civil actions should be heard, so far as possible, by a specialist High Court judge, then the same should apply to a serious criminal prosecution. For that reason, the Review Group considers that any criminal prosecution on indictment for a breach of the Competition Acts should be returnable before the Central Criminal Court. It would be a matter for the administrative discretion of the President of the High Court to try to ensure that in the event of a prosecution on indictment for a breach of the Competition Acts, one of the specialist competition law High Court judges was assigned to the Central Criminal Court for the purpose of that prosecution.

4.4.27 It is, of course, impossible to say as to what extent persons will opt for the elective hearing procedure. But it does present the parties with a number of attractive features:

- If dissatisfied with the Competition Authority decision, there is no obligation to pay the fine and the party concerned still has all or virtually all of the protections of the criminal law in the event of a prosecution;
- If the party does pay the fine it gets immunity from prosecution and thus removes the possibility of jail sentences;

⁹⁸ At present, civil actions for a breach of section 5 (abuse of a dominant position) can be brought in the Circuit Court but actions for a breach of section 4 cannot be so brought. Although the Review Group does not accept that enlarging the Circuit Court jurisdiction will in fact reduce the costs of competition law litigation, it does seem slightly odd to allow a section 5 action but not a section 4 action to be brought in the Circuit Court and insofar as any jurisdiction in these matters is to be given to the Circuit Court at all, it seems more logical that the Circuit Court should be entitled to hear actions under both sections 4 and 5. This is the subject of a later recommendation in this report at section 4.9.

- The proceedings before the Competition Authority can be in private so that sensitive commercial information may not become publicly available.

4.4.28 It may be objected that these features dilute some of the features of criminal enforcement such as the glare of publicity and the possibility of jail sentences. This is undoubtedly true but the Review Group while acknowledging that jail sentences are likely to have some deterrent effect, considers that the power to direct very substantial fines in circumstances where there is a considerable attraction in paying the fine is also likely to have a very significant deterrent effect. The fines at present can be up to £3 million or 10% of the turnover of the undertaking in the financial year ending in the twelve months prior to the decision, whichever is the greater. The Review Group considers that there is a very considerable advantage to the effective enforcement of competition law if a system can be devised under which these issues are resolved by the Competition Authority rather than by the court given the specialised expertise of members of the Competition Authority in the area and the Review Group's recommendations are an attempt to do this within the proper constitutional constraints.

4.4.29 One issue which did concern the Review Group somewhat about the suggested model is that the power to offer the parties the option of the elective hearing rests exclusively with the Director and where the alternative is merely that the Director will recommend to the Competition Authority that some form of proceedings be brought, a recommendation that the Competition Authority might or might not agree with. A variation was discussed by the Review Group under which the Director would make his report to the Chairman including, where appropriate, a recommendation that the parties be offered the option of the elective hearing and that the Chairman would then decide whether the parties should be given this elective option or whether the matter should be put before the full Competition Authority with a view to court proceedings. The disadvantage of that variation is that it seems likely that the Chairman of the Competition Authority would then have to exclude

himself from any adjudicatory panel set up to hear the case where the parties opted for the elective hearing (because there would probably be a breach of the principles of natural justice where the Chairman had seen the Director's report and conclusions). The Review Group felt that it was undesirable that the Chairman of the Competition Authority should be excluded from this type of adjudicatory function. There is nothing to stop the Chairman from setting down policy guidelines for the Director as to the type of cases where the elective hearing option should or should not be offered and the Review Group considers that this should provide reasonable protection against any arbitrary use of the elective option procedure.

- 4.4.30 Finally, the Review Group considers that it is important that the role and function of the Chairman of the Competition Authority should be expressly defined so as to give him the responsibility for co-ordinating and directing the overall work and operation of the Competition Authority and that the Chairman should have executive responsibility for the staff of the Competition Authority.
- 4.4.31 Insofar as prosecutions on indictment are to be brought by the Director of Public Prosecutions, it is obviously important that sufficient resources and expertise be made available to the Director of Public Prosecutions to enable him to prosecute such cases efficiently and with expedition. The Review Group has already made the point in its Discussion Document that the effect of enforcement of competition law will be damaged if out of the matters referred to the DPP by the Competition Authority there are not at least some prosecutions and if there are not at least some successful prosecutions.
- 4.4.32 Although the Minister has had the enforcement power since the introduction of the 1991 Act, the Minister has never exercised nor, to the knowledge of the Review Group, has he or she sought to exercise this power. Given that the Competition Authority is the logical body to exercise this power, the Review Group is of the view that the legislation should be amended so as to remove the references to the Minister having the power to take action under section 6

of the 1991 Act or to take summary proceedings under section 3(6)(a) of the 1996 Act.

4.4.33 Accordingly the Review Group recommends as follows.

Recommendation

The Review Group recommends that the Competition Acts be amended to incorporate the following provisions:

- (a) The Chairman of the Competition Authority shall have responsibility for co-ordinating and directing the overall work and operation of the Competition Authority and shall have executive responsibility for the staff of the Competition Authority.
- (b) The role and function of the Director of Competition Enforcement (“the Director”) shall be as follows:
 - (i) The Director shall be an officer of, and shall be appointed by, the Competition Authority but shall not be a member of the Authority.
 - (ii) The Director shall carry out investigations into possible breaches of the Competition Acts whether on foot of complaints made to the Competition Authority or at the request of the Competition Authority or on his own initiative.
 - (iii) The Director shall have available to him for this purpose staff members who shall work exclusively on the investigation and enforcement side of the Competition Authority’s work.
 - (iv) Save in relation to offering persons the option of the elective hearing procedure set out in paragraph (d) below, the Director

shall report to the Chairman of the Competition Authority in relation to his investigations and shall recommend what action, if any, he considers should be taken including civil or criminal proceedings or referring the matter to the Director of Public Prosecutions.

- (v) In cases where the Competition Authority decides to bring civil proceedings in court or to prosecute summary offences in court, the Director shall have responsibility for the day to day conduct of such proceedings subject to the direction of the Competition Authority.
 - (vi) In the case of an elective hearing, the Director shall act in the role of complainant before the Competition Authority.
- (c) On receipt of a report from the Director, the Chairman shall circulate the Director's report to all other members of the Competition Authority and the Competition Authority shall then decide on what action, if any, should be taken.
- (d) If the Director forms the view that there is sufficient evidence available to him to warrant making a case against any person or persons that they have been guilty of a breach of any provision of the Competition Acts, he may, in lieu of making a report to the Chairman of the Competition Authority, adopt a procedure ("the elective hearing procedure") which shall be as follows:
- (i) The Director shall notify the parties concerned that he is of the view that there may have been a breach of the Competition Acts and that he proposes to recommend to the Competition Authority that criminal proceedings be taken by the Competition Authority against the parties concerned unless each of the parties concerned request him in writing within twenty-one days that the matter be heard before the Competition Authority.

- (ii) On so notifying the parties the Director shall specify in detail and with particularity the allegations against the parties, the level of fine he proposes to seek if the parties opt for the elective hearing procedure and the form of action he proposes to recommend to the Competition Authority if the parties do not request a hearing before the Competition Authority.
- (iii) If each of the parties so request, the Director, within the twenty one day period referred to above, shall inform the Chairman of the Competition Authority accordingly and the Chairman shall then select no less than three members (“the panel”) of the Competition Authority to hear the matter. For this purpose, the Chairman may request the Minister to appoint temporary members to the Competition Authority (such as experienced litigation lawyers) and the Minister shall, so far as possible, accede to such request.
- (iv) The Director shall act as complainant in the hearing before the panel and may retain solicitor and counsel for this purpose. The parties shall be entitled to be likewise represented. The hearing of the panel shall be in camera unless all the parties otherwise consent. The Director shall furnish to the parties well in advance of the hearing all documents available to him and statements of all witnesses in relation to the matter save for legally privileged documents. Disputes about privilege shall be decided by summary application to the court. Evidence may be put before the panel by way of affidavit evidence or oral evidence or both as each party shall decide. Any such deponent or witness giving oral evidence may be cross examined by any of the other parties. Evidence shall be admissible in accordance with the ordinary rules governing the admissibility of evidence in criminal proceedings save that the recommendations in this report for the amendment of such rules of evidence shall be

adopted and applied by the panel. The panel shall not have any power to order the parties to the proceedings before it to make discovery of documents without prejudice to the right of any party to put any document in evidence.

- (v) The standard of proof shall be the criminal standard of proof. The orders which the panel may make on foot of any findings of any breach of the Competition Acts shall be limited to ordering the relevant parties to pay such fines as may be specified by the Competition Authority in its decision which fine shall not exceed the limits which may exist from time to time in the legislation for convictions on indictment in relation to the matters where the Competition Authority finds that there has been a breach of the Competition Acts.
- (vi) Following such hearing, the panel shall give a written reasoned decision within a time limit to be announced by the panel at the end of the hearing. In the event of the panel deciding that one or more of the parties before it should pay a fine, the decision shall specify the amount of the fine and the period within which the fine is to be paid which period shall be not less than twenty eight days.
- (vii) If the person concerned pays to the Competition Authority the amount of the fine imposed within the specified time or within such further time as may be agreed with the Competition Authority, or if the person concerned is found by the Panel to be innocent of the allegations, then the Competition Authority shall not thereafter be entitled to bring any criminal prosecution against the persons who have thus paid the fine in respect of the matters the subject of the hearing before the Competition Authority or have been found to be innocent (as the case may be) and the Competition Authority shall not be entitled to refer such matters to the Director of Public Prosecutions and the

Director of Public Prosecutions shall not be entitled to bring any prosecution in relation to such matters. However, the Competition Authority shall still be entitled to bring civil proceedings against the persons concerned for an injunction to restrain any breach of the Competition actions. Such civil proceedings shall be brought by the Competition Authority in the normal way provided however that a document purporting to be a copy of the decision of the panel of the Competition Authority shall be admissible in any civil proceedings as evidence (a) of the facts set out therein without further proof unless the contrary is shown and (b) of the opinion of the panel of the Competition Authority in relation to any matter contained in the report.

- (viii) If any party to an elective hearing who is ordered by virtue of a decision of the panel of the Competition Authority to pay a fine within a specified period (or within such other period as may be agreed with the Competition Authority) fails to pay such fine, then without prejudice to the Competition Authority's entitlement to bring any civil proceedings for an injunction as referred to above, the Competition Authority shall be entitled to bring a criminal prosecution against the persons concerned, whether by way of summary proceedings or by way of proceedings on indictment. The Competition Authority shall only have power to bring proceedings on indictment in these circumstances and in all other cases, that power shall remain with the Director of Public Prosecutions. The decision of the Competition Authority shall not be admissible in any criminal proceedings for breach of the Competition Acts.
- (ix) In the event of further breaches of the Competition Acts, the fact that similar type actions or behaviour were the subject of an elective hearing shall not be a bar to the Competition Authority taking civil proceedings or commencing a summary prosecution

or referring the matter to the Director of Public Prosecutions in relation to alleged breaches of the Competition Acts which post-date alleged breaches which had been the subject matter of an alleged hearing.

- (x) Notwithstanding that the proceedings before the panel of the Competition Authority may be heard in camera, the Competition Authority shall be entitled to publish its written decision but it shall excise from its judgment any figures or information which are in the nature of business secrets or sensitive commercial information unless the parties otherwise consent provided however that the Competition Authority shall not be entitled to publish its written decision or make known its contents for so long as the Competition Authority or the DPP are considering a criminal prosecution or until after any criminal prosecution has been finally determined.
- (e) Any criminal prosecution on indictment for a breach of the Competition Acts should be returnable before the Central Criminal Court.
- (f) The existing power of the Minister to bring summary proceedings for offences under the Competition Acts should be abolished. By a majority, the Review Group considers that breaches of the Competition Act should continue to be capable of summary prosecution.

4.5 Whether Changes should be Introduced in the Law of Evidence in Proceedings under the Competition Acts

- 4.5.1 As discussed above, the most serious type of anti-competitive behaviour is probably price fixing and participation in cartels and it is in such areas that criminal prosecutions are most likely having regard to the Competition Authority's enforcement priorities. It is equally the case, for reasons already touched upon, that procuring the necessary evidence in a manner which will be admissible in court can be difficult. The necessity for fair procedures on the part of the Competition Authority and any authorised officers appointed by the Competition Authority when conducting investigations, when carrying out what are colloquially known as "dawn raids", and when questioning company officials and staff; the inadmissibility of statements procured under compulsion; the privilege against self incrimination; and the necessity for strict compliance with the limits of search warrants are all matters which tend to make the prosecution task more difficult, though they are fundamental to the proper safeguard of individual rights.
- 4.5.2 The 1996 Act contains a provision in Section 4 in relation to expert evidence to the effect that an expert can give admissible evidence as regards any matter calling for expertise or special knowledge that is relevant to the proceedings and in particular as to the effects which agreements etc. may have on competition in trade. Such experts may also give explanations to the Court of any relevant economic principles which may be of assistance to a judge or jury. It should be noted however that express provision is made for the trial judge to ultimately exclude such evidence if he or she thinks that the interest of justice so require. While the provisions of section 4 probably reflect what is the current position with regard to the admissibility of expert evidence in court in civil proceedings, the Review Group considers that it would be useful for the avoidance of doubt if the provisions of section 4 were made expressly applicable to both civil and criminal proceedings.

- 4.5.3 Save for this particular provision, a prosecution for an offence under the Competition Acts falls at present to be dealt with under the rules of evidence applicable to any criminal offence where guilt must be proved beyond a reasonable doubt.⁹⁹ The evidential and trial models for criminal law are based upon the standard core offences in respect of which the criminal law developed. These are murder, arson, rape and theft. The commission of all these offences gives rise to the prospect of evidence being available. People have to engage in overt and obvious forms of activities to murder someone for example. The same applies to all the other examples listed. Therefore, somebody might see them doing it. Someone may also survive the crime, such as the victim, and may be in a position to give evidence of identification or in the case of rape a lack of consent.
- 4.5.4 Competition crimes are, however, within the category of society crimes. There may be no individual identifiable victim. The collective victim is the consumer. The consumer is put at a loss of a better product or a cheaper product due to the activities of cartels or the abuse of a dominant position, but may not be aware of the existence of the cartel. The consumer tends to believe that the price which he is paying is probably a fair price because he believes that it is product of a competitive process. The consumer is unaware of and cannot give any evidence of the cartel or the price fixing agreement or whatever the illegal activity may be. This puts competition crime at a disadvantage.
- 4.5.5 In addition, the rules as to the inadmissibility of evidence have developed in a way that is similarly centered around the core offences. A fingerprint might be left at the scene of a crime, for example, on a shattered window in a burglary, or on a knife at the scene of a murder. A blood sample splashed from the victim onto the accused may be later removed from his clothing and provide a DNA sample which would be conclusive evidence of contact. Similarly, any other form of fluid or hair moving in either direction from

⁹⁹ Various statutory defences are provided for in Section 2(2)(c) and Section 2(7)(b) of the Competition (Amendment) Act 1996 which have to do with the question of whether the defendant knew or could reasonably have been expected to know that activity in question was

victim to accused, may strongly point towards the culprit of the crime. None of these considerations as to the ready availability of admissible evidence apply to criminal breaches of competition law.

4.5.6 The closest analogy one can draw between competition crime and traditional crime is that of organised crime. Competition crime, in order to be effected, has to be organised. There has to be a leading mind on each side of the cartel. In many instances they will communicate with each other on the level of chief executive to chief executive. It may be enough to draw a “gentleman’s agreement” between them or to record their understanding by e-mails or telephone calls. It is possible, though unlikely, that acolytes may be involved to do the bidding of their masters. It may be possible, where that occurs, to get one of the acolytes to turn State’s evidence. That evidence would then be subject to the accomplice warning that it is dangerous to rely on the uncorroborated testimony of an accomplice, but that a conviction can result, nonetheless, if the jury is sure beyond reasonable doubt, having considered the warning, that the prosecution have made out their case. In itself, accomplice evidence would be valuable, but again, regrettably, it is unlikely to be available. Competition crime generally takes place at a level where phone calls between principals, or documents exchanged between principals, may be enough to effect the practice. Therefore accomplice evidence will be unlikely to be available. The question then arises as to what might be available?

4.5.7 Extremely wide powers are provided for under Section 21 of the 1996 Act. These were provided in the context of giving to the investigating authorities the power to uncover evidence of competition crime. They were also given in circumstances where the then prevailing view of the law was that an admission obtained pursuant to a statutory demand might well be admissible in evidence.¹⁰⁰

4.5.8 An authorised officer is empowered to inspect and take copies and extracts from books, documents and records. This is useful in the sense that one may

an offence. However, these statutory defences do not relate to the question of the admissibility of evidence.

¹⁰⁰ *Heaney -v- Ireland* (1996) 1 IR 580.

then have documents which indicate that managing director A was in contact with managing director B and that a document passed from A to B suggesting an appropriate price, for example, for all cars of a particular kind on the Irish market. Computer records or e-mails may well provide the same kind of evidence. This is a useful investigation tool, but as will be explained, it does not constitute admissible evidence.

4.5.9 In addition, Section 21(1)(e) allows an authorised officer to ask a person carrying on the relevant activity for any information which the authorised officer may reasonably require in regard to such activity. The people involved in the management of the relevant corporate entity cannot refuse to give the requested information without committing a criminal offence.¹⁰¹ That information, if honestly given, may well provide information to the effect that a concerted practice or an abuse of a dominant position was being effected by the company in which the person works. The admission of such information as evidence in a criminal trial is hugely problematic.

4.5.10 Since the decision of the European Court of Human Rights in *Saunders v the United Kingdom*¹⁰² and since the decision in *Re National Irish Bank Ltd.*¹⁰³, information extracted under a physical or legal compulsion cannot be used in evidence against the person making the admission¹⁰⁴. In criminal law an admission is only evidence against the person who makes it. However, under section 2(9) of the 1996 Act, an act done by an officer or employee of an undertaking for the purposes of, or in connection with the business or affairs

¹⁰¹ Section 21(3).

¹⁰² (1996) 23 EHRR 313. The court held that the fact that evidence was obtained pursuant to a statutory demand meant that the subsequent use of that evidence in a criminal trial was a breach of the guarantee of a fair trial in Article 6(1) of the European Convention on Human Rights. The evidence in question had been obtained by an inspector appointed under the UK Companies legislation. See also *Murray -v- United Kingdom* (1996) 22 EHRR 29 to the effect that drawing adverse inferences from an accused's silence infringed the entitlement to a fair hearing under Article 6(1) in circumstances where the right of access to a lawyer under Article 6(3)(c) had also been infringed.

¹⁰³ (1999) 1 ILRM 321.

¹⁰⁴ See Discussion Document, page 164-165. In *Re National Irish Bank Limited*, the Supreme Court stated: "It is proper, therefore, to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession." (Page 360). This decision seems to mark a significant change in the law in this jurisdiction in relation to statements made pursuant to a statutory compulsion,

of that undertaking is to be regarded as an act done by that undertaking. In other words, it may be arguable that if you can get the officer to admit that he effected a cartel on behalf of the company, this in itself constitutes evidence against the company. That might, however, be made more clear were there to be an amendment of that section.

4.5.11 It seems that ordinarily (though it has never been decided in this jurisdiction) corporate criminal liability will arise where the relevant decisions leading to the crime were taken at a sufficiently high level so as, in point of rationality, the company can be made liable.¹⁰⁵ What one needs to do in those circumstances is to find evidence which shows that the decision was taken on behalf of the corporation and was taken at the right level. Even then, one still needs to make that evidence admissible. Since, as previously indicated, it will not fit within the traditional law pattern of a fingerprint, a DNA sample or an identifiable wrong that can be identified in court, then, absent accomplice evidence, it is very hard to see what kind of evidence can be introduced.

4.5.12 In the United States, it has been held that even using information improperly extracted to follow through a chain of inquiry (for example to use the admission to look in a particular filing cabinet to see if a particular document is there) is caught by the prohibition against the use of illegally obtained evidence and thus may not be used in court.¹⁰⁶ The Irish Supreme Court has not yet made a definitive pronouncement on that point.¹⁰⁷ It is clear enough, however, that the information which the authorities are entitled to seek under section 21 may be compelled from a person working for a company who fits within the statutory parameters of that section.¹⁰⁸ But it is equally clear that it is can never be used in a criminal prosecution against that person. It is therefore unclear as a matter of Irish law as to whether it can be used against anybody else, or against a company or whether it can be used to further the

the full implications of which may not yet be appreciated. As discussed in Section 4.3 above, the issue of economic compulsion has not yet been tested.

¹⁰⁵ *Tesco Supermarkets v Nattress* (1972) AC 153; *Church of Scientology of Toronto* (1997) 116 CCC (3d) 1; *Canadian Dredge and Dock Company Ltd. v R Ltd.*(1995) 19 CCC (1SCC) at 29.

¹⁰⁶ *Kastigar v US* 406 US 441 (1972).

¹⁰⁷ See *Re National Irish Bank Ltd.* (1999) 1 ILRM 321 at 360-36.

¹⁰⁸ *Heaney and McGuinness v Ireland* (1996) 1 ILRM 580.

investigation in the context of a pending or intended criminal prosecution. If the United States precedent were to be followed, then it would be seen that it could not be used.¹⁰⁹

- 4.5.13 The criminal liability of directors, managers and officers is dealt with under Section 3(4)(a) of the Competition (Amendment) Act 1996. If a director, manager or other similar officer of a company has authorised or consented to the wrong in question, then personal liability arises. A presumption arises under subsection (b). Where it is proved that an accused was at the time a director, manager or other similar officer of a company it is to be presumed that this person consented to the doing of the acts of the company. This is a useful provision but it still does not solve the core dilemma of how to get the evidence to proceed with the prosecution.
- 4.5.14 The two basic problems are (a) how to get somebody to make a voluntary admission, not under statutory compulsion, so that the admission will be admissible in evidence and (b) how to introduce documents as admissible evidence in circumstances where the author of the document, if he or she is the accused, cannot be compelled to give evidence.

Admissions

- 4.5.15 Admissions constitutes someone saying or writing something to the effect that they have a responsibility for a crime, or for an element of crime. An admission can also be made, for example, in relation to a factual element of a case. So , for example, to say that one was in a particular street at a particular time may be an admission that one had the opportunity to commit a murder. Admissions have traditionally been obtained through someone being arrested and questioned in a context of a structured interrogation by Garda Officers.

¹⁰⁹

It should be noted however that from certain comments made at the end of the judgement of Barrington J in *Re National Irish Bank Ltd.*, it might be inferred that a piece of incriminating evidence which was discovered by the authorised officers as a direct result of an admission

4.5.16 From the perspective of what one might term conventional criminal law, the competition legislation is extraordinary in that there are no arrest provisions under the 1996 Act; the offences are not scheduled for the purpose of Sections 29 and 30 of the Offences Against the State Act 1939; they are not offences which pass the five year threshold for making them arrestable offences laid down by Section 4 of the Criminal Law Act 1997; nor are they offences under the Criminal Justice Act of 1996, which allows for detention and questioning for up to seven days on the authority of a District Judge; nor are they offences, because of the five year threshold, to which the ordinary powers of arrest and detention under sections 4, 5 and 6 of the Criminal Justice Act, 1984 apply. An amendment to apply Sections 4, 5 and 6 of the Criminal Justice Act 1984 was rejected in the Dáil. It follows that persons suspected of virtually any other criminal offence can be arrested and detained for questioning, but a person suspected of involvement in a competition offence cannot be arrested and detained unless the purpose is to charge that person and to bring them before a court. It may be that one needs an arrest warrant from the District Judge to arrest that person to bring them before the District Court for charging.

4.5.17 This situation is something of an anomaly. It means, in effect, that in the absence of the sort of incentives provided by a leniency programme, admissible confessions or admissions are very difficult to obtain. The fact that a person who refuses to give an authorised officer such information as he may reasonably require when engaged on a search under section 21 of the 1991 Act thereby commits an offence, means that any answer may well be regarded as having been given under compulsion. Of course, the mere fact that this particular sanction is mentioned on the statute book in respect of an obstruction of the authorised officer does not necessarily mean that an answer given will be deemed under compulsion. In *Re National Irish Bank Ltd.*, Barrington J in the Supreme Court stated: "*The fact that inspectors are armed*

which in itself is excluded, could be admissible. See, however, *The People (DPP) -v- Cooney* (1997) 3 IR 205.

*with statutory powers or may even have invoked the law, does not necessarily mean that a statement made in reply to their questions is not voluntary”.*¹¹⁰

- 4.5.18 Thus, the trial judge in the criminal trial will not only consider the fact of the statutory compulsion but will consider all of the circumstances in which the statement was made. It is a matter for the trial judge to decide whether or not, in those circumstances, the confession or the admission was voluntary, or not. If he decides that it was not voluntary, then he has no discretion but to exclude it from evidence.
- 4.5.19 It may be questioned as to whether an admission extracted from a person in their office, when authorised officers arrive unexpectedly and begin to conduct various searches on the premises and demand answers from company employees, who may never have experienced anything like this process before and who will probably be told that it is an offence to refuse to answer questions, could be regarded as making statements as anything other than under compulsion.
- 4.5.20 It seems to be the case that when the Competition Authority send in authorised officers (who may include the Director of Competition Enforcement himself), armed with a search warrant, they make clear to the persons on the premises the gravity of the situation.¹¹¹
- 4.5.21 This problem might be overcome if a provision for detention and questioning was introduced in accordance with the provisions which apply to other criminal offences. Obviously, when persons are arrested, they are detained under a compulsion. But once in custody, they are free to make a statement if they wish. They are always warned that under the “Judges Rules” they are not

¹¹⁰ (1999) 1 ILRM 321 at 353.

¹¹¹ In referring to media reports of complaints regarding the conduct of searches, the Director of Competition Enforcement has stated: “*Indeed it appears from many of these reports that what upset individuals was the very fact that the search taking place, and in some instances people actually said it seemed they were the subject of some form of criminal investigation!*”. Massey, *op.cit.* p.9 It would seem from this quotation that it is the Director’s intention that in the course of such searches people on the premises should be left in no doubt that they are indeed the subject of some form of criminal investigation.

obliged to make a statement. If they do, and the statement is adjudged to be voluntary (the proof of this is on the prosecution), a statement made in Garda custody is sufficient evidence, if it constitutes an admission of the elements of the offence, to convict a person with that offence. The Review Group therefore gave consideration to recommending that powers of arrest and detention be introduced with a view, primarily, to setting up the circumstances under which voluntary statements and admission might be made which would be admissible in evidence.

4.5.22 The real question is whether executives or other employees of a company allegedly engaged in some form of activity which constitutes a breach of section 4 or 5 will be prepared to make a statement containing critical admissions if they are arrested and detained in Garda custody and (probably) having had the benefit of legal advice. The question is, perhaps, a question of human psychology to which it is impossible to give a definitive answer. One view is that the circumstances of arrest and detention will be so alien and intimidating to most executives and employees that they will be ready to blurt out any and all information which they possess which persons more experienced in that situation might not. The contrary view is that the important information will probably be possessed by executives who are used to stress and pressure, who will have the benefit of legal advice, and who may calculate that they are better off saying nothing precisely because anything they say may well be admissible.

4.5.23 Some members of the Review Group had a concern that where a company is charged with offences under sections 4 or 5 (or even where individual directors or executives are so charged), the circumstances are unlikely to be such that the directors or executives in question will be hard to locate or will be likely to flee the jurisdiction or otherwise render a prosecution impossible. The arrest and detention procedure was seen by some as an overly heavy handed approach to a crime which, though a crime, hardly ranks on the same scale of moral offence as individual crimes against the person such as murder, rape, assault and so forth or even property crimes which directly affect the person such as theft of one's possessions or breaking and entering into one's

private house. There is also the point that there is considerably more ambiguity about whether one has entered into an agreement in breach of section 4 compared with whether one has murdered somebody. Other members took the view that activity which constitutes a breach of section 4 and 5 adversely affects consumers and that an analogy can therefore be drawn with the theft offence albeit that the element of personal intimidation or danger that may be present in cases where a person's house is burgled or bag snatched on the street, is absent. Still other members took the view that if breaches of section 4 and 5 are criminal offences, then no distinction should be drawn between the arrest and detention provisions applicable to such offences and the arrest and detention provisions applicable to the vast majority of other criminal offences. Another view was that the Competition Authority has the power to summon and examine witnesses under paragraph 7 of the Schedule to the 1991 Act so that an arrest and detention power should be unnecessary.

- 4.5.24 The Review Group was divided on the issue as to whether the arrest and detention procedure should be introduced. All members recognised and accepted the anomaly described above. The point of difference was whether or not the arrest and detention procedure was likely to lead to any significant voluntary admissions (which would be the primary purpose of introducing such a procedure). The majority of the Review Group was of the view that the arrest and detention procedure should apply to the investigation of competition law cases but where the arresting officer should have approval for the arrest from an officer not below the rank of Superintendent.

Documents

- 4.5.25 A separate problem is the problem of admission of documentary evidence. Assume, for the sake of illustration, that an inspection of an office pursuant to Section 21 results in the finding of a document, which sets out a concerted practice between two or more people in business. The question arises as to how this document can be introduced into evidence in the criminal trial.

4.5.26 The Criminal Evidence Act 1992 does not provide any great assistance. This merely allows ordinary business records to be admitted if certain other matters are proved. Thus, one has to prove that the records were compiled in the ordinary course of business by a person who had, or might reasonably supposed to had, personal knowledge of the matters in question but cannot now be expected to remember such a transaction. But how does one prove this if the person in question is the accused? One cannot because the 1992 Act does not change the rules as to admission by an accused person. The main purpose of the Criminal Evidence Act 1992 is to (for example) allow identifying marks on cars and other items of mass production to be used by reference to the original records of the manufacturer to prove ownership for the purpose of theft. That is far removed for the problem now under discussion. For example, the 1992 Act does not allow a record found in the accused's office, or on his computer, to be used in evidence against him.

4.5.27 Furthermore, the mere fact that somebody's name appears on a document, or may appear to be the author of the document, does not give rise to any evidential inference. Anybody can put anybody else's name on a document. Even if a fingerprint is found on the document matching the fingerprint of the person whose name appears at the bottom of the document, this does not prove that the person signed the document or made the statements in the document. It may show that this person handled the paper at some stage but whether before or after the words were written on the paper, one cannot tell. Therefore, to discover in someone's office a document signed by A and by B, which sets out a concerted practice, is not going to be admissible in evidence in itself as against A or B. One has to go further and show that this is an admission made by the person in question. If the document is in handwriting, than a handwriting expert who can prove that the person wrote the document is enough. If the document is signed, then handwriting analysis of the signature can be enough.¹¹²

¹¹² A person who knows the accused's handwriting can do the same job.

- 4.5.28 However, a signature is usually an insufficient sample upon which to base an opinion. If, as appears more likely, a document or a memo goes unsigned from A to B and suggests something, then in those circumstances it is not admissible against either A or B. Since anyone could have written it and since anyone could have attached the names of the persons in question to the document, the document as evidence is worthless.
- 4.5.29 The same problem arises where a document is discovered on a computer hard disk. Nowadays one can copy the whole of a computer hard disk and the ordinary procedure is to keep two copies, one of which is given to the party searched. If there are documents on the hard disk (and this includes documents which have been erased) which show a concerted practice, the same problem arises. How does one attribute these documents to the people who are apparently writing to each other, preparing schemes in respect of each other, or setting up documents which tend to show a concerted practice or an abuse of a dominant position? The answer is that the ordinary rules of admissibility, in terms of admissions set out above, make this extremely difficult. One would have thought that with a computer in a person's office, it should be easy to ascribe responsibility for what is on the hard disk of that computer to the person ordinarily using it. Regrettably from the prosecution perspective, that is not the case.
- 4.5.30 In the *People (DPP) v Dolan*¹¹³ a woman was charged with fraud. The alleged scheme was that in a large company when people left the payroll she kept them on, and then simply paid the wage packet to herself. This scheme was perfectly obvious from the computer. However, the computer records were admissible merely as evidence of what was keyed in and keyed out of the computer and the wider argument that because it was her computer and therefore she should take responsibility for it, was rejected by the trial judge. Since two or three other people could have had access to the computer, and since there was no individualised call-sign, known to her only that designated her work within the computer, a reasonable doubt automatically arose. It was

again the problem of ascribing the document to someone. The judge ruled that unless the prosecution were in a position to prove that the computer entries were made by her, the evidence could not be used against her. Since two or more people has access to the same computer and could have made the same entries, the prosecution case was doomed to fail and the woman was acquitted.

4.5.31 The Review Group has considered how this type of problem might be overcome in the context of prosecutions for breaches of competition law. A possible solution is to introduce a statutory presumption that any document which on the face of it purports to have been written by a person, or purports on the face to it to have been written by a person to a person, was in fact written by that person, and was in fact sent to the person to whom it was addressed and was received by that person. The statutory presumption could provide that such a document would then constitute an admission by the person presumed to have made the same, or the corporation presumed to have made the same, and (where the context so allows) by the person to whom it was presumed to have been sent and received. The burden of proof would then shift to the accused to explain that document and, if necessary, to explain that the apparent inference is not, in fact, correct. The Review Group has been advised that the shifting of the burden, in such circumstances, is unlikely to be regarded as unreasonable or unconstitutional. Once the accused raised a reasonable doubt in relation to the document in terms of his authorship of it, or in terms of the corporation for which he works, an acquittal would follow.

4.5.32 Furthermore, it would be helpful to introduce a statutory presumption that documents which are retrieved from a electronic storage system, which has proved to have been ordinarily used by a person in the course of his or her business were, until the contrary is proved, generated by or authored by such person. Finally, the Review Group considers that a presumption should be introduced that a statement made in such a document shall be admissible

¹¹³

A case which took place before Judge Patrick Smith in 1988 in the Dublin Circuit Court. The Review Group is indebted to Peter Charleton S.C. for this information.

against the person who has created or has drawn up the document or who has received the document, whether in written, mechanical, or electronic form.

4.5.33 These statutory presumptions would, in effect, make it the law that a statement made in a document apparently authored by A or B, or by C Company Limited, would be admissible were A, B or C Company Limited charged with an offence. The document would be admissible not only against them, but against other parties to whom the document was addressed as evidence of a concerted practice between them or (for example) the abuse of a dominant position where such appears to be so on the face of that document or series of document.

4.5.34 The point was made above that effective enforcement of competition law requires that the profile of competition law be raised and that a competition culture be created. Successful prosecutions are, in the view of the Review Group, an essential part of this process. The Review Group does not believe that the introduction of the sort of presumptions outlined above in relation to documentary evidence would, in the context of competition law prosecutions, represent any unwarranted interference with the paramount rights of the accused to a fair trial. On the contrary, the Review Group believes that the introduction of amendments to the law of evidence along these lines would facilitate the obtaining of convictions of persons who are in truth guilty of the offences charged.

4.5.35 The Review Group also considered what changes might be made to the way in which economic evidence is dealt with in court. The Review Group is conscious that the rules of evidence in both civil and criminal proceedings have been devised over many years for the protection of the rights of accused persons and filtering out evidence which may be regarded as unreliable for one reason or another (for example hearsay evidence). The Review Group is reluctant to recommend any particular changes to the conduct of criminal trials beyond the changes in relation to the law of evidence discussed above but it does consider that certain other changes could be usefully made in the context of civil proceedings.

Admission of Survey Evidence

4.5.36 Survey evidence may play a very important part in competition law litigation. It may be objected that survey evidence is in its nature, hearsay evidence, but the Irish courts have generally been prepared to admit survey evidence without too much difficulty.¹¹⁴ Of course, the weight to be attached to survey evidence is a different matter and depends on the circumstances. If survey evidence is going to be of any value, it will have to be shown that it was properly and professionally conducted in accordance with accepted principles of survey evidence, that the sample was sufficiently large so that the statistical conclusions can be inferred at a high confidence level, that the questionnaires were properly drawn up so that the answers, when understood in the context of the questions asked, are relevant to the issues, and so forth. Survey evidence which fails to meet these type of criteria may be accorded little weight.¹¹⁵ Survey evidence can also be very useful in establishing the necessary facts as to what is the relevant market and what the effect of particular conduct is on that relevant market.

4.5.37 If there were difficulties about the admission (as distinct from the weight) of survey evidence, the Review Group would recommend that such evidence be admissible as an exception to the hearsay rule. However, since judges appear to be prepared to admit survey evidence in competition law cases without any undue difficulty, the Review Group does not consider that any specific recommendation in this respect is necessary.

The Use of Assessors in Court

4.5.38 A theme which runs throughout much of this report is the inherent unsuitability of the courtroom and the forensic rules of evidence in an

¹¹⁴ See, for example, the *Masterfoods Limited -v- HB Ice Cream* case where extensive use was made of survey evidence.

¹¹⁵ See *Arnotts Limited -v- TPC* (1990) 97 ALR 555 at 602-609.

adversarial system for the evaluation of the sort of issues which arise under competition law. This unsuitability is not just to do with the complexity of the evidence. Such complexity can be overstressed and clear presentation by lawyers and experts who thoroughly understand the issues can do much to make the material much more accessible. Furthermore, as pointed out elsewhere in this report, courts are very well used to dealing with what is at times extremely complex technical evidence on a wide variety of topics and disciplines. What is unusual about some of the issues of competition law which fall to be decided by the court is the extent to which they involve questions of economic policy. A justification for a particular restrictive practice on the basis that it gives consumers a “fair” share of the benefit which is alleged to result from the restrictive practice (e.g. a more efficient distribution system) is an issue qualitatively different from deciding whether or not the administration of a particular drug to treat a particular medical condition was or was not negligence or whether a particular machine or process is sufficiently similar to a patented process as to constitute a patent infringement.

4.5.39 Thus, in a competition law case, the court is faced with the dual difficulty of what can be highly technical evidence on the principles of economics plus the necessity to consider policy type matters which rarely fall within the court’s jurisdiction. In both of these contexts, the Review Group considers that greater use could productively be made of an existing power available under the Rules of the Superior Courts, namely the power of the court to sit with an assessor. The court has the power to sit with an assessor or assessors in such manner and upon such terms as the court may direct.¹¹⁶ Thus, the court could appoint an independent assessor (say, an expert economist) who would sit with the judge and advise the judge in relation to complex points of economics or economic policy which may arise.¹¹⁷

¹¹⁶ Order 36, Rule 41 of the Rules of the Superior Courts.

¹¹⁷ Some of the parties who made submissions to the Commission on the White Paper argued in favour of appointing a national Advocate General to assist national courts in the application of Article 81 and Community law in general. Commission’s *Summary of Observations on the White Paper*, paragraph 5.2, page 15.

4.5.40 Lawyers (and even judges) tend not to be in favour of assessors. It is partly a fear of increased unpredictability in an already uncertain process. It is partly the apprehension that the judge may be unduly influenced by the assessor's views to the detriment of the force of the submissions made by the advocates. There is also the concern that if the assessor belongs to a particular school of thought, this may predispose him or her to one view rather than another.

4.5.41 However, there are well established guidelines in relation to the use of legal assessors or any similar procedure where the decision making body itself obtains legal advice on the matters in issue. In the *State (Polymark Ireland Limited) v Labour Court*¹¹⁸ Blayney J stated:

“It might be assistance for the future, however, if I were to indicate what procedure the Labour Court could safely adopt if similar circumstances arise again. They should first inform the parties of their intention to ask the registrar for legal advice; then, having obtained the advice, they should, at a resumed hearing, inform the parties of the nature of the advice they had obtained and give the parties an opportunity of making submissions in regard to it, and finally, having heard the submissions, the members of the court, should, on their own, without further reference to the registrar, arrive at their own conclusion on the issue. If this procedure had been adopted in the present case, no possible objection could have been raised by the prosecutor.”

4.5.42 This passage was approved by Murphy J in *Georgopoulos -v- Beaumont Hospital Board*.¹¹⁹ Such a procedure or a similar procedure would undoubtedly be followed by High Court judge sitting with, say, an expert economist assessor. Thus, if the economist assessor formed a particular view on a particular point (say, that one of the parties did or did not have sufficient market power in the relevant market such as might be necessary to characterise it as dominant), the trial judge would undoubtedly inform the

¹¹⁸ (1987) ILRM 357

¹¹⁹ (1994) ILRM 58. In that case, the Hospital Board which was enquiring into the facts surrounding the dismissal of a registrar in neurosurgery was not obliged to disclose the legal advice which it had obtained from its legal assessor (a retired President of the Circuit Court) because the advice given related only to the principles of natural and constitutional justice which would have to be followed by the board in its own procedures and not to any issue of

parties that this was the advice he was getting from the expert assessor and give the parties an opportunity to comment upon and make submissions on such a view. The decision ultimately remains the decision of the trial judge and not the assessor.

- 4.5.43 Obviously, the choice of assessor is very important. The independence of the judicial process must not be seen to be compromised in any way by an input at judicial level where there is even a risk of the perception of a favouritism towards one view or another (as distinct from the legitimate preference which may evolve for one view rather than another having heard the evidence). But it seems to the Review Group that these are not insuperable problems and that an expert economist sitting as an assessor with a trial judge may make a very valuable contribution to the conduct of the case, to a clear identification of the issues, to a greater understanding on the part of the judge, to a shortening of the case and to ultimately a reduction in the costs involved.¹²⁰

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law which was to be determined by the board. Indeed, the board had no issue of law before it to determine as it was exclusively an enquiry into the facts.

In volume 8 *Competition Press* (Edition 10, 1999) there is an interesting discussion at pages 264-270 of the ways in which economic evidence is handled in different jurisdictions, which discussion draws on papers delivered at a seminar organised by the OECD. Keane J. (as he then was) put forward the suggestion of a competition tribunal which would decide the factual issues which came before it with an appeal to the High Court on any question of law (but which would not have any criminal jurisdiction). Such a tribunal operates in Australia where the President of the Australian Competition Tribunal is also a judge of the Federal Court of Australia. He sits on the competition tribunal with two others, one of whom is an expert economist and the other is a retired business person. While the tribunal can decide questions of law, errors of law can be reviewed by the court. Expert evidence before the Australian Competition Tribunal is given in a somewhat novel fashion where the experts prepare written reports which are circulated and where the experts are then sworn in at the same time and, in effect, a debate takes place between the expert witnesses presided over by the Tribunal with interventions from the lawyers. The President of the Tribunal, Judge Lockhart is quoted as saying: "*We have found in practice that what would have been, say, three or four days in a big case cross-examination by experts, tends to become three or four hours because there is not much left to do. The experts have done it for us. And they have by this process defined the really relevant questions in the case. ... The advantages of this method of receiving the experts' evidence is that the worst effects of the adversary system are nullified, or at least they are seriously reduced ... Ultimately though it is the judges who decide the law of competition.*" Another member of the Australian Competition Tribunal, New Zealand High Court Judge Maureen Brunt, describes the situation in New Zealand and also comments that "*The reception of economic evidence in the Australian Courts has been fraught with difficulty and controversy.*" Judge Diane P Wood, a judge of the Seventh Circuit Court of Appeal in the USA, and a very well known expert in this area, refers to the possibility of the judge appointing an economist as his or her own expert (somewhat similar to the suggestion made above about the use of an assessor). She also touches upon the distinction between an inquisitorial type system (where much of the evidence may be produced by the court or the court appointed expert) and the adversarial system (where the evidence is exclusively what the parties themselves choose to produce).

4.5.44 Accordingly the Review Group recommends as follows.

Recommendation:

- (1) By a majority the Review Group recommends that powers of arrest and detention be extended to competition law offences but that the arresting officer should have approval for the arrest from an officer not below the rank of Superintendent.
- (2) The Review Group recommends that amendments be made to the rules governing the admission of documentary evidence and the inferences to be drawn from such documents in the context of civil or criminal proceedings for breaches of the Competition Acts. In particular, the Review Group recommends;
 - (a) That a statutory presumption be introduced that a document, which on the face of it purports to have been written by a person, or purports, on the face of it, to have been written by a person to a person, was in fact written by and sent by the person who appeared to have written it and was received by the person to whom it was addressed and that the statements in the documents in question be deemed admissions that the statements in question were made and received by the apparent author and recipient of the document respectively, which presumption would be rebuttable;
 - (b) That a statutory presumption be introduced that documents which are retrieved from an electronic storage system, which is proved to have been ordinarily used by a person in the course of his or her business were, until the contrary is proved, generated by or authored by such a person;

- (c) That a statement made in such a document shall be admissible by the person who is proved or presumed to have created or drawn up such document or (where relevant in the context) who has received such a document whether in written, mechanical or electronic form;
- (d) That the provisions with respect to expert evidence contained in section 4 of the Competition (Amendment) Act 1996 should be extended to civil proceedings for the avoidance of doubt; and
- (e) That greater consideration should be given to the use of court appointed assessors in the conduct of competition law cases (whether civil or criminal).

4.6 The Necessity to Protect the Rights of Persons the Subject of Investigations by the Competition Authority

The Competition Authority's Powers of Investigation

- 4.6.1 The Competition Authority has a variety of powers available to it to investigate suspected breaches of the Competition Acts.¹²¹ The Director of Competition Enforcement can carry out an investigation either on his own initiative or as a result of a complaint to him from any person into any matter where he suspects that a breach of section 4 or 5 of the 1991 Act has occurred or may occur or into the commission of the various offences under the 1996 Act.¹²²
- 4.6.2 An essential weapon in the Director's armoury is the power to apply to a District Justice for a search warrant pursuant to section 21 of the 1991 Act. The Competition Authority can appoint one or more persons to be "authorised officers" for the purposes of the 1991 Act.¹²³ This can include the Director of Competition Enforcement since the persons who can be appointed as "authorised officers" are not limited. It is pursuant to such search warrant that the Competition Authority can carry out what is sometimes referred to as a "dawn raid" on a company's premises. The warrant may authorise the authorised officer to do the following things:
- (a) Enter and inspect premises (or vehicles) where a business is being carried on;

¹²¹ These powers are apart from the various provisions in the legislation under which the Competition Authority may carry out various studies or analyses. These provisions are discussed further below.

¹²² Paragraph 1A of the Schedule to the 1991 Act as inserted by section 9 of the 1996 Act.

¹²³ Section 20 of the 1991 Act. At present, the Minister also has the power to appoint persons to be "authorised officers" for the purposes of the 1991 Act. If the recommendation made in this report that the enforcement power be confined to the Competition Authority, then there would seem no reason to retain the Minister's power to appoint authorised officers.

- (b) Require the person carrying on the business or anybody employed there to produce books, documents or records in the power or control of that person if they relate to the business “and to give to the authorised officer such information as he may reasonably require in regard to any entries in such books, documents and records.”¹²⁴
- (c) Inspect and copy or take extracts from any such books, documents and records.
- (d) Require any of the employees to give to the authorised officer any information he may require with regard to the persons carrying on the business or employed in connection with the business.¹²⁵
- (e) Require the person carrying on the business or any employees to give to the authorised officer “any information which the officer may reasonably require in regard to such activity” (i.e. in relation to the business).¹²⁶

4.6.3 The Director (assuming that he is the authorised officer) must apply to a District Judge where the Director swears an information setting out the grounds upon which the Director believes that the warrant should be issued. There must be enough information contained in the sworn information to enable the District Judge to exercise his discretion as to whether or not the warrant should be issued.¹²⁷ Any person who obstructs or impedes an authorised officer in exercising these powers is guilty of an offence which

¹²⁴ Section 21(1)(b) of the 1991 Act.

¹²⁵ This seems to be information about the people themselves and the membership and management of any unincorporated body of persons as distinct from information about the business itself.

¹²⁶ Section 21(1)(e) of the 1991 Act. The “activity” is defined in section 21(1)(a) as “any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business.”

¹²⁷ *The People (DPP) -v- Kenny* (1990) 2 IR 110. In that case, there was no evidence that the Peace Commissioner (who was empowered to issue the search warrant) had made any inquiry as to the basis of the garda officer’s suspicion. The warrant was declared invalid because the Peace Commissioner had therefore failed to exercise his judicial discretion. See also *Larkin -v- O’Dea* (1994) 2 ILRM 448.

carries sanctions ranging up to £1000 and/or imprisonment for up to twelve months.¹²⁸

4.6.4 Quite apart from this power in relation to a search warrant and the power to obtain information from the employees etc. in question, the Competition Authority has a power under paragraph 7 of the schedule to the 1991 Act to summon witnesses to attend before it who may be examined under oath and who may be obliged to produce to the Competition Authority any documents in their power or control. Any such witness before the Authority is entitled to the same immunity and privileges as if he were a witness before the High Court.¹²⁹

4.6.5 The wording of this provision is very similar to the wording of the provisions in the Tribunals of Inquiry Act 1921 under which Tribunals of Inquiry are empowered to summon witnesses, examine them under oath, obtain documents and so forth. Some of the difficulties with this procedure are well known in the context of Tribunals - for example, the fact that procedures which are drawn from an adversarial system by which defined disputes between litigants can be resolved are transplanted into an essentially inquisitorial and investigatory procedure raises questions as to how persons' rights to natural and constitutional justice can be observed.¹³⁰ These problems are exacerbated when the conduct which is the subject of inquiry is potentially criminal in nature and where the person carrying out the inquiry may be doing so with a view to assembling evidence for the purpose of a prosecution.

¹²⁸ Section 21(3) of the 1991 Act. Note also that by virtue of section 21(4) of the 1991 Act (inserted by section 11 of the 1996 Act), a very wide definition of "records" is given which includes disks, tapes, sound tracks, films, tapes and so forth whereby information, sounds, signals or images can be reproduced in some way.

¹²⁹ Schedule to the Competition Act 1991, paragraph 7(2).

¹³⁰ See *Goodman International -v- Hamilton* (1992) 2 IR 542; *Redmond -v- Flood* (1999) 1 ILRM 241; *Lawlor -v- Flood*, Supreme Court, Unreported, 8th October 1999; *Bailey -v- Flood*, Supreme Court, Unreported, 28th July 1998.

The Necessary Level of Suspicion for the Granting of a Search Warrant

- 4.6.6 The Competition Act does not specify what level of suspicion the authorised officer should have before applying for a search warrant. Section 21(1) merely provides that the authorised officer can apply for the warrant “for the purpose of obtaining any information necessary for the exercise by the Authority” of its functions under the Act. In almost every other area of criminal law, the person applying for a search warrant must have a reasonable suspicion that a crime has been committed.
- 4.6.7 It is possible that this requirement has been left out of section 21 on the basis that as originally enacted, breaches of the Act were not criminal offences and it may have been envisaged that the search warrant procedure would be primarily used in the context of investigations being carried out by the Competition Authority which would not in themselves lead to any particular form of sanction. While the Minister had an enforcement role under the 1991 Act, that did not involve any criminal prosecution and at best, the Minister would have been able to bring a civil application for an injunction or a declaration (but not damages) in respect of any suspected breach of the Act. It may thus have been thought the “reasonable suspicion” test was unnecessary and might be impossible to overcome where the Competition Authority was merely carrying out, say, a sectoral investigation (although this in turn begs the question as to why the relatively draconian power of acting on foot of a search warrant would be used in such a context).
- 4.6.8 Whatever the reason, it seems to the Review Group that the introduction of the criminal sanctions means that the authorised office must, measured objectively, have a reasonable suspicion that a crime has been committed or is about to occur and that enough evidence must be put before the District Judge on foot of which he can have a reasonable suspicion that a breach of the Act has occurred (or is about to occur).

Judicial Review of the Issue of a Search Warrant

- 4.6.9 There are differences, and they may be important differences, between the powers of the Garda Síochána in the investigation of crime and the powers of an administrative body such as the Competition Authority which is given the power to apply for a search warrant and act upon it if issued, but where this may not necessarily be with a view to criminal proceedings or where criminal proceedings may not necessarily issue. For example, it is clear from section 21(1) of the 1991 Act that the Competition Authority can apply for a search warrant “for the purpose of obtaining any information necessary for the exercise by the Authority ... of [its] functions under this Act.” The Competition Authority could thus use this power in the course of, say, carrying out an investigation of an abuse of a dominant position under section 14; or carrying out a study or analysis under section 11; or (perhaps less likely) evaluating an agreement notified to it under section 7. By contrast, the Garda Síochána only carry out searches in the course of a criminal investigation.
- 4.6.10 In this latter context, it seems clear that one cannot apply to court in advance of the criminal trial with a view to seeking a declaration that the search warrant was invalid. Once the search warrant is issued, the search is carried out and the question of whether evidence discovered as a result is admissible may then become an issue at the trial. For example, it may be argued that the warrant was defective or that the search was not carried out in accordance with the terms of the warrant or was otherwise carried out in some way which is unfair. The authorities seem clear however that these are issues to be resolved at the stage of the trial by the trial judge.¹³¹

¹³¹ *Byrne -v- Gray* (1988) IR 31; *Berkeley v Edwards* (1998) IR 219; *DPP -v- Windle* (2000) 1 ILRM 75. These cases are authority for saying that if the object in seeking judicial review of the warrant is to exclude the evidence obtained on foot of the search warrant, then the proper forum for the determination of the issue of the admissibility of the evidence is the (usually forthcoming) trial of the applicant.

4.6.11 Where the Competition Authority applies for a search warrant however, and conducts a search, there may be no trial at all. Yet it is clear that search warrants constitute a potentially invasive procedure into a variety of constitutional rights which persons enjoy (such as under Article 40.5 of the Constitution) and that there must be an available mechanism to ensure that a remedy is available for any infringement of persons' constitutional rights in the course of the exercise of the search warrant procedure. For example, in *Hanahoe -v- Hussey*¹³² Kinlen J, when considering the constitutional aspect of the issuing of a search warrant, stated:

*“In the case of serious invasion of constitutional rights, the judge must be satisfied on the facts that the appropriate statute would apply and must seek to ensure that the constitutional rights of the citizen are protected.”*¹³³

4.6.12 Where no criminal prosecution is pending, it is possible to bring an application for judicial review of, variously, the Competition Authority's decision to apply for a search warrant; the decision of the District Justice to grant the search warrant; and the actions of the Competition Authority's authorised officer in carrying out a search on foot of the warrant. If no criminal prosecution takes place, the primary relief sought may be declaratory in nature or the return of any items seized¹³⁴ but it is of course entirely possible to seek and obtain damages for breach of constitutional rights particularly in circumstances where that is the only remedy available by which the person's constitutional rights can be vindicated.¹³⁵

¹³² (1998) 3 IR 69.

¹³³ Page 93.

¹³⁴ See, for example, *Simple Imports Ltd -v- The Revenue Commissioners*, Supreme Court, Unreported, 19th January 2000 where the warrants on their face stated that the District Judge was satisfied that the officer had “cause” or “ground” to suspect that there were uncustomed goods on the premises. The goods in question had been seized on foot of the warrants. However, since the warrant did not recite that the District Judge had satisfied himself that there was reasonable cause or good grounds for the suspicion of the officer, the warrant was bad on its face, a defect which could not be cured by subsequent evidence that enough information had in fact been put before the District Judge which might well have enabled him to form the necessary view which was a precondition to the issuing of the warrant. Since the object of the judicial review application was to obtain the return of the goods seized rather than the exclusion of evidence at any forthcoming criminal trial, the applicants were thus entitled to an order quashing the search warrants and obtaining the return of their goods.

¹³⁵ See the discussion in Hogan and Morgan, *Administrative Law in Ireland*, 3rd Edition (1998) pages 819-827.

4.6.13 A related and somewhat difficult issue is the extent to which corporate bodies may rely upon constitutional protections which are expressed in the Constitution in terms which seem to relate to human persons only. It is not for the Review Group to attempt to resolve this issue but the legal advice available to the Review Group indicates that the better view is that the fact that persons may choose to conduct their business affairs through the medium of companies or corporate bodies with separate corporate personalities does not deprive such persons (and thus the associated corporate bodies) of their constitutional rights.

Understanding the Purpose of the Search

4.6.14 At present, it does not appear that there is any requirement in the legislation that the authorised officer has to explain the purpose of the search, why the investigation is being carried out, the issues to which the investigation is directed, the sort of documents or other evidence which the officer expects or wishes to find and so forth. There is no legislative requirement that the authorised officer should produce the sworn information upon which the search warrant was obtained. Searches can be carried out in grim silence while the authorised officers go through people's desks, filing cabinets and computers where the staff of the business in question may have little or no idea as to the purpose of the search.

4.6.15 The Review Group considers it desirable that the authorised officers carrying out a search on behalf of the Competition Authority should inform the persons in charge in the premises where the search is being carried out of the essential nature of the purpose behind the search so that the persons concerned may understand the essence of what is being alleged against them or the business.¹³⁶ The Review Group does not believe that an obligation to disclose

¹³⁶ The Director of Competition Enforcement has stated publicly that "*the Authority only seeks a court warrant where it believes that there is ... prima facie evidence of a breach of the Acts ... In addition in the overwhelming majority of cases where warrants have been obtained have been in respect of alleged 'price fixing' behaviour.*" Massey, *op. cit.*, page 9.

the purpose of the investigation would in itself represent any hindrance to the Competition Authority's power to carry out the search while at the same time such disclosure may serve to reassure employees who may have no culpable guilt in the matter at all as to the nature of the process and may assist in reducing any unnecessarily oppressive quality which, by their nature, such searches are prone to produce.

- 4.6.16 Such an obligation would also seek to conform with fundamental principles of fairness and due process. In the case of an ordinary arrest, the person who is arrested and searched is entitled to be told in straightforward language as to why he has been arrested and is also entitled to a description of the statutory power which is being used to detain and search him.¹³⁷ Equally, there must be some objective justification for inspecting a particular book or record or taking a copy of it in the sense that the exercise of inspection and copying must have some relevance to the alleged crime under investigation. In England, it has been held that

*“the search must have a purpose and what may be searched as relevant to one purpose may, or may not, be as extensive as that which has to be searched as relevant to another purpose.”*¹³⁸

- 4.6.17 The Review Group sees no reason as to why the basic requirements surrounding a search warrant for the investigation of what might be termed traditional crimes should not apply to an administrative authority exercising a similar power of search. The Federal Court of Australia has held that such principles should apply to a search conducted by an administrative body. In *Australian Federation of Air Pilots -v- Australian Airlines*¹³⁹ the issue was

¹³⁷ *Farrelly -v- Devally* (1998) 4 IR 76. This may not apply where the circumstances are such that the person arrested must have known of the reason for his arrest.

¹³⁸ *R -v- Tillet* (1969) 14 FLR 101 at 113. This principle has subsequently been given statutory force by section 16(8) of the English Police and Criminal Evidence Act 1984 which provides that “a search under warrant may only be a search to the extent required for the purpose for which the warrant was issued.” See also, Feldman, *The Law Relating to Entry, Search and Seizure* (1986) paragraph 5.26 which states: “The warrant must provide sufficient information to allow the officer and the occupier to know the extent of the officer's powers, and if that entails knowing what the offence is then the offence must be stated, with more or less particularity, in the warrant.”

¹³⁹ (1991) 28 FCR 360, 52 Australian Criminal Reports 464.

whether a regulatory body, which had a power of inspection, could exercise that power of inspection if the relevant official subjectively considered that there was a sufficient connection between the purpose of the inspection and what he was inspecting or whether there had to be a sufficient objective connection. The court held that there must be an objective connection.

- 4.6.18 Accordingly, the Review Group recommends that any authorised officer of the Competition Authority carrying out any searches should inform the persons in charge on the premises in question as to the essential nature and purpose of the search including the subject matter of the investigation and, where it is the case, the nature of any allegation which has being made against the business or persons whose premises are subject to the search.

Disclosing the Information

- 4.6.19 Somewhat different considerations may apply to the question of whether the authorised officer should be obliged to show a copy of the sworn information to the persons on the premises. Prima facie, the Review Group thinks that the authorised officer should be so obliged, but recognises that there may be circumstances where the Competition Authority would legitimately wish to keep confidential the source of the information it has obtained which has led it to applying for the search warrant. Traditionally, the reason for not disclosing sources in a criminal context is the possibility that the source might be endangered. This problem is particularly acute in terrorist crimes or other crimes involving violence. While this danger may be reasonably regarded as very significantly less in the context of criminal offences under the Competition Acts, the identity of the source could still be a very sensitive matter e.g. if the source was an employee of the business whose premises is subsequently searched.

- 4.6.20 The necessity to protect “whistleblowers” is the subject of another recommendation in this report. For present purposes however, the Review Group recognises that it may be inappropriate to oblige the Competition

Authority to reveal its sources which may be mentioned in the sworn information prepared for the purpose of obtaining the search warrant. Thus the Review Group recommends that while the authorised officers should be obliged to produce the sworn information to the persons on the premises where the search is being carried out, the Competition Authority should be entitled to block out from the copy of the information thus shown to the persons in question the names of any sources and any information from which the identity of the source might reasonably be inferred, if the authorised officer thinks this is appropriate in the circumstances.

The Privilege Against Self Incrimination

4.6.21 The Review Group previously considered this issue and took the view that the law in this area had been significantly clarified by the Supreme Court decision in *Re National Irish Bank Limited*¹⁴⁰ so that a specific recommendation was not necessary on this issue.¹⁴¹

4.6.22 This topic has been touched on above in the context of the recommendation as to changes in the law of evidence. The Review Group understands that the Committee to Review the Offences Against the State Acts 1939-1998 is considering the question of the right to silence and its relationship to section 52 of the Offences Against the State Act 1939.¹⁴²

4.6.23 Aside from the position under the Irish Constitution, it is also of relevance to consider the position under the European Convention on Human Rights (“the

¹⁴⁰ (1999) 1 ILRM 321.

¹⁴¹ Discussion Document on Competition Law, pages 164-165.

¹⁴² Under this section, a member of the Garda Síochána can question a person who has been detained under the Act and such person must give “a full account of such person’s movements and actions during [a] specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under [the 1939 Act] or any scheduled offence.” Under section 13 of the Offences Against the State (Amendment) Act 1998, section 52 has no effect unless the member of the Garda Síochána first informs the person detained, in ordinary language, that the demand is being made under section 52 and that the consequences of a refusal to comply are that the person is guilty of an offence, the point being that an admission obtained in such circumstances may not now be admissible because it has been obtained pursuant to a statutory compulsion.

Convention”) to which Ireland is a party. Article 6 of the Convention provides in part as follows:

- “(1) *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...*
- (2) *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*”

4.6.24 In *Funke -v- France*¹⁴³, the court held that Article 6(1) protects

*“the right of anyone ‘charged with a criminal offence’ within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself.”*¹⁴⁴

4.6.25 The European Court of First Instance considered this issue in *BASF -v- Commission*¹⁴⁵. The court arguably expressed somewhat inconsistent positions, holding on the one hand that to recognise an absolute right of silence “would go beyond what is necessary to preserve the defence rights of undertakings and would constitute an unjustified hindrance to the Commission in the accomplishment of its task” but also holding that “the Commission may not, however, by a decision to request information, undermine the undertaking’s defence rights. Thus it may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove.”¹⁴⁶

¹⁴³ (1993) 16 EHRR 297; (1993) 1 CMLR 897.

¹⁴⁴ See also *Murray -v- United Kingdom* (1996) 22 EHRR 29; and *Saunders -v- United Kingdom* (1996) 23 EHRR 313. For a useful discussion of this issue and the relationship between the Convention and the Treaty, see Forrester *Modernisation of EC Competition Law*, Paper delivered to Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law and Policy, 14th and 15th October 1999, page 43-81.

¹⁴⁵ Commonly referred to as the PVC case, judgment delivered on the 24th April 1999.

¹⁴⁶ Paragraphs 448 and 449.

4.6.26 The critical power given to the authorised officer in this regard is that referred to in section 21(1)(e) of the 1991 Act where the authorised officer can require the person in charge of the business or any employee to give him “any information which the officer may reasonably require in regard to such activity.” That is not limited to explanations in relation to particular documents or information in relation to individual persons or the structure of the organisation (both of which are dealt with in other subparagraphs of section 21(1)).

4.6.27 It is clear that if the authorised officer insists on exercising this power, then, as discussed above, where the circumstances are such that the resulting information will not be regarded as having been imparted voluntarily, the statement or the admission will not be admissible in evidence. It may be the case however that the authorised officer gathers useful information from the admission which in turn leads him to certain other evidence (e.g. particular documents in a filing cabinet). Whether or not such other evidence should be admissible seems to the Review Group to be a matter which is best decided by the trial judge who will know the circumstances of the particular case rather than attempting to lay down any a priori rule about the matter. It may well be prudent for authorised officers not to insist on answers to the questions they are asking in certain circumstances. But, again, this seems to be a matter for the policy and discretion of the authorised officer and the Competition Authority rather than an appropriate subject for legislative intervention.

4.6.28 Accordingly, the Review Group does not recommend any change in the legislative position in this area.

The Right to Legal Advice

4.6.29 An issue which commonly arises is the extent to which persons the subject of a “dawn raid” are entitled to have their solicitor present before the authorised officer continues with the search or the extent to which they are entitled to

consult with their solicitor (perhaps by telephone) before the search commences or before they answer any questions.

4.6.30 The general rule in criminal law is that one does not have a right to legal representation during a search. On the other hand, a suspect is usually arrested and detained before he is charged and he has a right to legal advice during his detention and has the right to consult with a solicitor (although he does not necessarily have the right to have the solicitor present during the questioning).

4.6.31 It is instructive to look at the procedures adopted by the Commission in its investigation process. The Commission's powers in this regard are contained in Article 11 and Article 14 of the Regulation 17.¹⁴⁷

Articles 11 and 14 of Regulation 17

4.6.32 Article 11 is a two-stage procedure involving a request for information followed by a formal Commission decision if necessary. For the purpose of carrying out its various duties, the Commission is entitled to obtain what is described as "all necessary information" from undertakings, from Governments and from the competent authorities of the Member States. The Commission can send a request for information to an undertaking (and must give a copy at the same time to the competent authority of the Member State where the undertaking is situated). The Commission must state "the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information."¹⁴⁸ The undertakings are obliged to supply the information requested and the Commission can fix time limits within which the information must be provided. If the undertaking fails to give the necessary information, the Commission can take a formal decision requiring the information to be supplied within a given time frame and must

¹⁴⁷ The White Paper proposes a number of significant extensions of these powers. These proposals have drawn severe criticism as being inconsistent with the European Convention on Human Rights. See, for example, Forrester, *op. cit.*, pp. 43-81; Siragusa, *op. cit.*, pp. 35-47.

¹⁴⁸ Regulation 17, Article 11(3). The sanctions for incorrect information are monetary fines.

indicate the penalties for failure to comply. This decision is capable of review by the Court of Justice.

4.6.33 Article 14 on the other hand gives the Commission specific powers to undertake investigations and there is a clear parallel between Article 14 of Regulation 17 and the Competition Authority's powers under section 21 of the 1991 Act. Thus, for the purpose of all "necessary investigations into undertakings and association of undertakings" authorised officials of the Commission are empowered:

- (a) to examine the books and other business records;
- (b) to take copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport or undertakings.¹⁴⁹

4.6.34 Before any such investigation, the Commission must inform the competent authority of the Member State where the investigation is to occur that there will be an investigation and of the identity of the authorised officials. The Commission's decision to order the investigation must specify the subject matter and purpose of the investigation, appoint the date on which it is to begin, indicate the penalties for non-compliance and refer to the right to have the decision reviewed by the Court of Justice. Furthermore, the Commission must consult with the competent authority in the Member State where the undertakings in question are located before coming to a decision to order an investigation. The competent authority in the Member State has a duty to assist the officials of the Commission in the investigation if so requested.

¹⁴⁹

Article 14(1).

- 4.6.35 There are in fact two different procedural routes which may be followed which lead to a Commission investigation under Article 14. First, authorised officials of the Commission may exercise their investigatory powers upon producing a written authorisation of their power to do so and specifying the matters referred to in Article 14(2). Neither Article 14(1) nor Article 14(2) expressly state that the persons whose premises are searched or the persons who are questioned must co-operate with the officials, answer the questions and so forth. The alternative route is where the Commission actually orders an investigation by a decision of the Commission and it is expressly provided in Article 14(3) that in those circumstances there is an obligation to submit to such investigations i.e. a legal obligation to comply with the terms of the decision. Thus, it appears to be the case that when the officials conduct an investigation as authorised officers of the Commission but where the Commission have not taken a formal decision to order an investigation, the undertaking need not comply with the Commission's investigatory requests.¹⁵⁰ On the other hand, an investigation pursuant to a formal Commission decision does create an obligation to comply with it and any breach is punishable by a fine. The latter version of the Article 14 investigation (pursuant to a formal Commission decision) is now much more frequently employed by the Commission than the less formal version. Nonetheless, under either version, the powers are the same i.e. those set out in Article 14(1) as outlined above.
- 4.6.36 There is a body of Community case law dealing with what relationship between a document and an alleged infringement is necessary to justify a request for disclosure;¹⁵¹ the necessity to exercise the power to request information in a reasonable manner; in a manner consistent with the principle of proportionality; and with a limited measure of intervention.¹⁵² It is noteworthy in the context of the discussion above about the desirability of the authorised officer of the Competition Authority informing the persons on the premises as to the essential purpose of the investigation that Article 11

¹⁵⁰ Commission Answer to Written Question No. 677/79 (1979) O.J. C310/30.

¹⁵¹ *SEP -v- Commission* (1994) ECR I-1911.

¹⁵² See, for example, *Acciaieria e Tubificio di Brescia -v- High Authority* (1960) ECR 71.

expressly requires that the request for information under Article 11 must state the legal basis and the purpose of the request.¹⁵³

4.6.37 The entirely separate and independent power of investigation under Article 14 is both more open ended and less well defined. For example, while it may appear implicit that the persons on the receiving end of the investigation are obliged to comply with the Commission's requests to take copies of documents or to ask for oral explanations on the spot, in the case of an investigation on foot of a sample mandate or authorisation, Article 14 (unlike Article 11) does not expressly state that the undertakings etc. must supply the information requested. Furthermore, it seems clear that any implicit obligation to co-operate with the investigation is not an absolute obligation since, among other things, the question of the privilege attaching to lawyer/client communications arises¹⁵⁴ as does the privilege against self incrimination and the right of the undertaking concerned not to have to undermine its own defence.

4.6.38 Although Article 14 contains a power to "ask for oral explanations on the spot", this does not mean that the Commission officials can thus side step the procedural requirements of fairness which are more expressly enshrined in Article 11 such as alerting the persons concerned to the nature of the investigation, not undermining their defence and so forth. In *National Panasonic (UK) Limited -v- Commission*¹⁵⁵ the European Court of Justice stated:

"It is not true to say that the Commission may obtain information by requiring explanations on the spot at the

¹⁵³ Note however that in *Brescia*, the court stated: "Contrary to the complaint made by the applicant and although the decision is imperfectly formulated as regards the need for the request for information, sufficient reasons are given for the decision, since the mere reference to the performance of its tasks by the High Authority is supplemented by the statement of the purposes for which the information was intended." Page 82.

¹⁵⁴ In some continental European jurisdictions, communications with and advice from in-house counsel are not afforded the same degree of privilege as are similar type communications and advice from outside counsel. In general, however, no such distinction is drawn under Irish law once the in-house counsel is a properly admitted solicitor or barrister and thereby subject to the various ethical obligations which that involves.

¹⁵⁵ (1980) ECR 2033

time of an investigation by means of a decision under Article 14 and thus avoid the safeguards of the procedure under Article 11. In fact officials of the Commission undertaking an investigation are empowered to require explanations of specific concrete questions arising out of the books and business records which they examine, which has nothing to do with the power to ask general questions requiring careful consideration and perhaps the gathering of information by the firm."¹⁵⁶

4.6.39 One commentator has made the point that in the White Paper, the Commission is in fact seeking extended powers of investigation while at the same time describing such extension as a mere "clarification" of what it understands to be its present powers. After referring to the above passage from *National Panasonic* the author states:

"This appears to contradict what the Commission now says about its own powers in the White Paper, namely that Article 14 should be amended 'to make it clear that ... the authorised Commission officials are empowered to ask ... any questions that are justified by and related to the purpose of the investigation, and to demand a full and precise answer.'"¹⁵⁷

4.6.40 While it is clear that the company under investigation must have some duty to co-operate with the Commission officials¹⁵⁸ there is a balance to be struck between the scenario where a company points the Commission officials in the direction of vast rooms of filing cabinets and affords them no further assistance and the scenario where Commission officials can demand that the company go through all the files and produce any documents which might incriminate the company. Similarly, the Commission itself acknowledges that

¹⁵⁶ Paragraph 25.

¹⁵⁷ White Paper, paragraph 113. The quotation is drawn from Forrester, *op. cit.*, page 48. A useful summary of the concerns about the Commission's proposals to extend its investigatory powers can be found in the Commission's *Summary of Observations on the White Paper*, 1999, paragraph 7.1-7.4, pages 22-24. Much of the concern focuses on the proposals in relation to oral questioning of persons on the premises and the proposed ability of the Commission to summon individuals to the Commission's premises.

¹⁵⁸ *Fabbrica Pisana* (1980) CMLR 354

the power to ask for explanations cannot be used to intimidate company officials into making admissions that they might not otherwise make.¹⁵⁹

4.6.41 Insofar as the question of the right to legal representation during the searches concerned, there is a balance to be struck between the right to take legal advice and the undesirability of holding up the search procedure while legal advice is obtained (perhaps by telephone) or by awaiting the arrival of a solicitor during which time it is possible that relevant evidence might be destroyed. Conversely, the undertaking may have certain documents which are properly privileged and which the Commission should not be entitled to see but where it may not be possible to successfully assert that right in the absence of speedy access to a lawyer.

4.6.42 In the course of Commission investigations, there can be no objection to an undertaking having a solicitor present during the search and the European Court of Justice has recognised that parties have a right to legal representation.¹⁶⁰ On the other hand, it does not appear that under Community law there is any right to have one's solicitor or legal advisor actually present. Thus, in *National Panasonic (UK) Limited -v- Commission*¹⁶¹ the Commission officials conducted a "dawn raid" and arrived at the company's premises at 10.00 a.m. The company sought to contact their solicitor and made arrangements to fly him to the nearest airport and have a car then take him to the company premises. The officials refused to wait any longer than 10.45 a.m. even though the solicitor had not yet arrived and then commenced their investigation. The court concluded that no fundamental right of the company had been infringed.¹⁶² On the other hand, the Commission officials must

¹⁵⁹ The Commission has stated that "the power should not be used to pressure the officials of a firm into making oral admissions which they would not make if they had the time for reflection afforded them by a written request under Article 11." Commission Notice: *Dealing with the Commission: Notifications, complaints, inspections and fact finding powers under Articles 85 and 86 of the EEC Treaty* (1997).

¹⁶⁰ *Hoechst AG -v- Commission* (1989) ECR 2859.

¹⁶¹ (1980) ECR 2033.

¹⁶² The court did not expressly comment on the issue as to whether the company was entitled to have a solicitor present but given its conclusion, it seems implicit that the court considered there was no such right. This was the opinion of Advocate General Warner.

allow the company a reasonable time to get legal advice.¹⁶³ The Commission has stated:

*“Naturally the Commission representatives are prepared to wait for a lawyer to be present before commencing an inspection, provided that the delay is reasonable and that no documents are removed from the premises or destroyed in the meantime.”*¹⁶⁴

4.6.43 On the basis of the explanatory notes issued by the Commission it would seem that while the investigating officials will accept some delay, they will only do so provided the management undertake that the business records will remain in the place and state they were in when the officials arrived and the officials must not be obstructed in any way from entering and remaining in occupation of offices of their choice.

4.6.44 Other issues also arise. Can the Commission demand an explanation from a particular person nominated by the Commission or is it for the company to put forward the official who it says will provide the explanations? The better view seems to be that while the Commission cannot compel any particular person to answer the questions, the company has an obligation to put forward the person who is in the best position to respond to the queries. The general point is that powers of investigation and inquiry of this nature which are somewhat similar to the powers contained in section 21 of the 1991 Act can be a source of confusion and ultimately delay to the investigatory process unless the principles are stated as clearly as possible.

*“It is also clear that the Commission’s theories as advanced in the White Paper are not identical to those advanced in court cases and its own brochure. This tension between theoretical power and practical necessity gives rise to genuinely difficult questions which have rarely been examined thoroughly.”*¹⁶⁵

¹⁶³ Commission Answer to Written Question No. 284/92: (1992) O.J. C168/45. See also the Explanatory Note to Authorisation to Investigate Under Article 14(2) of Regulation No. 17/62 and a similar explanatory note in relation to Article 14(3) published by the Commission.

¹⁶⁴ *Mawac* (1993) O.J. L20/6.

- 4.6.45 To date, there has been little legal challenge to the authorised officers of the Competition Authority in the exercise of their powers under section 21 although as the use of such powers becomes more widespread, there will inevitably be increasing concern as to the precise scope of the powers conferred by section 21. The debate which has taken place in the academic literature and before the European Court of Justice in relation to the Commission's corresponding powers is indicative of the sort of issues that will inevitably arise.¹⁶⁶ The Review Group believes that it is therefore in the interests of both the Competition Authority and the persons or companies who may be subject to investigation by the Competition Authority that the procedures governing such investigations are defined with the greatest amount of clarity so as to minimise disputes and recourse to the courts which, however necessary, can only have the effect of delaying what may well be a very necessary investigation.
- 4.6.46 Insofar as the question of obtaining legal advice during a search is concerned, the Review Group believes that it should be made clear that the undertaking is entitled to obtain legal advice before having to comply with any request from the authorised officer. However, this does not mean that the authorised officers can be delayed from proceeding with their task until such time as a solicitor or legal advisor actually arrives. The undertaking must however be given reasonable time to contact their legal advisor, acquaint him or her with the nature of the problem, allow him or her to consider the matter (necessarily in a brief way) and to then give advice to the undertaking as to what it should do. However, if the undertaking does request time to take such legal advice, the authorised officer should only be obliged to grant this request provided the relevant senior person on the premises undertakes that no documents or records will be altered, destroyed or moved pending the taking of legal advice, The Review Group considers that any breach of such an undertaking should be a criminal offence.

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Forrester, *op. cit.*, page 52.

4.6.47 The Review Group therefore recommends as follows.

Recommendation:

- (a) Before applying for a search warrant, an authorised officer of the Competition Authority must have a reasonable suspicion that a crime has been or is about to be committed and must put enough evidence before the District Judge on foot of which the District Judge can properly be satisfied, on the basis of the information provided by the authorised officer, that, viewed objectively, the cause or ground relied upon by the officer for his suspicion is reasonable.
- (b) Any authorised officer of the Competition Authority carrying out any searches should inform the persons in charge on the premises in question as to the essential nature and purpose of the search including the subject matter of the investigation and, where it is the case, the nature of any allegation which has been made against the business or persons whose premises are subject to the search.
- (c) While the authorised officers should be obliged to produce the sworn information to the persons on the premises where the search is being carried out, the authorised officers should be entitled to block out from the copy of the information thus shown to the persons in question the names of any sources and any information from which the identity of the sources might reasonably be inferred, if the authorised officer thinks this is appropriate in the circumstances.
- (d) Persons the subject of investigations on the premises should be entitled to seek legal advice before being obliged to comply with any request from the authorised officer but are not entitled to insist that the legal advisor should be present before the search begins. The authorised officer must allow the persons concerned a reasonable time to contact their solicitor or other legal advisor and obtain advice with regard to the

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See generally, Kerse, *E.C. Antitrust Procedure*, 4th Edition (1998) chapter 3, pages 112-154.

search. What is a reasonable time will depend on the circumstances. While the authorised officer cannot object to the presence of legal advisors while the search is being carried out, the authorised officer should not be obliged to wait for the legal advisors to arrive before beginning the search once a reasonable time has been afforded for the taking of legal advice on the search. The authorised officers should be entitled to request an undertaking from the relevant senior persons in charge on the premises that no documents or records of any description will be destroyed, altered or moved while the undertaking is taking legal advice and pending the commencement of the search. Any breach of this undertaking should be a criminal offence.

- (e) The remedy of judicial review should be available in relation to the validity of a search warrant issued under section 21 and as to the lawfulness of any search subsequently carried out on the authority of any such search warrant.

4.7 The Protection of Whistleblowers

4.7.1 The Review Group's interim recommendation was as follows.

Interim recommendation: Legislation should be enacted which would grant immunity from suit to persons who bona fide and in good faith make complaints or furnish information to the Competition Authority in relation to possible breaches of the Competition Acts 1991-1996 notwithstanding that such disclosure might, in the absence of such legislation, constitute a wrong on the part of the person making such complaint or disclosure. An appropriate model for such legislation may be found in the Protection for Persons Reporting Child Abuse Act 1998. In circumstances where a complaint is made to the Competition Authority that there has been a breach of the Competition Acts 1991-1996, it is a matter for the Competition Authority to decide in the first instance whether the identity of such complainant and some or all of the material furnished by any such complainant should be disclosed to the party against whom the complaint is made. Such decision should be informed by a consideration of a balance between the public policy interest in encouraging complainants to come forward and the rights of parties against whom complaints are made to properly and adequately defend and vindicate their position. The Competition Authority or the person or persons against whom the complaint is made should be entitled to apply to the High Court for directions as to whether in the circumstances of any particular complaint, the identity of the complainant and/or any or all of the material furnished by the complainant to the Competition Authority should be disclosed to the person or persons against whom the complaint is made. Such issue should be considered de novo by the High Court having regard to the public policy considerations referred to above, the rights of the parties (including their rights under the Data Protection Act and the Freedom of Information Act) and any proposals which may be suggested to the court which would enable the public interest in the preservation of the anonymity of the complainant to be preserved consistent with the necessity to ensure that any person against

whom a complaint is made should not be deprived of any information which would be relevant in demonstrating that a breach of the Competition Acts 1991-1996 had not occurred.

- 4.7.2 This recommendation provoked comparatively little comment. One view expressed to the Review Group was in support of the recommendation and stressed that any immunity from suit should be subject to provisos similar to those contained in the Protection for Persons Reporting Child Abuse Act 1998 e.g. that the complainant must have acted reasonably and in good faith. This submission also suggested that protection of reporting employees, again similar to protection provided in the above 1998 Act, should also be included.
- 4.7.3 Another submission, though apparently supporting the recommendation referred to the possibility that the point could be met by including the Competition Acts in any general legislation dealing with this type of issue.
- 4.7.4 In the United Kingdom, the Public Interest Disclosure Act 1998 came into force on the 2nd July 1999 which amends the UK Employment Rights Act 1996. As a result of the amendments, an employee who makes what is described as a “protected disclosure” has a right not to be victimised on the grounds of having made such disclosure and the right not to be dismissed or selected for redundancy on this basis. There is no cap on the compensation available if, say, an employee is dismissed for this reason. A “protected disclosure” is one which in the reasonable belief of the worker¹⁶⁷ tends to show a breach by the employer in one or more of six categories:
- (i) Criminal offence.
 - (ii) Failure to comply with any legal obligations.
 - (iii) Miscarriage of justice.
 - (iv) Endangering of health and safety of any individual.
 - (v) Damage to the environment.

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An extended definition of “workers” is given to include contractors, agency workers, trainees and all employees of the National Health Service.

(vi) Deliberate concealment of information tending to show any matter falling within one of the other five categories.¹⁶⁸

4.7.5 The UK Act also provides that the worker should raise his or her concerns in the first place with the employer (or the relevant Government department if in the public service). The disclosure must be made in good faith if it is to be protected. Alternatively, in the case of a regulated industry, the disclosure can be made for certain specified types of malpractice to the regulator. If the worker wishes to make some kind of wider public disclosure (to the police, to a trade union, to a member of parliament or to the media and so forth), a variety of other requirements have to be satisfied. The disclosure must not be for personal gain and there must be good reason why an internal or regulatory disclosure would not be sufficient; and it must be reasonable in all the circumstances of the case to make such public disclosure.¹⁶⁹

4.7.6 The Review Group agrees that any legislation which does protect whistleblowers as envisaged in the interim recommendation should contain a requirement that the complainant must have acted reasonably and in good faith. Without spelling out all of the provisions, the Review Group intended that its reference to the Protection for Persons Reporting Child Abuse Act 1998 as the appropriate model would carry with it the various provisos and qualifications contained in that legislation.

4.7.7 The Review Group also agrees that reporting employees should be similarly protected. As pointed out in the Review Group's Discussion Document, two separate issues arise. One is the question of the protection of the whistleblower's identity. While desirable, there may be circumstances where the identity has to be disclosed in order to enable the party against whom allegations are made to properly defend itself. That is why the interim recommendation includes a provision whereby either the Competition

¹⁶⁸ However, a disclosure is not a qualifying disclosure if the disclosure itself would be a criminal offence such as a disclosure contrary to the Official Secrets Act.

¹⁶⁹ Disclosure may however be made to a legal advisor to obtain legal advice on the issue and such disclosure will be protected. See Mansfield, *The Public Interest Disclosure Act* 149 New

Authority or the persons against whom allegations are made can apply to the High Court for directions as to whether in the circumstances it is necessary that the identity of the person making the allegation should be revealed.

- 4.7.8 The other issue is particularly relevant where the whistleblower is an employee of the organisation against whom the allegations are made. If his identity becomes known, there is always the possibility of some form of action being taken by the employer against the employee/whistleblower. As is apparent from the discussion document, the Review Group considered that a bona fide reporting of an allegation by an employee should not be deemed to constitute an infringement of the employee's duty of fidelity (so that the employee could not be dismissed on this ground).
- 4.7.9 However, it occurs to the Review Group that the wording of its recommendation (which gives the whistleblower "immunity from suit") might not, if taken literally, give protection to an employee against dismissal. Accordingly, the final recommendation has been modified to make this point clear.
- 4.7.10 As regards the question of whether or not this type of provision should be enacted by way of an amendment to the Competition Acts or whether it should be provided for in separate and more general legislation (such as the UK Public Disclosure Act 1998), the Review Group has no strong view on this issue. In the context of the legislative consolidation which the Review Group recommends in this report it might seem appropriate to incorporate this protection in a consolidated Competition and Mergers Act. However, the Review Group considers that this is ultimately a point which falls to be decided by reference to which piece of legislation (a whistleblowers bill or a consolidated competition and mergers bill) goes first through the process of enactment. It is the Review Group's view that this protection should be introduced sooner rather than later to encourage persons to come forward with bona fide complaints about breaches of the Competition Act.

Law Journal, page 1658-1659, 5th November 1999. See also Lewis and Bowers, *Protecting*

4.7.11 Accordingly, the Review Group makes the following recommendation.

Recommendation: Legislation should be enacted which would grant immunity from suit to persons who bona fide and in good faith make complaints or furnish information to the Competition Authority in relation to possible breaches of the Competition Acts 1991-1996 notwithstanding that such disclosure might, in the absence of such legislation, constitute a wrong on the part of the person making such complaint or disclosure. Such legislation should also provide that any employee of any undertaking or any independent subcontractor of any undertaking cannot be dismissed, selected for redundancy, have their contract terminated (as the case may be) or otherwise made subject to a detriment solely by reason of the fact that such employee or subcontractor has made a complaint or has furnished information to the Competition Authority in relation to the undertaking in question in the circumstances referred to above. An appropriate model for such legislation may be found in the Protection for Persons Reporting Child Abuse Act 1998. In circumstances where a complaint is made to the Competition Authority that there has been a breach of the Competition Acts 1991-1996, it is a matter for the Competition Authority to decide in the first instance whether the identity of such complainant and some or all of the material furnished by any such complainant should be disclosed to the party against whom the complaint is made. Such decision should be informed by a consideration of a balance between the public policy interest in encouraging complainants to come forward and the rights of parties against whom complaints are made to properly and adequately defend and vindicate their position. The Competition Authority or the person or persons against whom the complaint is made should be entitled to apply to the High Court for directions as to whether in the circumstances of any particular complaint, the identity of the complainant and/or any or all of the material furnished by the complainant to the Competition Authority should be disclosed to the person or persons against whom the complaint is made. Such issue should be considered de novo by the

High Court having regard to the public policy considerations referred to above, the rights of the parties (including their rights under the Data Protection Act and the Freedom of Information Act) and any proposals which may be suggested to the court which would enable the public interest in the preservation of the anonymity of the complainant to be preserved consistent with the necessity to ensure that any person against whom a complaint is made should not be deprived of any information which would be relevant in demonstrating that a breach of the Competition Acts 1991-1996 had not occurred.

4.8 Appeals from the Competition Authority to the High Court

4.8.1 The interim recommendation made by the Review Group was as follows.

Interim recommendation: The Review Group considers that any appeal from a decision of the Competition Authority to the High Court under section 9 of the Competition Act 1991 should be on a point of law only save that findings of fact by the Competition Authority could be reversed by the High Court if, on the basis of the same material and evidence as was before the Competition Authority, the High Court comes to the view that the finding of fact by the Competition Authority was very clearly wrong. No new evidence should be admissible before the High Court in relation to any such findings of fact save that the High Court should have a discretion, on application being made to it, to admit expert evidence if the High Court considers that such expert evidence would be of assistance in elucidating the meaning of any of the factual material and evidence which was before the Competition Authority. Such discretion should be exercised sparingly and only in cases where the High Court considers that there is genuine doubt as to the meaning of some aspect of the materials or evidence which was before the Competition Authority. In admitting such evidence, the High Court should specify the matters to which such evidence should be confined. The decision of the Competition Authority should be prima facie evidence of the facts stated therein. Issues of law should be decided by the High Court de novo. Regulations governing appeals from a decision of the Competition Authority under section 9 of the Competition Act 1991 should be introduced to clarify these matters. There should be no limitation on the right of appeal from the decision of the High Court to the Supreme Court in accordance with the normal rules governing such appeals.

4.8.2 This recommendation generally met with approval. One submission, while supporting the recommendation, also drew attention to the provision of the Electricity Regulation Act 1999 which provides for the establishment of an

Appeal Panel to hear appeals against decisions of the Commission for Electricity Regulation. Appeals from decisions of the Appeal Panel can only be made to the High Court by way of judicial review (i.e. to review the procedural fairness of the Appeal Panel's decisions and not the substantive merits of the decision).

- 4.8.3 The Review Group agrees that this is a very worthwhile concept. In relation to deregulated industries, there is a confusing lack of uniformity in the way in which appeals from decisions of regulators are to be dealt with. For example, in the case of the allocation of licences for mobile and personal communications services, there is a right of appeal to the High Court from a decision of the Director of Telecommunications Regulation whereby she refuses to grant such a licence to an applicant.¹⁷⁰ This contrasts with the right of appeal in the electricity industry to the Appeal Panel with only a right of recourse to the High Court for judicial review. The Review Group believes that it is undesirable that there should be this type of difference between the appeal mechanisms in regulated industries and makes a recommendation in

¹⁷⁰ Section 111(2)(B) of the Telecommunications Services Act 1983 as inserted by the European Communities (Mobile and Personal Communications) Regulations 1996 which gave effect, inter alia, to Commission Directive No. 90/338/EC. No guidance is given in the statutory scheme as to the nature or scope of this appeal.

In *Orange Communications Limited -v- The Director of Telecommunications*, High Court, Unreported, 18th March 1999, it was argued by the Plaintiff that the right of appeal involved a full de novo hearing in the High Court. The Director argued (which argument was accepted by the High Court) that the appeal, while involving a level of scrutiny greater than that of judicial review, did not involve a full rehearing and that the court was confined to assessing whether or not the Director's decision was "unreasonable" (a test which it was suggested, is not as difficult to pass as the judicial review test of "irrationality"). In those proceedings, Macken J also ruled that no evidence at all was admissible in relation to the issue of unreasonableness although evidence was admissible in relation to an allegation of bias made against the Director. Macken J gave judgment in the case as a whole on the 4th October 1999 holding that the decision of the Director to refuse to grant a licence to Orange Communications Limited (she had proposed to grant it to the rival bidder, Meteor Mobile Communications Limited) was unreasonable and gave rise to a reasonable apprehension that the decision was biased (although the judge expressly found that there was no actual bias). The High Court's decision was in turn the subject of an appeal to the Supreme Court where the findings of unreasonableness and apparent bias were challenged and where, on a cross-appeal, Orange Communications Limited challenged the ruling that no evidence could be admissible on the reasonableness issue (and also challenged the finding of no actual bias). This appeal started on the 18th January 2000 and finished on the 15th February 2000. At time of writing, the judgment of the Supreme Court is still awaited. It should be noted that the one point upon which there was no appeal to the Supreme Court was the High Court's ruling on the scope of the appeal i.e. that the test under the particular statutory provision was that of unreasonableness.

chapter 5 of this report to the effect that the concept of an Appeal Panel to hear appeals against the decisions of the regulator should be adopted where one member of the Competition Authority should be appointed to any such Appeal Panel.¹⁷¹

- 4.8.4 Appeals from the Competition Authority itself, of course, are in a somewhat different category to appeals from decisions of regulators. Two separate situations have to be distinguished - the current situation and the likely or possible situation if some version of the White Paper proposals are ultimately adopted at Community level and are in turn reflected in consequential changes to the role and function of the Competition Authority.
- 4.8.5 As discussed in Chapter 3 of this report, in the latter case there are very broadly two options. The first option is that all issues of alleged breaches of Articles 81 and 82 will be dealt with by the High Court and that the same will be true of issues under sections 4 and 5 on the basis that the current system of licences and certificates will be abolished. Under that scenario, the question of an appeal from decisions of the Competition Authority will not arise because the Competition Authority will no longer take any decisions as we understand them today. Its role in relation to mergers (if the recommendations of this report are adopted) will not be to take final decisions but to make recommendations to the Minister.
- 4.8.6 The other broad scenario is where some adjudicatory function is preserved for the Competition Authority within the necessary constitutional limits, as discussed in Chapter 3 of this report. The particular structure adopted will influence the sort of appeal (if any) which should exist to the High Court. Assume, for example, that a model is adopted where the Competition Authority hears all the evidence in relation to an allegation of a breach of section 4 or 5 (or Article 81 or 82), makes findings of fact in the shape of a report which is then transmitted to the High Court and on foot of which the parties then argue as to whether or not there has been any breach of the

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See section 5.3.

relevant sections and if so, what the sanctions should be. The only appeal issue which can arise in relation to the Competition Authority's function under that scenario is the extent to which the parties should be able to challenge the findings of fact made by the Competition Authority. If one permits a full de novo appeal, then the fact finding procedure before the Competition Authority (which would be intended to exploit the expertise of the Competition Authority in this area) would be largely set at naught. It might be that in such circumstances the only challenge which could be made to the report of the Competition Authority would be by way of judicial review.

4.8.7 An alternative version of the model would give the Competition Authority the power not only to determine the facts, but to determine whether or not a breach of the relevant sections or articles had occurred (so that the High Court's primary function would be to determine the level of damages or fines which should be imposed or other relief which should be granted). However, one can readily envisage in such a model that before the High Court was asked to determine the appropriate remedy, there would be an appeal to the High Court on a point of law which might or might not result in an alteration or reversal of the Competition Authority's findings on liability. Only then would the High Court be in a position to determine the appropriate sanctions and remedies.

4.8.8 The Review Group considers that it is not only premature but virtually impossible to make any recommendation as to the sort of appeal which might lie in such circumstances, given the many possible models which might be adopted and where there is no assurance as to the final shape of the reforms proposed by the Commission, let alone the shape of such legislative amendments that might then be made at national level. The Review Group believes however that the guiding principle which should govern any appeal is that the scope of the appeal should be clearly defined, the rules as to what sort of evidence is admissible on the appeal should also be clearly defined, and

specific rules of court procedure should be laid down for the conduct of such appeals.¹⁷²

- 4.8.9 Turning therefore to the appeal which does currently exist, namely the appeal under section 9 of the Competition Act 1991 against decisions of the Competition Authority, the Review Group remains of the belief that its interim recommendation is correct subject to one qualification and clarification which relates to the status of findings of fact by the Competition Authority.
- 4.8.10 It seems unnecessary to state that the decision of the Competition Authority should be prima facie evidence of the facts stated therein. As articulated in the earlier part of the interim recommendation, a finding of fact by the Competition Authority can only be reversed by the High Court if, on the basis of the evidence before the Competition Authority, the High Court concludes that the finding of fact by the Competition Authority was very clearly wrong. The expression “very clearly wrong” is meant to communicate the idea that it is not necessary to go so far as to show that the finding of fact was irrational. On the other hand, if the arguments in favour of one finding of fact as distinct from an alternative finding of fact seem fairly well balanced, then the court should not interfere with whatever view the Competition Authority took on the facts. If, however, exercising its own judgment, the court considers that on the basis of the evidence before the Competition Authority, the finding of fact which it drew was simply wrong, then the court should feel free to reverse that finding of fact.
- 4.8.11 Various different expressions are used in the case law to try to communicate the flavour of this process and the particular standard of scrutiny or assessment which should be engaged in by the court. Expressions such as “plainly wrong”, “clearly wrong” and so forth are used to mark off the level of scrutiny from, on the one hand, the judicial review standard of irrationality,

¹⁷² For example, should the appeal be by way of a special summons grounded on affidavit? If so, is other oral evidence to be admissible? Is the appeal to be by way of plenary summons with

and on the other hand the finely balanced issue of fact where the court should not interfere with the decision of the Authority.

- 4.8.12 A flavour of the appropriate standard of scrutiny may be gained from a consideration of the following passage from the judgment of the Supreme Court of Canada in *Canada (Director of Investigation and Research) -v- Southam Inc*:

“The standard of patent unreasonableness is principally a jurisdictional test ... but on the other hand, an appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly a third standard is needed.

I conclude that the third standard should be whether the decision of the tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal’s decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or

only oral evidence admissible? What are the presumptions (if any) in relation to findings of fact by the Competition Authority? The list is not endless, but long.

testing to find the defect, then the decision is unreasonable but not patently unreasonable ...

In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In other words, deference in terms of a “standard of reasonableness” and deference in terms of “weight” are two sides of the same coin.”¹⁷³

4.8.13 No short form of words which attempts to define a standard of review like this is wholly satisfactory. Nonetheless, the Review Group believes that the wording of its interim recommendation can be improved if the phrase “very clearly wrong” was replaced by the single word “wrong”. The point of so amending the recommendation is that once one moves away from the standard of irrationality (patently unreasonable etc.), then any version of unreasonableness or wrongness comes to the same thing - the court is satisfied that the conclusion of fact drawn by the Competition Authority (on the basis of the evidence before it) was incorrect. If it is a finely balanced judgment which could reasonably be called either way, then the court cannot be satisfied that the Competition Authority’s decision was wrong. But once the court is so satisfied, then it seems to introduce an unnecessary level of refinement to require that the decision should be “very clearly” wrong or some such similar phrase.

4.8.14 The Review Group also considers that the reference to the decision of the Competition Authority being prima facie evidence of the facts stated therein

¹⁷³ (1997) 1 S.C.R. 748, judgment of Iacobucci J. The judge went on to quote from a Canadian textbook, Kerans, *Standards of Review Employed by Appellate Courts* (1994) with approval as follows: “*Experts, in our society, are called that precisely because they can arrive at well informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated.*” (Emphasis added by the Canadian Supreme Court). The decision in *Southam* was one relied upon by Kearns J in this jurisdiction in *MJ Gleeson -v- The Competition Authority* in approving the “reasonableness” test.

should be dropped as also unnecessarily confusing since it is yet another version of the concept of deference discussed above. Also, the wording of the interim recommendation which states that the appeal shall be on a point of law “only” save where the findings of fact are wrong may also be slightly confusing. The reality of the recommendation is that there is an appeal on both a point of law and on the facts. The difference from a full de novo appeal lies in the sort of evidence that can be introduced. The evidence is to be confined to the evidence which was before the Competition Authority and on the basis of that evidence, the debate can take place in the High Court as to whether the Competition Authority decision was right or wrong. There are really only two circumstances where some other evidence is put before the High Court. First, the High Court should have a discretion to admit expert evidence on a fairly sparing basis. Secondly, all the grounds upon which a judicial review could be sought of the decision should be available in the appeal. This means that if a party wanted to show that a particular finding of fact by the Authority was irrational, it might be possible to introduce some evidence which would support that proposition in the way that such evidence is commonly introduced in judicial review applications. To put it another way, the section 9 right of appeal (as amended by the Review Group’s recommendations) is not intended to substitute for or to whittle down the rights which any party would have, even absent a statutory appeal, to apply for judicial review.

- 4.8.15 Finally, while it is unnecessary to amend the wording of the recommendation in this respect, the Review Group wishes to draw attention to the necessity for the regulations governing appeals to deal with the specific mechanism by which the evidence which was before the Competition Authority is brought before the High Court for examination. While there are different ways to do this, the Review Group suggests that the regulations specify that the appeal should be brought by way of Special Summons; that the applicant should set out his case on affidavit; and that the Competition Authority be obliged to put in an affidavit which, at minimum, will exhibit all of the material which was before the Competition Authority when it took its decision. If any issues of confidentiality arise in relation to names or figures in any documents which

constitute the record before the Competition Authority, the Competition Authority should in the first instance be entitled to block out such commercially sensitive information subject to the right of the appellant to ask the High Court to rule on the issue (where the High Court can, if necessary, look at the original version of the document). The purpose of the Competition Authority swearing an affidavit which exhibits the record is to bring that record before the court (and to make it available to the appellant) in a convenient and admissible fashion. The regulations should also make clear that any point which might be raised in an ordinary judicial review application can be raised in the course of such an appeal by way of Special Summons.¹⁷⁴

4.8.16 Accordingly, the Review Group recommends as follows:

Recommendation: The Review Group considers that any appeal from a decision of the Competition Authority to the High Court under section 9 of the Competition Act 1991 should be on the basis of the same material and evidence as was before the Competition Authority. The appeal can be brought on any point of law. Furthermore the High Court should be entitled to reverse a finding of fact by the Competition Authority if it comes to the view that the finding of fact by the Competition Authority was wrong. No new evidence should be admissible before the High Court in relation to any such findings of fact or point of law save that the High Court should have a discretion, on application being made to it, to admit expert evidence if the High Court considers that such expert evidence would be of assistance in elucidating the

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The objection may be made that this enables the appellant to avoid the usual hurdle which is faced by an applicant for judicial review, namely the necessity to apply *ex parte* to the court for liberty to bring the judicial review proceedings. The purpose of this procedure is to enable the court to prevent frivolous or vexatious attacks on the decisions of administrative bodies which might otherwise delay the implementation of administrative decisions. However, it would seem unnecessarily cumbersome to provide that the appellant has an automatic right of appeal on a point of law against a decision of the Competition Authority and yet, at the same time, to say that judicial review type issues (many of which are virtually indistinguishable from points of law) require some sort of separate application for liberty to bring the proceedings. The Review Group considers therefore that the appellant should not have to bring any application for liberty to bring his appeal from the decision of the Competition Authority, whether or not his grounds of appeal include what might conventionally be regarded as judicial review type grounds. As in any set of proceedings, it is always open to a defendant to bring an application to strike out the proceedings or part of the proceedings on the grounds that they are frivolous or vexatious.

meaning of any of the factual material and evidence which was before the Competition Authority. Such discretion should be exercised sparingly and only in cases where the High Court considers that there is genuine doubt as to the meaning of some aspect of the materials or evidence which was before the Competition Authority. In admitting such evidence, the High Court should rule on the matters to which such evidence should be confined. The appellant should also be entitled to raise any point which he would be entitled to raise by way of judicial review and may adduce any evidence which would be relevant and admissible for the purpose of a judicial review application. No prior leave of the court to the making of an appeal from a decision of the Competition Authority shall be necessary notwithstanding that the grounds of appeal may include grounds which are judicial review type grounds and which would otherwise require the leave of the court. Issues of law should be decided by the High Court de novo. Regulations governing appeals from a decision of the Competition Authority under section 9 of the Competition Act 1991 should be introduced to clarify these matters. There should be no limitation on the right of appeal from the decision of the High Court to the Supreme Court in accordance with the normal rules governing such appeals.

4.9 The Desirability of Specialist Judges

- 4.9.1 In its discussion document, the Review Group expressed the view that competition law cases should be assigned to judges drawn from a small panel of High Court judges nominated for this purpose by the President of the High Court. This is already done in relation to other specialist areas such as examinerships and admiralty. The Review Group does not consider that it is necessary or realistic to form a separate division of the High Court for this purpose.
- 4.9.2 Although the Review Group did not draw up a interim recommendation in this regard (primarily on the basis that the point was a point to do with the administration of the High Court rather than something which required any amendment to any legislation or regulation), the Review Group considers that this point is of such importance that it deserves a recommendation in its own right.
- 4.9.3 This may be a convenient point to refer to a submission which was made to the Review Group that it would assist in the effective enforcement of competition law if the cost of competition law cases could be reduced and that one way to reduce those costs is to provide that actions for a breach of section 4 of the Competition Act 1991 can be brought in the Circuit Court as well as the High Court. The point is made that at present, under section 6(2)(b) of the Competition Act 1991, an action for a breach of section 5 (abuse of a dominant position) can be brought in the Circuit Court save that no damages can be claimed beyond the limit of the Circuit Court jurisdiction (currently £30,000) unless the parties otherwise agree.
- 4.9.4 The Review Group notes and accepts that the cost of litigating competition law cases can act as a deterrent to parties contemplating proceedings. But one of the reasons why competition law litigation is expensive is that the issues (whether of fact, law or economics) tend to be quite complex and their

resolution can require sometimes very complex and lengthy evidence and cross-examination, particularly of expert witnesses. The value of the time of such experts and the cost of retaining such experts and lawyers will not be determined by the level of the court in which the dispute is heard. What the jurisdictional level of the court may influence, in terms of costs, is the amount of the costs which the winning party is entitled to recover from the losing party. The party that succeeds in such litigation (whether plaintiff or defendant) will undoubtedly be dismayed to discover that notwithstanding his victory, he is only able to recover costs on the Circuit Court scale which, in comparison to the level of costs he will probably have incurred, will leave him very significantly out of pocket.

4.9.5 In addition, since there is a right of appeal from the Circuit Court to the High Court, the possibility of commencing proceedings in the Circuit Court would only seem to add to the potential length of the proceedings overall. Such an appeal can be brought without any leave and involves a full de novo hearing before the High Court. On such important matters where any breach of the Act remains a criminal offence, it seems unlikely that an appeal can be avoided by one or other party except in the clearest possible case and in such a case the matter is likely to be settled in any event rather than fought, irrespective of which court has jurisdiction. The Circuit Court proceedings may thus merely become a practice outing before the main event in the High Court. The overall length of the case will be increased because of the necessity to fight the case twice. Furthermore, the costs will significantly increase, if not double, by virtue of the necessity to litigate the same matter twice. The suggestion therefore that the extension of the Circuit Court jurisdiction to section 4 cases will reduce costs seems to rest on a misconception of the reality of the litigation process.

4.9.6 It might be thought that there may be comparatively simple cases involving breaches of section 4 which would not require much expert evidence and where a private plaintiff might be more encouraged to bring such actions if he could do so in the Circuit Court with a consequently lower risk on costs should he lose. One might imagine, for example, a consumer taking an action (perhaps

backed by others in the locality) against a number of pubs in a small rural town on the basis that the pubs were engaged in price fixing in relation to the price of drinks. The apparent simplicity of such an action can be deceptive once one gets down to the detail of what is required to prove the case. There will inevitably be controversy about the relevant product market (the extent to which beer, wine and spirits are substitutes for each other; even within the beer market, the extent to which lager beer, stout, bottled beers and so forth are competing products; the issue of the price elasticity of demand as between these different products; the extent to which beer served in a pub at a given price should be regarded as competing with beer available from the local supermarket in a six-pack at a different price; the relevant geographic market; and so forth). Consumers in the hypothetical situation envisaged seem more likely to the Review Group to make a complaint to the Competition Authority and leave it to the Authority to take the appropriate action.

4.9.7 There is also the point that it will be very difficult to develop a small group of specialist Circuit Court judges in the area of competition law because Circuit Court judges do not form a collective pool of judges, available to be assigned to one court or another or one case or another, as is largely the case with the High Court in Dublin. Circuit Court judges are scattered throughout different circuits in the country although there are, of course, a number of Circuit Court judges in the Dublin Circuit. It would thus be difficult (though in Dublin at least, perhaps not impossible) to channel Circuit Court competition cases into the same few judges to enable them to build up the necessary experience in the area. The Review Group has made inquiries in relation to the number of actions which have been brought in the Circuit Court alleging an abuse of a dominant position (which jurisdictional facility has been available since the Competition Act was introduced in 1991). While the available evidence is somewhat scanty and anecdotal, it appears that the number of such proceeding is extremely low.

4.9.8 Agreements and arrangements which are alleged to be in breach of section 4 can occur on a much smaller scale and insofar as there is any logic to giving a role to the Circuit Court in the area of competition law, it seems to the Review

Group that it would be more relevant to give it a jurisdiction in relation to section 4 rather than section 5.

4.9.9 Ultimately, the Review Group sees no particular disadvantage to amending the legislation so as to permit an action for a breach of section 4 to be brought in the Circuit Court (subject, of course, to the jurisdictional limit on damages). The Review Group is doubtful however as to whether this change will have any material effect and does not believe that this change will contribute in any significant way to reducing the costs of competition law litigation.

4.9.10 Insofar as the costs of litigation are concerned, the Review Group has made in this report recommendations in relation to the admissibility of evidence in competition law cases, the increased use of assessors, and an enhanced (optional) adjudicatory function for the Competition Authority all of which may, in different ways, contribute to reducing the cost of competition law litigation somewhat. There is nothing unique about the costs of competition law litigation as compared with the costs of any complex litigation. Persons adversely affected by breaches of competition law do however enjoy one significant advantage over private litigants in other fields of law. Persons aggrieved by breaches of the Competition Acts can make a complaint to the Competition Authority and if the Authority takes action and is successful, then the party aggrieved will have achieved the desired result at neither cost to himself nor the incurring of any risk of having to pay the other party's costs.

4.9.11 Accordingly, the Review Group recommends as follows:

Recommendation

- (a) Where possible, competition law cases in the High Court should be determined by a judge drawn from a small panel of High Court judges with a training and/or expertise relevant to competition law and economics, which panel would be nominated for this purpose by the President of the High Court on an informal basis.

(b) Section 6(2) of the Competition Act 1991 should be amended to provide that an action under section 6 can be brought in respect of a breach of either section 4 or section 5 in the Circuit Court subject to the limit on the award of damages as currently expressed in section 6(2)(b) of the Competition Act 1991. Insofar as may be practicable, such cases should be heard by a judge drawn from a small panel of Circuit Court judges nominated for this purpose by the President of the Circuit Court on an informal basis in accordance with the criteria referred to above in relation to the High Court.

4.10 The Question of a “De Minimis” Exception

4.10.1 The interim recommendation made by the Review Group was as follows:

Interim recommendation: On balance, a majority of the Group favours the introduction of a *de minimis* rule. A majority suggests that such a rule should be provided for by an amendment of the Act. The relevant criteria could be set out in the body of the Act, or specified by the Minister. The relevant criteria ought to be based on market share or turnover (where falling below either criterion would be sufficient to avail of the exemption).

4.10.2 In its analysis of this issue in the discussion document, the Review Group pointed out that two quite separate approaches to a *de minimis* exception are possible. One approach is to simply include a statutory provision to the effect that no order would be made in respect of what would otherwise be a breach of section 4(1) of the 1991 Act unless, in all the circumstances of the case, the breach had a sufficiently significant effect (or “an appreciable effect”) on competition in the relevant market. A variation on this approach is to exclude what might otherwise be a breach of section 4(1) if the matters complained of do not adversely affect the interests of consumers in the relevant market to any significant extent, whether by reference to price, range of choice, terms of trading or otherwise. This type of approach can be referred to for convenience as the “appreciable effect” approach.

4.10.3 The alternative approach is to provide that small businesses, defined by reference to specified criteria (such as annual turnover or a percentage of market share) should not be subject to the prohibition in section 4(1).

4.10.4 *De minimis* provisions are quite common in other jurisdictions and the discussion document outlined the position in six other Member States.¹⁷⁵

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Discussion document on Competition Law, pages 115-116.

Furthermore, at Community law level, the existence of a de minimis exception is well recognised both in the case law of the European Court of Justice¹⁷⁶ and by means of notices issued by the Commission such as the Notice on Agreements of Minor Importance issued on the 9th December 1997.

- 4.10.5 Indeed, both the Commission's and the court's interpretation of Article 81(1) has introduced the interpretative gloss of the doctrine of "appreciable effect" into the assessment of whether there has been a breach of Article 81(1). To that extent, the "appreciable effect" version of the de minimis exception is nothing more than an interpretation of section 4(1) which reflects the Community interpretation of Article 81(1).
- 4.10.6 The theme resurfaces in the White Paper.¹⁷⁷ The new type of block exemption to be issued by the Commission will restrict the benefit of general exemption through a market-share threshold criterion (meaning, presumably, that parties with larger market shares will not benefit from the general exemption).¹⁷⁸ The new block exemptions are intended to have a wider scope of application than before.

*"The use of market-share thresholds will allow the Commission to eliminate the strait jacket effect of the current regulations and to cover the vast majority of agreements, and in particular those concluded by small and medium sized undertakings."*¹⁷⁹

- 4.10.7 This is, of course, somewhat different to exempting agreements generally merely because the parties to the agreement are below a certain size or below a certain market share since the agreements will only be exempt if they are within the terms of the block exemption. But it comes close to a very general exemption based on size (or more precisely, market share) given that the new type of block exemption will not be the sort of "precedent agreement" which

¹⁷⁶ See the decision in *Volk -v- Vervaecke* (1969) ECR 295, referred to in the Discussion Document at pages 113-114.

¹⁷⁷ Paragraph 27 of the White Paper gives the history of the emergence of the "appreciable effect" doctrine.

¹⁷⁸ White Paper, paragraph 71.

¹⁷⁹ White Paper, paragraph 78.

at present is the essence of a block exemption but instead will exempt generally agreements of a certain type subject only to a black list of prohibited provisions.

- 4.10.8 The case against a de minimis provision in Irish law is a simple one. Ireland is a small country where comparatively small business arrangements may have, it is argued, important consequences for consumers in a comparatively small area. It was this sort of thinking which prompted the Competition Authority, in its very first decision in 1991, to rule out any scope for the operation of a de minimis doctrine in its interpretation of section 4(1), notwithstanding that the agreement in issue (a non compete provision in an agreement where one partner sold his interest in a small television and hi-fi sale and repair business to the other partner) involved a small and localised business.¹⁸⁰
- 4.10.9 As noted in the Review Group’s discussion document, there was considerable disagreement among members of the Review Group on this issue. While a majority favoured some form of de minimis exception, there was further disagreement within this particular grouping as to whether it should take the “appreciable effect” form or whether it should exempt businesses below some level of turnover and/or market share.¹⁸¹ The submissions received were themselves divided.
- 4.10.10 The primary point made against a de minimis exception is that if small firms (however defined) have a blanket exemption from section 4, then they will be free to engage in cartels and price fixing. In practical terms, it is argued, this means that retailers such as pubs, filling stations, pharmacists, grocery shops and so forth would be free to engage in price fixing as would most self employed professionals. It was argued that if there was to be a de minimis exception, the exception should not cover cartels and price fixing so that businesses and firms of any size could be subject to attack for engaging in

¹⁸⁰ Competition Authority Decision No. 1, *Nallen-O’Toole (Belmullet)*, 2nd April 1992.

¹⁸¹ It is clear therefore that only a minority of the Group were actually in favour of specific monetary criteria which would define a de minimis exception, a point which seems to have been overlooked by some of the parties who subsequently made submissions to the Review

such practices which, it is argued, are harmful to the consumer irrespective of the size of the businesses engaged in them.

4.10.11 The submissions which supported a de minimis exception did so on slightly different grounds. One view argued for criteria based on market share and turnover whereas another view was that the appreciable effect form of exemption was preferable. This was favoured on the basis that it would allow a much greater degree of flexibility to both the Competition Authority and the courts in relation to the application of the Competition Acts to particular cases. The “appreciable effect” approach would, it was argued, allow the Act to be interpreted as applying to a cartel in a local market which might not be the case if the exception was couched in terms of monetary or market share thresholds.

4.10.12 In support of this type of de minimis exception, the following points were made to the Review Group:

- It will be consistent with the interpretation of Article 81 of the Treaty adopted by the Court of Justice as long ago as 1969.
- It will give express statutory recognition to a principle which in reality is applied by the Competition Authority as in, for example, its category certificate relating to mergers.
- It would emphasise the fact that competition law is designed to protect and promote competition in the economy as a whole and not to provide protection to undertakings engaged in business disputes with other undertakings which have no significant impact on competition in the market in which they are operating.
- It should encourage the Competition Authority to concentrate its enforcement efforts on serious infringements of the Competition Act

Group. It was precisely because there was such a diversity of views within the Review Group

and thereby demonstrate to the general public (including the business community) that the fundamental purpose of competition law is to benefit the economy as a whole by eliminating serious distortions of the normal operation of market forces.

- It would avoid the risk of competition law being brought into disrepute as a result of excessive concentration on trivial issues.

4.10.13 The Review Group has carefully considered this controversial issue. It agrees with the point that cartels and price fixing are potentially harmful, irrespective of the size of the undertakings engaged in such practices. Given the Review Group's agreement that the enforcement priority should be in relation to price fixing and cartels and given the desirability (from the viewpoint of raising public consciousness of the issue) that the Competition Authority should be seen to have some success in this area, the Review Group considers that a de minimis exception based on monetary or marketary thresholds is probably not desirable at this stage in the development of competition law in this country.

4.10.14 The real purpose behind a de minimis exception is simply to ensure that competition law does not defeat its own objective by becoming unnecessarily intrusive into arrangements which may technically have an effect on competition but which in reality do not affect the competitive environment within which business life takes place. Its purpose is also to ensure that competition law is not used by one competitor against another purely for the purpose of gaining individual commercial advantage when there is no significant effect on competition generally. Such an approach would appear to be in conformity with the Community law interpretation of Article 81(1) and is further supported by the shift in the White Paper towards what is in reality an invitation to national competition authorities and courts to ask whether an agreement etc. does indeed have any appreciable effect on competition generally. It seems desirable that Irish competition law should enshrine the same concept.

that submissions were specifically sought on this issue.

4.10.15 A legislative amendment such as that referred to in the interim recommendation to the effect that a particular agreement etc. which was in breach of section 4(1) (on a rule of reason analysis) would nonetheless not be prohibited by the court unless an appreciable or significant effect could be shown on competition generally seems to be no more than a restatement of the current judicial interpretation of section 4. To that extent it may be unnecessary to enshrine it in legislation and indeed, any particular such formula might be an unwelcome restriction on the ability of the court to refine its interpretation of section 4. For so long as section 4 remains in its current form (where the various mitigating factors referred to in section 4(2) are matters which, on their face, are to be taken account of only by the Competition Authority in considering whether or not to grant a licence),¹⁸² the maximum judicial freedom to interpret section 4 seem desirable. This is why the interpretative approach of the rule of reason is so important in this context.

4.10.16 Despite the difference of view within the Group as to whether or not there should be a de minimis exception based on monetary criteria, ultimately, the Review Group as a whole agreed that it would not be necessary to introduce any specific de minimis exception if the Competition Authority were to issue a category certificate or notice giving guidance as to the types of agreement (whether by reference to their qualitative nature or size) which the Competition Authority would not regard as falling within the scope of the prohibition contained in section 4.

4.10.17 Accordingly, the Review Group recommends as follows:

Recommendation:

The Review Group does not consider it necessary to introduce a specific de minimis exception while recognising at the same time that it is a misallocation of resources for the attention of either or both of the Competition Authority

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Subject however to the rule of reason analysis under section 4(1).

and the courts to be devoted to agreements, decisions or concerted practices which do not have appreciable effects on competition generally in the economy. The Review Group therefore recommends that the Competition Authority should issue a category certificate or notice giving explicit guidance on the nature and type of agreements, decisions or concerted practices (whether by reference to sectors of the economy, types of agreements, quantitative criteria or otherwise) which the Competition Authority considers do not have a sufficiently appreciable effect on competition generally so as to fall within the scope of the prohibition contained in section 4 of the Competition Act 1991.

5.1 Introduction

5.1.1 As explained in the Discussion Document, the terms of reference of the Group cover the effectiveness of competition legislation and associated regulations generally in the economy. They were not, however, intended to require the Group to undertake a comprehensive study of all the issues which arise in relation to the interaction between competition law and the State sector. In particular, the terms of reference do not extend to advising on when sector specific regulation of particular industries is appropriate or what form such regulation should take. (These topics are of considerable current interest and other initiatives are being taken by the Government in relation to various aspects of the regulatory regimes which currently exist in some sectors and which may in the future be proposed for others¹⁸³.) It is therefore not within the remit of the Group to consider these issues and this Final Report does not attempt to do so. However, as indicated in the Discussion Document, the Group is very conscious of the actual and potential impact of the State sector, in its various manifestations, on the effectiveness of competition law. It therefore considered, in Chapter 7 of the Discussion Document, the following aspects of the interaction between the activities of the State and competition law:

- the application of competition law to (a) commercial enterprises owned or controlled by the State or to which the State has granted special or exclusive privileges and (b) commercial enterprises entrusted with the provisions of services of general economic interest;

¹⁸³ For example, on the 15th of March 2000, the Minister for Public Enterprise published a paper entitled “Governance and Accountability Issues in the Regulatory Process: Policy Proposals”(available on <http://www.irlgov.ie/tec/publications>). The Minister for Enterprise

- the interaction between competition law and State regulation of “natural monopolies”;
- the effect on competition of legislation or regulations controlling entry to particular economic sectors and/or the activities of firms involved in particular economic sectors.

5.1.2 This chapter reviews the interim recommendations made in Chapter 7 of the Discussion Document in the light of submissions received and further discussions within the Group. The final recommendations of the Group in relation to the topics considered in the Discussion Document are then put forward.

Trade and Employment has also indicated her intention to establish a group to consider broader issues concerning the operation of competition in regulated sectors.

5.2 The application of competition law to (a) commercial enterprises owned or controlled by the State or to which the State has granted special or exclusive privileges and (b) commercial enterprises entrusted with the provisions of services of general economic interest

5.2.1 The Review Group had made the following interim recommendation.

Interim recommendation: The Group does not consider it necessary to amend the definition of an “undertaking” in the 1991 Act. Neither does it appear to most members of the Group necessary to amend the Competition Acts to incorporate a provision along the lines of Article 86(2) of the EC Treaty.¹⁸⁴

Commercial enterprises owned or controlled by the State or to which the State has granted special or exclusive privileges.

5.2.2 No submission received by the Group in response to the Discussion Document suggested any modification of the application of the Competition Acts to commercial enterprises owned or controlled by the State or to which the State has granted special or exclusive privileges. Accordingly, the Group confirms its interim recommendation to the effect that it does not consider it necessary to amend the definition of an “undertaking” in the Competition Act, 1991.¹⁸⁵

¹⁸⁴ The interim recommendation referred to Article 90(2) of the EC Treaty which, since the ratification of the Amsterdam Treaty, has been renumbered as Article 86(2).

¹⁸⁵ The “Policy Proposals” paper published by the Minister for Public Enterprise on the 15th of March 2000 (see previous footnote) supported this approach in the following terms: “...as a general principle, competition rules should apply throughout the public enterprise sectors, although issues such as public service - social requirements need to be taken into account.”

Commercial enterprises entrusted with the provision of services of general economic interest

5.2.3 As can be seen from the interim recommendation, most members of the Group did not consider it necessary to amend the Competition Acts to incorporate a provision along the lines of Article 86(2) of the EC Treaty.

5.2.4 It will be recalled that Article 86(2) of the EC Treaty reads as follows:

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.”

5.2.5 One submission received by the Group acknowledged the reasons put forward by the Group to justify its view that it is unnecessary to amend the Competition Acts to incorporate a provision along the lines of Article 86(2) of the EC Treaty. However, that submission went on to say that there may be sound reasons why such an amendment should be incorporated in the Competition Acts and suggested that the arguments in favour of such an amendment should be explored further by the Group. The submission pointed out that if it is accepted that certain undertakings may be required to accept obligations of general economic interest (such as the provision of universal telecommunications or electricity distribution services), then it may be appropriate to recognise in competition legislation that the provision of such services can, in certain circumstances, necessitate arrangements which infringe the Competition Acts (such as cross-subsidisation by a dominant undertaking). By contrast, the only other submission which addressed this point supported the recommendation that no amendment along the lines of Article 86(2) should be

included in the Competition Acts. It is notable that no submissions requesting such an amendment were received from undertakings which might be regarded as having been entrusted with the operation of services of general economic interest. It would therefore appear that this interim recommendation of the Group is not one which has given rise to serious concerns regarding the ability of undertakings entrusted with the operation of services of general economic interest to discharge their responsibilities effectively.

5.2.6 Nonetheless, as suggested, the Group has given some further consideration to the issue. The most recent case to be decided by the Court of Justice of the European Communities in which the interpretation of Article 86(2) arose was a case involving *Deutsche Post AG and Citicorp*.¹⁸⁶ The case related to the “re-mailing” by a Citicorp subsidiary of large quantities of mail relating to credit card transactions in Germany. The system operated by Citicorp involved the processing centrally at centres in the USA and the Netherlands of data relating to credit card transactions in Germany. The processing involved the preparation of statements, bills and payment and/or billing requests which were then printed and dispatched in the Netherlands to the traders and customers in Germany to which they related. Deutsche Post, the German national postal monopoly claimed postage at its internal rate in respect of each of the letters posted from the Netherlands to addressees in Germany, as it was entitled to do under the relevant provisions of the Universal Postal Convention. Citigroup challenged Deutsche Post’s right to levy this charge on the grounds that it was contrary to the competition rules in the EC Treaty. In its defence, Deutsche Post argued that it was an entity entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) of the Treaty and that its right to levy the postage charge on the Citigroup mail was necessary for the performance of the tasks which had been assigned to it.

5.2.7 The ECJ held that the performance of the obligations flowing from the Universal Postal Convention (which set out the terms on which Contracting

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Judgment of 10 February 2000 in joined cases C-147/97 and C-148/97.

States are obliged to forward and deliver to the relevant addressees international letter post items which are passed to them by the postal services of other contracting states) involved the provision of a service of general economic interest within the meaning of Article 86(2). The ECJ acknowledged that a Contracting State's right under the Convention to treat international items of mail as internal post in circumstances such as those which arose in the Citicorp case (i.e. where the mail generated by credit card transactions in Germany was mailed in large quantities from another country) creates a situation where Deutsche Post could be led to abuse its dominant position. The Court therefore went on to examine the extent to which Deutsche Post's right to levy a postal charge in respect of such mail was necessary to enable it to perform the above-mentioned task of general economic interest, which flowed from its obligations under the Universal Postal Convention. It concluded that if Deutsche Post were obliged to forward and deliver to addressees resident in Germany mail posted abroad in large quantities by a sender resident in Germany (in this case, Citicorp's German subsidiary) without receiving any financial compensation for doing so, then the performance of the task of general economic interest which flowed from Deutsche Post's obligations under the Universal Postal Convention would be jeopardised. The Court therefore decided that Deutsche Post was justified in charging internal postage rates on such mail. However, it went on to say that the exercise of that right would be contrary to Article 86(1) of the EC Treaty, read in conjunction with Article 82 thereof ¹⁸⁷ if it was entitled to levy the full internal postage rate without deducting the "terminal dues" payable to it by the Dutch postal service in respect of the items concerned.

- 5.2.8 The facts of the above case have been set out in some detail partly because they represent a recent example of the ECJ's interpretation of Article 86 of the EC Treaty but also because they provide an illustration of an arrangement which, in the absence of a provision such as Article 86(2), would be likely to involve an infringement of the competition rules in the EC Treaty. It might be argued, on the basis of cases such as this, that national competition legislation should

¹⁸⁷ i.e. the exercise of the right granted to Deutsche Post would inevitably involve an abuse of its

therefore incorporate provisions corresponding to Article 86(2) in order to protect undertakings entrusted with the provision of services of general economic interest against the risk that actions which they may be required to take in order to provide those services may involve an infringement of national competition law.

5.2.9 The arguments against the introduction of such a provision were considered in some detail in the Discussion Document.¹⁸⁸ It is not proposed to repeat those arguments here but the most important of them may be summarised as follows:

- there is no perceived demand for the inclusion of a provision along the lines of Article 86(2) in the Irish Competition Acts;
- the inclusion of Article 86(2) in the EC Treaty is necessary because Article 86(1) prohibits Member States from enacting, in relation to public undertakings and undertakings to which Member States have granted special or exclusive rights, measures which are contrary to the rules in the EC Treaty (in particular, the competition rules). Community law takes precedence over any conflicting provision of national law. In the absence of a provision such as Article 86(2), a Member State would be unable to enact national laws or other measures required to enable undertakings discharge “public interest” tasks entrusted to them where those measures would infringe EC competition law. This rationale for a general exemption along the lines of Article 86(2) does not apply at the national level since the legislature of a Member State is free to enact specific legislation at any time qualifying the application of national competition law to undertakings entrusted with tasks of general economic interest;¹⁸⁹
- the enactment of a general amendment along the lines of Article 86(2) would result in uncertainty with regard to the application of national

¹⁸⁸ dominant position.
See pages 186 to 188.

competition law to the undertakings to which it would apply and might encourage a negative rather than a positive attitude towards competition in such organisations.

5.2.10 The Discussion Document noted that the UK Competition Act, 1998 includes a provision along the lines of Article 86(2). The legislation of a number of other Member States (notably Austria, the Netherlands and Italy) contains similar provisions. However, it is notable that, in at least some of these countries (e.g., Italy), the national provisions are drafted more stringently than Article 86(2).

5.2.11 Having considered this issue further, the Group still takes the view that, on balance, it is unnecessary and undesirable to incorporate a general exemption from the Competition Acts in respect of undertakings entrusted with tasks of general economic interest along the lines of that set out in Article 86(2) of the EC Treaty. If it were felt that a provision along the lines of Article 86(2) should be incorporated in national legislation, the Group would recommend that it be drafted in a way which would make it clear that any exemption from the Competition Acts would apply only in respect of actions which could be regarded as strictly necessary for the discharge of the public interest functions assigned to the undertaking concerned.

5.2.12 Accordingly, the Review Group recommends as follows.

Recommendation:

- (a) The Group does not consider it necessary to amend the definition of an “undertaking” in the 1991 Act.
- (b) The Group does not consider it necessary to amend the Competition Acts to incorporate a provision along the lines of Article 86(2) of the EC Treaty.

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Such legislation might, of course, infringe Article 86(1) of the EC Treaty, in which case the provisions of Article 86(2) might also be relevant.

5.3 The interaction between competition law and State regulation of certain economic sectors

5.3.1 The Group's interim recommendation under this heading was as follows:

Interim Recommendation: The Group recommends

- (a) that the Competition Acts should continue to apply to undertakings operating in an industry which is regulated by a sector specific regulator in the same way as they apply to all undertakings, subject, possibly, to any exemptions which are considered essential for the effective operation of the regulatory system. Any such exemptions should be contained in primary legislation and should be limited in time;
- (b) that the Competition Authority should retain exclusive jurisdiction to administer the Competition Acts, whether in respect of regulated undertakings or otherwise;
- (c) that the risk of conflict and inconsistent actions and decisions being taken by the Competition Authority, on the one hand, and the sectoral regulators, on the other, be addressed by enacting legislation:
 - (i) to make it clear that both the Competition Authority and the sectoral regulators have authority to exercise discretion to defer to the other agency's consideration of a matter coming within both of their jurisdictions;
 - (ii) to require each agency to notify the other of any action initiated by it which might reasonably be regarded as involving action which the other agency might also be entitled to take;
 - (iii) to require the agencies to consult with each other in circumstances

where they have both initiated action in relation to the same matter with a view to (I) avoiding unnecessary duplication, whether by temporary or permanent deferral by one agency to the other or otherwise and (II) avoiding inconsistent decisions being taken by the two agencies in relation to the same matter;

- (iv) to prohibit any party from pursuing a complaint with one agency in relation to a matter in respect of which that party has filed a complaint with the other agency (without prejudice to any party's right to initiate court action for any breach of law);
- (v) to require sectoral regulators to consult the Competition Authority before taking any decision in relation to the behaviour of undertakings in the regulated market which might constitute infringement of the Competition Acts and to take account of any opinion expressed by the Competition Authority in relation to the matter;
- (vi) to require sectoral regulators to consult the Competition Authority before introducing regulatory measures which may have implications for competition in the regulated market and to take account of any opinion expressed by the Competition Authority in relation to the matter;
- (vii) generally to share all necessary information concerning matters which might reasonably be regarded as coming within each of their jurisdictions, subject to any constraints on disclosure of information supplied in confidence to either agency.
- (viii) to require the Competition Authority and the sectoral regulators to meet at least once a quarter for the purpose of informing each other about all such matters as may be relevant to the necessary co-operation between them.

- 5.3.2 This is a complex recommendation and its different elements will therefore be considered separately.
- 5.3.3 With regard to paragraph (a), no submission to the Group objected to the recommendation that the Competition Acts should continue to apply to undertakings operating in an industry which is regulated by a sector specific regulator in the same way they apply to all undertakings. This element of the interim recommendation will therefore be confirmed in the Group's final recommendation. However, a number of submissions made the point that regulatory rules should not be inconsistent with competition law given that one of the principal objectives of regulation is to create structures and rules which encourage competition in markets which have previously been insulated, to some degree, from competition.¹⁹⁰ The Group finds this argument convincing and therefore proposes to omit from its final recommendation the qualification to its interim recommendation which envisaged the possibility of exemptions which might be considered essential for the effective operation of the regulatory system. (The possibility of actions taken by undertakings entrusted with the operation of services of general economic interest being exempt from the Competition Acts is a distinct issue which has been addressed in Section 5.2 above.)
- 5.3.4 Paragraph (b) recommended that the Competition Authority should retain exclusive jurisdiction to administer the Competition Acts, whether in respect of regulated undertakings or otherwise. The submissions received by the Group generally favoured this recommendation. Some submissions reviewed arguments favouring alternative approaches without coming to any definite conclusion while one submission (from a sectoral regulator) strongly argued in favour of giving sectoral regulators power to enforce the Competition Acts within their own sectors.

¹⁹⁰ The "Policy Proposals" paper published by the Minister for Public Enterprise on the 15th of March 2000 stated the same principle in the following terms: "*as a general principle the sector*

5.3.5 Before putting forward specific arguments in favour of this approach, this last-mentioned submission acknowledged that regulatory rules relating to specific sectors should not, in principle, be inconsistent with competition law. This is clearly the position in circumstances where EC competition law applies since Community law takes precedence over any conflicting provisions of national law. Given that the substantive provisions of the Irish Competition Acts are modelled on the corresponding EC competition rules, it is unlikely that any regulatory rule which was inconsistent with those substantive rules would be enforceable; but the legislation establishing the sectoral regulators currently operating in Ireland (i.e., in the telecommunications and electricity industries) contains no express provision acknowledging the precedence of the Irish Competition Acts over any inconsistent regulatory rules. It may be desirable to amend the relevant regulatory legislation to clarify this important issue. As noted in the Review Group's Discussion Document, Article 10 (ex 5) of the EC Treaty requires that any national authority (including sector specific regulators) must not grant any licence or give any authorisation or approval which is a prerequisite to any arrangement which is contrary to Community competition law.¹⁹¹

5.3.6 The arguments put forward in this submission in favour of the proposition that sectoral regulators should be given jurisdiction to enforce the Competition Acts in the sectors which they regulate may be summarised as follows:

- A regulator would probably be better informed about possibilities of anti-competitive behaviour within the regulated industry than is the Competition Authority. Sharing of such information may not be possible for confidentiality reasons. As a result, anti-competitive behaviour may go undetected and the cost of gathering evidence, one of the major costs of any anti-trust case, would be increased.

- *specific regulatory rules should not conflict with the competition rules that apply generally throughout the economy.*"

¹⁹¹ See Discussion Document, p 58 referring to *Ahmed Saeed Flutreisen* (1989) ECR 803

- The regulator may be in a better position in terms of expertise and resources to pursue an action.
- It may undermine a regulator's ability to obtain voluntary compliance from regulated firms if the Competition Authority initiates an action (presumably because the defendant in such an action will feel obliged to adopt a defensive position rather than negotiate concessions with the regulator).

5.3.7 The submission therefore proposes that sectoral regulators should be given jurisdiction to enforce the Competition Acts in their sectors. However, it acknowledges that it would be inappropriate for many reasons to give such regulators exclusive enforcement powers. It cites, in particular, the risk of regulatory capture; the need for long-term and cross-sector consistency in the application of competition law and the need to limit special exemptions from enforcement of the competition rules by the Competition Authority.¹⁹² Instead, the submission recommended that the Competition Authority and sectoral regulators should have equal concurrent jurisdiction to enforce the competition rules in the courts and, in particular, to investigate a case *ex officio*. It acknowledges that such a proposal could give rise to problems of double jeopardy and puts forward some proposals to minimise the risk of this happening. Its most significant suggestion in this regard is that the sectoral regulator should be given a lead role under a system of concurrent enforcement for a strictly limited period. While this proposal is not spelt out in detail, it clearly envisages a subordinate role for the Competition Authority since it proposes that the Authority would be free to act in the absence of a resolution of the issues by the regulator or where the regulator does not wish to or cannot act as effectively as the Competition Authority. While it is acknowledged that such an arrangement would require good co-ordination and consultation between the agencies, it does not explain in detail what trigger mechanisms would activate the Authority's "step-in" rights. The proposal also envisages that the temporary nature of any such lead role (which it says should continue

for, at most, a few years) would mean that the emphasis would shift back towards equal concurrent enforcement for the Authority and the regulator as liberalisation of the regulated market continues; this is appropriate because competition rules can replace regulatory rules as the liberalisation process advances.

5.3.8 The Group gave careful consideration to these difficult issues in the Discussion Document and reviewed the approach adopted in a number of other jurisdictions¹⁹³. It is notable that different solutions have been adopted in different countries, so it is clear that no universally acceptable model has yet been devised.

5.3.9 The Group acknowledges the force of some of the arguments advanced in the above-mentioned submission in favour of giving sectoral regulators equal concurrent jurisdiction with the Competition Authority to enforce the Competition Acts in the regulated sectors. It would not regard such an approach as wholly unacceptable. But it would still, on balance, favour the approach recommended in its interim recommendation (i.e., that the Competition Authority should retain exclusive competence to administer the Competition Acts in all sectors of the economy). It may be worth recalling here the principal reasons advanced by the Group in support of this recommendation:

- vesting the powers of the Competition Authority in sectoral regulators would fragment the administration of the Competition Acts and increase

¹⁹² The Group listed a number of other reasons in its Discussion Document: see pp. 208-210. These are summarised below.

¹⁹³ See, for example, Kerf and Geradin, *Controlling Market Power in Telecommunications; Antitrust vs Sector-Specific Regulation; An Assessment of the United States, New Zealand and Australian Experiences*, (1999) 14 Berkeley Technology Law Journal 919. The Group did not consider a solution which would involve the unification of sectoral regulation and competition law enforcement under a single agency. This is the model which was adopted in Australia after the publication in 1993 of a detailed report on competition policy by an independent committee of inquiry (usually referred to as the Hillmer Report): Australian Publishing Service, Canberra 1993 ISBN 0 644. It was felt that a review of such structural issues fell outside the Group's terms of reference. It may, however, fall to be considered as part of the Government's general review of regulatory policy issues.

the risk of inconsistency in their interpretation and enforcement in different sectors of the economy;

- the Competition Authority has particular expertise in competition law; it deals with its application across a wide range of industries and is therefore likely to have a broader view of its impact on the economy than a sectoral regulator;
- the Authority is in regular communication with other national and international competition agencies in relation to competition law matters and is therefore in a position to develop competition law jurisprudence and practice in light of international developments;
- the need for sectoral regulation should diminish as new competitors enter recently liberalised markets; as the process develops, it will be increasingly important to ensure that general competition law is applied to the undertakings operating in such markets in the same way as it is applied in other markets;
- the consultation and co-ordination between the Competition Authority and sectoral regulators would be likely to be more, rather than less, complex if each of them had jurisdiction to enforce the Competition Acts.

5.3.10 Regulators and competition agencies strive towards the same goal, the attainment of a freely competitive market environment in which the former public utility or former state monopoly faces competitors of at least equal stature so that the interplay of market forces can do the work they are presumed to do in the ultimate interest of the consumer. Where regulators and competition agencies tend to differ is how the transition from some form of quasi-monopoly to full-throated competition should be managed. That issue becomes clouded by three further issues - what may be argued as a continuing necessity for some form of regulation to preserve a public service aspect of the industry which it is feared may vanish in free competition; the extent to

which free unrestrained competition is different from something called “fair” competition; and the length of time the industry should be deemed to be in transition from one state to another such as to warrant the continuing influence of the regulator. These and the many related issues are beyond the remit of the Review Group but the Review Group is satisfied that at the end of the day these difficulties should not detract from the primary role which competition law has as the template by reference to which the other issues have to be resolved.¹⁹⁴

5.3.11 The Group therefore recommends that the Competition Authority should retain exclusive jurisdiction, with the courts, to administer the Competition Acts in all sectors of the economy.

5.3.12 The Group acknowledges, as it did in the Discussion Document, that the overlapping jurisdiction of the Competition Authority and the sectoral regulators can give rise to serious difficulties even where the sectoral regulators have no jurisdiction under the Competition Acts. These difficulties include:

- the risk of actions being taken by the two agencies in relation to the same matter;

¹⁹⁴ “How should regulators approach the competitive transformation of network industries? The temptation is to “manage” the competitive transition so as to determine the outcome of competition. Thus, paradoxically, the process of deregulation often brings about increased regulatory intervention in the marketplace and correspondingly greater administrative costs and market inefficiencies. The result is neither fish nor fowl, neither a regulated market nor a competitive one. The benefits of competition do not materialise. Partial deregulation distorts economic incentives in a manner that is far worse than rate-of-return regulation or newer forms of incentive regulation. The staffs and budgets of the regulatory agencies swell as they undertake the impossible task of managing markets. The problem is akin to privatisation in planned economies. Government policy makers must be willing to forsake power and influence over the economy, and to trust what they sometimes view as the “chaos” of the marketplace. Regulators are concerned with achieving competition “fairly”, yet markets are well known for their efficiency properties, rather than the equity of the outcomes that they produce. Economists may posture as purists and assert that it is misguided for regulators to pursue any goal other than economic efficiency. However correct that position may be as a matter of theory, it does not take the institutional setting of regulation as it really is. Consequently, although economists may consider the definition of “fair competition” to be an oxymoronic undertaking, it is nonetheless necessary to supply regulators with an operational definition of fairness that does not attempt to specify outcomes. They need a set of objectives that does not perpetuate regulation but rather lets regulation recede as competition progresses.” Sidak and

- the risk of different and even conflicting decisions being taken by the two agencies in relation to the same matter;
- the waste of resources involved in having more than one agency deal with the same allegedly anti-competitive behaviour.

5.3.13 It was for these reasons that the Group emphasised in the Discussion Document the need for regular communication and coordination between the Competition Authority and sectoral regulators with regard to developments in the regulated sectors and actions which the different agencies might wish to take in relation to them. The Group's proposals in this regard were set out in paragraph (c) of the interim recommendation.

5.3.14 The proposals set out in paragraph (c) were supported in most of the submissions received by the Group. However, one submission considered the recommendation in paragraph (c) (iv) – i.e. that an aggrieved party would not be entitled to pursue a complaint before both a regulator and the Competition Authority - to be unworkable. It was pointed out that an aggrieved party might not know the position adopted by a regulator or the Competition Authority in relation to a particular complaint until the end of the complaint procedure before the relevant agency. It was also argued that since a regulator should not have power to approve agreements or practices which are prohibited by competition law, an aggrieved party should not be denied access to the Competition Authority, even if that party has also complained to the regulator about the same issue.

5.3.15 Other submissions have, however, expressed grave concern about the risk of "double jeopardy" which could result from actions being taken by a regulator and the Competition Authority in relation to the same matter. Paragraph (c)(iv) of the interim recommendation which was suggested by a similar provision in the UK Competition Act, 1998, was designed to alleviate such concerns. While the Group would hope that appropriate co-ordination between regulators and

the Competition Authority would minimise the risk of conflicting actions being taken by them in relation to the same matter, it does not seem unreasonable to expect a complainant to pursue his complaint with the agency which he judges best placed to provide him with an appropriate remedy rather than file complaints with two agencies at the same time in relation to the same matter. The alternative, which would require the object of the complaints to deal with complaints before two agencies at the same time would seem to shift the balance too much in favour of the complainant and could promote the duplication of agency activity which the Group's other recommendations are designed to avoid. For these reasons, the Group proposes to repeat the thrust of paragraph (c)(iv) in its final recommendation while at the same time making it clear that it is not intended to exclude the possibility of serial, as opposed to concurrent, complaints being filed with a regulator and the Competition Authority in relation to the same matter.

5.3.16 With regard to paragraph (c)(v), it was suggested in one submission that this recommendation could cause undesirable delays in the discharge by regulators of their responsibilities. The Group acknowledges this possibility, but believes that the recommendation is a necessary consequence of the recommendations made in paragraphs (a) and (b) to the effect that the Competition Acts should apply to undertakings operating in all sectors of the economy and that the Competition Authority should have exclusive jurisdiction to administer the Competition Acts.

5.3.17 However, in order to avoid the risk of disruption to the work of regulators, the Group proposes to incorporate in its final recommendation a reference to time limits within which the Authority must respond to a request received from a regulator, failing which the regulator would be entitled to proceed with its decision.

5.3.18 One submission took the view that the recommendation in paragraph (c)(vi) was too wide and vague. The Group accepts this criticism and proposes to omit

this paragraph from its final recommendation. Its omission does, however, emphasise the need for effective on-going communication and co-ordination between sectoral regulators and the Competition Authority.

5.3.19 One submission referred to the recommendation for quarterly meetings in paragraph (c)(viii) as "heavy handed". The Group acknowledges that the recommendation is quite specific, but given the clear need for effective communication and coordination between regulators and the Competition Authority and the evident failure of such efforts in the past, it considers it essential that the agencies should be under a clear legal obligation to put appropriate procedures in place. If this is not done and the agencies were to exercise their separate, but sometimes overlapping, jurisdictions without reference to each other, this would inevitably give rise to a level of confusion and uncertainty which would not only be unacceptable to the community at large, but damaging to the standing and effectiveness of the agencies themselves.

5.3.20 Although it was not addressed in the Discussion Document or in the submissions received in response to it, the Group has considered whether the achievement of consistency between the policies and decisions of the Competition Authority, on the one hand, and those of sectoral regulators, on the other, might be facilitated through the appeal mechanisms which are available in relation to decisions of sectoral regulators. The Group has made comprehensive recommendations in Chapters 4 and 6 regarding the forms of appeal which should be available in relation to decisions of the Competition Authority. It would be outside its terms of reference to undertake a similar exercise in relation to appeals from decisions of sectoral regulators. Its consideration of the issue has therefore been confined to a review of the extent to which appeal mechanisms might be used to encourage coordination between sectoral regulators and the Competition Authority.

5.3.21 The Group notes that the issue of appeals from decisions of sectoral regulators is addressed in the "Policy Proposals" paper recently published by the Minister

for Public Enterprise¹⁹⁵. The general recommendation in the paper is that there should be statutory provisions setting out the terms on which decisions of regulators would be subject to *judicial review* (i.e., that an application for judicial review would have to be made within a fixed period and that the regulator's decision would apply pending the outcome of the appeal process).¹⁹⁶ The "Policy Proposals" paper goes on to say that clear provisions for judicial review and the regulators' own codes for decision procedures should obviate the need for a general right of appeal against regulators' decisions *on the merits*. It considers such a general right of appeal on the merits to be undesirable given that it can result in the appeal body becoming the real regulator and can be used as a delaying tactic to prevent the effective implementation of the regulator's decisions. However, it also states that there are (unspecified) circumstances in which a right to appeal a regulator's decision on the merits may be necessary or desirable; although it notes that because of their technical nature, such appeals may prove unwieldy for the courts to handle. It therefore recommends that such appeals should be heard and decided by a panel established, under statute, by the Minister for Public Enterprise and comprising, typically, three independent persons who have requisite expertise.

5.3.22 The Group believes that the use of such specialised appeal panels is a sensible way of dealing with appeals on the merits against decisions of sectoral regulators (where such appeals are considered necessary or desirable). It has reviewed the provisions relating to such an appeal panel already contained in the Electricity Regulation Act, 1999¹⁹⁷. It notes that when establishing an appeal panel under that Act, the Minister for Public Enterprise must consult with the Competition Authority as to the composition of the appeal panel. This is an important provision and clearly recognises the need for close coordination between the policies pursued by sectoral regulators, on the one hand and the Competition Authority, on the other. In the Group's view, it is essential that any future legislation relating to such appeal panels should contain a provision designed to facilitate coordination of policy between sectoral regulators and the

¹⁹⁵ The discussion of this issue appears in paragraph 4.1.2 of the Policy Proposals paper.

¹⁹⁶ The Minister will consider further whether the right to seek judicial review of regulators' decisions should be subject to certain restrictions to be specified in the relevant legislation.

Competition Authority. This could provide for consultation with the Authority regarding the composition of the appeal panel (along the lines contained in the Electricity Regulation Act, 1999) or it could provide that one member of the proposed three-person panel would be a member of the Competition Authority. The latter approach would encourage a closer degree of cooperation between sectoral regulators and the Competition Authority and is therefore the option which the Group recommends.

5.3.23 Accordingly, the Review Group recommends as follows.

Recommendation : The Review Group recommends

- (a) that the Competition Acts should continue to apply to undertakings operating in an industry which is regulated by a sector specific regulator in the same way as they apply to all undertakings;
- (b) that the Competition Authority should retain exclusive jurisdiction, with the courts, to administer the Competition Acts in all sectors of the economy;
- (c) that the risk of conflict and inconsistent actions and decisions being taken by the Competition Authority, on the one hand, and the sectoral regulators, on the other, be addressed by enacting legislation :
 - (i) to make it clear that both the Competition Authority and the sectoral regulators have authority to exercise discretion to defer to the other agency's consideration of a matter coming within both of their jurisdictions;
 - (ii) to require each agency to notify the other of any action initiated by it which might reasonably be regarded as involving action which the other agency might also be entitled to take;

- (iii) to require the agencies to consult with each other in circumstances where they have both initiated action in relation to the same matter with a view to (a) avoiding unnecessary duplication, whether by temporary or permanent deferral by one agency to the other or otherwise and (b) avoiding inconsistent decisions being taken by the two agencies in relation to the same matter;
- (iv) to prohibit any party from pursuing simultaneous complaints with more than one agency in relation to the same matter; but this recommendation is not intended to prohibit a party from pursuing the same complaint with another agency after its rejection by the first agency and is not intended to prejudice any party's right to initiate court action for any breach of law;
- (v) to require sectoral regulators to consult the Competition Authority before taking any decision in relation to the behaviour of undertakings in the regulated market which might constitute infringement of the Competition Acts and to take account of any opinion expressed by the Competition Authority in relation to the matter which is furnished to the regulator within a specified time-limit (in default of which the regulator should be free to proceed as it deems fit);
- (vi) generally to share all necessary information concerning matters which might reasonably be regarded as coming within each of their jurisdictions, subject to any constraints on disclosure of information supplied in confidence to either agency;
- (vii) to require the Competition Authority and the sectoral regulators to meet at least once a quarter for the purpose of informing each other about all such matters as may be relevant for the purpose of ensuring optimal co-operation and coordination between them.
- (viii) that legislation (such as the Electricity Regulation Act 1999) which

provides for the establishment of an appeal panel for the purpose of hearing and deciding appeals on the merits from decisions of a sectoral regulator should provide that one member of the appeal panel (in the case of a three-person panel) should be a member of the Competition Authority.

5.4 The Relationship Between Competition Law and Regulated Industries

5.4.1 The Review Group made the following interim recommendation.

Interim Recommendation:

- (a) That the Competition Acts be amended
 - (i) to grant immunity from criminal prosecution and/or liability in damages under the Competition Acts in respect of actions taken by undertakings pursuant to a ruling, decision or approval granted by a sectoral regulator;
 - (ii) to make it clear that the other remedies available to the Competition Authority and private parties under section 6 of the 1991 Act (i.e., injunction or declaration) remain available in respect of the actions of undertakings operating in a regulated industry except insofar as such actions are expressly excluded by statute from the application of the Competition Acts;
 - (iii) to allow a court called upon to hear such an action to exercise its discretion to defer the hearing of the case until certain steps in the relevant regulatory process specified by the court have been taken.
- (b) That exemptions from the application of the Competition Acts in respect of a regulated industry should be given only in primary legislation; that they should be limited to specific actions rather than be general in nature; that they should be given only to the extent that an exemption is essential to ensure the effective operation of the regulatory system and that they should be limited in time.

- 5.4.2 In relation to paragraph (a) (i), one submission (made by a sectoral regulator) argued that no decision by a sectoral regulator should grant immunity from competition law. It pointed out that individual firms must take responsibility for compliance with competition law regardless of regulatory decisions. It also argued that immunity from criminal prosecution seemed unnecessary since it was implausible that a criminal prosecution could succeed in circumstances where an undertaking had acted pursuant to a decision by a regulator. Other submissions, however, argued that compliance with a regulatory decision should provide immunity from all liability under the Competition Acts, whether civil or criminal, since it was unacceptable that undertakings should be exposed to the risk of legal proceedings in such circumstances.
- 5.4.3 The Group's interim recommendation was intended to reflect a reasonable compromise between these opposing views. On the one hand, the Group wishes to emphasise in its recommendations that the Competition Acts should apply to all sectors of the economy, whether regulated or not, and that if a decision of a sectoral regulator conflicts with competition law, the latter should prevail. On the other hand, the Group accepts that undertakings in regulated sectors who act in compliance with a ruling, decision or approval granted by a sectoral regulator should not be exposed to the risk of criminal prosecution or liability in damages in such circumstances, however remote that possibility may be. The Group believes that its interim recommendation strikes the right balance in this regard and therefore proposes to adopt it as its final recommendation, subject to some minor drafting amendments suggested in one submission.
- 5.4.4 With regard to the recommendation in paragraph (b) of the interim recommendation, this Report has already noted that a number of submissions have made the point that regulatory rules should not be inconsistent with competition law, given that one of the principal objects of regulation is to create structures and rules which encourage competition in markets which have previously been insulated, to some degree, from competition. The Group agrees with this view and, on that basis, has decided to omit from its final recommendation the qualification in its interim recommendation which

envisaged the possibility of exemptions from the Competition Acts being granted where this was essential for the effective operation of the regulatory system. It would be inconsistent with this decision to retain paragraph (b) of the interim recommendation and the Group therefore proposes to omit this paragraph from its final recommendation.

5.4.5 The Review Group therefore recommends as follows.

Recommendation

The Review Group recommends that the Competition Acts be amended

- (i) to grant immunity from criminal prosecution and/or liability in damages under the Competition Acts in respect of actions taken by undertakings pursuant to and in accordance with a ruling, decision or approval granted by a sectoral regulator;
- (ii) to make it clear that the other remedies available to the Competition Authority and private parties under section 6 of the 1991 Act (i.e., injunction or declaration) remain available in respect of the actions of undertakings operating in a regulated industry pursuant to and in accordance with a ruling, decision or approval granted by a sectoral regulator except insofar as such actions are expressly excluded by statute from the application of the Competition Acts;
- (iii) to allow a court called upon to hear such an action to exercise its discretion to defer the hearing of the case until certain steps in the relevant regulatory process specified by the court have been taken.

5.5 Legislation as an Impediment to Competition

5.5.1 The Review Group made the following interim recommendation.

Interim Recommendation:

- (a) In relation to proposed primary legislation, the sponsoring Minister should be free to request the opinion of the Competition Authority on the implications for competition of the proposed legislation. Whether such an opinion is obtained or not, the Minister should be required to accompany proposals for legislation with a statement indicating whether they are likely to have any impact on competition in the market to which the legislation relates and, if so, explaining what that impact may be and, in the event that it may restrict competition, why such restrictions are justified in the public interest. The statement should also state whether the Minister obtained the opinion of the Competition Authority in relation to the proposals and, if so, provide a summary of that opinion. The Minister's statement and any opinion of the Competition Authority should be made available to the public on the publication of the Bill.
- (b) In relation to Ministerial regulations, the sponsoring Minister should be free to request the opinion of the Competition Authority on the implications for competition of the proposed regulations. Any such opinion should be made available to the public upon the publication of the regulations.
- (c) The Authority should be given express statutory power (i) to offer the opinions requested pursuant to the procedures referred to in paragraphs (a) and (b) above; and (ii) to review and make recommendations in relation to the impact on competition of existing legislation (whether

primary or secondary) and of regulations adopted by regulatory bodies responsible for the regulation of particular sectors of the economy or of particular trades or professions (where these are not subject to the application of section 4 of the 1991 Act as associations of undertakings).

- (d) The Competition Acts should recognise and encourage the role of the Competition Authority as an advocate of competition, as is done in other countries with whose firms Irish firms must compete. Implementation of this objective would include the provision of a broad statutory basis for matters such as: the publication of general discussion papers by the Authority; participation by the Authority in the development of national policies which may impact on competition; cooperation with sectoral regulators concerning competition-related matters and the right to make submissions to and appear before Committees of the Oireachtas in relation to issues which, in the opinion of the Committee or the Authority, may have an impact on competition in particular sectors of the economy.
- (e) The Authority should be given sufficient additional resources to carry out this additional work, which could, in the Group's view, make a significant contribution to improving the competitiveness of certain sectors of the economy.

5.5.2 The submissions received in relation to this recommendation were all in favour of the proposals. They are therefore adopted without amendment as the Group's Final Recommendation.

Recommendation

- (a) In relation to proposed primary legislation, the sponsoring Minister should be free to request the opinion of the Competition Authority on the implications for competition of the proposed legislation. Whether

such an opinion is obtained or not, the Minister should be required to accompany proposals for legislation with a statement indicating whether they are likely to have any impact on competition in the market to which the legislation relates and, if so, explaining what that impact may be and, in the event that it may restrict competition, why such restrictions are justified in the public interest. The statement should also state whether the Minister obtained the opinion of the Competition Authority in relation to the proposals and, if so, provide a summary of that opinion. The Minister's statement and any opinion of the Competition Authority should be made available to the public on the publication of the Bill.

- (b) In relation to Ministerial regulations, the sponsoring Minister should be free to request the opinion of the Competition Authority on the implications for competition of the proposed regulations. Any such opinion should be made available to the public upon the publication of the regulations.
- (c) The Authority should be given express statutory power (i) to offer the opinions requested pursuant to the procedures referred to in paragraphs (a) and (b) above; and (ii) to review and make recommendations in relation to the impact on competition of existing legislation (whether primary or secondary) and of regulations adopted by regulatory bodies responsible for the regulation of particular sectors of the economy or of particular trades or professions (where these are not subject to the application of section 4 of the 1991 Act as associations of undertakings).
- (d) The Competition Acts should recognise and encourage the role of the Competition Authority as an advocate of competition, as is done in other countries with whose firms Irish firms must compete. Implementation of this objective would include the provision of a broad statutory basis for matters such as: the publication of general discussion papers by the Authority; participation by the Authority in the development of national

policies which may impact on competition; cooperation with sectoral regulators concerning competition-related matters and the right to make submissions to and appear before Committees of the Oireachtas in relation to issues which, in the opinion of the Committee or the Authority, may have an impact on competition in particular sectors of the economy.

- (e) The Authority should be given sufficient additional resources to carry out this additional work, which could, in the Group's view, make a significant contribution to improving the competitiveness of certain sectors of the economy.

Chapter 6 Mergers and Acquisitions

6.1 Mandatory Notification¹⁹⁸

6.1.1 The Group's interim recommendation was as follows.

Interim Recommendation

The Group recommends that the current system of mandatory notification should continue to exist where the defined financial thresholds are exceeded.

6.1.2 This recommendation was acceptable to all those who made their views on the Discussion Document known. The Group therefore adopts this recommendation.

Recommendation

The Group recommends that the current system of mandatory notification should continue to exist where defined financial thresholds are exceeded.

6.2 Thresholds

6.2.1 The Group's interim recommendation was as follows.

¹⁹⁸ For ease of reference, the term "merger" as used in this Chapter should be regarded as including a "take-over".

Interim Recommendation:

The Group recommends the retention of the thresholds for notification based on a turnover criterion and the abolition of the gross assets criterion. The Group recommends that thresholds be set in respect of the parties to a proposed transaction. A majority recommends that the threshold should be increased to £30 million. In addition, it is recommended that a threshold be fixed in respect of the level of activity within the State. A majority recommends that this also be fixed at £30 million. The method of calculating turnover provided for in the Merger Regulation should be followed. The Minister should retain the power to dis-apply the thresholds.

6.2.2 This recommendation, which comprises a number of detailed recommendations, was the subject of much comment. Certain aspects were received positively, others less so.

Nature of the Thresholds

6.2.3 In response to the proposal that the gross assets test should be dropped, it was submitted that such a test could be useful to retain control of mergers between enterprises which, whilst being engaged for profit or gain to some extent, are essentially investment rather than trading vehicles (such as property holding companies or enterprises or undertakings which are in a “quasi-dormant” position or undertakings which have valuable collections of national, artistic or historical objects). However, the Group is of the view that mergers of such undertakings are unlikely to pose a threat to competition. An asset test is rarely found in the merger control legislation of other countries and is not part of the EC Merger Regulation.¹⁹⁹ Since trading companies will always

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“The Merger Regulation is based on the theoretical premises that mergers affecting more than one Member State should be reviewed by the Commission, while concentrations having purely national effects should fall within the exclusive jurisdiction of the Member State concerned. To make this premise workable, a simple test was devised based on the turnover of the merging companies. Mergers with a ‘Community dimension’ (i.e. mergers between companies with turnover above certain thresholds) fall, in principle within the exclusive

generate turnover, the Group believes that its interim recommendation that the threshold test for the application of the Act should be related solely to turnover will capture those mergers which should be subject to scrutiny under the Act. Accordingly, it has decided to confirm this aspect of its interim recommendation.

6.2.4 Section 2(1)(a) of the Mergers and Take-Overs (Control) Act, 1978, as amended, (the “1978 Act”) provides that a merger will be notifiable only if the turnover (or gross assets) of “*each of two or more of the enterprises to be involved*” exceeds the threshold. As set out in the Discussion Document, the Group discussed the suggestion that the 1978 Act should apply where only the acquiring enterprise exceeds the threshold; in other words, the Act would apply even if the target company did not exceed the threshold (or possibly exceeded a lower threshold than would apply to the acquiring enterprise). However for the reasons set out in the Discussion Document²⁰⁰, the Group took the view that it was inappropriate to fix no threshold or to fix a lower threshold for the target company. Its Interim Recommendation therefore recommended the fixing of turnover thresholds for each of the parties involved in the merger. It has been pointed out that this wording gave the impression that what was being proposed was that the threshold ought to be exceeded by every party involved a merger.

6.2.5 The Group has given further consideration to this issue. Any clarification of the point begs the question as to which of the enterprises involved in a merger should be taken into account for the purpose of determining the application of the Act to that merger. The Group is satisfied that the vendor should not be regarded as one of the enterprises involved since its relationship with the

jurisdiction of the Community, while those without a ‘Community dimension’ (i.e., mergers between companies with turnover below the thresholds) remain subject to the jurisdiction of national authorities. Further provisions attempt to refine this somewhat crude balancing between Community and national jurisdiction: the Commission will operate in close liaison with the Member States; Member States may ask for the referral to their national authority of mergers above the thresholds and may refer to the Commission mergers below the thresholds; finally, Member States may continue to protect their ‘legitimate interest.’” Siragusa, *Merger Control and State Aids Panel: Merger Control in the European Community* (1994) 9 Connecticut Journal of International Law 535.

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merged entity will cease when the merger is completed. The legislation should therefore make it clear that the vendor's turnover should be excluded when deciding whether the Act applies to a particular merger or not. In effect, this would mean that the enterprises to be taken into account would be the acquirer and the target company.

6.2.6 A number of submissions have also proposed that the Act should be amended to make it clear that inter-group mergers should be exempted from the requirement to notify. Currently, the Act provides for such an exemption²⁰¹ merely in relation to transactions involving wholly-owned subsidiaries. The Group is of the view that this exemption should be extended to mergers between any members of the same group of companies.

6.2.7 The Discussion Document also recommended that there should be both a national threshold together with a worldwide threshold to trigger the notification obligation. Certain commentators seem to have understood the Group to recommend that the application of the Act should be determined by reference to the turnover of the parties involved which is generated in the State and not their world-wide turnover. In fact, the intention of the recommendation was that the turnover threshold should relate to worldwide turnover but that an additional threshold should also be fixed in relation to the level of activity within the State.

6.2.8 In this regard, the Group notes the current practice of the Department of Enterprise, Trade & Employment (the "Department") in relation to mergers between non-Irish enterprises, one or more of which carries on business through a subsidiary or branch in Ireland. The Department takes the view that such mergers are notifiable if:

- (a) the worldwide businesses of two or more of the enterprises involved exceeds one or other of the existing thresholds in the Act; and

²⁰¹ Section 1(3)(g)

- (b) the target enterprises' business in Ireland exceeds one of those thresholds.

6.2.9 However, in the case of acquisitions by Irish entities (whether within the State or abroad), the Department does not apply the test in paragraph (b). In other words, it regards the Act as applying to such mergers if the world-wide turnover of the parties exceeds the thresholds in the Act, even if their turnover in the State falls below those thresholds.

6.2.10 This practice of the Department as set out in paragraph 6.2.8(b) above is not, however, reflected in the current wording of the Act since the Act makes no distinction between the world-wide activities of the enterprises involved and their activities in Ireland. As a consequence, numerous international mergers of enterprises which have only an insignificant presence in the State have to be notified under the Act. Although these are cleared as a matter of course by the Department, this anomaly in the scope of the application of the Act gives rise to a significant number of unnecessary notifications which involve costs for the companies involved and an increased work-load for the Department.

6.2.11 It has been submitted to the Group that the broad thrust of existing Departmental practice should be reflected in the Act. The Group is satisfied that this should be done. In this regard, it proposes a test based on the existing Departmental practice and consistent with the Group's approach that the position of the vendor ought not be of relevance. In its final recommendation the Group therefore recommends that the merger should be notifiable if:

- (a) the *world-wide* turnover of *each of two or more* of the enterprises involved (being the merging entities other than the vendor) exceeds the threshold set out in the Act; and
- (b) the turnover of any *one* of the those enterprises *in the State* also exceeds the threshold.

6.2.12 This recommendation has the great advantage of excluding from notification international mergers of enterprises which do not have a significant presence in the State. The fact that the vendor will not be one of the parties whose turnover is taken into account will also reduce the number of unnecessary notifications. It is true that the fact that paragraph (b) of the recommendation refers to any one of the enterprises involved (typically, the purchaser and the target) rather than the target alone means that it may catch a larger number of mergers than would be caught by a formula fully reflecting the Department's current practice (as set out in paragraph 6.2.8 above). But the Department's practice is somewhat anomalous in its application to acquisitions by Irish enterprises and the Group's recommendation would eliminate this anomaly by applying the same formula regardless of the nationality of the acquirer. It is also at least arguable that the Act should apply, for example, to the acquisition by a foreign company, whose turnover in the State exceeds the threshold, of another company in the State whose world-wide turnover exceeds the threshold in the Act, but whose turnover in the State does not. Such a merger would be excluded from the Act if it were amended to provide that it would apply only where the turnover of the target in the State exceeds the threshold.

Level of Thresholds

6.2.13 In its Discussion Document, the Group specifically requested submissions in relation to the proposal that the threshold level should be increased from £20 million to £30 million (or to the Euro equivalent of approximately €38 million). This proposal has not met with significant opposition. However, it was criticised on the basis that the number of Irish companies with a turnover above €38 million is relatively small, being approximately IR£30 million. Nonetheless, the Group is of the view that the proposed increase of thresholds to €38 million is appropriate, having regard to the increase in the level of GNP since the thresholds were last increased in May 1993. The result of the increase will, of course, be that certain mergers will no longer have to be notified. On the basis of information furnished by the Department, it seems

that the proposed raising of the thresholds would result in approximately 25% of mergers currently notified no longer being required to be notified.

6.2.14 The Group is also satisfied to make the recommendation that the mechanisms provided for in the EC Merger Regulation²⁰² for calculating the turnover of certain financial institutions and insurance companies, ought to be followed, as suggested in the Discussion Document.

6.2.15 The Group notes that the Act does not apply to mergers between enterprises whose sole activity is the provision of services provided by the holders of licences granted pursuant to Central Bank Act, 1971, as amended, or the provision of services provided by Trustee Savings Bank certified under the Trustee Savings Bank Act, 1866, as amended. However, the Group is aware that, as a matter of practice, most mergers in the banking sector are in fact notified.²⁰³ There are a number of reasons for this. First, the wider range of services provided by banking institutions (e.g., insurance and stockbroking services) means that most banks are involved in providing more services than those provided by the holder of a licence under the Central Bank Acts. Second, Section 1(1) of the 1978 Act defines enterprise as including, (at (ii)), *“a holding company within the meaning of section 155 of the Companies Act, 1963”*. Since most mergers in the banking sector generally take place between holding companies, they will be mergers between “enterprises” within the meaning of this definition in the Act rather than mergers between enterprises providing services pursuant to a licence under banking legislation. In other words, the present exclusion is not broad enough to cover the current reality of bank mergers.

6.2.16 Having regard to the reality of the situation, and to the submissions received on this subject, the Group recommends the repeal of the exemption in favour of banking institutions currently provided for under the Act. It does not see any

²⁰² Council Regulation (EEC) No. 4064/89, OS2 219 p5 as amended

²⁰³ The Group met with the members of the Department of Finance Working Group on Strategic Issues in the Banking Sector to discuss the interaction of the of the Central Bank Act, 1989, and in particular Section 77 thereof, with the 1978 Act and the desirability of exempting mergers or acquisitions in the banking sector from the scope of the 1978 Act.

policy argument in favour of retaining the current exemption, which in order to be effective in practice would, in any event, need to be extended.

6.2.17 Accordingly the Review Group recommends as follows.

Recommendation

The Review Group recommends

- (a) the retention of the thresholds for notification based on a turnover test and the abolition of the gross assets test;
- (b) that thresholds be set in respect of two or more enterprises involved in the merger, being the acquirer and the target enterprise, to the exclusion of the vendor;
- (c) that a new, additional turnover test be introduced which would have the effect of excluding mergers where the turnover in the State of the parties involved is not significant. The test proposed is therefore that the merger should be notifiable if:
 - (i) the *world-wide* turnover of *each of two or more* of the enterprises involved (being the merging entities rather than the vendor) exceeds the threshold; and
 - (ii) the turnover *in the State* of any *one* of the those enterprises also exceeds the threshold. In each case, the threshold should be increased to €8 million.
- (d) that the Minister should retain the power to dis-apply the thresholds in respect of particular categories of merger (so as to bring mergers in specified sectors, such as the media, within the scope of the Act even if the thresholds are not exceeded);

- (e) that banking institutions should be subject to the mergers legislation;
- (f) that the methods of calculating turnover of financial institutions provided for in the EC Merger Regulation should be adopted at the national level; and
- (g) that inter-group mergers should be exempted from the application of the Act.

6.3 The Appropriate Structure for the Control of Mergers

6.3.1 The group's interim recommendation was as follows.

Interim Recommendation

- (a) The majority of the Group recommends that notifiable transactions should be notified to the Competition Authority.
- (b) The Group recommends that a two tier system be introduced allowing for a fast track procedure for mergers which give rise to no great competition concerns and a second in-depth investigation for those which do give rise to such concerns. In the context of the second phase, the parties should be entitled to negotiate with the Competition Authority in order to attempt to remedy any concerns prior to the making of a decision.
- (c) The final decision would rest with the Minister who would be entitled to take stated public policy factors into account when departing from the view of the Authority. Strict time limits should be introduced in respect of all stages of the procedure.
- (d) Retrospective approval should be provided for.

6.3.2 While the Group continues to be divided on the issue of the body to which notifications ought to be made, the majority is of the view that such notification ought to be to the Competition Authority. The Group notes that this recommendation has, in general, met with approval.

6.3.3 The Group also continues to be of the view that the final decision should lie with the Minister. The basis for this is that while the primary substantive criterion for the review of a merger should be its likely impact on competition,

the Group believes that it should also be possible for a merger control regime to take account of other public interest considerations. The Minister, rather than the Competition Authority, is competent to take decisions on public interest grounds²⁰⁴ and it is for this reason that the Group recommends that the final decision on mergers notified under the Act should rest with the Minister. The Minister's review of mergers should, however, be limited to such public policy grounds only.

- 6.3.4 It has been submitted by certain persons that the Group should reconsider this proposal. It is argued that if the Minister is to have the final decision on a merger, it would be unwieldy for the initial notification to go to the Competition Authority. In addition, it has been submitted that the Competition Authority would incur significant costs if it had to deal with all mergers. Lastly, given the Competition Authority's role in relation to prosecutions, it has been submitted that businesses are concerned that information supplied in relation to a merger might be used against those businesses (for example, in the context of a complaint by other parties).
- 6.3.5 The majority of the Group does not find these submissions persuasive. While the Group does not view its function as being that of dealing with the resourcing of the Competition Authority, its recommendation is predicated upon the assumption that the requisite resources will be made available. The issue of the Competition Authority's role in relation to prosecutions will be addressed below.
- 6.3.6 On the other hand, it has been submitted that the final decision should rest with the Authority on the basis that its personnel are well placed to assess mergers expertly and impartially and free from party or lobby affiliations. It is argued that this would de-politicise merger control.²⁰⁵

²⁰⁴ i.e. the type of criteria referred to in the 1978 Act in the context of the exigencies of the common good. This is the subject of section 6.4 of this Report.

²⁰⁵ Siragusa has observed that while there is general agreement that the operation of the Merger Regulation by the Commission is a success, still "*some negative remarks on the implementation of the Regulation have been made. As was illustrated recently by Mannesman/Vallourec/Ilya (Case IV/M315, decision of 31st January 1994) the Commission is perceived as an inherently political body whose decisions do not always follow strict economic*

6.3.7 The Group proposes that notifications should be made to the Competition Authority and that the Competition Authority should be required to decide on the basis of competition criteria only. It is in this realm that it is a specialist body. The issue of whether or not the public good, for stated reasons, requires competition considerations to be departed from is an inherently political one and is one that is best taken by a politically accountable person. The Group is satisfied that a certain political element is inherent in any merger control system. While the Minister will of course be open to political lobbying, the decision of the Minister, which the Group believes should be fully reasoned and published, will permit full public scrutiny of the Minister's decision. Lobbying the Minister appears to the Group to be a corollary of the democratic process. Consequently the Group considers that the structure to be put in place should provide that notification should be to the Competition Authority. The latter body should make the initial recommendation. The final decision on public policy grounds ought, however, to rest with the Minister.

6.3.8 The Group's proposal for a fast-track procedure for mergers giving rise to no competition concerns was generally welcomed. However, a number of submissions have made the point that it ought to be open to the Competition Authority to suggest alterations to the proposed transaction even at the initial phase. This could obviate the necessity to initiate a second in-depth phase. The Group agrees with this suggestion and therefore recommends that the possibility of negotiating alterations to the proposed transaction should be available at all phases of the procedure.

6.3.9 In its Discussion Document, the Group recommended that there be strict time limits for the consideration of the proposed merger. The Group has given further consideration to this matter and has reviewed the existing time limits in the Act and the time limits provided for in the EC Merger Regulation. The

analysis. It is widely believed that the Merger Task Force opposed the merger of the steel companies but was overruled by the Commissioners. The perception of political influence on the antitrust review of mergers is aggravated by a lack of transparency in the decision making process and the scant judicial review of the Commission's decisions. ... [T]he Commission

Group proposes that the Merger Regulation model should be broadly followed. As a result, it proposes that the time limit for the initial Stage 1 examination be a period of one month. This time limit should begin on the day following the receipt of notification or in the event of the information supplied being incomplete, on the day following the receipt of the complete information. As is envisaged in Article 11 of the Mergers Regulation, the Group proposes that requests for information made by the Competition Authority within that three week period should “re-set the clock at zero” until the information is provided. Equally, the time –limit should be capable of extension by two weeks where the enterprises involved offer undertakings in Stage 1 to deal with any concerns on the part of the Authority. A further two month time limit should then be provided for to allow the Competition Authority to undertake an in-depth Stage 2 investigation where it considers this necessary. Lastly, a one month period should be allowed for the Minister to consider the Competition Authority’s decision in the light of the public policy criteria which the Minister is entitled to take into account. Having regard to these suggestions, all mergers should be dealt with within a five month period at the most, subject to any extensions of the period due to incomplete documentation being furnished or to the Authority making a request for further information.

6.3.10 The Discussion Document also suggested that if the Authority, on the initial examination, came to the view that no question of competition law arose, the matter would be referred to the Minister for her views. It was proposed that the Minister could request the Authority to carry out a more detailed investigation. This suggestion has been described in one submission to the Group as an “anomaly”. It is criticised on the basis that if the Authority is to be regarded as the body with expertise in the competition area and if it is to concern itself solely with assessing the competition implications, it is inappropriate for the Minister to ask it to think again. The Group is of the view there is substance to this criticism and that its interim recommendation would result in unnecessary delay and uncertainty. In reality, it is only in rare cases that mergers which the Authority deems not to warrant an in-depth analysis would give rise to

has recognised most of this criticism and is attempting to improve its procedures.” Siragusa,

concerns on the part of the Minister. However, the Group nevertheless thinks it appropriate that the Minister would retain the power to review the Authority's decision on public policy grounds, if necessary.

6.3.11 In addition, the Group has been asked to address the status of any undertakings given in return for obtaining Competition Authority approval. The Group is of the view that such undertakings ought to be legally binding conditions attaching to the approval decision. It has been suggested that it should not be open to the parties to seek to have the Minister modify such undertakings. As the Group has recommended that the final decision should rest with the Minister, it would therefore be open to the Minister to refuse to sanction the proposed merger on public policy grounds, even taking account of the undertakings given. However, it should not be open to the Minister to seek to re-negotiate undertakings negotiated by the parties with the Competition Authority.

6.3.12 Lastly, the Group recommended that retrospective approval ought to be permitted. The Group also recommended that the Authority ought to be able to impose a fine on parties in respect of the failure to notify and that conditions ought to be imposed in respect of such retrospective approval. This recommendation met with some approval. However it was criticised on the basis that it is unlikely that undertakings forget to notify unwittingly.

6.3.13 This recommendation was made in view of the permanent shadow on title that a non-notified merger may cast if title to shares or assets may not have passed as a result of a failure to notify a notifiable merger under the 1978 Act²⁰⁶. However, having considered the matter further, the Group took the view that the introduction of the possibility of retrospective approval would give rise to significant difficulties. Unless there were significant deterrents built into the system, it could encourage laxity in relation to the prior notification obligation, which is the fundamental principle on which the procedures in the Act are based. It is questionable whether the Authority could be given any significant

²⁰⁶ *op. cit.*, page 540.
Section 3(2) of the 1978 Act.

fining powers under the Constitution. A retrospective notification would present serious problems of analysis for the Competition Authority and the Minister and would require the introduction of wide-ranging powers (including procedures to de-merge a merged entity) to deal with the consequences of a merger which did not satisfy the criteria for approval under the Act. Given the Group's other recommendations, which will have the effect of reducing the categories of notifiable mergers to those which might potentially have a significant effect on competition, the risk of the notification requirement being over-looked through inadvertence in the future would seem to be very small. Obviously, deliberate failure to notify should not be rewarded by the establishment of elaborate statutory procedures to deal with late notifications. It is interesting to note, in this context, that the EC Merger Regulation, which requires prior notification of proposed mergers coming within the scope of the Regulation, does not provide for retrospective approval of mergers which should have been, but were not, notified. For all these reasons, the Group has decided to reverse its interim recommendation to the effect that the legislation should provide for retrospective approval of mergers under the Act.

6.3.14 Accordingly, the Review Group recommends as follows.

Recommendation

The majority of the Group recommends

- (a) that notifiable transactions should be notified to the Competition Authority and that a two tier system be introduced allowing for a fast-track procedure for mergers which give rise to no competition concerns and a second in-depth investigation phase for those which do give rise to such concerns;
- (b) that the Competition Authority's decision that a proposed merger gives rise to no competition concerns at the first stage would be final, subject only to the Minister's review on public policy grounds;

- (c) that in the context of either phase, the parties should be entitled to negotiate with the Competition Authority, in an attempt to remedy any concerns prior to the making of a decision;
- (d) that any undertakings given to the Competition Authority in this regard should be legally binding and it ought not be open to the parties to seek to re-negotiate these undertakings with the Minister. Rather, the Minister could endorse the Competition Authority's approach or refuse to approve the merger, even having regard to the undertakings proffered;
- (e) that the Minister would be entitled to take only non-competition public policy factors into account when departing from the view of the Authority; and that her decision should be fully reasoned and published; and
- (f) that strict time limits ought to be introduced in respect of all stages of the procedures, being three weeks for the preliminary phase, two months for the in-depth phase and a further one month for the Minister. The Minister would have one month to deal with the matter, irrespective of whether the merger was referred to the Minister after the fast-track phase one or the in-depth phase two investigation.

6.4 Criteria to be Applied in Assessing Mergers

6.4.1 The Group's interim recommendation was as follows.

Interim Recommendation

The Group recommends that the Competition Authority should apply pure competition criteria, such as those heretofore applied. As regards the criteria to be taken into account by the Minister, these should include the interests of efficiency and consumer benefit envisaged by Section 4(2). In addition, it is recommended that the Minister be entitled to take account of industrial policy, employment, regional development and environmental policy.

6.4.2 There was little criticism of the Group's proposal that the Competition Authority be required to assess notifications on the basis of competition criteria, to the exclusion of general public policy factors. The Group proposed that the test developed by the Competition Authority in respect of the application of Section 4 of the Competition Act, 1991 ("the 1991 Act") should continue to apply, i.e. whether or not the merger was likely to result in the diminution of competition in the relevant market.

6.4.3 Having discussed the matter further, the Group is of the view that the test to be applied ought to be based on the test set out in the EC Merger Regulation which permits a merger to proceed provided that it

“does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it”.

The reference to impeding competition in the common market would, of course, in the context of national law be a reference to impeding competition in the State.

This test does not appear to differ significantly from the test applied by the Competition Authority in its analysis of merger cases to date (whether undertaken pursuant to the 1978 Act or the Competition Act, 1991). In addition, the Group is of the view that there is an advantage in having national law mirror the EC rules in order to provide for consistency and to avail of the precedent value of an established body of decisions and case law.

6.4.4 As regards the Minister, it is proposed that the Minister should be entitled to review mergers on public interest grounds only; however, she would be entitled to take a decision on such grounds which would be at variance with the Competition Authority's recommendation. To the extent that the Discussion Document suggested that the Minister ought to be entitled to reconsider the Competition Authority's assessment on the basis of criteria referred to at Section 4(2) of the 1991 Act, the Group wishes to depart from that approach. It is satisfied that the assessment of the competition implications of mergers should be undertaken only by the Competition Authority as the specialist body competent in such matters.

6.4.5 With regard to the public interest factors which the Minister would be entitled to take into account, these were set out in the Discussion Document (being industrial, employment, regional development and environmental policy) and met with general approval.²⁰⁷ No other factors were proposed. However, in the light of further discussions, the Group was concerned that there might be circumstances where other public policy concerns could arise which would not strictly fall within the four headings mentioned. For example, in the Review Group's Discussion Document on some recommendations of the Newspaper Commission, there is a discussion of the factors related to political and cultural diversity, freedom of expression and so forth which should be taken into account by the Minister in deciding upon a merger or an acquisition in the field of newspapers or in the field of media generally. Circumstances might also arise where there might be reasonable grounds for believing that, say, the

²⁰⁷ See Discussion Document, page 42.

acquiring entity was engaged in illegal behaviour (for example, drug trafficking) and where the Minister might legitimately consider that it was undesirable that a perhaps significant Irish business should fall under such control. For these reasons, the Review Group considers that the four headings mentioned should be stated by way of example of the public policy concerns which can be taken into account by the Minister but that no attempt should be made to define the exact scope of such public policy concerns in any exhaustive fashion..

6.4.6 Accordingly, the Review Group recommends as follows.

Recommendation:

The Group recommends that the Competition Authority should apply pure competition criteria based on the test set out in the Merger Regulation. This would permit a merger to proceed provided that it “does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the State or in a substantial part of it”. This test should be written into the mergers legislation or any consolidated legislation. As regards the criteria to be taken into account by the Minister, these should relate only to public policy matters. These criteria should be specified in a non-exhaustive way in the Act and should include industrial policy, employment, regional development, environmental policy and the suitability of the proposed purchasers in the light of public policy considerations.

6.5 The Application of the Competition Act to Mergers

6.5.1 The Review Group's interim recommendation was as follows.

Interim recommendation

The majority of the Group recommends that Section 4 of the Competition Act, 1991 should no longer apply to mergers *per se* nor to any directly related restrictions which are notified as an integral part of the merger. The Group also recommends that Section 5 of the Act should no longer be applicable to a proposed merger but that this should, of course, not affect the possibility of relying on Section 5 in relation to the actions of the merged entity.

6.5.2 The Group's proposal that Section 4 of the Competition Act, 1991 ("the 1991 Act") should no longer apply to mergers *per se* nor to any directly related restrictions which are notified as an integral part of the merger has been generally endorsed.

6.5.3 However, the Group's proposal recommending against the continued application of Section 5 to mergers was perhaps the most criticised aspect of the Group's report. In general, the Group was asked to reconsider the issue on the basis that the type of situation which occurred in *Cooley*²⁰⁸ ought to be addressed and ought not simply be dismissed as too difficult or insignificant to be subject to some regulatory control.

6.5.4 In *Cooley*, the proposed transaction was not notifiable under the 1978 Act as the thresholds provided for under that Act were not exceeded. Nonetheless, the Competition Authority took the view that to allow the merger to proceed would have an adverse effect on competition. If neither section 4 nor section 5 of the 1991 Act were to apply to mergers falling below the thresholds, mergers such

²⁰⁸ *Irish Distillery Group plc/Cooley Distillery* (Decision No. 285, 25th February, 1994 Notification number CA/62/63).

as those which arose in *Cooley* would avoid any regulatory scrutiny. Much of the controversy in relation to the Group's interim recommendation in this area may spring from an ambiguity in the wording of the interim recommendation. As is apparent from the analysis in the Discussion Document²⁰⁹, the Review Group's primary concern was to avoid the problem of double jeopardy i.e. that parties to a transaction could submit to the mergers regulatory process, obtain approval, and yet find that their merger was open to attack under section 4 or section 5. Because the Competition Authority in its decision in *Woodchester* had held that section 4 could apply to agreements which were mergers, some parties felt that it was necessary to apply for a licence from the Competition Authority in relation to the merger as well as complying with the mandatory notification procedure to the Minister under the 1978 Act. The question of notification to the Competition Authority for a licence in relation to section 5 simply did not arise because there was no procedure under which a person could apply for a licence to commit an abuse of a dominant position.²¹⁰

6.5.5 Having considered the matter further and having, in particular, considered the submissions which were received on this issue, the Group continues to think it appropriate that mergers notified and cleared under the 1978 Act should not generally be vulnerable to challenge under Section 5 of the 1991 Act. However, the Group considers that the interim recommendation should be modified to make clear the position in relation to mergers which are not notifiable under the 1978 Act in order to address the *Cooley* situation and the comments received in response to the interim recommendation.

6.5.6 The Group therefore recommends that section 5 should not apply to mergers which are subject to mandatory notification under the 1978 Act. However, in order to address the difficulties exemplified by the *Cooley* case in relation to

²⁰⁹ Pages 42-45.

²¹⁰ One of the recommendations of this report is that it should be possible to apply for a certificate that a particular course of action by one party or agreement between two or more parties (as the case may be) does not constitute an abuse of a dominant position. The Group's interim recommendation was therefore designed primarily to eliminate the double jeopardy problem and to clarify that insofar as a transaction had received mergers approval, it could not be attacked under section 5 although obviously the actions of the merged entity could be so attacked if the merger created a dominant position which was subsequently abused.

mergers which fall below the thresholds in the 1978 Act, the Group recommends that section 5 should continue to apply in relation to such mergers subject to a number of qualifications.

6.5.7 The first such qualification is that it should be possible to obtain immunity from a section 5 challenge to such a sub-threshold merger by obtaining a clearance under the 1978 Act (being the Act specifically designed for the review of mergers) or any consolidated Act. Since, by definition, such mergers are not subject to the mandatory notification provisions of the 1978 Act, any notification of a sub-threshold merger would be voluntary. In this respect, it would be similar to notifications under the Competition Acts, which are also voluntary and are designed to enable the parties concerned to obtain a decision from the Competition Authority if they are doubtful about the application of the Competition Acts to the notified arrangements. In the same way, the proposed voluntary notification system under the 1978 Act would enable the parties to a proposed merger who might have concerns about a challenge under section 5 to obtain the views of the Competition Authority (and a decision from the Minister) in relation to the proposed merger before it is consummated. A notification of such a merger under this procedure would suspend the right of third parties (including the Competition Authority or the Minister) to challenge the implementation of the merger under section 5. Clearance of the merger by a decision of the Minister under the 1978 Act would provide the parties with an immunity from challenge under section 5 in respect of the merger and any associated ancillary agreements (but not, of course, from challenges under the Competition Acts in respect of post-merger activities of the merged entity). Notification under the 1978 Act (which would have to be made before completion of the proposed merger in accordance with the procedures established under that Act) would suspend any challenge to the proposed merger under section 5.

6.5.8 The second qualification to the recommendation that section 5 should apply to sub-threshold mergers relates to the time-scale within which a challenge under

section 5 could be made. Unnotified sub-threshold mergers²¹¹ would be open to attack both by private parties and by the Competition Authority. However, in view of the difficulty of unscrambling a merger, it is imperative that strict time limits be provided for in any such action. The Group therefore recommends that proceedings should be instituted by the Competition Authority or by private parties either before the consummation of the merger (where the parties become aware of the proposed merger before it is consummated) or, in the case of a consummated merger, within three months from the date of its consummation. In view of the fact there might be some delay before either the Competition Authority or a private party became aware that the merger had taken place, the latter time limit should be one which could be extended by the Courts.

6.5.9 In the event of such proceedings being brought, the Court would be entitled to declare whether or not the merger breached Section 5. Of course, the merger could subsequently proceed if the parties to the merger addressed the concerns raised by the Court. In the event of the merger having already been consummated, the Court ought to have the power to order effective remedies, such as divestiture. This remedy would effectively replace the current power of the Minister to order divestiture under Section 14 of the Competition Act, 1991. Elsewhere in this report the recommendation is made that Section 14 be repealed and that the court be given express power to order divestiture, having regard, among other things, to doubts regarding its compatibility with the Constitution.²¹²

²¹¹ Sub-threshold mergers which are notified and not cleared under the 1978 Act would be prohibited under that Act. This would mean, inter alia, that title to the shares or assets involved could not pass to the proposed purchaser.

²¹² Section 8.10.

6.5.10 Accordingly, the Review Group recommends as follows.

Recommendation:

The Group recommends that Section 4 of the Competition Act, 1991 should no longer apply to mergers *per se* nor to any directly related restrictions which are notified as an integral part of the merger. The majority of the Group also recommends that Section 5 of the 1991 Act should no longer be applicable to mergers which exceed the thresholds provided for under the mergers legislation. Such mergers would fall to be assessed under the mergers criteria and, if approved, could not then be attacked under section 5. Section 5 should, however, continue to apply to mergers falling below the thresholds, subject to two qualifications. The first qualification is that it should be possible to obtain immunity from a section 5 challenge to such a sub-threshold merger by obtaining a clearance under the 1978 Act (being the Act specifically designed for the review of mergers). Since, by definition, such mergers are not subject to the mandatory notification provisions of the 1978 Act, any notification of a sub-threshold merger would be voluntary. The second qualification is that any such action should be subject to strict time limits. Proceedings challenging a merger under section 5 should therefore be instituted by the Competition Authority or by private parties either before the consummation of the merger (where the parties become aware of the proposed merger before it is consummated) or, in the case of a consummated merger, within three months from the date of its consummation. In view of the fact there might be delay before either the Competition Authority or a private party became aware that the merger had taken place, the latter time limit should be one which could be extended by the Court.

6.6 Review Mechanism

6.6.1 The Review Group's interim recommendation was as follows.

Interim Recommendation

It is recommended that it be expressly provided that the decision of the Minister be reviewable in judicial review proceedings on the grounds that the recommendation from the Competition Authority was irrational. The Group recommends that no appeal to the Courts or to an independent body on the merits should be provided for.

6.6.2 The Group's proposal that, in view of the necessity of legal certainty in this area, appeals on the merits from the Minister's decision ought to be excluded, met with general approval.

6.6.3 However, the Group also recommended that judicial review should lie against the Minister's decision. Certain parties submitted that it was inappropriate that judicial review should lie. However, the Group is firmly of the view that there would be constitutional difficulties in seeking to exclude the Minister's decision from the scrutiny of the Courts. In any event, the Group is of the view that it would be undesirable to seek so to do.

6.6.4 As the Group pointed out in its Discussion Document, in the normal course it would be difficult, if not impossible, in the context of judicial review proceedings to go behind the Minister's decision in order to challenge the recommendation made to the Minister by the Competition Authority. Consequently, the Group proposed that the mergers legislation make specific reference to the fact that the decision of the Minister ought to be capable of being reviewed on the grounds that the recommendation made by the Competition Authority was irrational. This proposal has met with criticism on the grounds that if the Competition Authority recommended that a merger be

prohibited, where it would be likely to result in a significant lessening of competition, then it would be unnecessary to provide for the possibility of judicially reviewing the Competition Authority's decision. Presumably, this is on the grounds that the Competition Authority would be incapable of applying such a criterion in an irrational fashion. As set out above, this Group has recommended that the substantive test for the assessment of a merger under Irish law should be the test which applies under the EC Merger Regulation. However, the Group does not share the view that it would be impossible to apply such a test in an irrational manner. Those arguing against the adoption of the express provision authorising the review of the Competition Authority's recommendation appeared to argue that it would open the possibility of submissions being made to the Minister to the effect that the Authority's conclusions were wrong. However, this assumes that the Minister would have the power to review the Competition Authority's recommendation on competition law grounds, which is not what the Group has recommended. In fact, given the Group's recommendation that the Minister has to, in effect, accept the competition analysis proffered by the Competition Authority, if it were not possible to attack the Minister's ultimate decision on the basis that the Competition Authority recommendation was irrational or reached in breach of the principles of natural justice and so forth, then it would mean that the actual decision maker on the merger insofar as competition criteria are concerned (the Competition Authority) would be entirely immune from judicial review. In the Group's view, this would be an intolerable situation.²¹³

6.6.5 Further, it has been submitted that the proposal that the Minister's decision would be reviewable on the grounds that the recommendation from the Competition Authority was irrational would only be acceptable if the

²¹³ The reason the Group has recommended that the attack on the Competition Authority's decision would still take place through a judicial review of the Minister's decision is simply because judicial review is usually concerned with actual decisions and not recommendations. It would, of course, be possible to provide for a procedure whereby the Competition Authority's recommendation to the Minister (which is, in effect, binding on the Minister) would be regarded as the decision insofar as competition criteria are concerned and that the Competition Authority's report and recommendation could then be attached directly by way of judicial review. It does not seem to the Review Group to be of crucial importance as to which procedural avenue is adopted provided parties do have an opportunity to judicially review the conclusion reached by the Competition Authority on the proposed merger or acquisition.

Competition Authority could participate in any judicial review proceedings brought. However, while the Competition Authority obviously must have the chance to defend itself, the Group is satisfied that Order 84 of the Rules of the Superior Courts would adequately meet this concern. It would be open to the Court or to the parties to apply to have the Competition Authority joined as a notice party to any judicial review proceedings. It would also be open to the Competition Authority to apply to be joined as a notice party. Consequently, the position of the Competition Authority would not have to be defended by the Minister.

- 6.6.6 In the normal course an application for leave to apply for judicial proceedings must be made promptly. Where the party seeking leave to apply for judicial review wishes to quash a decision, it must seek leave to apply for judicial review within, at most, six months of the date of the decision²¹⁴.
- 6.6.7 In the mergers area, in view of the importance of prompt action, the Group is of the view that legislation should provide for a stricter time limit. Pursuant to Section 12 of the 1978 Act, an appeal on a point of law to the High Court had to be made within one month of the date of the making of the contested Order. It should therefore be acceptable to provide that judicial review proceedings would also have to be brought within a one month period.
- 6.6.8 It was also submitted that the Group might consider making a recommendation to the effect that judicial review should only be granted if the Court was satisfied that there were substantial grounds for challenging the decision²¹⁵ and that appeals to the Supreme Court should be excluded. In this regard, what was proposed was not dissimilar to provisions contained in the Local Government (Planning & Development) Act, 1963 (the “1963 Act”) as amended by the Local Government (Planning & Development) Act, 1992. Section 80 of the 1963 Act now provides that an application for leave to apply for judicial review must be made within two months of the date on which the contested decision is

²¹⁴ Order 84 rule 21(1) of the Rules of the Superior Courts.

given and must be made by motion on notice to specified parties (as opposed to seeking leave *ex parte* which is what is normally provided for in judicial review proceedings). Section 82(3B)(a) provides that leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed.

6.6.9 Lastly Section 82(3B)(b)(i) of the 1963 Act provides that the determination of the High Court on an application for leave to apply for judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case, save with leave of the High Court, such leave to be granted only where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. This provision is only dis-applied where the determination of the High Court involves a question as to the constitutionality of any provision.

6.6.10 Having discussed these submissions, the Group is of the view that the normal requirement to seek leave *ex parte* ought not be modified, as the planning code model can have the effect of actually lengthening the entire appeal process rather than shortening it. As regards the standard to be applied at the leave stage, the Group is not of the view that the distinction between the “substantial grounds” criterion proposed and the “arguable case” criterion applied generally in judicial review is one that is particularly clear or easy to grasp. In the circumstances the Group is of the view that the normal judicial review leave criterion should continue to apply.

6.6.11 In relation to the proposal to exclude appeals to the Supreme Court, the Group is of the view that the planning model has obvious merits in areas where speed and certainty are of the essence and therefore recommends the mirroring in mergers legislation of the planning model in this regard i.e. that save for a point of constitutional law, an appeal to the Supreme Court would only be permitted where the High Court certifies that its decision involves a point of law of

²¹⁵

The Group presumes that this submission intended that this issue would be raised at the stage

exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

6.6.12 A further issue which arises in relation to the conduct of judicial review proceedings is the extent to which the Court may vary the conditions attached to a decision rather than simply quashing the decision, or sending it back to the Authority. The Group is of the view that the Court should have the jurisdiction to vary the conditions (as is the case pursuant to Section 9 of the Competition Act, 1991). This ability on the part of the Court could be particularly important to avoid delay. Of course, the power to vary conditions could only be exercised where judicial review procedures allowed it; the mergers legislation ought to make it clear that the existence of such a power does not imply that the review being conducted by the Court constitutes a full appeal on the merits.

6.6.13 Lastly, the Group considered a problem which can arise where the applicant for leave cannot show an arguable case, as he has not yet obtained discovery. He may obtain leave on some grounds, obtain discovery and find out that he has a variety of other good grounds which are then too late to raise.

6.6.14 In the planning context, this problem has been solved by a provision which requires An Bord Pleanala to make its file available for public inspection and copying once it has made its decision. The Group is of the view that a similar rule should apply both in relation to the decision of the Competition Authority and the decision of the Minister. It should be open to the Authority/Minister to remove or block out commercially sensitive matters. Provision could be made for an applicant to apply to the Court at the leave stage for permission to have sight of the blocked out portions. The Court could decide whether to release the information on the grounds that this should be done if, in the hands of the applicant, the information would reasonably advance his case for judicial review.

6.6.15 Accordingly the Review Group recommends as follows.

when the application for leave for judicial review is made.

Recommendation

- (a) The Review Group recommends that it be expressly provided that the decision of the Minister be reviewable in judicial review proceedings on the grounds among others that the recommendation from the Competition Authority was irrational or in breach of natural justice. Judicial review proceedings should be instituted within one month from the making of the Minister's decision.

- (b) The Review Group recommends that no appeal to the Courts or to an independent body on the merits should be provided for. The general principles regulating leave to apply for judicial review should apply. The Court should have power to vary the conditions imposed in the contested decision. Appeals to the Supreme Court should be excluded save for points of law of exceptional public importance or challenges to the constitutionality of the provisions of the mergers legislation. The Competition Authority's or the Minister's file ought to be made available from the date of the relevant decision.

6.7 Standing to bring judicial review proceedings

6.7.1 The Review Group's interim recommendation was as follows.

Interim recommendation:

The Group recommends that the issue of who should be considered to have standing to bring judicial review proceedings should be left to the Courts to determine in accordance with the general rules on this issue.

6.7.2 It was submitted that the classes of potential applicants should be specifically limited by the mergers legislation to "aggrieved persons" or "persons having a legitimate interest in the decision". Other than this submission, the proposal of the Group appears to have met with general acceptance.

6.7.3 The Group is of the view that it should not modify its recommendation in this regard. The case law of the courts on persons with standing to bring judicial review proceedings should apply equally in this area. The result of such case law is to restrict the number of persons who have "*locus standi*" to challenge a decision. This, in reality, limits the classes of potential applicants. However, it allows the Court some flexibility to determine who the proper applicant should be.

6.7.4 Accordingly the Review Group recommends as follows.

Recommendation

The Group recommends that the question as to who should be considered to have standing to bring judicial review proceedings should be left to the Courts to determine in accordance with the general rules on this issue.

6.8 Transparency and information

6.8.1 The Review Group's interim recommendation was as follows.

Interim Recommendation:

The Group recommends that information relating to transactions notified to the Competition Authority be published, that decisions taken in respect of mergers be published and that the Competition Authority and the Minister be required to publish a detailed report on an annual basis.

6.8.2 This recommendation has not been particularly contentious. However, a number of submissions have pointed out the fact that the requirement that notifications be published may pose a difficulty. It is argued that there may be circumstances in which the fact of a proposed merger may in and of itself constitute sensitive commercial information. It was therefore argued that the Competition Authority should be allowed some flexibility with regard to the timing of the publication of notice of receipt of a merger notification, so as to allow for deferral of such publication in appropriate cases.

6.8.3 However, the Group reiterates that one of the primary criticisms of the current system is the lack of transparency in the process. The Irish system, it has been pointed out²¹⁶, is much more closed than either the EC or the UK system where the fact of notification is published.

6.8.4 The Group is of the view that, having regard to its recommendation in relation to pre-notification consultation, parties to a merger concerned about publicity could consult informally with the Competition Authority prior to making a notification. This could lessen the sensitivities of the parties. Consequently, the Group is of the view that publication of the fact of notification still ought to

²¹⁶ See Maher, *Competition Law: Alignment and Reform*; (Roundhall Sweet & Maxwell, 1999) p.241.

be recommended. Such publication should, as set out in the Discussion Document, have regard to the business secrets of the parties.

6.8.5 It was also submitted that the appropriate point at which to publish information relating to a notification was when the notified merger passed to the second or in-depth stage of analysis and not earlier. However, while this suggestion holds some attraction, it would preclude interested parties from becoming involved at the first stage procedure and making their views known to the Competition Authority. In the event of their opposing a proposed merger, they could not therefore become involved until the second or in-depth stage. Consequently, the Group is of the view that notification of mergers ought to be published at the commencement of the first stage (i.e., effectively upon or very soon after notification of the proposed merger to the Authority).

6.8.6 In relation to the annual report, the proposal was made that the recommendation requiring the Competition Authority and the Minister to publish a report on an annual basis should not specify that such report was to be “detailed”. The Group is satisfied that the nature of the report is a matter that can be left to the discretion of the Competition Authority and the Minister.

6.8.7 It has also been submitted to the Group that it would be useful if the Competition Authority would prescribe formats for notifying a merger. The Group endorses this submission.

6.8.8 Accordingly, the Review Group recommends as follows.

Recommendation:

The Group recommends that information relating to transactions notified to the Competition Authority be published upon their notification or shortly thereafter, that decisions taken in respect of mergers be published and that the Competition Authority and the Minister be required to publish a report on an

annual basis. The Group also recommends that the Competition Authority should prescribe suitable formats for notification.

6.9 Fair Procedures

6.9.1 The Review Group's interim recommendation was as follows.

Interim recommendation:

The Group recommends that provision be made for the procedures to be followed by the Competition Authority and the Minister in respect of notified mergers. It recommends that all interested parties be entitled to make submissions to the Competition Authority and that an oral hearing take place if requested by the parties. The Group also recommends that, once referred to the Minister, the parties should also have the opportunity of making submissions and of having a formal hearing.

6.9.2 The Group is conscious that its recommendation in respect of fair procedures, which met with general approval, nonetheless must take into account the general time limits now recommended by the Group. In this regard, it is appropriate to address the distinction which may have to be drawn between the position and rights of the parties to the proposed transaction and the position and rights of other interested parties. The Group is conscious of the fact that, having regard to the necessity for speedy decisions, the rights of third parties may have to be more limited than the rights of the parties to the transaction. The Group is mindful of the distinction drawn in the EC regime between the parties to the transaction and others²¹⁷. The Group is therefore of the view that it is appropriate that a distinction be drawn between the entitlements of parties

²¹⁷ Article 18. See also Commission Regulation EEC No. 2367/90 of 25 July 1990 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No. 4064/89 on the Control of Concentrations between undertakings (1990) OJL 219p5, Article 13-15. This distinction was discussed in *Kaysenburg S.A -v- Commission of the European Communities*, Case T-290/94 [1997] II-2137

to a proposed transaction and interested third parties. In respect of the former, there should be an entitlement to make submissions and to attend at an oral hearing. However, in respect of the latter, the Competition Authority and the Minister should have a discretion as to whether or not third parties should be deemed to have a sufficient interest in the proposed transaction to warrant the opportunity to attend at a meeting or hearing.

6.9.3 Accordingly, the Review Group recommends as follows.

Recommendation

The Group recommends that provision be made for the procedures to be followed by the Competition Authority and the Minister in respect of notified mergers. It recommends that the parties to a transaction should be entitled to make submissions to the Competition Authority and that an oral hearing should take place if requested by the parties to the proposed transaction. The Group also recommends that, once referred to the Minister, the parties to the transaction should also have the opportunity of making submissions and of having an oral hearing. Both the Competition Authority and the Minister should have a discretion in respect of the participation of third parties in any of these procedures.

6.10 Pre-Notification Procedure

6.10.1 The Review Group' interim recommendation was as follows.

Interim Recommendation:

The Group recommends that greater flexibility be introduced into the merger control system, allowing for contact between the parties to a proposed transaction and the Competition Authority prior to notification.

6.10.2 Again, this suggestion met with general approval. It was submitted, however, that the Group should recommend against attempting to incorporate detailed provisions relating to such pre-notification guidance in the legislation, as was recently attempted in the UK. It was argued that attempts to spell out the legal implications of the procedure might defeat its purpose, which is to introduce a degree of flexibility and to allow for informal communication, permitting the parties to a proposed transaction to obtain some indication of the likely reaction to the proposal if it were notified in the proposed form.

6.10.3 The Group agrees with this submission and thinks it appropriate that the pre-notification procedure ought to be a flexible one.

6.10.4 This proposal has been criticised on the grounds that it makes no sense for the Group to make proposals without any consideration of the associated resource implications. As already indicated, the Group does not believe that it falls within its remit to make detailed recommendations regarding resource allocation. It makes its proposals on the assumption that if its recommendations are accepted, the requisite resources will be made available to the Authority.

6.10.5 The proposed creation of "Chinese walls" within the Authority in order to encourage firms wishing to engage in pre-notification discussions and to allay their concerns arising out of the Authority's enforcement powers under the

1991 Act has also met with criticism. The Competition Authority itself has indicated that both in principle and in practice it would be unacceptable for it to give a guarantee that it would not take enforcement action in respect of any information it received in pre-notification discussions. The Authority proposes the creation of a dedicated merger unit. It does not indicate whether or not, even in the event of such a unit existing, it would still be incapable of giving a commitment in respect of the pre-notification procedure.

6.10.6 The Group is of the view that it is desirable in principle that confidential pre-notification consultation should be made available. It is difficult to see how such consultation can work unless the Competition Authority is willing to respect the confidentiality of the discussions. It might, of course, be open to parties to have their advisers contact the Competition Authority for guidance without giving the names of the parties involved. However, in a small market such as Ireland the parties might be concerned that their identities would become apparent. In the circumstances, it seems appropriate that legislation should impose an obligation on the Competition Authority not to make use of information given to it in the pre-notification phase in any enforcement proceedings taken pursuant to the 1991 Act. The Group is satisfied that the imposition of such an obligation on the Competition Authority is in keeping with the discussion on the distinction to be drawn between the adjudicatory and enforcement functions of the Authority, discussed at some length in Chapter 4 which concluded that some level of separation between the various roles of the Authority is desirable. In particular, it is recommended that the Director of Competition Enforcement not be a member of the Authority and that his staff not fulfil functions on the regulatory side of the Competition Authority's work. The idea is to ensure that as far as possible information from the notifications/mergers side of the Competition Authority's work does not spill over into the enforcement side.

6.10.7 Accordingly, the Review Group recommends as follows.

Recommendation

The Group recommends that greater flexibility be introduced into the merger control system, allowing for confidential discussions between the parties to a proposed transaction and the Competition Authority prior to notification. The Competition Authority ought not to be entitled to rely on any information obtained in the context of such pre-notification discussions in any enforcement proceedings under the 1991 Act.

6.11 Role of the Director of Consumer Affairs

6.11.1 The Review Group made the following interim recommendation.

Interim Recommendation:

The Group recommends that the Competition Authority enforce compliance with decisions or orders made under the Act. The Group is not of the view that it is necessary for the Director of Consumer Affairs, the Minister or other persons to bring such enforcement proceedings.

6.11.2 No criticisms were made of this proposal and the Group is happy to repeat it.

6.11.3 Accordingly the Review Group recommends as follows.

Recommendation:

The Group recommends that the Competition Authority enforce compliance with decisions or orders made under the Act. The Group is not of the view that it is necessary for the Director of Consumer Affairs or the Minister to bring such enforcement proceedings.

Chapter 7 The Report Of The Newspaper Commission

7.1 Introduction

7.1.1 As explained by the Group in its document entitled “Proposals for Discussion in relation to some recommendations of the Report of the Commission on the Newspaper Industry” (“the Discussion Document”),²¹⁸ in October 1997 the Tánaiste and Minister for Enterprise, Trade and Employment (“the Tánaiste”) referred to the Group three of the sixteen recommendations made by the Commission on the Newspaper Industry (“the Newspaper Commission”). The Newspaper Commission reported to the Minister in June 1996. The three recommendations which the Tánaiste referred were as follows:-

Recommendation 1 (Change of Ownership)

“The Minister for Enterprise and Employment in exercising his powers to regulate changes of ownership in the newspaper sector should assess the implications of any change on:

- (a) The strength and competitiveness of the indigenous industry in relation to the UK titles;
- (b) The plurality of newspapers ownership;
- (c) The plurality of titles;
- (d) The diversity of views in Irish society and

²¹⁸ February 1999.

(e) The maintenance of cultural diversity.”

Recommendation 2 (Acquisition of Control Over Newspaper By Other Means)

“By a majority of the Commission, that consideration should be given to amending existing mergers controls in the newspaper industry so as to widen the powers to regulate not only the acquisition of shares but also the acquisition of control over newspapers by other means.”

Recommendation 10 (Concentration of Ownership on a Media Wide Basis)

“Any issue of concentration of ownership in the media should be considered on a media-wide as well as on a single media basis and in any such consideration effect should be given to the difference in consequences arising from such concentration in one branch of the media and concentration in different branches of the media.”

7.1.2 The Tánaiste requested the Group to take these recommendations into account as appropriate in its report. The purpose of the Discussion Document was to set out the preliminary recommendations of the Group as to how the Newspaper Commission’s recommendations should be taken into account in the context of mergers and competition law. The Group specifically called for submissions from the public on its recommendations.

7.1.3 In its Discussion Document, the Group made it clear that it viewed its function as being limited to a consideration of how the recommendations made by the Newspaper Commission could best be accommodated and implemented in the context of the Group’s review of merger and competition law. It therefore did not consider that it had the power to consider the merits of the recommendations. Certain of the submissions made to the Group did not observe this distinction and were in part directed at the recommendations made

by the Newspaper Commission itself rather than the Group's recommendations as to their implementation. In this chapter, the Group will again seek to respect the limited nature of the functions which it views itself as having. However, in certain instances it will refer to submissions made as to merits of the Newspaper Commission's recommendations where it considers that such submissions may also be pertinent in the context of the implementation of the Newspaper Commission's recommendations.

7.1.4 The Group's Discussion Document must, of course, be viewed not only in the light of the submissions received by it but equally in the light of the proposals made elsewhere in this report, and in particular in the context of Chapter 6 on Mergers and Acquisitions. As will be set out below, when viewed in the light of the final recommendations made elsewhere in this report, certain of the Group's interim recommendations in relation to newspapers require to be modified. It is therefore proposed, in this chapter, to set out the various interim recommendations, to discuss these recommendations in the light of the submissions received and of the recommendations made elsewhere in this report and then to set out the Group's final recommendations.²¹⁹

²¹⁹ The first two interim recommendations in the Discussion Document on the Newspaper Commission recommendation were in relation to section 14 of the Competition Act 1991. The Discussion Document expressly pointed out that the continued role and function of section 14 was an issue of general application which would be referred to in the Discussion Document on competition. However, since it had an impact on newspapers and since the Newspaper Discussion Document was published before the Discussion Document on Competition, the interim recommendation in relation to section 14 was referred to in the Discussion Document on the newspaper recommendations. The interim recommendation in relation to section 14 is dealt with in this report at section 8.10 and will not therefore be referred to in this chapter.

7.2 Change of Ownership

7.2.1 Aside from the two interim recommendations concerning section 14 of the Competition Act 1991²²⁰, the Discussion Document put forward five interim recommendations in response to the Newspaper Commission's change of ownership recommendation.²²¹ Each of these five interim recommendations will now be discussed, the first being interim recommendation number 3.

Interim Recommendation Number 3

7.2.2 The Review Group made the following interim recommendation.

Interim Recommendation

The Group recommends that the concept of the “exigencies of the common good” as referred to in Section 9(1)(a) of the 1978 Act should be specifically defined in the case of a proposed merger or take-over of a newspaper (or, if the Oireachtas were to enact legislation to regulate concentrations in the media sector generally, a proposed merger or take-over in the media sector) to include the five criteria identified by the Newspaper Commission and a sixth criterion which would refer to the position of any of the enterprises involved in the proposed merger or take-over in the media market. Accordingly, the Group suggests the following new subsection to be inserted into Section 9:

“(6) Notwithstanding the foregoing, the Minister may prohibit any merger or take-over of any business which consists, in whole or in part, of the printing, publishing or distribution (other than the retailing to the general public) of newspapers, having considered a report of the Authority, where the Minister believes that the exigencies of the common good so warrant having particular regard to:

²²⁰

See previous footnote.

²²¹

The interim recommendations were set out at pages 56-60 of the Discussion Document.

- (a) *the strength and competitiveness of the indigenous newspaper industry;*
- (b) *the plurality of ownership;*
- (c) *the plurality of titles;*
- (d) *the diversity of views in Irish society;*
- (e) *the maintenance of cultural diversity; and*
- (f) *the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises”*

If the Oireachtas were to enact legislation to regulate mergers or concentrations in the media sector generally (as opposed to the newspaper sector particularly) then the following provision could be considered by the Oireachtas:

“(6) Notwithstanding the foregoing, the Minister may prohibit any merger or takeover of any business which is, in whole or in part, in the media sector, having considered a report of the Authority, where the Minister believes that the exigencies of the common good so warrant having particular regard to:

- (a) *the strength and competitiveness of the indigenous newspaper industry;*
- (b) *the plurality of ownership;*
- (c) *the plurality of titles;*
- (d) *the diversity of views in Irish society;*
- (e) *the maintenance of cultural diversity; and*
- (f) *the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises.”*

- 7.2.3 In making this recommendation, the Group is, in reality, advising merely as to the manner in which the recommendation made by the Newspaper Commission might be implemented. The Group has not sought to enter into a discussion as to the desirability of including the criteria identified by the Newspaper Commission in any assessment of a merger in the media market. However, it is nonetheless worth drawing attention to certain comments made in the submissions to the Group.
- 7.2.4 However, before dealing with these particular points, it is useful to review the Group's third recommendation in the light of the final recommendations now made elsewhere in this report. As appears from the Discussion Document, the Group considered that the best way of implementing the recommendation made by the Newspaper Commission was to require the Minister to take account of the specific issues identified by the Newspaper Commission when assessing the "exigencies of the common good" pursuant to Section 9 of the 1978 Act. In Chapter 6 of this Report, this Group now recommends that merger notifications be made to the Competition Authority and that the latter body assess the acceptability of mergers in the light of competition criteria only. The Minister may then endorse or reject the recommendation of the Competition Authority, based solely on certain public policy grounds. Having regard to this approach, the draft recommendation made by the Group regarding the additional Newspaper Commission's criteria can be slotted neatly into the new structure proposed. The additional criteria would be considered solely by the Minister, in conducting her public policy review.
- 7.2.5 The Competition Authority has, however, pointed out that as regards the criteria proposed by the Newspaper Commission at (b), (c) and (f) i.e. the plurality of ownership, the plurality of titles and the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises, these are criteria which would, in any event, be taken into account as part of a standard competition analysis. These criteria, it is submitted, require an analysis of market share, a definition of product market, consideration of product differentiation and an examination as to the effect of the acquisition on related

markets. These are criteria which, it is argued, would fall within the remit of the competition analysis to be conducted by the Competition Authority. The Authority then goes on to express its reservations as to the criteria specified at (a), (d) and (e) i.e. the strength and competitiveness of the indigenous newspaper industry, the diversity of views in Irish society and the maintenance of cultural diversity. These criteria, the Competition Authority submits, require the analysis of a merger from the perspective of protecting competitors, rather than competition. The Competition Authority does not endorse what it regards as the “protectionist intention” of these criteria. Lastly, the Authority criticises the approach whereby a merger be analysed on the basis of the nationality of the shareholders of the acquirer, the target, or other firms in the market.

7.2.6 As indicated above, while the Group does not feel that it is entitled to reconsider the merits of the Newspaper Commission’s proposals, it is nonetheless of the view that the submissions made by the Competition Authority require some consideration. Certainly, the criteria specified at (a), (d) and (e) are clearly matters which fall outside the scope of a regular competition analysis of a merger and would therefore appear to be appropriate matters for the Minister, as opposed to the Competition Authority, to deal with. As regards the point made by the Competition Authority in relation to (b), (c) and (f), the Group is not convinced that these are matters which are properly dealt with only in the context of a competition law assessment of a merger in this sector. It may be that they are factors which should be taken into account in such an assessment. However, having regard to the approach set out in the Discussion Document, it appears to the Group that these could also properly be viewed as matters which the Minister should be entitled to take into account when conducting her public policy review. The nature of the media sector is such that issues such as the plurality of ownership of titles and the position in the media market generally of enterprises constitute public policy issues as they inevitably overlap with questions of editorial and cultural diversity. It is not intended that, in taking account of the criteria recommended by the Newspaper Commission, the Minister should in any way seek to duplicate the work of the

Competition Authority and to conduct her own assessment of competition law issues.

7.2.7 In its Discussion Document, the Review Group made the following observation:

“Political concern with media pluralism is born of a sense of the value of free speech, a recognition that speech in this context is intimately connected with an entitlement to read, watch and listen to a diversity of views and the shared value that such diversity is essential to the healthy functioning of a democracy. The conventional free speech philosophy is defended and characterised by the image of an atomistic market-place of ideas in which ideas freely jostle and compete with each other for the attention, loyalty and ultimately the belief of the citizen. Just as the process of competition in the market-place for goods leads to the more efficient production of better refrigerators for the benefit of the consumer, so it is envisaged that debate, disagreement and diversity will lead, in the end, to truth.”²²²

7.2.8 These factors, while present, perhaps, as a sort of incidental by-product of a conventional competition analysis of a newspaper merger or acquisition, nonetheless represent a set of criteria for the analysis of the merger which are qualitatively different from those criteria which make up conventional micro-economic competition analysis. As such, they are matters which properly fall to be considered by the Minister as a public representative in a democracy.

7.2.9 Other parties have proposed that the listing of the criteria at (a) to (f) does not, in fact, go far enough. It is proposed that the mergers legislation should seek to define terms such as “indigenous newspaper industry” and “cultural diversity”. Reference is made to the definition provided for by the Newspaper Commission, in its report (at page 23) in respect of the former:

²²² In his famous dissenting opinion in *Abrams -v- United States*, 250 US 616 (1919), Holmes J explained that “*The best test of truth is the power of thought to get itself accepted in the competition of the market.*” The Discussion Document went on to point out that “*there are those who argue that this metaphor, seductive though it is, is flawed on the basis that people either consciously or unconsciously listen selectively only to those viewpoints which reinforce their existing ideas, preconceptions, prejudices or unconscious desires.*” (Pages 7-8).

“The indigenous newspaper industry is one located in Ireland; staffed predominantly by Irish residents; directed to the people of Ireland and mainly dealing with Irish affairs, national and local. It consists of daily, Sunday and weekly newspapers which:

- (i) in their editorial and advertising content are directed to the Irish market either nationally or locally;*
- (ii) are published in Ireland in the main controlled by Irish interests;*
- (iii) are written by journalists and editors, the great majority of whom are ordinarily resident in Ireland; and*
- (iv) in most instances are printed and distributed by persons working in Ireland”.*

It has been submitted to the Group that the insertion of such a definition into the mergers legislation would be desirable.

7.2.10 The Group has carefully considered this definition and, on balance, is of the view that it is inappropriate to seek to set out in legislation the concrete definition of the term “indigenous”. Rather, it was agreed that the notion of what was “indigenous” or what represented “cultural diversity” ought to be a flexible one. In the circumstances, the Group is of the view that it would not be appropriate to insert the definitions proposed into the mergers legislation. It is preferable that the (admittedly difficult) job of applying these definitions be left to the Minister. It would be for the Minister to seek to apply these concepts in an appropriate manner. In the event of any person deeming himself to have been prejudiced by the manner in which the Minister sought to apply these terms, then it would be open to that person to bring judicial review proceedings in the manner recommended at Chapter 6 of this Report.

7.2.11 However, the Group is troubled by the prospect of incorporating a principle into mergers legislation which expressly requires that considerations of nationality may influence the outcome of the mergers approval process. In its Discussion Document, the Review Group noted as follows:

“The Group has a concern that no amendments should be made to the legislation which would have the appearance of specifically targeting UK titles or indeed other titles in other

Member States. This is because of the possibility that the specific isolation of UK titles may then be regarded as a particular impediment or hurdle facing only UK titles which may be contrary to Articles 6 and 52 of the EC Treaty which prohibit discrimination between EU citizens in matters such as in the present situation. In any event, it may be difficult to classify a title as being a UK title when, in fact, the newspaper company may have an “Irish edition”. The Group’s recommendation above does not involve any such isolation of UK titles but the Group is concerned that any alternative proposals which may be canvassed would not inadvertently breach EU law.”

7.2.12 The Group is conscious that it has no function to review the recommendations of the Newspaper Commission but it does seem to the Group that the reference to the indigenous newspaper industry may present serious problems if it were translated into legislation. An explicit criterion of this kind - however laudable and even desirable - would seem to amount to a form of discrimination (even if indirect) on grounds of nationality. Accordingly, if this criterion were explicitly enumerated in legislation, then it appears to the Group that there must be some risk that such a criterion might be held to offend against Articles 6, 49 and 86(1) of the Treaty of Rome. While the reference to the indigenous newspaper industry has been left in the Group’s final recommendation on the basis that it has to take the Newspaper Commission recommendations as a given, the Group’s recommendation in this respect must be read in light of its concern about the compatibility of this particular aspect of the recommendation with Community law.

7.2.13 Having regard to the recommendations made in Chapter 9 of this Report in respect of legislative consolidation, the Group does not now think it appropriate to propose any specific wording of a legislative amendment.

7.2.14 Accordingly, the Review Group recommends as follows:-

Recommendation

The Group recommends that the concept of the “exigencies of the common good” as referred to in section 9(1)(a) of the Mergers, Takeovers and

Monopolies (Control) Act 1978 or in any consolidated legislation should be specifically defined in the case of a proposed merger or takeover of a newspaper (or, if the Oireachtas were to enact legislation to regulate concentrations in the media sector generally, a proposed merger or takeover in the media sector) to include the five criteria identified by the Newspaper Commission (subject to compatibility with Community law) and a sixth criterion which would refer to the position of any of the enterprises involved in the proposed merger or takeover in the media market. Accordingly, the Group recommends that when assessing the permissibility of mergers or takeovers in the media sector, the Minister shall, in addition to the public policy factors generally applicable to mergers, take account of the following factors:-

- (a) the strength and competitiveness of the indigenous newspaper industry;
- (b) the plurality of ownership;
- (c) the plurality of titles;
- (d) the diversity of views in Irish society;
- (e) the maintenance of cultural diversity; and
- (f) the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises.

Recommendation No. 4

7.2.15 The Review Group made the following as its fourth recommendation:-

Interim Recommendation:

The Group recommends that the 1978 Act should be amended to enable the Minister to adopt statutory instruments, generally. One such statutory instrument could define the concept of the “media sector” in the event that the proposed amendment to Section 9 extends to mergers or takeovers in the media sector (as distinct from the newspaper industry only).

7.2.16 This recommendation in reality constitutes an overlap between the manner in which the public policy criteria applicable to newspaper/media sector mergers

ought to be implemented and the Newspaper Commission's recommendation 10 to the effect that any issue of concentration of ownership in the media should be considered on a media-wide basis.

7.2.17 The Group's recommendation has met with general endorsement. However, in the interval since the Group's interim recommendations were published, our attention has been drawn to the implications of the Supreme Court's recent decision in *Laurentiu -v- Minister for Justice, Equality and Law Reform*²²³. Here the Supreme Court held that the extensive powers to make statutory instruments governing immigration matters which has been granted by section 5 of the Aliens Act 1935 to the Minister for Justice were unconstitutional. In this case the court re-emphasised that Article 15.2.1 of the Constitution - which vests the Oireachtas with exclusive legislative power - prevented the delegation of such powers to the executive and held that the Minister's powers under the 1935 Act to make statutory instruments were in substance legislative powers.

7.2.18 In the light of *Laurentiu*, it seemed to the Group that it would no longer be open to the Oireachtas to proceed with this interim recommendation. If the Minister were to be given the power to define by statutory instrument provisions of the 1978 Act otherwise left undefined, the inevitable conclusion in the light of *Laurentiu* would be that this would amount to an unconstitutional delegation of legislative powers to the Minister, contrary to Article 15.2.1. Chapter 6 recommends that the Minister be given a general discretion to take public policy issues into account when assessing mergers and takeovers, but it would, of course, be desirable that the policy considerations in question should be expressly enumerated. Where public policy changes, (for example, the 1978 Act nowhere refers to environmental policy), then the Act ought to be amended to reflect these new considerations.

7.2.19 The Group remains of the view that the specific public policy criteria which the Newspaper Commission has recommended ought to be taken into account

²²³

(2000) 1 ILRM 1.

when assessing mergers in the newspaper industry could apply equally to the media sector generally.

7.2.20 The difficulty that arises is the manner in which the “media sector” could be defined. Although the Group sought submissions on this issue, none of the submissions received specifically addressed this question. In the light of the intervening decision in *Laurentiu*, it would appear that if the term “media sector” is to be legislatively defined, this must be done by the Oireachtas alone through the means of primary legislation and not by the Minister by means of statutory instrument. In any event and on further reflection, it appears to the Group that it is probably not essential that this phrase be defined, since its import is generally well understood and can be flexibly applied on a case-by-case basis by the Minister.

7.2.21 Accordingly, the Review Group does not think it appropriate to put forward the fourth interim recommendation as a final recommendation.

Recommendation No. 5

7.2.22 The Group’s fifth interim recommendation was as follows:-

Interim Recommendation

The Group recommends that when a proposed merger or take-over in the newspaper or media sector (as the case may be) is referred by the Minister to the Competition Authority pursuant to Section 7 of the 1978 Act, the Competition Authority should be both entitled and required to take account of not only the existing Section 8 criteria but also the six factors referred to in the Group’s suggested new Section 9(6) of the 1978 Act.

7.2.23 The interim recommendation by the Group was predicated on the assumption that the existing system provided for under the 1978 Act would continue to exist. This requires the Competition Authority, once a reference has been made

to it by the Minister, to give its views on the likely effect of the proposed merger on certain public policy factors. The Group has given this issue considerable attention in the context of Chapter 6. As appears from Chapter 6, the Group is of the view that there should be a division of competence between the Competition Authority and the Minister. The former should be required to assess mergers on foot of a competition law analysis solely. The Minister, being the publicly accountable entity, should then be responsible for seeking to assess the merger in the light of public policy criteria. The Group has therefore taken the view that the various public policy criteria which fall to be taken into account by the Minister in the mergers model recommended in Chapter 6 of this report are not factors to be expressly taken into account by the Competition Authority. While in practice there may inevitably be some degree of overlap between some criteria (for example, a competition concern with ensuring that there are enough thriving newspapers in the marketplace will tend to serve the public policy goals of maintaining cultural and political diversity), it still seems appropriate that the Competition Authority's analysis should not be cluttered by public policy considerations which do not sit particularly easily with a micro-economic analysis conducted in terms of concentration, market power and dominance.

7.2.24 In the circumstances, the Group does not think it appropriate to put forward its fifth interim recommendation as a final recommendation.

Recommendation No. 6

7.2.25 The Review Group's sixth interim recommendation was as follows:-

Interim Recommendation:

The Group draws attention to the powers of the Minister contained in paragraph 1(3) of the Schedule to the Competition Act 1991 which provide that the Minister may appoint additional temporary members to the Competition Authority for such period and on such terms and condition as she may specify in the appointment. While there was some disagreement among members of

the Group as to the practicality of appointing temporary outside members to the Competition Authority, there was a general view that such a proposal would be preferable to setting up another independent body to assess newspaper or media mergers on the grounds that the creation of another such body would be an unwelcome addition to the bureaucracy of the mergers process.

7.2.26 Elsewhere in this report²²⁴ the question of the Minister's power to appoint temporary members to the Competition Authority is discussed and it is recommended that this power should be retained. In the context of the Newspaper Discussion Document, the above interim recommendation was essentially to the effect that no independent body should be set up merely to assess newspaper or media mergers. The Group was and continues to be of the view that mergers within the newspaper or media sector must, in the first instance, be assessed in accordance with competition criteria in the same manner as any other merger. Consequently, it appears to the Group that the Competition Authority is the specialist body equipped with the necessary skills to assess any such merger. The Group did not and does not see the necessity to set up any independent body which would, in reality, merely be duplicating the work of the Competition Authority.

7.2.27 In the submissions to the Review Group there was support from within the newspaper industry for a proposal to establish an independent body to assess mergers in the newspaper industry. This was on the basis that it was critical that the Minister receive an informed view as to how the Newspaper Commission's criteria should be applied. However, the Group's view is that, as it is solely for the Minister to apply the public policy criteria, the Minister may take account of submissions from interested parties and ought therefore to be in a position to make her decision on an informed basis.

7.2.28 As regards the issue of the appointment of temporary members, the Group merely drew attention to the pre-existing powers under the 1991 Act. The Competition Authority has made the point that such a provision is necessary to

²²⁴

Section 8.3.

allow the Minister to appoint additional members in circumstances where, due to existing commitments or unforeseen circumstances, the Authority would otherwise be unable to carry out its functions. The Authority was critical of any suggestion to the effect that the Minister should appoint temporary members specifically in merger cases in the newspaper or media market. Other parties making submissions were also critical of the idea that temporary members could be appointed for the purpose of dealing with certain sectors. Having regard to the Group's final recommendation in relation to the division of functions between the Competition Authority and the Minister, set out at Chapter 6 and also referred to above, the Group is now of the view that there ought to be no necessity to appoint temporary members to the Competition Authority to deal with the newspaper sector or the media sector generally. The proposed division of functions means that the Competition Authority would be responsible for applying competition law criteria solely. The Minister would be responsible for applying public policy criteria. Consequently, there ought to be no necessity for the Competition Authority to deal with newspaper/media mergers in any different manner to other mergers.

Recommendation No. 7

7.2.29 The Group's seventh interim recommendation was as follows:-

Interim Recommendation:

The Group recommends that in light of the objectives sought to be served by the first recommendation of the Newspaper Commission, the Minister, in considering the particular matters identified by the Newspaper Commission such as the strength and competitiveness of the indigenous industry in relation to the UK titles, the plurality of ownership, editorial and cultural diversity and so forth, should be entitled to consider circumstances where an acquisition by one newspaper of another might be approved rather than prohibited if the target of the acquisition was otherwise likely to fail resulting in the elimination of that newspaper entirely.

7.2.30 Again, this recommendation must be viewed in the light of the restructuring proposed by the Group in Chapter 6, i.e. a revised division of competence between the Competition Authority and the Minister.

7.2.31 A matter which may be taken into account when assessing a merger from the competition law view point is what is known as the “failing firm” defence. In this regard, the Group notes that in *Cooley*²²⁵ the Competition Authority took into account a submission made by Irish Distillers Group to the effect that an anti-competitive merger should be allowed where one of the merging firms was “failing”. The Authority, in that decision, appeared to accept that this idea could be a valid defence but indicated that the defence was not satisfied in that particular case.

7.2.32 In *Barlo*²²⁶, however, the Authority took account of the “failing firm” defence and applied it to the facts at issue. Consequently, no amendment of the mergers legislation or the Competition Act would be required to enable the Competition Authority to take account of this defence.

7.2.33 The Authority also considered this issue in its report on the Tribune Group²²⁷. The Authority indicated (at paragraph 6.19) that it was well aware that a likely consequence of the proposal that Independent Newspapers should not be permitted to acquire a greater percentage in the Tribune Group was that the Sunday Tribune would cease to appear. The Authority indicated that if the Tribune were to close down, there would be obvious consequences which would be detrimental to competition. An important player would have been removed from the market, and only four Irish Sunday newspapers would be left, two of them being owned by the Independent. Competition would have been reduced, though a strengthening of all the remaining newspapers might offset this to some extent. Choice would have been restricted, especially at the

²²⁵ *Irish Distillery Group plc and Cooley Distillery plc* (Decision No. 285, 25th February 1994, Notification No. CA/62/93)

²²⁶ *Barlo Group plc/Kingspan Group plc* (Decision No. 302, 25th March 1994) Notification No. CA/2/94

²²⁷ *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%*. This Report was undertaken at the request of the Minister, pursuant to Section 8 of the 1978 Act.

top end of the market. However, the Authority concluded that this situation would be “the lesser of two evils” although it would be regrettable. The Authority also considered that there was a distinct possibility that the niche occupied by the Tribune would quickly be filled by another similar paper, not controlled by the Independent and unencumbered by debt. This, it was argued, might be to the long term benefit of competition.

7.2.34 Having regard to the above, it is clear that there is no need to confer specific authority on the Competition Authority to take the “failing firm” defence into account. The issue really is the extent to which the Minister is entitled to take such issues into account, in seeking to assess a proposed merger in the newspaper/media sector from the public policy point of view. The Group is of the view that it is implicit in the criteria which it has recommended that the Minister ought to be entitled to take account of the likely survival of the relevant enterprise as a relevant factor. Consideration cannot be given to the question of plurality of ownership, of titles, and the maintenance of cultural diversity without consideration of the effect of allowing a given enterprise in the media sector to fail. The Group is conscious that there will, inevitably, be a certain overlap between the consideration by the Competition Authority of the failing firm defence and the Minister’s consideration of the public policy criteria which the Newspaper Commission has recommended that she ought to take account of. However, the Competition Authority’s emphasis will be on the application of the failing firm defence from a competition law point of view. The Minister’s emphasis will be on the cultural implications.²²⁸

7.2.35 Accordingly, the Group is of the view that both the Competition Authority and the Minister will be entitled to take account of the “failing firm defence”, while approaching it from somewhat different angles. The Group is not, however, of the view that there is any necessity to repeat its interim recommendation since, in the Minister’s case, the consideration of the failing firm defence flows from the public policy criteria which the Minister is required to take into account.

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See the analysis in the Discussion Document of the operation of joint operating agreements between newspapers in the United States pursuant to the US Newspaper Preservation Act 1970 and section 58(3) of the UK Fair Trading Act 1973. Discussion Document, pages 37-42.

7.3 The Acquisition Of Control Over Newspapers By Other Means

7.3.1 The Group's interim recommendations numbers 8 and 9 can be dealt with together and were as follows:-

Interim Recommendations 8 and 9

8. To implement the acquisition of control recommendation in a relatively brief way, the Group recommends that the most appropriate amendment would be to amend the definition of "merger or take-over" in section 1(3) of the Mergers, Take-overs and Monopolies (Control) Act 1978 to provide that in the case of newspapers, a merger would be deemed to exist if one enterprise not only acquired control of another, but acquired a decisive influence by any particular means which would not be confined to the acquisition of shares. The Group therefore puts forward for consideration a recommendation that the definition of "merger or take-over" in section 1(3) of the 1978 Act be amended to include, as the last paragraph in section 1(3) the following provision:

"Notwithstanding the foregoing, a merger or takeover shall be deemed to exist for the purposes of this Act where an enterprise acquires control or a decisive influence by whatever means (including, without limitation, the provision or use of finance, services, facilities or resources or any combination thereof) of the whole or part of an enterprise engaged, in whole or in part, in the publication, production or distribution (other than retailing to the general public) of newspapers".

The Group recommends that if such a provision were adopted, there should be an exception for licensed banks as well as insolvency practitioners who were appointed in the ordinary course of business.

9. The Group invites submissions as to whether the provisions in relation to the control contained in the Australian Broadcasting Services Act 1992 form

a model which could be adopted in this jurisdiction for the purpose of implementing the Newspaper Commission's acquisition of control recommendation. Insofar as persons consider that the Australian model is broadly suitable but with modifications, the Group specifically requests that submissions on this issue should detail any modifications which may be felt to be appropriate.

- 7.3.2 These recommendations were designed to deal with the Newspaper Commission's recommendation number 2 to the effect that consideration should be given to amending existing merger control measures in the newspaper industry so as to widen the powers to regulate not only the acquisition of shares but also the acquisition of control over newspapers by other means. As appears from the interim recommendations, in reality recommendation number 9 was more in the nature of a call for submissions as to the suitability of the Australian model for this jurisdiction.
- 7.3.3 As pointed out in the Discussion Document, the concept of "control" is one that is notoriously difficult to define. Defining "control" in very specific terms which are designed to capture a range of potential situations and transactions inevitably runs the risk that certain transactions will be left out. On the other hand, defining a concept such as "control" in very broad terms creates undesirable uncertainty. Consequently, in its Discussion Document the Group sought to propose a *media res* by providing for the amendment of the concept of merger or takeover as provided for in the 1978 Act in order to introduce a test in the case of newspaper mergers whereby a merger would be deemed to exist if one enterprise not only acquired control of another but acquired a decisive influence by any particular means which would not be confined to the acquisition of shares.
- 7.3.4 The Competition Authority made the point, in respect of this recommendation, that merger analysis required a consideration of the substance as well as of the form of any transaction. Consequently, the acquisition of control or decisive

influence by contract or other type of agreement should fall within the ambit of merger policy, along with other more standard arrangements such as the acquisition of shares or assets. The Competition Authority did not give its view as to whether or not the 1978 Act already permits such an analysis. Others, however, did make this point. The view was expressed that the existing concept of “common control” provided for at Section 1(3)(a) of the 1978 Act was already sufficiently broad and appeared to cover the possibility of acquiring control by means other than the acquisition of shares. There did not appear to be any particular support for the introduction of a specific reference to “decisive influence” solely in relation to newspaper mergers. It was argued that the concept of direct and indirect control set out in the EC Merger Regulation²²⁹ could usefully be mirrored in Irish law. This would be more appropriate than the importation of concepts of control from Australian legislation which, it was submitted, provided for a very different control regime and was specifically designed to cover a wide variety of matters affecting the broadcasting sector. In general, while there was disappointingly little discussion of the Australian model in the submissions, the submissions did not support the introduction of a new model such as the Australian one.

- 7.3.5 None of the submissions appears to argue for a test of control applicable to the newspaper industry specifically. On reflection, the Group is of the view that it would be inappropriate to provide for any such sector-specific test. Rather, the Group was impressed by the arguments made to the effect that the 1978 Act was perhaps sufficiently broad already to cover indirect control to include the acquisition of “decisive influence”. While this is a matter which relates to mergers generally, the Group is of the view that arguments that the EU definition of a merger ought to be mirrored into Irish law is persuasive. The Group notes that Article 3 of the Merger Regulation defines concentrations (or mergers) in the light of the acquisition of “direct or indirect control”. Article 3(3) then goes on to define control and provides that

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Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ No. L257, 21st September 1990, page 13

“control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decision of the organs of an undertaking”.

7.3.6 Article 3(4) then provides that:

“control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts have the power to exercise the rights deriving therefrom”.

7.3.7 The adoption of such a test in Irish law would, in the view of the Group, not differ greatly from the existing test. However, it would have the advantage of spelling out the concepts of direct and indirect control more clearly than is currently done in Irish law. Furthermore, the adoption of such a definition would bring with it a body of established and well-scrutinised case law which would facilitate advisers required to determine whether or not control for the purposes of mergers legislation existed.

7.3.8 Accordingly, the Group recommends as follows:-

Recommendation:

The Group recommends the adoption in Irish mergers law of the control test provided for by Article 3 of the EU Merger Regulation.

Article 3(1) of the Mergers Regulation defines a “concentration” as being deemed to arise where:-

- “(a) two or more previously independent undertakings merge; or*
- (b) one or more persons already controlling at least one or more undertakings; or*
- (c) acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or part of one or more other undertakings.”*

Articles 3(3) and 3(4) provide as follows:-

“3 For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- (a) ownership or the right to use all or part of the assets of an undertaking;*
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*

4. Control is acquired by persons or undertakings which:

- (a) are holders of the rights or entitled to rights under the contracts concerned; or*
- (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.”*

The precise legislative wording to be adopted to incorporate these concepts into Irish mergers law is a matter to be addressed on legislative consolidation.

7.4 **Concentration Of Ownership On A Media Wide Basis**

Recommendation No. 10

7.4.1 The Review Group's draft recommendation on this topic was as follows:-

Interim Recommendation:

Recommendation number 3 above requires the Minister, when considering a newspaper merger, to consider not only the various criteria identified by the Newspaper Commission in its first recommendation, but also "the position in the media market of any of the enterprises involved in the proposed merger or take-over". If this recommendation is adopted, the Group considers that it will be sufficient to give the Minister power to consider the media-wide consequences which are the subject of the Newspaper Commission's recommendation no. 10.

7.4.2 This recommendation is, in reality, no more than a repetition of the Group's interim recommendation number 3 and is designed specifically to deal with the Newspaper Commission's recommendation number 10. As indicated above, the Group's interim recommendation number 3 met with general approval and adequately deals with the Newspaper Commission's recommendation number 10. Accordingly the Review Group does not consider it necessary to put forward its tenth interim recommendation as a final recommendation.

Recommendation No. 11

7.4.3 The Review Group's interim recommendation number 11 was as follows:

Interim Recommendation:

The Group recommends that the Minister's power to order the Competition Authority to carry out investigations (whether in its existing forms under section 11 (as amended by the 1996 Act) and section 14 of the Competition Act 1991 or any variation on such investigative powers as suggested at recommendations numbers 1 and 2 should be amended so as to empower the Competition Authority, in dealing with any notification or investigation under the Competition Acts, to take into account the effect of any merger, acquisition or interest on competition in the media market generally.

- 7.4.4 Again, the Group is of the view that this recommendation has been dealt with by the recommendation that section 14 be repealed, by the recommendation that the legislation be amended to make clear that the court can order divestiture, and by the first recommendation in this chapter. Having regard to the fact that the Competition Authority will, inevitably, have regard to the effect of a merger on any connected market, the Group feels that it is unnecessary to repeat this recommendation.

Chapter 8 The Operation and Procedures of the Competition Authority

8.1 Introduction

8.1.1 At the heart of effective public administration is public trust and confidence in the efficiency and fairness of bodies engaged in administrative policy and decision making. This is particularly important when the administrative decisions in question partake of a quasi-judicial nature, to a greater or lesser extent. The decisions of administrative bodies do not necessarily determine people's rights as such, but they can profoundly impact upon the way in which and the extent to which people can enjoy the exercise of those rights. The impact of planning decisions on the exercise of property rights is a classic example.

8.1.2 It is therefore important that the Competition Authority is made up of and staffed with persons of the appropriate expertise, knowledge and fair-mindedness. It must be and be seen to be independent of the executive arm of government. In carrying out its functions, its procedures must be and be seen to be open and fair. Those who "lose" in consequence of a decision (e.g. a refusal of a licence) must clearly understand the reasons why they have lost.

8.1.3 The Competition Authority has submitted to the Review Group that such issues are of less importance than the other substantive issues, such as strengthening the enforcement function or considering the implications of Community competition law for Irish competition law or resolving the complex interaction between State regulation of certain industries and competition. The Review Group agrees with this order of priorities, which is why the bulk of its discussion document on competition law was devoted to such issues.²³⁰

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Only 19 of the 235 pages of discussion in the Discussion Document on Competition Law were devoted to the issues the subject of this chapter. Only 9 pages were devoted to the procedures of the Competition Authority.

8.1.4 The point has also been made that if the European Commission's White Paper proposals are adopted and if the legislative response in Ireland is to do away with the current notification system in relation to licences (and perhaps also in relation to certificates), then the question of procedures in relation to notifications as such will cease to be relevant. This is undoubtedly true. But such change is likely to be at least three years away (if not more). Even then it is by no means clear as to precisely what shape the new system will take or the extent to which notification in some form will still feature. Furthermore, for so long as the Competition Authority still continues to exist, issues such as its independence, the quality of its members and the fairness of its procedures will remain active and important issues. In that context, it must be remembered that irrespective of what may happen to the current licensing system, the Review Group's recommendations in relation to mergers envisage an expanded role for the Competition Authority as the recipient of all applications for mergers approval. One of the reasons why the merger regulation at Community level has been such a success is the speed and efficiency with which the Commission deals with applications for mergers approval and the well-defined and fair procedures which accompany that process.

8.1.5 Finally, it is easy to be dismissive of what can be disparagingly referred to as mere procedural issues which can sometimes be seen, particularly by those required to follow fair procedures, as an irritating obstacle to getting on with the real business. This is to miss the point that any form of decision-making will ultimately be rendered worthless if it does not enjoy the confidence of the participants that the process is fair. The importance of this principle is well-expressed in the following comment by a leading US constitutional law expert:

“Whatever its outcome ... a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to

interchange express the elementary idea that to be a person rather than a thing is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the “validity and moral authority of a conclusion largely depend on the mode by which it was reached. ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.”²³¹ At stake here is not the much-acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice.”²³²

8.2 **Criteria for Appointment to the Competition Authority**

8.2.1 The interim recommendation of the Review Group was as follows.

Interim recommendation: The schedule to the Competition Act 1991 should be amended to provide that only persons who, in the opinion of the Minister for Enterprise, Trade and Employment have sufficient knowledge, expertise in or experience of economics, competition law, public administration or business generally would be eligible for appointment to the Authority. Permanent members of the Competition Authority should be paid salaries which are sufficient in all the circumstances to attract individuals of the necessary calibre from other areas of the private or public sector to the Competition Authority. It should be a condition of appointment of any permanent member of the Authority that he or she may not, while a member of the Authority, enter into negotiations with any party as to his or her future employment but that the salary of any retiring member should continue to be paid for a period (say, two months) after his or her retirement from the Competition Authority to enable such former member to pursue any available career options. Alternatively, it could be provided that following his or her term of office with the Competition Authority, and for a period of 18 months, a former member cannot act in any

²³¹ *Joint Anti-Fascist Refugee Committee -v- McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring).

²³² Tribe, *American Constitutional Law* (2nd Edition, 1988) page 666 (emphasis in original).

position where he or she may be liable to use or disclose information acquired by him or her in the exercise of his or her functions as a member of the Competition Authority, save for work in the Civil Service or as a consultant to any Minister of the Government.

8.2.2 In its discussion of the problems which might arise if members of the Competition Authority were to leave to take up positions in the private sector and in particular how potential conflicts of interest in such a situation might be resolved, the Review Group commented that

“it would be neither wise nor fair to exaggerate a potential problem which to date does not appear to have created any difficulty in Ireland. Equally, it would be foolish in the context of a vibrant and expanding economy to fail to take the opportunity to put in place procedures which can help prevent any such problem ever arising.”²³³

8.2.3 As it happened, not long after the publication of the discussion document in September 1999, both the Chairman and another member of the Competition Authority resigned to take up other positions.²³⁴

8.2.4 The Competition Authority generally agreed with the Review Group on this recommendation with the proviso that members of the Authority should be allowed negotiate with a possible future employer outside the country or in an unrelated field, since otherwise members may be induced to serve out a full term, even where they are no longer committed to the post, because of the uncertainty of finding another job. If the alternative eighteen months provision based on the telecommunications model²³⁵ is adopted, the Competition Authority suggests that it may be necessary to define more precisely the areas of work which would be temporarily closed to members of the Competition Authority since, given the wide brief of the Competition Authority, members

²³³ Discussion Document on Competition Law, page 125.

²³⁴ The Review Group is not suggesting that any conflicts of interest arose in the instant cases, merely that mobility from the Competition Authority is a practical reality.

²³⁵ Paragraph 8 of the First Schedule to the Telecommunications (Miscellaneous Provisions) Act 1996.

could otherwise be prevented from working in almost any organisation for eighteen months after leaving the Authority.

- 8.2.5 Another submission also supported the interim recommendation in principle on the basis that it was important that the independence of the Competition Authority is not compromised in any way. This submission suggested a period of six to twelve months during which the ex-member of the Authority would continue to be paid but during which he or she could not act in any position where he or she might be liable to use or disclose information acquired by him or her in the exercise of his or her functions as a member of the Competition Authority. The exception suggested in the interim recommendation for work in the Civil Service or as a consultant to any Minister of the Government should, in the view of this submission, be restricted to work in the Civil Service.
- 8.2.6 Another submission felt that any restriction of this nature was unnecessary. It is an offence for a person to disclose information available to him by virtue of the powers of obtaining information conferred by the 1991 Act or by any other enactment conferring functions on the Competition Authority or through being present at a meeting of the Authority held in private.²³⁶
- 8.2.7 While acknowledging that this latter provision does indeed exist in the schedule to the Competition Act, the Review Group is concerned that reliance on it may not provide a sufficient remedy. First, it may be difficult to point to any disclosure of any particular item of confidential information. Secondly, the sanction is a criminal prosecution which would clearly only be resorted to in very serious cases and has the usual difficulties associated with criminal prosecution. Thirdly, and perhaps most importantly, the point of concern is not so much the disclosure of any particular item of confidential information, but rather the avoidance of an ex-member of the Authority putting himself in a position where he or she either has or may appear to have a conflict of interest. Were this to be regarded as acceptable, the Review Group is apprehensive that

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Paragraph 9 of the schedule to the Competition Act 1991. It was submitted to the Review Group that on this basis, any ex-member of the Competition Authority is in any event subject to a prohibition on the disclosure of confidential information.

it would undermine the independence and standing of the Competition Authority.

8.2.8 As regards the different models which have been suggested concerning the type and extent of restriction which would be placed on an ex-member of the Competition Authority, the Review Group considered that any of the alternatives which have been canvassed are probably acceptable and that the choice of any one alternative is less important than the fact that some such provision is adopted. A balance has to be struck having regard to the necessity to preserve the independence and integrity of the Competition Authority (including the confidentiality of information submitted to it) on the one hand, and the legitimate pursuit of their own careers and prospects by persons who may serve for some years as members of the Competition Authority, on the other. Just as the salaries and benefits paid to members of the Competition Authority must be sufficient to ensure that persons of the necessary calibre join and remain with the Competition Authority for reasonable periods of time²³⁷, equally restrictions on what they may do following their time at the Competition Authority must not be so onerous as to discourage suitably qualified persons from applying for positions as members of the Competition Authority.

8.2.9 It seems to the Review Group that the mischief which a recommendation in this area is aimed at is primarily concerned with what a member of the Competition Authority does while he or she is still a member of the Competition Authority as distinct from what he or she does subsequently. The fundamental point is that a member, while exercising his or her functions as a member, should have neither the appearance nor the reality of any conflict of interest by virtue of any

²³⁷ The Group is concerned to note that the salaries of members of the Authority (even the Chairman) are significantly lower than the salaries of the sector-specific regulators who have been appointed in relation to the telecommunications, electricity and airports sectors. (In the case of electricity, the relevant legislation established a regulatory framework consisting of a three person commission for electricity regulation; although only one member has been appointed to date, this structure is very similar to that of the Competition Authority). Such a differential in remuneration seems undesirable given the Group's recommendations concerning ongoing relations between the Competition Authority and sector-specific regulators and may be perceived as sending out the wrong message regarding the importance of competition and competition law enforcement in these sectors.

private sector involvement in any way which might appear to impinge on that member's independence in the performance of his or her functions. In a sense, a post-membership ban on working in related areas for twelve months or eighteen months is primarily designed to create a set of circumstances where there will as a practical matter be no incentive for a member of the Competition Authority to become involved in negotiations concerning any possible private sector employment while still a member of the Authority.

8.2.10 There is a concern that insofar as the member acquires confidential information during his or her tenure as a member, he or she should not subsequently use that confidential information in a private sector context. As one of the submissions has pointed out, there is at present a prohibition on members using such confidential information under pain of criminal sanction. A disadvantage of this position however is that a private party adversely affected by any subsequent misuse of confidential information by a member of the Competition Authority may not be able to bring civil proceedings because in general, a transgression of the law which is a criminal offence can only be prosecuted as a criminal offence.²³⁸

8.2.11 Thus, on balance, the Review Group considers that the focus of this recommendation should be on preventing conflicts of interest arising while the person is still a member of the Competition Authority rather than seeking to restrain their employment prospects subsequently. Insofar as any misuse of confidential information is concerned, the Review Group considers that aside from the criminal sanction, any person adversely affected by any such misuse of confidential information should be entitled to bring civil proceedings against the ex-member in question.

8.2.12 The Review Group has become aware that the Government is at present considering guidelines on these issues which would apply to senior figures in

²³⁸ There is an exception if the private plaintiff first obtains the fiat of the Attorney-General which is a somewhat cumbersome and rarely used procedure. Alternatively, a private plaintiff may be able to bring civil proceedings in circumstances where it can be shown that the criminal sanction is ineffective as a deterrent or is not being enforced. Of course, civil proceedings can

the public service such as the Secretary General of Government Departments. Given that the Review Group has no strong view on which of the many possible solutions to this type of potential problem is preferable, the Review Group considers that whatever guidelines are laid down in respect of senior figures in the public service should apply equally to members of the Competition Authority

8.2.13 Accordingly, the Review Group recommends as follows:

Recommendation:

- (a) The schedule to the Competition Act 1991 should be amended to provide that only persons who, in the opinion of the Minister for Enterprise, Trade and Employment have sufficient knowledge, expertise in or experience of one or more of the following, economics, competition law, public administration or business generally would be eligible for appointment to the Authority.
- (b) Permanent members of the Competition Authority should be paid salaries which are sufficient in all the circumstances to attract individuals of the necessary calibre from other areas of the private or public sector to the Competition Authority.
- (c) Any guidelines or regulations adopted in relation to conflicts of interest and future employment of senior figures in the public service should be extended to include the members of the Competition Authority and the Director of Competition Enforcement.
- (d) Paragraph 9 of the schedule to the Competition Act 1991 should be amended so that the prohibition in paragraph 9(1) should extend to any information obtained by any person while a member of or in the employment of or where acting as a consultant or advisor to the Competition Authority where such information can objectively be regarded as confidential information.

be brought notwithstanding the criminal sanction if the statute expressly authorises civil proceeding.

(e) Paragraph 9 of the schedule to the Competition Act 1991 should also be amended so as to give any party who suffers any loss or harm as a result of any breach of the prohibition in paragraph 9 of the schedule (as amended) the right to bring civil proceedings whether by way of damages, declaration or injunction notwithstanding the existence of the criminal sanction.

8.3 Possibility of Appointing Temporary Members

8.3.1 The Review Group's interim recommendation was as follows.

Interim recommendation: Some members of the Review Group consider that the legislation should be amended to enlarge the possible numbers of permanent members of the Competition Authority. If such a proposal is implemented the Review Group on balance feels that the power to appoint temporary members probably serves little useful purpose. However, there is at least some support within the Review Group for retaining the power to appoint temporary members on the basis that the power could be used in circumstances where the transaction under consideration by the Competition Authority required more specialist knowledge than that available to the permanent members of the Competition Authority.

8.3.2 At least one submission to the Review Group interpreted this interim recommendation as a interim recommendation by the Review Group that the possible number of permanent members of the Competition Authority should in fact be enlarged. This is not the case and the Review Group hoped that it was clear from the Discussion Document²³⁹ that it was only some members of the Review Group who were of this view on the basis that this in turn would remove the need for the possibility of appointing temporary members. Other members of the Review Group were in favour of the existing provision whereby temporary members can be appointed to the Competition Authority and saw no need for the enlargement of the number of members of the Competition Authority.

8.3.3 All of the submissions received by the Review Group which addressed this issue opposed the enlargement of the number of members of the Competition

²³⁹ Pages 126-127.

Authority. Instead, the point was made that it would be a better use of resources to increase the staff of the Competition Authority. Until comparatively recently, there were five members of the Competition Authority (at time of writing there are three) and only seventeen staff, seven of whom are in clerical grades. The Competition Authority is of the view that this level of staff is insufficient to support a five member Authority. The Director of Competition Enforcement has also made known his view recently that the Competition Authority has inadequate staff and professional resources to effectively enforce competition law and has made a submission to the Review Group to this effect.

- 8.3.4 The question of both the number of members of the Authority and the staff and resources which should be made available to the Authority is a question which has to be considered in the context of the workload and demands made upon the Authority. The volume of notifications has declined significantly and may disappear for practical purposes a number of years hence. On the other hand, if the recommendations of this report are adopted, the Competition Authority will have an increased workload in relation to mergers. Furthermore, the Review Group hopes and anticipates that the enforcement function will become more important; if this happens, it will inevitably require more resources, including lawyers, whether as “in-house” lawyers or by way of subcontracting the work to outside firms of solicitors. While it may be said that every organisation always considers that it is understaffed, the Review Group sees no reason to disagree with the Competition Authority’s own assessment that the current level of staff is insufficient to support its functions. Bearing in mind the comments made above in relation to the changing role of the Competition Authority, the Review Group considers that no change should be made in the maximum number of members of the Competition Authority and repeats the view already expressed in the Discussion Document that the Competition Authority should be given whatever resources are necessary to enable it to carry out its functions, including an adequate number of properly qualified, professional and experienced staff.

8.3.5 A separate issue is whether the existing power of the Minister to appoint temporary members to the Competition Authority should be retained. While most of the submissions which touched on this issue stressed the necessity for the members of the Competition Authority to be themselves highly qualified and experienced, the point was also made that if in individual cases, particular specialised expertise was needed, such expertise can be obtained by the Competition Authority retaining the appropriate advisors and consultants rather than appointing a specialist or an expert as a temporary member. The Review Group agrees with this submission. However, the Review Group considers that the power to appoint temporary members should be retained as there may be circumstances where such appointments are necessary (e.g. where existing members are ill or incapacitated or temporarily unavailable or may find themselves subject to a conflict of interest). If temporary members are appointed to deal with a particular issue or case, an appearance (however unwarranted) may be given that an attempt is being made to constitute the Competition Authority in a particular way so as to produce a particular result. That would have adverse consequences for the necessary perception of the Competition Authority's independence.

8.3.6 Somewhat different considerations however may arise if the recommendation that the Competition Authority be given the function of conducting elective hearings is adopted.²⁴⁰ Such hearings will closely resemble court proceedings for the reasons already discussed in chapter 4 of this report. It seems essential that to enable the relevant panel of the Competition Authority to adjudicate properly on issues which uniquely arise in a courtroom setting and are the daily professional fare of experienced advocates, such experienced advocates (including for this purpose retired judges) should have a very significant role in the determination of those issues when they arise before the panel in the course of an elective hearing. Whether this is achieved by appointing one or more such advocates as temporary members of the Competition Authority for the purpose of constituting part of the panel which will conduct the elective hearing or whether it is done through the appointment of such advocates as legal assessors

²⁴⁰ See sections 4.4.13 to 4.4.29 of this Report.

to the panel is, perhaps, less important than the fact that such experienced legal input is critical if the elective hearing procedure is to become established on a credible and respected basis. The independence of this panel will be a critical issue. Some parties may feel or may not appreciate the distinction between the Director of Competition Enforcement and the Competition Authority and may not understand that the Director's staff will work exclusively on the enforcement side and not on the regulatory/adjudicatory side. There may, in any event, be a feeling or a suspicion that the Competition Authority may be in some way predisposed towards finding in favour of its own Director. The Review Group was thus of the view that it is probably preferable that the relevant experienced lawyers are appointed as temporary members for the purpose of the elective hearing and actually sit as part of the panel taking the decision and not merely as legal assessors tendering legal advice. Indeed it would probably be desirable (although not an inflexible rule) that even where the Chairman of the Competition Authority was a member of the panel, the chairman of the panel for the purpose of the hearing should be an experienced advocate appointed as a temporary member precisely for the purpose of chairing the particular panel hearing. Just as it was of assistance to the establishment of the independence and credibility of An Bord Pleanála that its first chairman was a distinguished retired High Court judge, so there is much to be said for the view that the panel in an elective hearing should be chaired by a lawyer of unquestioned expertise and independence.

8.3.7 Accordingly, the Review Group recommends as follows:

Recommendation: The Review Group recommends that no change be made to the possible numbers of permanent members of the Competition Authority. The Minister's power to appoint temporary members should be retained. While the circumstances under which this power should be used are primarily a matter for the discretion of the Minister, the Review Group suggests that this power should normally be used only in cases where existing members of the Competition Authority cannot function whether through illness, incapacity, absence, conflict of interest or otherwise. However, insofar as the

recommendation of this report concerning the possibility of an elective hearing being conducted by a panel of the Competition Authority is adopted, the Review Group considers that experienced litigation lawyers could usefully be appointed as temporary members of the Competition Authority for the purpose of constituting part of the relevant panel. The Review Group emphasises the necessity for the panel to be both in fact and to be seen to be entirely independent in the exercise of its adjudicatory function during the elective hearing procedure and that all reasonable steps should be taken to promote and ensure such independence. The Review Group considers that there would be a value in having any such panel chaired by an experienced litigation lawyer whose expertise and independence are undoubted with a view to building up and establishing the credibility of the panel and the elective hearing procedure.

8.4 **Strengthening the Independence of the Authority**

8.4.1 The Review Group's interim recommendation was as follows.

Interim recommendation: The Review Group considers that with a view to strengthening both the actual and perceived independence of the Competition Authority, the Competition Authority should be given a separate vote in the allocation of the State finances and should enjoy substantial budgetary independence in the manner already enjoyed by other comparable independent agencies. The offices of the Competition Authority should ideally be located in buildings which are not shared with any other section of government.

8.4.2 This interim recommendation met with general approval.²⁴¹ One party who commented on this interim recommendation had no strong view as to where the Competition Authority should be located. The Review Group itself does not

²⁴¹ For the avoidance of doubt, it is not suggested that the budgetary independence of the Competition Authority would extend to the Competition Authority fixing the remuneration of

have any strong view in this regard and the use of the word “ideally” in the recommendation is intended to convey that while the Review Group considers that separate offices are the optimum situation, it does not consider that this is a crucial requirement. For example, proper staffing with qualified personnel is clearly more important than separate offices.

8.4.3 Accordingly, the Review Group recommends as follows:

Recommendation: The Review Group considers that, with a view to strengthening both the actual and perceived independence of the Competition Authority, the Competition Authority should be given a separate vote in the allocation of the State finances and should enjoy substantial budgetary independence in the manner already enjoyed by other comparable independent agencies. The offices of the Competition Authority should ideally be located in buildings which are not shared with any other section of government.

8.5 **Whether the Authority should be under a Statutory Time Limit to Deal with Notifications**

8.5.1 The Review Group’s interim recommendation was as follows.

Interim recommendation: It does not appear that the Competition Authority should be under a statutory time limit to deal with notifications. However, if it is thought desirable that some form of time limits be introduced, the Review Group suggests that a provision analogous to the time limit provisions imposed on An Bord Pleanála by the Local Government (Planning and Development) Act 1992, sections 2(2) and 2(3) could be adopted. The result of such provision would be to impose a duty on the Competition Authority to arrive at its decision on notifications within a four month period but that where it appeared to the Competition Authority that it would not be possible or appropriate to

its own members although it should be entitled to fix the remuneration it considers appropriate

determine a notification within that period, the Competition Authority would serve a notice to that effect and the period of time in question would then be extended.

- 8.5.2 The submissions which were received which addressed this issue were generally in favour of it. There was considerable support for the imposition of a statutory time limit. One submission agreed with the interim recommendation meaning that it disagreed with the imposition of statutory time limits although raising no objection to the alternative suggestion modelled on the planning example.
- 8.5.3 One submission argued that from a business perspective, it is essential that a response should be received from the Competition Authority within a defined time. Another submission expressed the view that time limits analogous to those currently imposed on the Minister in merger notifications should be adopted and that these time limits should only be capable of extension by the High Court upon application to it by the Competition Authority.
- 8.5.4 The Review Group considers that there is much to be said for an actual time limit to deal with notifications. At both Community level and national level, the mergers process is subject to a time limit (where that is particularly important in the context of mergers and acquisitions for commercial reasons) and it has been found possible, for the most part, to adhere to such time limits. This in part contributes to the relative satisfaction of parties with the operation of mergers control procedures. The fact that the number of notifications under the Competition Act is declining and that the Authority's workload in this respect is diminishing is another reason why it should be possible to deal with notifications within a defined period.²⁴²

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to be paid to its staff and the fees to be paid to any consultants or advisors. Although it is acknowledged that the Competition Authority's workload may increase in other areas as discussed in this report.

8.5.5 Given the declining importance of notifications, the Review Group considers that the idea of introducing an application to the High Court to extend the given time limit is probably over-elaborate.

8.5.6 On balance, the Review Group considers that a time limit provision modelled on that contained in the planning code is the appropriate provision to adopt. This, in effect, puts an obligation on the Competition Authority to use its best endeavours to give a decision on a notification within a given time period (the Review Group suggests four months). However, the Competition Authority can extend this period itself if it considers that it would not be possible or appropriate to determine the notification within the period in question. The reference to impossibility is self-explanatory. The reference to appropriateness is designed to give flexibility to the Competition Authority in circumstances where, for example, the European Commission might seek to intervene on foot of the sort of powers it envisages in the White Paper and might take the matter out of the jurisdiction of the Competition Authority. Other circumstances can be envisaged such as High Court proceedings involving an agreement or concerted practice which had been notified to the Competition Authority. In such circumstances, the Authority might legitimately consider it appropriate not to give a decision on a notification until such time as the High Court had given judgment.

8.5.7 Thus, the Review Group recommends as follows:

Recommendation: The Competition Act 1991 should be amended to provide that it is an objective of the Competition Authority to give its decision on any notification to it seeking a licence or certificate in relation to section 4 of the Competition Act 1991 within four months from receiving such notification or application. A provision analogous to the time limit provisions imposed on An Bord Pleanála by the Local Government (Planning and Development) Act 1992, sections 2(2) and 2(3) should be adopted. The result of such provision would be to impose a prima facie duty on the Competition Authority to arrive at its decision on notifications within a four month period but that where it

appeared to the Competition Authority that it would not be possible or appropriate to determine a notification within that period, the Competition Authority would serve a notice on the parties to that effect and the period of time in question would then be extended for the further period specified in the notice.

8.6 Necessity for the Adoption of Procedural Rules Governing the Competition Authority's Procedures and Oral Hearings

8.6.1 The Review Group's interim recommendation was as follows.

Interim recommendation: The Review Group recommends that the Minister should by regulation prescribe the manner in which the functions of the Competition Authority are to be exercised. In this context, consideration should be given to providing for a hearing officer who would not be a member of the Competition Authority, who would chair any oral hearings held by the Competition Authority and would resolve any procedural issues which might arise in the course of that hearing or in the course of any particular notification generally. Whether or not the concept of a hearing officer is adopted, consideration could also be given to providing for an informal right of appeal on procedural issues arising within a notification process (such as controversies as to the excision of confidential information from documents) from any ruling of the Competition Authority (or the hearing officer as the case may be) on such a point to an independent person to be drawn from an appointed panel of solicitors, barristers and economists experienced in competition law matters. The regulations should also deal with:

- (a) The extent to which all notifications require to be advertised;
- (b) The type of information to be supplied with notifications;
- (c) The rights of third parties to comment and the extent to which the information contained in the notification should be supplied to them;
- (d) The statement of objections procedure;
- (e) The circumstances in which an oral hearing may/should be held;
- (f) Scale fees for notifications.

8.6.2 This recommendation met with general approval subject to the point that the necessary resources will have to be made available to fund the hearing officer. All of the Review Group's recommendations are made on the assumption that

sufficient resources will be made available to enable the recommendations to be implemented.

8.6.3 The primary purpose of the recommendation is to give the Minister the power to prescribe by regulation the manner in which the functions of the Competition Authority are to be exercised. The particular factors referred to in the recommendation are those which seem at present to need most attention. Obviously, as the functions of the Competition Authority may change or develop over time, such regulations may have to be amended, replaced or expanded from time to time accordingly.

8.6.4 Therefore, the Review Group recommends as follows.

Recommendation: The Review Group recommends that the Minister should by regulation prescribe the manner in which the functions of the Competition Authority are to be exercised. In this context, consideration should be given to providing for a hearing officer who would not be a member of the Competition Authority, who would chair any oral hearings held by the Competition Authority (other than the panel hearings held as part of the elective procedure) and would resolve any procedural issues which might arise in the course of that hearing or in the course of any particular notification generally. Whether or not the concept of a hearing officer is adopted, consideration could also be given to providing for an informal right of appeal on procedural issues arising within a notification process (such as controversies as to the excision of confidential information from documents) from any ruling of the Competition Authority (or the hearing officer as the case may be) on such a point to an independent person to be drawn from an appointed panel of solicitors, barristers and economists experienced in competition law matters. The regulations should also deal with:

- (g) The extent to which all notifications require to be advertised;
- (h) The type of information to be supplied with notifications;
- (i) The rights of third parties to comment and the extent to which the information contained in the notification should be supplied to them;

- (j) The statement of objections procedure;
- (k) The circumstances in which an oral hearing may/should be held;
- (l) Fees for notifications.

8.7 Whether the Authority should be Obligated by Law to give Written Reasons for all of its Decisions

Interim Recommendation: The Competition Acts 1991-1996 should be amended as to require the Competition Authority to furnish written reasons for all of its decisions including the reasons for the refusal of any certificate or licence applied for. An express provision should be included that the Authority will not be deemed to be in breach of this obligation insofar as it may omit commercially sensitive information from its reasoned decisions subject to the other recommendation dealing with the determination of what may legitimately be regarded as sensitive commercial information whose publication may be withheld by the Competition Authority.

- 8.7.1 This recommendation also met with general approval, although the point was made that the Competition Authority does in fact give written reasons as a matter of practice. This is true and, indeed, the Review Group considers that a very significant contribution to competition law and practice and general public awareness of the issues involved has been made by the body of reasoned decisions which the Competition Authority has issued which are, for the most part, cogently argued and clearly written.
- 8.7.2 However, the Review Group considers that it is of some importance that the duty to give reasons should be enshrined in law, not merely to ensure that the practice adopted by the current Competition Authority members should continue into the future when the Competition Authority will be made up of different personnel, but also because the duty to give reasons is important in the context of the scope of appeal to the High Court under section 9 which is recommended by the Review Group. An appeal must, if it is to be a real appeal, be based on a set of reasons which are available to the appellant who can thus discern from the decision whether or not it is worth appealing and he must be able to have sufficient detail as to the reasons so that he can formulate his arguments in that respect.

8.7.3 Thus, in *The State (Creedon) -v- Criminal Injuries Compensation Tribunal*²⁴³ the Supreme Court stated:

*“Once the courts have a jurisdiction and if that jurisdiction is invoked, an obligation, to inquire into and, if necessary, correct the decisions and activities of a tribunal of this description, it would appear necessary for the proper carrying out of that jurisdiction that the courts should be able to ascertain the reasons why the Tribunal came to its determination. Apart from that I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi judicial nature.”*²⁴⁴

8.7.4 Similarly, in *International Fishing Vessels Limited -v- Minister for the Marine*²⁴⁵ Blayney J stated:

“It is common case that the Minister’s decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprived the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister’s decision might be quashed. As a result the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed.”

8.7.5 While it is true that not every administrative decision must be accompanied by a statement of reasons (in the absence of a statutory obligation to give reasons),

²⁴³ (1988) IR 51.

²⁴⁴ Page 55.

²⁴⁵ (1989) IR 149.

the principle appears to be as stated by Costello P in *McCormack -v- The Garda Síochána Complaints Board*:

*“If a statute permitted an appeal to the court from a decision of an administrative authority on a point of law, the failure to give reasons for a decision may well amount to a breach of a duty to apply fair procedures if it could be shown that their absence rendered ineffectual a statutory right of appeal.”*²⁴⁶

8.7.6 A more recent case involving a statutory obligation to give reasons is *Genmark Pharma Limited -v- The Minister for Health*.²⁴⁷ The Minister had refused to grant a product authorisation for a pharmaceutical product and had a statutory obligation (under the relevant directive) to give reasons in detail for this refusal. The Minister had based his decision on advice received from the National Drugs Advisory Board which advice and recommendations had not been made available to the Applicant who therefore had no opportunity to give its response thereto or to seek to persuade the Minister that the advice was wrong. In quashing the Minister’s decision, Carroll J stated:

“Another flaw in the decision process was the failure to disclose to Genmark the letter of the 6th of January 1994 which was not just a repeat of the letter of the 7th April 1993 sent to Genmark. The letter of the 6th January 1994 contained additional matters e.g. there is a reference to Pharmacokinetic Data, Dose Response Relationship, data on improved quality of life, data on side effects. It also says the dossier did not comply with national/EEC guidelines.

Genmark was entitled to know what were the final grounds put forward by the NDAB so that it could respond to them before the Minister made his decision. It is not enough to say that Genmark was aware of the main ground i.e. lack of randomised phase three clinical trials. It was entitled to be informed of all the grounds.

Genmark also complains that the respondent failed to give reasons for this decision. This is not just required by natural and constitutional justice, but it is specifically

²⁴⁶ (1997) 2 IR 489. See also *Maigueside Communications Limited -v- Independent Radio and Television Commission* High Court, Unreported, 18th July 1997; *Flood -v- Garda Síochána Complaints Board* (1997) 3 IR 321.

²⁴⁷ High Court, Unreported, 11th July 1997.

required by Directive 65/65. Article 12 requires a refusal to be notified stating in detail the reasons on which it was based. In my opinion, it was not sufficient for the Minister just to refer to regulations. Article 12 requires detailed reasons to be given. The regulations deal with generalities.”²⁴⁸

8.7.7 It is also noteworthy that Carroll J unequivocally held that there was a duty on the Minister to disclose the advice upon which the Minister was acting so as to permit Genmark to make appropriate responses thereto and representations to the Minister in relation thereto.

8.7.8 The Review Group considers that the point in this case where the statutory obligation was to give reasons “in detail” (as distinct from merely giving reasons) is important. The nature of the issues which fall to be resolved by the Competition Authority is complex and a true appreciation of the basis upon which the Competition Authority comes to its decision (which in turn may require the resolution of multiple issues) requires that detailed written reasons be given. The interim recommendation has been amended to make this point clear. The Review Group also considered that the reference in the interim recommendation to the other recommendation dealing with the determination of what may be regarded as sensitive commercial information (i.e. the previous recommendation) was a little unclear and the wording has been amended accordingly.

8.7.9 Accordingly, the Review Group recommends as follows.

Recommendation: The Competition Acts 1991-1996 should be amended so as to require the Competition Authority to furnish detailed written reasons for all of its decisions including the reasons for the refusal of any certificate or licence. An express provision should be included that the Authority will not be deemed to be in breach of this obligation insofar as it may omit commercially sensitive information from its reasoned decisions (where any dispute on what constitutes such information can be resolved by the informal appeal to an independent person referred to in the previous recommendation).

8.8 Whether the Applicant for a Certificate or a Licence should be able to Appeal Against the Refusal to Grant such a Certificate or a Licence

8.8.1 The Review Group's interim recommendation was as follows.

Interim recommendation: Section 9 of the Competition Act 1991 should be amended to permit a party who applies for a licence under section 4(2) or a certificate under section 4(4) of the Competition Act 1991 to appeal from such a decision to the High Court in the same way as an appeal can be brought against a decision of the Competition Authority to grant such a certificate or a licence.

8.8.2 This recommendation met with general approval and the Review Group accordingly puts it forward as a final recommendation, subject to a drafting change for clarity.

Recommendation: Section 9 of the Competition Act 1991 should be amended to permit a party who applies for and is refused a licence under section 4(2) or a certificate under section 4(4) of the Competition Act 1991 to appeal from such a decision to the High Court in the same way as an appeal can be brought against a decision of the Competition Authority to grant such a certificate or a licence. If the recommendation that it should be possible to apply for a certificate that a particular course of conduct is not in breach of Section 5 of the Competition Act 1991 is adopted, then a similar right of appeal against a refusal of such a certificate should lie to the High Court.

8.9 The Minister's Powers to Request the Competition Authority to Carry Out an Investigation or Study and to Order Divestiture

8.9.1 The Review Group's recommendation in this respect (made originally in its discussion paper on certain recommendations of the report of the Newspaper Commission, which discussion paper was published in February 1999) was as follows:

Interim recommendation: The Minister's power in section 14 to request the Competition Authority to carry out an investigation is confined to circumstances where the Minister forms the opinion that there is an abuse of a dominant position. It may be difficult for the Minister to form such an opinion in advance of the investigation to which the opinion is the necessary precondition. In addition, while section 11 of the Competition Act 1991 (as amended by section 8 of the Competition (Amendment) Act 1996) enables the Minister to request the Competition Authority to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services, there seems no reason in principle why section 14 should be couched in terms that are limited to an investigation of a possible abuse of a dominant position. In the Group's view, section 14 could be widened so as to expressly empower the Minister to request the Authority to carry out an investigation into any agreements, decisions or concerted practices which may contravene section 4 of the Competition Act 1991.

In either case, the Group considers that the necessary precondition to such a request by the Minister should not be the formation of an opinion by the Minister that there is a violation of section 4 or 5 (as the case may be), but that the Minister has reasonable grounds for believing that there may be a violation of section 4 or 5. This represents a lower level of confidence required of the Minister as to the existence of a violation of section 4 or 5 before requesting an investigation.

8.9.2 One submission to the Review Group supported this recommendation as it stood. Another submission suggested that consideration be given to deleting section 14 or merging it with section 11. Yet another submission thought the recommendation was pointless on the grounds that section 14 is concerned with the power of the Minister to order some adjustment of a dominant position (such as divestiture of assets) and that this type of power would have no relevance to an inquiry into a breach of section 4 the only consequence of which could be that the agreement is void. This latter criticism however misunderstands the purpose of the interim recommendation. The Minister at present has no power to request the Competition Authority to carry out an investigation into what may appear to be the Minister to be a breach of section 4.²⁴⁹ The point of the recommendation was that the Minister should be entitled to request the Competition Authority to investigate a possible breach of section 4. Of course, the outcome of any such report would not involve an adjustment of a dominant position and the Review Group recommendation did not suggest otherwise. The outcome, presumably, would be that if, having responded to the Minister's request, the Competition Authority was satisfied that there was a reasonable case that a breach of section 4 had occurred, it would take action by bringing proceedings against the appropriate parties in the High Court.

8.9.3 Insofar as it goes, the Review Group remains of the view that this is a sensible proposal. Indeed, given that the Review Group is recommending that the Minister cease to have any enforcement function in relation to the Competition Acts, it is difficult to see why she should not be entitled to request the Competition Authority to investigate a potential breach of section 4.

8.9.4 However, in its consideration of this issue, a different point of concern has occurred to the Review Group. As noted in the Review Group's discussion document on the newspaper commission, the power of the Minister under section 14(3)(b) to adjust a dominant position by a sale of assets or otherwise is a significant and dramatic power amounting to a power to order divestiture,

²⁴⁹ The Minister's power to request the Competition Authority to carry out a study under section 11 is in relation to any practice or method of competition affecting the supply and distribution

subject to the sanction of the Houses of the Oireachtas.²⁵⁰ There are at least two objections to the continuance of this power.

8.9.5 First, notwithstanding that it requires the sanction of both Houses of the Oireachtas, there must be at least a doubt over the constitutionality of such a provision. It can only be exercised where the Minister is, in effect, satisfied that there has been an abuse of a dominant position of sufficient seriousness as to warrant her “adjusting” that position. In effect, the Minister is required to come to the view that a breach of the Act has occurred and then imposes a sanction (having obtained the consent of both Houses of the Oireachtas), a sanction which may be far-reaching and dramatic in its consequences. Furthermore, since the 1996 Act, such a finding is, in effect, a finding that a criminal offence has been committed.

8.9.6 The constitutionality of this procedure seems highly doubtful. It is true that the requirement that the Oireachtas must consent provides an additional political safeguard against abuses. If, however, the Minister cannot properly be given such powers, then the fact that the legislative branch consents is, strictly speaking, irrelevant to the issue of whether this provision is constitutionally valid. But it is hard to see how the Minister could properly be given such powers. In effect, the Minister is required to determine whether a breach of the Act has occurred and, if so, whether divestiture is the appropriate remedy in respect of such a breach. It is hard to avoid the conclusion that the Minister has been thereby given judicial powers which ought properly be confined to the courts. Accordingly, it would seem that Section 14(3)(b) contravenes Article 34.1 of the Constitution in as much as it purports to assign to the Minister what is properly regarded in these circumstances as a judicial power, and the Review Group has been so advised.

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of goods or the provision of services which seems to contemplate a general study of a sector or an industry rather than a specific case.
Discussion Document on Newspaper Commission Recommendations, page 28.

8.9.7 Secondly, and even if the provision were not of dubious constitutionality, it is difficult to see why the Minister should retain this power in circumstances where the Competition Authority has the power to investigate such matters and then bring proceedings as it sees fit to remedy the situation. At the time the section 14 power was introduced, the Competition Authority had no enforcement function and it is arguable that once the 1996 Act was introduced, section 14 in its entirety ceased to be of any particular relevance. If the Competition Authority brings proceedings for a breach of Section 5 (abuse of a dominant position), the High Court has the power to grant relief by way of injunction.²⁵¹ In its Discussion Document on the Newspaper Commission recommendations, the Review Group pointed out that there might be some ambiguity as to whether the power to grant an injunction extended to a power to order divestiture and stated: “The court can grant relief by way of an injunction and while it may be that this seemingly conventional remedy is wide enough to encompass an adjustment of the dominant position by ordering divestiture, the Group is of the view that it may be desirable that such power be expressly given to the High Court.”²⁵² In that discussion document the Review Group raised the possibility that the remedy of divestiture might be confined to proceedings brought by the Competition Authority. The Group noted the alternative argument that “if divestiture is necessary to remedy the abuse of the dominant position, then to deny a private plaintiff such a remedy will be to deny him effective [vindication].”²⁵³ The Group considers that the latter viewpoint is correct. The Review Group thus considers that for the avoidance of doubt, the legislation should be amended to make clear that the court has the power to order divestiture by way of injunction as one of the possible responses to a finding of an abuse of a dominant position whether the plaintiff is the Competition Authority or a private plaintiff.

8.9.8 The Review Group thus considers that the preferable option is simply to repeal section 14 and make clear, in appropriate circumstances, that divestiture can be ordered by the court. If the Minister has any concerns about any individual

²⁵¹ Section 6(3)(a) of the Competition Act 1991.

²⁵² Discussion Document on Newspaper Recommendation pages 28-29.

²⁵³ Page 29

case which may involve a breach of either section 4 or section 5, she is as much at liberty as any person to communicate her concerns to the Competition Authority without the need for any specific statutory powers in that regard. The Review Group did consider a possible provision whereby if the Minister was to make such a request to the Competition Authority, the Authority would be obliged to act upon it i.e. to conduct an investigation. However, it seemed to the Review Group that to create such a duty might involve a potentially difficult interface between Government and the independence of the Competition Authority. For example, the question would arise as to who the Competition Authority would report to if it was under a duty to conduct an investigation at the request of the Minister. It might seem that the report would be made to the person who made the request - i.e. the Minister - but it would seem that the Minister could do little with the report other than send it back to the Competition Authority for action. This seems a curious and slightly pointless procedure. Instead, the Review Group thought it better to preserve the independence of the Competition Authority, to let the Minister make any request he or she wishes with regard to any form of investigation into any suspected breach of Section 4 or 5, and to then let the Competition Authority take such enforcement steps as it sees fit.

- 8.9.9 If section 14 is repealed, it will necessitate a consequent amendment of section 2(7)(a) of the 1996 Act insofar as that subparagraph provides that an undertaking which contravenes an order under section 14 is guilty of an offence. Certain other consequential amendments to section 2(7) of the 1996 Act will also be necessary where there are various references to section 14 of the 1991 Act. The detail of such amendments is a matter for the parliamentary draftsman. For example, the various provisions in section 2(7) of the 1996 Act which refer to section 14 of the 1991 Act will have to be recast so as to refer to orders under section 12(2) (as adapted by the 1991 Act) of the Mergers, Takeovers and Monopolies (Control) Act 1978.²⁵⁴

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See section 2(10) of the Competition (Amendment) Act 1996. A later recommendation made in this report is that of legislative consolidation. The point under discussion is a good example of the need for such consolidation. For example, section 14(11) of the 1991 Act repeals section 10 and 11 of the 1978 Act. There are various references in the 1978 Act to section 11 which references are (by virtue of section 14(7)) to be construed as references to section 14. If

8.9.10 Accordingly, the Review Group recommends as follows.

Recommendation: The Review Group recommends that section 14 of the Competition Act 1991 (the Minister's power to request the Competition Authority to carry out an investigation into an abuse of a dominant position and to subsequently require the adjustment of such dominant position subject to the sanction of the Houses of the Oireachtas) be repealed. Section 6(3) of the Competition Act 1991 should be amended to make clear that, in the event that the court finds that there has been an abuse of a dominant position, the court can make any order by way of injunction or otherwise that it sees fit with a view to bringing the abuse to an end including an order (a) prohibiting the continuance of the dominant position except on conditions specified in the order or (b) requiring the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or otherwise as the court may specify. The consequential impact on the Competition (Amendment) Act 1996 and the Mergers Take-overs and Monopolies (Control) Act 1978 should be addressed in the context of a legislative consolidation of the mergers and competition legislation.

section 14 itself is repealed in a manner whereby sections 10 and 11 of the 1978 Act remain repealed, then the references in the 1978 Act to section 11 of that Act become meaningless. This type of crossword puzzle interpretation of legislation has nothing to recommend it and can best be solved by legislative consolidation.

Chapter 9. Legislative Consolidation

- 9.1 Having drawn its conclusions, both as regards the competition and mergers aspects of its remit, the Group thought it appropriate to consider briefly the issue of legislative consolidation. In the context of mergers, the terms of reference of the Group specifically require the Group to consider this issue. The Group was asked to “review and make recommendations on mergers legislation” in the context of legislative consolidation. Obviously, in considering the Mergers and Take-overs (Control) Act, 1978 (“the 1978 Act”) in the light of legislative consolidation, it is logical to also view the Competition Acts, 1991 to 1996 (“the Competition Act”) in the same light.
- 9.2 Legislative consolidation, as a concept, is an inherently attractive one. The drawing together in one legislative instrument of a number of strands has clear advantages. Those to whom the law at issue is primarily directed find it easier to understand. Those whose job it is to advise and interpret legislation have their jobs made easier.

“A lack of transparency and accessibility seems to be the price to pay for an increase in refinement and justice in any legal system. Hence, the distance between the experts and bewildered citizens has grown and the legitimacy of the system has suffered. Seen in terms of democratic accountability, simplification indicates the intent to shape legislation in a more ‘citizen-centred’ manner to increase legitimacy through accessibility.”²⁵⁵

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Bieber and Amarelle, *Simplification of European Law* (1999) 5 Columbia Journal of European Law 15 and 16. See also Azzi, *Government Perspective: Better Law Making: The Experience and the View of the European Commission* (1998) 4 Columbia Journal of European Law 617. For an eloquent discussion of problems of codification and interpretation in common law, common civil law and hybrid jurisdictions such as Israel and Louisiana, see Herman, *The “Equity of the Statute” and Ratio Scripta: Legislative Interpretation among Legislative Agnostics and True Believers*, (1994) 69 Tulane Law Review 535.

In the particular context of competition legislation, the Group is conscious of the role played by the Competition Authority in advocating compliance with competition legislation. The function of the Competition Authority in this regard would doubtless be facilitated and be rendered even more effective if the legislation regulating the activities of the Competition Authority itself and, more generally, its powers and duties were to be provided for in a single instrument, capable of ready explanation.

9.3 In the field of mergers and of the Competition Acts, the case, to date, for legislative consolidation has not been particularly compelling. None of the submissions received by the Group has referred to any need to see mergers legislation or competition legislation, or both, drawn together in a single consolidating instrument. The 1978 Act, the Competition Act 1991 (“the 1991 Act”) and the Competition (Amendment) Act 1996 (“the 1996 Act”) are reasonably short. However, while the Acts can be navigated without enormous difficulty, there is a clear overlap between them. The 1978 Act has been amended by the 1991 Act and the 1996 Act. While the three Acts are not desperately crying out for consolidation, such consolidation could be carried out without enormous difficulty and would, in the view of the Group, have a significant positive impact.

9.4 Looking at the issue firstly from the view point of the 1978 Act, there would be a clear case for consolidation if the recommendations of the Group on mergers were to be acted upon. In effect, if its recommendations were to be acted upon, little would be left of the 1978 Act. On even a cursory examination, it is clear that the definition section of the 1978 Act would require to be radically overhauled, to take account of the fundamentally altered role to be played by the Competition Authority. While the provisions of the Act dealing with thresholds would continue to be of some relevance, nonetheless the heart of the Act, providing for the requirement of notification of proposed mergers to the Minister and for the possibility of reference, by the latter, of the notified merger to the Competition Authority, would be redundant. To the extent that the Group has recommended notification to the Competition Authority instead of

notification to the Minister, and has recommended the application, by the Competition Authority of a fresh test (the EU Mergers Regulation test) when assessing the acceptability of a proposed merger, and has further recommended the continued potential application of Section 5 of the 1991 Act in respect of sub-threshold mergers, there is a clear logic in seeking to amend the 1991 and 1996 Acts, in order to graft mergers onto them, rather than seeking to sew together the remaining entrails of the 1978 Act. The logic of so doing seems compelling, particularly in view of the fact that the 1978 Act has already been amended by the 1991 and 1996 Acts.

9.5 Obviously, the regime applicable to mergers under a restructured Competition Act would differ from the existing regime applicable to competition under the existing Competition Acts. There would, for example, be discrepancies between the forms of applications capable of being made to the Court. In the context of mergers, the judicial review mechanisms recommended by the Group would constitute the sole recourse to the Courts of parties involved in mergers procedure. By contrast, parties notifying potentially anti-competitive agreements to the authority would, in certain circumstances, be able to bring appeals pursuant to the mechanism provided for by Section 9 of the 1991 Act. While such procedural differences exist, there is nonetheless a certain overlap. The Group has recommended, in the context of mergers, that the fact of notification of a proposed merger should be published, as is already done in respect of notifications of anti-competitive agreements. Equally, it has made similar recommendations in the context of procedures, both in respect of mergers and competition matters.

9.6 The manner in which the mergers regime might be grafted onto the existing Competition Acts is a conundrum more properly requiring the specialist skills of the parliamentary draftsman. The opportunity could nonetheless be availed of to rationalise certain of the concepts currently specific to the 1978 Act and the 1991 Act respectively. Thus, a number of submissions made the point that the concept of “enterprise” for the purposes of the 1978 Act ought to be aligned with the concept of “undertaking” for the purposes of the 1991 Act. Clearly, if Section 5 of the 1991 Act is to apply to mergers, it makes no sense for there to

be a distinction between undertakings and enterprises. The only issue that will, of course, require to be addressed for the purposes of mergers is that of precluding individuals from being considered to be undertakings, and as may be the case pursuant to the 1991 Act.

9.7 In view of the above, there is clearly a strong case to be made for grafting mergers onto the competition regime. However, in view of the overhaul that this would require, and regard being had to the recommendations made elsewhere in this report in respect of the competition regime, it would seem appropriate to review the competition regime at the same time. One only has to look at the domino effect that repealing Section 14 of the Competition Act 1991 would have on both the 1978 Act and various provisions of the 1991 and 1996 Acts (as discussed in Section 8.10 above) to see that legislative consolidation becomes desirable almost to the point of necessity. The 1991 and 1996 Acts could therefore be rationalised by consolidating the applicable legislation in one statute.

9.8 In considering an overhaul of the competition regime, the potential impact of the Commission's White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty²⁵⁶ must of course be taken into account. As discussed elsewhere in this Report, if certain of the proposals set out by the Commission in its White Paper were to be mirrored in Irish law, such as by changing the current notification regime, then the existing Competition Acts would, in any event, require to be overhauled. However, as was indicated elsewhere, the earliest date upon which the White Paper is likely to be acted upon at European level is 2003. In the circumstances, there would seem to be little justification in postponing any proposals for consolidation consequent upon a decision to act on the recommendations in this report until such time as the White Paper recommendations are acted upon at European and then at domestic level.

²⁵⁶ OJC 365, November 26th, 1998, page 3

9.9 The Review Group therefore recommends as follows:

Recommendation: In the event of the recommendations set out in the Mergers chapter of this report being acted upon, it would be appropriate for the Competition Acts 1991 to 1996 to be amended in order to bring the regulation of mergers within the scope of a consolidated Competition and Mergers Act. In any event, if the proposals set out in the competition chapters of this report were to be acted upon, the opportunity should be taken to consolidate the 1991 and 1996 Acts at the same time.

Chapter 10 The Restrictive Practices (Groceries) Order 1987

10.1 Introduction

10.1.1 The interim recommendation made by the Review Group in its discussion paper published in December 1999 was as follows

Recommendation

(a) The Group as a whole recognised that a number of features of the Groceries Order as it currently stands are redundant as having been overtaken by the provisions of the Competition Acts, 1991-1996. To that extent, the Group as a whole agrees that the Groceries Order should be repealed but a number of members do not favour its repeal unless and until it is clear that it is going to be replaced by either legislation or regulations which would (i) include a ban on below cost selling and (ii) include at least a number of the so called fair trade provisions of the Groceries Order.

(b) A slim majority of the members of the Group are of the view that in any legislation or regulations which are introduced to replace the Groceries Order, a ban on below cost selling should not be introduced.

(c) Some of the members of the Group who favour retaining the ban on below cost selling stress the importance of some of the so called fair trade provisions of the Groceries Order and in particular stress the importance of the following provisions:

- The obligation on retailers to abide by suppliers' terms and conditions particularly in relation to credit;

- The ban on “hello money”.
- (d) At least some members of the Group who favour retaining the ban on below cost selling would regard the ban as less important if a provision were introduced which would prohibit retailers from restricting their offers to any specified class of customer so that if a retailer was selling products at below cost, other (perhaps smaller) retailers could purchase those products at that price from the larger retailer.
- (e) The Group therefore invites submission on a proposal that:
 - (i) the Groceries Order would be repealed;
 - (ii) any legislation or regulation introduced in relation to the grocery trade would not include a ban on below cost selling;
 - (iii) 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 are prepared to trade with them, would ban “hello money”, and would require retailers not to discriminate between classes of customers in respect of the products they sell.

10.1.2 Eighteen Submissions were received on the Group’s interim recommendation from the following persons/organisations:

- Superquinn;
- Competition Authority;
- Forfás;
- Director of Consumer Affairs;
- The Oireachtas Joint Committee on Enterprise and Small Business;
- Department of Agriculture and Food;
- IBEC Competition Council;
- Food and Drink Federation;
- The Soft Drinks Association;
- Small Firms Association;
- Clayton Love Distribution Limited;

- Vintners Federation of Ireland;
- BWG Limited;
- Musgrave Group;
- RGDATA;
- Green Isle Food Group Limited;
- Kathleen Walker; and
- David Molloy.

10.1.3 Of these submissions, only two (the Competition Authority and Superquinn) supported the Review Group's proposal to remove the ban on below invoice price selling. Three of the submissions (Forfás, the Director of Consumer Affairs and Kathleen Walker) did not express a definitive view one way or the other. The balance of the submissions were in favour of retaining the ban on below invoice price selling and retaining the principle so called "fair trade" provisions of the Groceries Order. The Review Group's interim recommendation did in fact recommend the retention of what are generally argued to be the two most important "fair trade" provisions i.e. the obligation on retailers to honour suppliers' credit terms and the ban on "hello money". The interim recommendation also proposed introducing a new provision which would require retailers not to discriminate between classes of customers in respect of the product which they sell. As explained in the Review Group's discussion document, this proposal was intended to address the concern that the removal of the ban might ultimately damage competition insofar as large retailers could use below invoice price promotions to drive smaller retailers out of business. The Review Group's interim recommendation was designed to ensure as far as possible that if a small retailer was adversely affected by a neighbouring large retailer engaged in heavy discounting of a particular line of products, then the small retailer would be able to obtain those products from the large retailer in question and thus preserve his market share of the sales of those products by being able to sell them at or near the discounted price offered by the large retailer. Very few of the observations received

commented on this proposal one way or the other.²⁵⁷ Instead, and as anticipated, the submissions primarily related to the debate about the removal of the ban on below invoice price selling. Perhaps inevitably, there was a large degree of overlap both between the submissions received subsequent to the publication of the discussion document in December 1999 and the submissions which the Review Group had received prior to the formulation of its interim recommendation.

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The Director of Consumer Affairs noted the necessity to ensure that any such provision was constitutional.

10.2 The Necessity for the Groceries Order in light of Competition Legislation

10.2.1 A number of the submissions received expressly argued that the Groceries Order fulfils certain policy objectives beyond the objectives of competition law. For example, it has been argued that the removal of the ban on below invoice price selling will adversely affect small retailers with consequent adverse impacts on employment, the quality of life in small rural communities, tourism (by virtue of the disappearance of attractive village shops) and so forth. The proposal referred to above whereby large supermarkets and other retail outlets could not refuse to sell their heavily discounted products to the local village shop keeper is in part a response to this type of concern. But this concern is not the principal ground upon which the supporters of the Groceries Order have made their arguments and in any event, such concerns, however valid they may be, do not form part of the perspective from which the Review Group analyses the Groceries Order which is to inquire as to whether the ban on below invoice price selling is a good or a bad thing for the effectiveness of competition generally.

10.2.2 Competition occurs very substantially through the mechanism of price competition although quality and service are also very important features of competition. Indeed, the opponents of the Groceries Order have submitted that one of the reasons why large multiples offering occasional deeply discounted promotions on certain lines will not adversely affect a variety of smaller retail outlets is precisely because such smaller outlets attract customers by virtue of their convenience, late opening hours and so forth i.e. that they do not set out to necessarily compete on price with large multiple outlets. Insofar as price competition itself is concerned, in ordinary circumstances, the entitlement of a seller to set the price of a product at such level as he sees fit is an essential precondition to the operation of price competition. To be restrained from doing so by the supplier who can set a minimum price below which the retailer may not sell the product does not seem to the majority of the Review Group to be justifiable unless it can be shown that the freedom to price certain products

below the supplier's invoice price is likely to lead to anti-competitive consequences to the detriment of the consumer and that competition law is inadequate to deal with any such anti-competitive consequences which may be argued to follow.

10.2.2 A number of the submissions to the Review Group in response to the Discussion Document addressed the relationship between the Groceries Order and the Competition Acts, 1991 - 1996. RGDATA's submission was representative of these arguments. In its submission, RGDATA contended that for a number of reasons competition law did not provide an adequate means of addressing issues arising in particular in the groceries sector. RGDATA gave the following reasons for this contention:

- (i) None of the major supermarket multiples are dominant in Ireland although they have significant market power which they can exercise in circumstances which are not covered by Section 5 of 1991 Act.
- (ii) The regime established by the Competition Acts places small businesses at a distinct disadvantage against larger businesses. In support of this proposition, RGDATA stated that two or more branches of the same supermarket multiple can combine their trading and promotional activities without engaging in conduct contrary to Section 4 of the 1991 Act (as amended) in circumstances where if two independently owned stores were to operate on the same basis they would fall foul of the provisions of Section 4.
- (iii) Competition law has too narrow a focus since it is grounded in economic theory. RGDATA submitted that competition law does not recognise other social and cultural issues associated with economic and business activity which it submits are sometimes of equal or greater importance in achieving "*an unfettered trading environment*".
- (iv) RGDATA submitted that many in the groceries sector believe that the Competition Authority has "*little appreciation of the realities of the*

dynamics and business risks involved in the competitive world of grocery retailing”.

- (v) RGDATA submitted that competition law does not take significant account of market power in assessing abusive behaviour on the part of a company which might only have, for example, a 20% share of the retail grocery market in Ireland but have significant market powers as a result of large scale operations in an adjoining market of the E.U.
- (vi) RGDATA submitted that many of those opposing the retention of the Groceries Order do not appreciate the nature of the relationship between the suppliers and retailers which it submits is not a relationship of equality. RGDATA submitted that suppliers do not have many competitive options and are usually not free to trade as they wish but are dependent on maintaining trade with a few retailers in a concentrated market for the bulk of their business.

10.2.3 In its submission in response to the Discussion Document, the Department of Agriculture and Food, while acknowledging that abolition of the Groceries Order might result in some short-term benefits to consumers, submitted that the Groceries Order should be retained in its entirety. One of the reasons put forward by the Department of Agriculture and Food was that under the Competition Acts, it was submitted action could only be taken “*after the event*”, in other words when a dominant position had been created.

10.2.4 IBEC submitted that even though the Groceries Order does restrict the retailer from selling below the supplier’s invoice price, this does not restrict price competition in any meaningful sense because selling below cost cannot be done indefinitely and businesses that sell below cost quickly cease to trade. IBEC argues that shoppers are attracted by offers of products substantially below cost but are unable to remember the prices of the vast majority of goods and are not able, therefore, to determine whether the prices of products, other than the well known products whose price reduction has been advertised, have or have not increased in price. It is submitted that the retailer will in fact put up the prices

of other products so that overall, the consumer will pay more for the basket of goods purchased. It is submitted that this type of loss leading is an unfair practice intended to deceive the consumer.

10.2.5 On the other side of the argument is the Competition Authority. In its submission in response to the Discussion Document, the Competition Authority welcomed and endorsed the Group's recommendation that the Groceries Order should be repealed. It submitted that there were many instances in which the provisions of the Groceries Order can operate at "*cross purposes*" with the Competition Acts. By way of example, the Authority submitted that the "*protection of sectoral interests rather than the interests of the consumer is in direct conflict with competition law*". The Authority further submitted that the Groceries Order may have the effect of "*detering legitimate competitive pricing behaviour rather than deterring prices that can be regarded as predatory as well as facilitating price fixing*". It further submitted that the Groceries Order "*may fail to tackle genuinely anti-competitive behaviour*" while preventing practices which are not anti-competitive and that these sorts of errors could have "*serious adverse effects on the sector and the economy in general*". In addition, the Authority contended that the Groceries Order has as "*its primary objective*" the protection of competitors rather than competition. It submitted that the ban on below invoice price selling could have the effect of applying dissimilar terms to equivalent transactions as a result of the non-uniform application of discounts which is something prohibited by Sections 4 and 5 of 1991 Act (as amended). It also submitted that the Groceries Order may have the effect of "*mistaking legitimate competitive behaviour from predatory behaviour*". The Authority further observed that activities such as retail price maintenance, price discrimination and the payment of "hello" money would be prohibited under the Competition Acts whenever they inhibit competition and therefore, to that extent, the Groceries Order is redundant. The Authority also pointed to the "*added administrative burden*" on businesses which have to comply with two different sets of rules where there is unnecessary duplication.

10.3 The Discriminatory Argument

10.3.1 A separate issue which arises is the argument that the increasing number of large multiple retail outlets which are either foreign owned or have substantial operations outside of Ireland enables them to source their products outside of Ireland and to then supply the product (from their own entity outside of Ireland) at such invoice price as they choose i.e. possibly below the “true” invoice price. It is argued that this type of “transfer” pricing enables foreign owned retailers or retailers with substantial foreign operations to effectively bypass the Groceries Order, something which Irish retailers without that foreign dimension to their business cannot do. It is thus argued that the Groceries Order is discriminatory against Irish retailers buying in Ireland.

10.3.2 In a report commissioned by Forfás on the Dynamics of Retail Sector in Ireland published in November 1999, there is a brief discussion of the Groceries Order summarising the arguments for and against the abolition of the order.²⁵⁸ The position is summarised in the Forfás report as follows:

“The key concern referred to by both retailers and suppliers is whether the Order can be applied in full in a retail environment that is becoming increasingly international and where transnational retailers operate businesses in a number of countries. In the traditional structure, where retailers were Irish based, where most suppliers were also Irish based and where many imported products were channelled through agents or distributors, the policing of pricing arrangements, selling practices and payment arrangements could be carried out with relative ease and relative completeness. This is no longer the case.

With regard to “hello” money the view within the industry is that as multinational retailers have an international supply base, it is possible for supply arrangements to be negotiated outside Ireland. It is therefore possible for arrangements which are illegal in Ireland but which are not illegal in other jurisdictions, to be negotiated, in respect of supplies to Ireland, in other countries. Thus, for example, a supplier

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See pages 116-117 of the Forfás report.

based in continental Europe could agree terms of supplying Irish stores with the retailer's buying department in another European country. Hence, product pricing arrangements and "hello" money practices could be agreed in another jurisdiction by other suppliers for supply into the Irish market.

The order may have limited benefits given the powers of the Competition Authority to act as described and the difficulty in policing activities outside Ireland although the Office of the Director of Consumer Affairs is satisfied with its ability to police the Order. Primary legislation may be required to better deal with the issue of below cost selling. A harmonised regulatory approach across the EU in respect of the payment of "hello" money would be of considerable benefit by increasing the transparency in the purchasing practices of retailers in international markets. The development of a harmonised approach on this issue should be actively promoted by Ireland at EU level."

- 10.3.3 The contrary argument is that there is nothing in the Groceries Order itself which distinguishes between Irish owned retailers and foreign owned retailers and that the Order (or any re-enacted version of the Order) should be capable of covering the invoice price of the real supplier. In other words, the relevant invoice price should be the price from the supplier who is outside the retail group which is selling in Ireland. In any event, it is argued that even if the system can be open to an element of evasion by certain retailers, that in itself should not provide a ground for abolishing the ban on below invoice cost selling if the arguments in principle in favour of such a ban are correct.

10.4 Conclusion

- 10.4.1 The members of the Review Group remain deeply divided on this issue. The arguments that certain positive benefits have flowed from the Groceries Order or that certain adverse affects will flow from the repeal of the Groceries Order cannot be definitively resolved on the basis of the available evidence because the evidence is incomplete and there are a variety of difficulties, referred to in the Discussion Document, on proving the causal relationship between the

presence or absence of the Groceries Order and a variety of consequences which are postulated.²⁵⁹

10.4.2 From the perspective of the effectiveness of competition law, the question is whether or not the ban on below invoice price selling and the consequent restriction on the retailer's ability to heavily discount prices affects competition to the detriment of the consumer. That it does affect competition seems common case between both sides of the argument. But the question is whether this interference in competition is good or bad for the consumer in the long run. To put it another way, the proponents of the ban argue that the ban does no more than promote "fair" competition and that while it interferes with the free play of market forces in a literal sense, that is no bad thing if the free play of market forces results in an adverse consequence for the consumer.

10.4.3 The critical issue therefore is how it is alleged that the consumer is protected by the ban or harmed by its removal. Ultimately, the argument rests on one's view of the ability of the consumer to understand what is going on and whether the consumer will be duped by what is argued to be the device or stratagem of a heavily discounted below invoice price promotion which is more than compensated for by price increases across a range of other goods in the store where the consumer cannot realistically know or understand that he or she is being charged higher prices by that store. The average supermarket carries 14,000-15,000 lines and it is argued that the capacity of the retailer to strategically price goods using loss leaders in order to optimise the profit margin in the basket is enormously more powerful than the capacity of the consumer to track prices. Thus, it is suggested that the removal of the ban

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The Competition Authority, in its submission, cited a study conducted by the Department of Food and Science in University College Cork, which sought to examine the impact of the ban on below cost selling on retail performance in Ireland. Collins and Oustapissidis *Below Cost Legislation and Retail Performance*, Agribusiness Discussion Paper No. 15; Department of Food Economics Discussion Paper Series; University College Cork (1997). This study had also been available to DKM in preparing their report for the Review Group. The UCC study found evidence to support a positive relationship between the ban on below cost selling and retail gross margins. The authors comment that there was no evidence to suggest that the category of foods studied "*was the focus of below cost selling by retailers, indicating that the ban may have resulted in increased margins across the board.*" However, so far as the Review Group is aware, this study is still at the stage of a discussion paper subject to peer

will only enhance the ability of large retailers to mislead consumers as to “perceived value”. It is argued that the retention of the ban is vital from the point of view of preserving competition for the long term benefit of consumers.

10.4.4 The contrary argument is twofold. First, while acknowledging the force of the point that the number of products is such that most consumers will not know or remember the prices of individual products²⁶⁰, it is argued that consumers nonetheless will know and will be keenly aware of the overall cost of the basket of goods which make up their stable purchases each week. The importance of the cost of the sort of grocery products which are covered by the Order is relatively greater the lower one’s income i.e. the price sensitivity of consumers increases the greater the proportion the expenditure on the shopping basket represents of the consumer’s disposable income. It is argued that it is too dismissive of consumers to presume that they will not notice if the bill for their shopping basket in the new supermarket to which they have been attracted by some deeply discounted price promotion is in fact greater than what they are accustomed to pay for the same basket in their normal supermarket or grocery outlet. Secondly, it is argued that the argument based on misleading consumers overlooks the likely competitive response of other competition supermarkets. If customers are indeed lured away from supermarkets A and B to supermarket C by some enormously attractive price promotion in supermarket C, it is argued that supermarkets A and B will respond by some other promotion which deeply discounts some other alternative but equally attractive product (or perhaps even the same product). It is argued that for so long as no one supermarket is in a dominant position, the force of competition between the supermarkets themselves will ultimately prevent an adverse consequence for the consumer even if in individual cases the prices of some goods are increased to compensate for the losses on a deeply discounted price promotion.

review and it seems appropriate that the results must, at this stage, be treated with caution until such time as the authors finalise their work.
Particularly where they are bar-coded rather than individually priced on the product itself.

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- 10.4.5 By its nature, this type of argument is one that is not possible to resolve in an entirely conclusive fashion. There is undoubtedly force in the submission that consumers do not really know the prices of individual products and can be misled accordingly. However, the majority of the Review Group took particular account of the fact that the Review Group had commissioned an independent study on the issue which recommended against the ban on below invoice price selling. The majority view was that they would require persuasive reasons to make a recommendation contrary to the result of the independent study and that in all the circumstances, the arguments favouring the ban on below invoice price selling were not sufficiently persuasive. In particular, the majority felt that whatever imperfections there undoubtedly are in the ability of consumers to perceive prices, the remedy for that should lie in improved consumer information rather than in retaining the ban on below invoice price selling. For example, the rapidly increasing use of the Internet is, in the majority view, likely to lead to a significantly enhanced ability on the part of consumers to check prices and to shop in a discriminatory fashion as between various retail outlets. The majority were of the opinion that the level of competition between the retail outlets themselves will largely protect consumer interests in the absence of collusive behaviour which would be contrary to section 4 of the Competition Act 1991.
- 10.4.6 An issue arises as to whether any one retail group in the grocery trade occupies a dominant position in the Irish market at present. If so, then depending upon the purpose and effect of the use by any such dominant undertaking of the strategy of below cost selling, such a strategy may be attacked as an abuse of a dominant position if below cost selling has the adverse consequences for consumers and suppliers (and perhaps other small retailers) that are contended for.
- 10.4.7 If a given supermarket chain is not in a dominant position, the question of attacking any supermarket behaviour on the basis of a breach of section 5 of the Competition Act 1991 does not arise on the conventional analysis of section 5. It should however be noted that there is a developing concept of “collective dominance” evolving in Community case law in relation to Article

82 to the effect that the market structure may be such that two or more independent firms, none of which individually occupy a dominant position, may be regarded as occupying a collective dominant position. Thus, in *Societa Italiano Vetro*²⁶¹ the European Court of First Instance stated:

*“There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by some economic links that, by virtue of that fact, together they hold a dominant position vis a vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.”*²⁶²

10.4.8 Since section 5 refers to an abuse “by one or more undertakings” in exactly the same language as Article 81, the basis for the concept of collective dominance (that the language assumes that there may be instances of collective dominance by two or more independent undertakings) applies equally to section 5 as to Article 81. Obviously, it is not possible to say in the abstract whether or not two or more large supermarket multiples in the Irish market would fall within the concept of collective dominance. Furthermore, the particular sort of links referred to in the above extract may not be present as between Irish supermarket chains. However, the concept of collective dominance is an evolving concept. Furthermore, the concept of dominance itself is not subject to rigid definition and it may be legitimate, when analysing market power, to take account of the fact that, say, a retail chain which has a given percentage of the Irish retail grocery market may be owned by an organisation whose turnover may be a multiple of the value of the entire Irish grocery market and has significant buying power.²⁶³ The Review Group merely draws attention to the concept and the possibility that insofar as it transpires that supermarket multiples do use below invoice price or below cost

²⁶¹ (1992) II ECR 1403.

²⁶² Paragraph 358.

²⁶³ For example, an issue may arise as to whether the buying power of retailers places suppliers in a position of economic dependency or whether it means that retailers are in a dominant position in the market for the purchase of grocery products.

selling as a technique which has adverse consequences for consumers, there may be a remedy through the concept of collective dominance. The majority of the Review Group does not however rest its recommendation on this point.

10.4.9 The majority were also of the view that the interim recommendation which involves retaining the ban on hello money and the requirement on retailers to honour suppliers' credit terms allied to the suggestion that retailers be prohibited from discriminating between classes of customers in respect of the product which they sell are worthwhile provisions which should be adopted. For the avoidance of misunderstanding, the final recommendation has been slightly modified to make clear that the reference to the requirement on retailers to honour suppliers' credit terms is intended to incorporate the existing provisions of the Groceries Order in that respect i.e. that suppliers would publish the terms upon which they are prepared to trade with all retailers and that it is those terms which the individual retailer would have to honour.

10.4.10 One submission suggested that there should be an exhaustive study and survey of suppliers and retailers trading in Ireland allied to an international study of the economics and practices of supermarket retailers. Such a study, however desirable, is beyond both the terms of reference and the resources of the Review Group. There is no doubt that those who have a concern that there is an imbalance in the Irish grocery market hold that view with deep conviction and it may be a matter which deserves study elsewhere. From the viewpoint of the ban on below cost selling however, the majority view was that despite the obviously strong purchasing power of major retailers vis a vis producers, insofar as consumer interests are concerned the fact that there is very considerable competition between the major retail outlets is to the benefit of the consumer and that insofar as the ban on below invoice price selling has any effect, it is more probable than not that its removal will enhance the pace and intensity of competition between the major retail outlets.

10.4.11 Despite the view which the majority of the Review Group have thus taken, it is right to record that the members of the Review Group were conscious of the

force of the argument that there may be a significant imbalance between the respective powers of large retailers on the one hand and suppliers, particularly Irish suppliers, on the other hand²⁶⁴. Large retailers have enormous purchasing power even if they are in closely fought competition with each other. Their purchasing power is such however that they do appear to have a significant ability to dictate terms to suppliers. Whether or not it is a sectoral interest argument, the reality may be that a producer will be adversely affected if a particular retail outlet very deeply discounts the price of a particular product because other competing retail outlets, rather than hand the discounter the advertising advantage of comparing the discounted price with the price in other stores, will simply cease to stock the line in question for so long as the discount promotion remains in operation. It is thus argued that the producer will find that his sales of that particular product drop considerably.²⁶⁵ However, even if this be so, the majority of the Review Group do not see that this has an adverse effect on competition as such as distinct from the suppliers in question.

10.4.12 It is not within the remit of the Review Group to analyse or come to more general conclusions on the grocery trade as a whole. However, it is worth drawing attention to the fact that on the 21st of April 1999, the UK Director General of Fair Trading in the United Kingdom asked the UK Competition Commission to enquire into the supply of groceries from multiple stores in the United Kingdom. This reference followed an eight month enquiry by the Office of Fair Trading which looked at the profit levels of the four largest supermarket chains in the United Kingdom - Tesco, Sainsbury, Safeway and Asdac. The Commission was primarily interested in the so called “one stop shop” pattern of grocery shopping in which consumers can buy most or all of their weekly grocery requirements in a single visit to a supermarket. In this context, the Commission looked at competition issues (especially local market concentration and barriers to entry), pricing and relations with suppliers. On

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The Review Group has also noted that the major retail outlets have increasingly sophisticated ways of tracking consumer preferences through the sort of technology involved in loyalty cards and matters of that sort

the 22nd of February 2000 the commission issued what it termed a “remedies statement” in which it set out hypothetical remedies to the problems which it had identified and invited views on these hypothetical remedies.

10.4.13 The primary competition issue raised by the Commission was whether there are a significant number of localities in which one or two supermarket chains have a high market share, such that consumers might face insufficient choice, or the supermarkets concerned face insufficient competition. The sort of remedies contemplated include restrictions on new investment, either in new stores or extensions, by supermarkets in locations where the market share criterion was exceeded; divestment of any land holdings in such locations, in order to facilitate entry or expansion by other supermarkets; divestment of stores where the criterion was breached, to reduce or to eliminate any excessive concentration identified and so forth.

10.4.14 The main pricing issues identified by the Commission were whether price competition is excessively concentrated on a relatively small number of frequently purchased items, and at stores which face the most local competition; whether suppliers’ price changes are passed through to consumers rapidly enough; and whether prices sufficiently reflect the costs of different products. Among the possible solutions to these problems (if they are found to exist) are measures to increase the transparency of pricing. Thus the Competition Commission comments:

“This might include: improvement in the presentation of price information on supermarket shelves, in particular for products where the price is less well known to customers or which are rarely if ever the subject of promotions; and increasing the ability of consumers (or other interested parties on behalf of consumers) to make easy comparisons between the prices of different supermarkets through a requirement that the companies publish all current retail prices on the Internet.”

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Of course, this conclusion does presume that the competing retail outlets do not match the discount on the particular product and that they will choose to respond by discounting some other product.

As regards more direct interference with the pricing, the Commission states that it:

*“does not currently envisage any remedies which would interfere with companies’ decisions on whether to adopt national pricing strategies or not.”*²⁶⁶

10.4.15 However, the Commission has invited comments on whether price differences between stores should be broadly related to costs and whether, if persistent selling at a loss threatens to damage the supply base of the products involved, or results in higher prices to consumers for other products (to finance the losses incurred), this practice might be prohibited. Finally, the Commission has invited comments on the possibility of drawing up a code of practice governing relationships between suppliers and retailers to ensure that any supermarket found to have exploited excessive buyer power should no longer do so and it sets out a possible list of elements which would be contained in such a code. It comments that “in a properly functioning market, competition should ensure that these conditions are normally met.”²⁶⁷

10.4.16 Finally, if, contrary to the majority recommendation, the ban on below invoice price selling were to be retained, some of those who argue for its retention also argue that any re-enactment of it should replace the concept of below invoice price selling with a concept of below cost selling where cost would be defined as the material cost of the product in question (i.e. excluding a consideration of overhead costs) and also that the definition of grocery products should be substantially expanded. For example, the Director of Consumer Affairs has observed to the Review Group that while the Office of the Director of Consumer Affairs has a fairly high rate of success in prosecutions under other legislation, prosecutions under the Groceries Order almost invariably fail. The main reason, it is suggested, is that the goods in question do not come within the definition of grocery goods. Thus a prosecution regarding sausages was lost on the basis that sausages constituted fresh meat and were thus outside the scope of the Order. Similarly, another case failed because health foods were held to be specialist items and not

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Remedies Statement, page 2.

grocery goods. The Director has also referred to the prosecution she brought last year against Superquinn and Retail Logistics Limited for breach of Article 18 of the Order (“hello money”) which was resolved through the giving of certain undertakings. The Director has noted that it was interesting that the complaint which initiated the investigation came from a supplier i.e. that it was the supplier who was looking for protection.²⁶⁸ The point being made by the Director of Consumer Affairs is to show that having a particular piece of legislation on the statute books is not necessarily the whole solution and that over time, the balance of power may shift from one side to another which may cause the rationale for the legislative measure to be questioned.

10.4.17 The majority recommendation of the Review Group is as follows:

Recommendation

The majority of the Review Group recommends that:

- (i) The Groceries Order be repealed;
- (ii) Any legislation or regulation introduced in relation to the Grocery trade should not include a ban on below cost selling;
- (iii) Some form of regulation be introduced in relation to the grocery trade which would in particular require suppliers to publish the terms on which they are prepared to trade with retailers, would require retailers to honour the credit terms on which suppliers are prepared to trade with them, would ban “hello money”, and would require retailers not to discriminate between classes of customers in respect of the products which they sell.

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Remedies Statement, page3.

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The Director points out that one interpretation of the requirement of the Groceries Order that suppliers must publish their terms of supply etc. is to protect retailers against the practices of suppliers. Others argue this is not the intent of the Groceries Order.

The Relationship between National and Community Competition Law

1. **Recommendation:** The Competition Acts 1991-1996 should be amended so as to empower the Competition Authority to apply any rules of Community law which form part of Community competition law insofar as such rules, as a matter of Community law, may be applied by a national authority.

2. **Recommendation:** The Review Group is of the view that it is premature to attempt to anticipate the ultimate form which the White Paper proposals may take and it is still less useful to attempt to formulate with any precision the appropriate national legislative response. The purpose of this recommendation is merely to indicate the sort of issues which the Review Group considers will be among the relevant issues to consider at the time. If the European Commission replaces Regulation 17 to give effect to the type of decentralised directly applicable system contemplated by the Commission's White Paper on the Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty and if it requires Member States to empower national competition authorities to apply Community law, the following matters will need to be discussed.
 - (a) Consideration should be given to constituting the Competition Authority as an adjudicatory body to hear and adjudicate upon complaints of a breach of Sections 4 and 5 of the Competition Act 1991 (as amended) and/or Articles 81 and 82 of the EC Treaty, within constitutional limits.

 - (b) In that context, and with a view to ensuring that breaches of national and Community Law can be dealt with in a common procedure, and having

regard to the constitutional limitations in entrusting an adjudicatory function in respect of national law to the Competition Authority, consideration should be given to the replacement of criminal sanctions with a system whereby the Competition Authority would recommend fines which would however be finally determined by the court. In that context, the function of the enforcement of competition law should be entrusted to a Director of Competition Law Enforcement, who would be entirely independent of the Competition Authority.

- (c) Consideration should be given to an alternative model of confining the adjudicatory function of the Competition Authority to ascertaining the facts, to be embodied in a report to be transmitted to the High Court, which would then decide upon the issue of whether any breach of the legislation had occurred and the consequences thereof.
- (d) If the Competition Authority can be satisfactorily reconstituted as an adjudicatory body in respect of national competition law consideration should be given to abolishing the existing function of the Competition Authority in granting licences under Section 4 of the Competition Act 1991 to the extent and in accordance with changes made to the notification/exemption system currently operative under Regulation 17 at Community level.

3. **Recommendation:**

- (a) The Competition Acts 1991-1996 should be amended to provide that any agreement, decision or concerted practice which might otherwise constitute a breach of Section 4(1) would not be in breach of Section 4(1) if the agreement, decision or concerted practice in question came within the terms and conditions of any individual exemption which might be granted by the European Commission pursuant to Article 81(3) and that such an agreement, decision or concerted practice (as the case may be) need not be notified to the Competition Authority for so

long as the Commission exemption in question remains in force and effect; provided however that the Competition Authority should be given express power to serve a notice on the parties to the agreement the subject of the individual exemption to the effect that the Competition Authority does not necessarily consider that the agreement satisfies the criteria for a licence set out in Section 4(2) of the Competition Act 1991. If the Competition Authority should serve such a notice on the parties on the agreement in question, then from the date of service of such notice the agreement would not enjoy any presumption that it was in conformity with the criteria set out in Section 4(2). Nothing in this recommendation is intended to prohibit the Competition Authority or a court from taking account of the fact that the agreement in question benefits from an individual exemption at Community level.

- (b) Where there is or has been in force an individual exemption pursuant to Article 81(3) of the Treaty in relation to any agreement, decision or concerted practice and such exemption remains in force, a claimant would not be entitled to damages for any alleged breach of Section 4(1) of the Competition Act 1991 for any period when the exemption in question was in force and applicable to the agreement, decision or concerted practice in question save that in the event of the Competition Authority serving a notice as referred to in paragraph (a) above such immunity from damages would exist only for the period up to the date of service of such a notice.
- (c) Insofar as any agreement, decision or concerted practice might appear to benefit from any block exemption which might be granted by the European Commission pursuant to Article 81(3) or otherwise, such agreement, decision or concerted practice would not on that account only be presumed to be in conformity with Section 4(1). Nothing in this recommendation is intended to prevent the Competition Authority or a court from taking account of the fact that the agreement in question benefits from a block exemption at Community level.

4. **Recommendation:** The Competition Act 1991 should be amended so as to enable the Competition Authority to certify that in its opinion, on the basis of the facts in its possession, any specified course of conduct, agreement or transaction (whether actual or proposed) does not offend against Section 5(1). It should further be provided that such a certificate may only be issued on application to the Competition Authority by one or more of the parties who has entered into or is proposing to enter into the course of conduct, agreement or transaction in question.

5. **Recommendation:** The EC (Rules on Competition) Regulations 1993 (Statutory Instrument No.142 of 1993) should be amended so as to provide that the Competition Authority (rather than the Minister) shall be the competent authority for the purpose of Council Regulations 17/62 and that both the Competition Authority and the Minister should jointly be the competent authority for the purposes of Council Regulation 4064/89.

The Enforcement of Competition Law

6. **Recommendation:** The Review Group recommends that
 - (a) breaches of the Competition Acts 1991-1996 should continue to be criminal offences
 - (b) the Director of Public Prosecutions should have available to him whatever resources and expertise are necessary for the efficient prosecution of such offences; and
 - (c) the Competition Authority should adopt a general policy that if it is considering a criminal prosecution against one or more persons or is considering referring the matter to the Director of Public Prosecutions

with a view to a prosecution on indictment, the Competition Authority should not commence any civil proceedings against the parties concerned until such time as it either decides that criminal proceedings are not appropriate or until the criminal proceedings are finally determined, save in exceptional circumstances.

7. **Recommendation:** The Review Group recommends that the Competition Acts be amended to incorporate the following provisions:

- (a) The Chairman of the Competition Authority shall have responsibility for co-ordinating and directing the overall work and operation of the Competition Authority and shall have executive responsibility for the staff of the Competition Authority.
- (b) The role and function of the Director of Competition Enforcement (“the Director”) shall be as follows:
 - (i) The Director shall be an officer of, and shall be appointed by, the Competition Authority but shall not be a member of the Authority.
 - (ii) The Director shall carry out investigations into possible breaches of the Competition Acts whether on foot of complaints made to the Competition Authority or at the request of the Competition Authority or on his own initiative.
 - (iii) The Director shall have available to him for this purpose staff members who shall work exclusively on the investigation and enforcement side of the Competition Authority’s work.
 - (iv) Save in relation to offering persons the option of the elective hearing procedure set out in paragraph (d) below, the Director shall report to the Chairman of the Competition Authority in

relation to his investigations and shall recommend what action, if any, he considers should be taken including civil or criminal proceedings or referring the matter to the Director of Public Prosecutions.

- (v) In cases where the Competition Authority decides to bring civil proceedings in court or to prosecute summary offences in court, the Director shall have responsibility for the day to day conduct of such proceedings subject to the direction of the Competition Authority.
 - (vi) In the case of an elective hearing, the Director shall act in the role of complainant before the Competition Authority.
- (c) On receipt of a report from the Director, the Chairman shall circulate the Director's report to all other members of the Competition Authority and the Competition Authority shall then decide on what action, if any, should be taken.
- (d) If the Director forms the view that there is sufficient evidence available to him to warrant making a case against any person or persons that they have been guilty of a breach of any provision of the Competition Acts, he may, in lieu of making a report to the Chairman of the Competition Authority, adopt a procedure ("the elective hearing procedure") which shall be as follows:
- (i) The Director shall notify the parties concerned that he is of the view that there may have been a breach of the Competition Acts and that he proposes to recommend to the Competition Authority that criminal proceedings be taken by the Competition Authority against the parties concerned unless each of the parties concerned request him in writing within twenty-one days that the matter be heard before the Competition Authority.

- (ii) On so notifying the parties the Director shall specify in detail and with particularity the allegations against the parties, the level of fine he proposes to seek if the parties opt for the elective hearing procedure and the form of action he proposes to recommend to the Competition Authority if the parties do not request a hearing before the Competition Authority.
- (iii) If each of the parties so request, the Director, within the twenty one day period referred to above, shall inform the Chairman of the Competition Authority accordingly and the Chairman shall then select no less than three members (“the panel”) of the Competition Authority to hear the matter. For this purpose, the Chairman may request the Minister to appoint temporary members to the Competition Authority (such as experienced litigation lawyers) and the Minister shall, so far as possible, accede to such request.
- (iv) The Director shall act as complainant in the hearing before the panel and may retain solicitor and counsel for this purpose. The parties shall be entitled to be likewise represented. The hearing of the panel shall be in camera unless all the parties otherwise consent. The Director shall furnish to the parties well in advance of the hearing all documents available to him and statements of all witnesses in relation to the matter save for legally privileged documents. Disputes about privilege shall be decided by summary application to the court. Evidence may be put before the panel by way of affidavit evidence or oral evidence or both as each party shall decide. Any such deponent or witness giving oral evidence may be cross examined by any of the other parties. Evidence shall be admissible in accordance with the ordinary rules governing the admissibility of evidence in criminal proceedings save that the recommendations in this report for the amendment of such

rules of evidence shall be adopted and applied by the panel. The panel shall not have any power to order the parties to the proceedings before it to make discovery of documents without prejudice to the right of any party to put any document in evidence.

- (v) The standard of proof shall be the criminal standard of proof. The orders which the panel may make on foot of any findings of any breach of the Competition Acts shall be limited to ordering the relevant parties to pay such fines as may be specified by the Competition Authority in its decision which fine shall not exceed the limits which may exist from time to time in the legislation for convictions on indictment in relation to the matters where the Competition Authority finds that there has been a breach of the Competition Acts.
- (vi) Following such hearing, the panel shall give a written reasoned decision within a time limit to be announced by the panel at the end of the hearing. In the event of the panel deciding that one or more of the parties before it should pay a fine, the decision shall specify the amount of the fine and the period within which the fine is to be paid which period shall be not less than twenty eight days.
- (vii) If the person concerned pays to the Competition Authority the amount of the fine imposed within the specified time or within such further time as may be agreed with the Competition Authority, or if the person concerned is found by the Panel to be innocent of the allegations, then the Competition Authority shall not thereafter be entitled to bring any criminal prosecution against the persons who have thus paid the fine in respect of the matters the subject of the hearing before the Competition Authority or have been found to be innocent (as the case may be) and the Competition Authority shall not be

entitled to refer such matters to the Director of Public Prosecutions and the Director of Public Prosecutions shall not be entitled to bring any prosecution in relation to such matters. However, the Competition Authority shall still be entitled to bring civil proceedings against the persons concerned for an injunction to restrain any breach of the Competition actions. Such civil proceedings shall be brought by the Competition Authority in the normal way provided however that a document purporting to be a copy of the decision of the panel of the Competition Authority shall be admissible in any civil proceedings as evidence (a) of the facts set out therein without further proof unless the contrary is shown and (b) of the opinion of the panel of the Competition Authority in relation to any matter contained in the report.

- (viii) If any party to an elective hearing who is ordered by virtue of a decision of the panel of the Competition Authority to pay a fine within a specified period (or within such other period as may be agreed with the Competition Authority) fails to pay such fine, then without prejudice to the Competition Authority's entitlement to bring any civil proceedings for an injunction as referred to above, the Competition Authority shall be entitled to bring a criminal prosecution against the persons concerned, whether by way of summary proceedings or by way of proceedings on indictment. The Competition Authority shall only have power to bring proceedings on indictment in these circumstances and in all other cases, that power shall remain with the Director of Public Prosecutions. The decision of the Competition Authority shall not be admissible in any criminal proceedings for breach of the Competition Acts.
- (ix) In the event of further breaches of the Competition Acts, the fact that similar type actions or behaviour were the subject of an elective hearing shall not be a bar to the Competition

Authority taking civil proceedings or commencing a summary prosecution or referring the matter to the Director of Public Prosecutions in relation to alleged breaches of the Competition Acts which post-date alleged breaches which had been the subject matter of an alleged hearing.

- (x) Notwithstanding that the proceedings before the panel of the Competition Authority may be heard in camera, the Competition Authority shall be entitled to publish its written decision but it shall excise from its judgment any figures or information which are in the nature of business secrets or sensitive commercial information unless the parties otherwise consent provided however that the Competition Authority shall not be entitled to publish its written decision or make known its contents for so long as the Competition Authority or the DPP are considering a criminal prosecution or until after any criminal prosecution has been finally determined.
- (e) Any criminal prosecution on indictment for a breach of the Competition Acts should be returnable before the Central Criminal Court.
- (f) The existing power of the Minister to bring summary proceedings for offences under the Competition Acts should be abolished. By a majority, the Review Group considers that breaches of the Competition Act should continue to be capable of summary prosecution.

8. Recommendation:

- (1) By a majority the Review Group recommends that powers of arrest and detention be extended to competition law offences but that the arresting officer should have approval for the arrest from an officer not below the rank of Superintendent.

- (2) The Review Group recommends that amendments be made to the rules governing the admission of documentary evidence and the inferences to be drawn from such documents in the context of civil or criminal proceedings for breaches of the Competition Acts. In particular, the Review Group recommends;
- (a) That a statutory presumption be introduced that a document, which on the face of it purports to have been written by a person, or purports, on the face of it, to have been written by a person to a person, was in fact written by and sent by the person who appeared to have written it and was received by the person to whom it was addressed and that the statements in the documents in question be deemed admissions that the statements in question were made and received by the apparent author and recipient of the document respectively, which presumption would be rebuttable;
 - (b) That a statutory presumption be introduced that documents which are retrieved from an electronic storage system, which is proved to have been ordinarily used by a person in the course of his or her business were, until the contrary is proved, generated by or authored by such a person;
 - (c) That a statement made in such a document shall be admissible by the person who is proved or presumed to have created or drawn up such document or (where relevant in the context) who has received such a document whether in written, mechanical or electronic form;
 - (d) That the provisions with respect to expert evidence contained in section 4 of the Competition (Amendment) Act 1996 should be extended to civil proceedings for the avoidance of doubt; and

- (e) That greater consideration should be given to the use of court appointed assessors in the conduct of competition law cases (whether civil or criminal).

9. Recommendation:

- (a) Before applying for a search warrant, an authorised officer of the Competition Authority must have a reasonable suspicion that a crime has been or is about to be committed and must put enough evidence before the District Judge on foot of which the District Judge can properly be satisfied, on the basis of the information provided by the authorised officer, that, viewed objectively, the cause or ground relied upon by the officer for his suspicion is reasonable.
- (b) Any authorised officer of the Competition Authority carrying out any searches should inform the persons in charge on the premises in question as to the essential nature and purpose of the search including the subject matter of the investigation and, where it is the case, the nature of any allegation which has been made against the business or persons whose premises are subject to the search.
- (c) While the authorised officers should be obliged to produce the sworn information to the persons on the premises where the search is being carried out, the authorised officers should be entitled to block out from the copy of the information thus shown to the persons in question the names of any sources and any information from which the identity of the sources might reasonably be inferred, if the authorised officer thinks this is appropriate in the circumstances.
- (d) Persons the subject of investigations on the premises should be entitled to seek legal advice before being obliged to comply with any request from the authorised officer but are not entitled to insist that the legal advisor should be present before the search begins. The authorised

officer must allow the persons concerned a reasonable time to contact their solicitor or other legal advisor and obtain advice with regard to the search. What is a reasonable time will depend on the circumstances. While the authorised officer cannot object to the presence of legal advisors while the search is being carried out, the authorised officer should not be obliged to wait for the legal advisors to arrive before beginning the search once a reasonable time has been afforded for the taking of legal advice on the search. The authorised officers should be entitled to request an undertaking from the relevant senior persons in charge on the premises that no documents or records of any description will be destroyed, altered or moved while the undertaking is taking legal advice and pending the commencement of the search. Any breach of this undertaking should be a criminal offence.

- (e) The remedy of judicial review should be available in relation to the validity of a search warrant issued under section 21 and as to the lawfulness of any search subsequently carried out on the authority of any such search warrant.

10. **Recommendation:** Legislation should be enacted which would grant immunity from suit to persons who bona fide and in good faith make complaints or furnish information to the Competition Authority in relation to possible breaches of the Competition Acts 1991-1996 notwithstanding that such disclosure might, in the absence of such legislation, constitute a wrong on the part of the person making such complaint or disclosure. Such legislation should also provide that any employee of any undertaking or any independent subcontractor of any undertaking cannot be dismissed, selected for redundancy, have their contract terminated (as the case may be) or otherwise made subject to a detriment solely by reason of the fact that such employee or subcontractor has made a complaint or has furnished information to the Competition Authority in relation to the undertaking in question in the circumstances referred to above. An appropriate model for such legislation may be found in the Protection for Persons Reporting Child Abuse Act 1998. In circumstances

where a complaint is made to the Competition Authority that there has been a breach of the Competition Acts 1991-1996, it is a matter for the Competition Authority to decide in the first instance whether the identity of such complainant and some or all of the material furnished by any such complainant should be disclosed to the party against whom the complaint is made. Such decision should be informed by a consideration of a balance between the public policy interest in encouraging complainants to come forward and the rights of parties against whom complaints are made to properly and adequately defend and vindicate their position. The Competition Authority or the person or persons against whom the complaint is made should be entitled to apply to the High Court for directions as to whether in the circumstances of any particular complaint, the identity of the complainant and/or any or all of the material furnished by the complainant to the Competition Authority should be disclosed to the person or persons against whom the complaint is made. Such issue should be considered de novo by the High Court having regard to the public policy considerations referred to above, the rights of the parties (including their rights under the Data Protection Act and the Freedom of Information Act) and any proposals which may be suggested to the court which would enable the public interest in the preservation of the anonymity of the complainant to be preserved consistent with the necessity to ensure that any person against whom a complaint is made should not be deprived of any information which would be relevant in demonstrating that a breach of the Competition Acts 1991-1996 had not occurred.

11. **Recommendation:** The Review Group considers that any appeal from a decision of the Competition Authority to the High Court under section 9 of the Competition Act 1991 should be on the basis of the same material and evidence as was before the Competition Authority. The appeal can be brought on any point of law. Furthermore the High Court should be entitled to reverse a finding of fact by the Competition Authority if it comes to the view that the finding of fact by the Competition Authority was wrong. No new evidence should be admissible before the High Court in relation to any such findings of fact or point of law save that the High Court should have a discretion, on

application being made to it, to admit expert evidence if the High Court considers that such expert evidence would be of assistance in elucidating the meaning of any of the factual material and evidence which was before the Competition Authority. Such discretion should be exercised sparingly and only in cases where the High Court considers that there is genuine doubt as to the meaning of some aspect of the materials or evidence which was before the Competition Authority. In admitting such evidence, the High Court should rule on the matters to which such evidence should be confined. The appellant should also be entitled to raise any point which he would be entitled to raise by way of judicial review and may adduce any evidence which would be relevant and admissible for the purpose of a judicial review application. No prior leave of the court to the making of an appeal from a decision of the Competition Authority shall be necessary notwithstanding that the grounds of appeal may include grounds which are judicial review type grounds and which would otherwise require the leave of the court. Issues of law should be decided by the High Court de novo. Regulations governing appeals from a decision of the Competition Authority under section 9 of the Competition Act 1991 should be introduced to clarify these matters. There should be no limitation on the right of appeal from the decision of the High Court to the Supreme Court in accordance with the normal rules governing such appeals.

12. Recommendation:

- (a) Where possible, competition law cases in the High Court should be determined by a judge drawn from a small panel of High Court judges with a training and/or expertise relevant to competition law and economics, which panel would be nominated for this purpose by the President of the High Court on an informal basis.
- (b) Section 6(2) of the Competition Act 1991 should be amended to provide that an action under section 6 can be brought in respect of a breach of either section 4 or section 5 in the Circuit Court subject to the limit on the award of damages as currently expressed in section 6(2)(b) of the

Competition Act 1991. Insofar as may be practicable, such cases should be heard by a judge drawn from a small panel of Circuit Court judges nominated for this purpose by the President of the Circuit Court on an informal basis in accordance with the criteria referred to above in relation to the High Court.

13. **Recommendation:** The Review Group does not consider it necessary to introduce a specific de minimis exception while recognising at the same time that it is a misallocation of resources for the attention of either or both of the Competition Authority and the courts to be devoted to agreements, decisions or concerted practices which do not have appreciable effects on competition generally in the economy. The Review Group therefore recommends that the Competition Authority should issue a category certificate or notice giving explicit guidance on the nature and type of agreements, decisions or concerted practices (whether by reference to sectors of the economy, types of agreements, quantitative criteria or otherwise) which the Competition Authority considers do not have a sufficiently appreciable effect on competition generally so as to fall within the scope of the prohibition contained in section 4 of the Competition Act 1991.

Competition Law and the State

14. **Recommendation:**
- (a) The Group does not consider it necessary to amend the definition of an “undertaking” in the 1991 Act.
 - (b) The Group does not consider it necessary to amend the Competition Acts to incorporate a provision along the lines of Article 86(2) of the EC Treaty.

15. **Recommendation:** The Review Group recommends

- (a) that the Competition Acts should continue to apply to undertakings operating in an industry which is regulated by a sector specific regulator in the same way as they apply to all undertakings;
- (b) that the Competition Authority should retain exclusive jurisdiction, with the courts, to administer the Competition Acts in all sectors of the economy;
- (c) that the risk of conflict and inconsistent actions and decisions being taken by the Competition Authority, on the one hand, and the sectoral regulators, on the other, be addressed by enacting legislation :
 - (i) to make it clear that both the Competition Authority and the sectoral regulators have authority to exercise discretion to defer to the other agency's consideration of a matter coming within both of their jurisdictions;
 - (ii) to require each agency to notify the other of any action initiated by it which might reasonably be regarded as involving action which the other agency might also be entitled to take;
 - (iii) to require the agencies to consult with each other in circumstances where they have both initiated action in relation to the same matter with a view to (a) avoiding unnecessary duplication, whether by temporary or permanent deferral by one agency to the other or otherwise and (b) avoiding inconsistent decisions being taken by the two agencies in relation to the same matter;
 - (iv) to prohibit any party from pursuing simultaneous complaints with more than one agency in relation to the same matter; but

this recommendation is not intended to prohibit a party from pursuing the same complaint with another agency after its rejection by the first agency and is not intended to prejudice any party's right to initiate court action for any breach of law;

- (v) to require sectoral regulators to consult the Competition Authority before taking any decision in relation to the behaviour of undertakings in the regulated market which might constitute infringement of the Competition Acts and to take account of any opinion expressed by the Competition Authority in relation to the matter which is furnished to the regulator within a specified time-limit (in default of which the regulator should be free to proceed as it deems fit);
- (vi) generally to share all necessary information concerning matters which might reasonably be regarded as coming within each of their jurisdictions, subject to any constraints on disclosure of information supplied in confidence to either agency.
- (vii) to require the Competition Authority and the sectoral regulators to meet at least once a quarter for the purpose of informing each other about all such matters as may be relevant for the purpose of ensuring optimal co-operation and coordination between them.
- (viii) that legislation (such as the Electricity Regulation Act 1999) which provides for the establishment of an appeal panel for the purpose of hearing and deciding appeals on the merits from decisions of a sectoral regulator should provide that one member of the appeal panel (in the case of a three-person panel) should be a member of the Competition Authority.

16. **Recommendation:** The Review Group recommends that the Competition Acts be amended

- (i) to grant immunity from criminal prosecution and/or liability in damages under the Competition Acts in respect of actions taken by undertakings pursuant to and in accordance with a ruling, decision or approval granted by a sectoral regulator;
- (ii) to make it clear that the other remedies available to the Competition Authority and private parties under section 6 of the 1991 Act (i.e., injunction or declaration) remain available in respect of the actions of undertakings operating in a regulated industry pursuant to and in accordance with a ruling, decision or approval granted by a sectoral regulator except insofar as such actions are expressly excluded by statute from the application of the Competition Acts;
- (iii) to allow a court called upon to hear such an action to exercise its discretion to defer the hearing of the case until certain steps in the relevant regulatory process specified by the court have been taken.

17. **Recommendation:**

- (a) In relation to proposed primary legislation, the sponsoring Minister should be free to request the opinion of the Competition Authority on the implications for competition of the proposed legislation. Whether such an opinion is obtained or not, the Minister should be required to accompany proposals for legislation with a statement indicating whether they are likely to have any impact on competition in the market to which the legislation relates and, if so, explaining what that impact may be and, in the event that it may restrict competition, why such restrictions are justified in the public interest. The statement should also state whether the Minister obtained the opinion of the Competition Authority

in relation to the proposals and, if so, provide a summary of that opinion. The Minister's statement and any opinion of the Competition Authority should be made available to the public on the publication of the Bill.

- (b) In relation to Ministerial regulations, the sponsoring Minister should be free to request the opinion of the Competition Authority on the implications for competition of the proposed regulations. Any such opinion should be made available to the public upon the publication of the regulations.
- (c) The Authority should be given express statutory power (i) to offer the opinions requested pursuant to the procedures referred to in paragraphs (a) and (b) above; and (ii) to review and make recommendations in relation to the impact on competition of existing legislation (whether primary or secondary) and of regulations adopted by regulatory bodies responsible for the regulation of particular sectors of the economy or of particular trades or professions (where these are not subject to the application of section 4 of the 1991 Act as associations of undertakings).
- (d) The Competition Acts should recognise and encourage the role of the Competition Authority as an advocate of competition, as is done in other countries with whose firms Irish firms must compete. Implementation of this objective would include the provision of a broad statutory basis for matters such as: the publication of general discussion papers by the Authority; participation by the Authority in the development of national policies which may impact on competition; cooperation with sectoral regulators concerning competition-related matters and the right to make submissions to and appear before Committees of the Oireachtas in relation to issues which, in the opinion of the Committee or the Authority, may have an impact on competition in particular sectors of the economy.
- (e) The Authority should be given sufficient additional resources to carry

out this additional work, which could, in the Group's view, make a significant contribution to improving the competitiveness of certain sectors of the economy.

Mergers and Acquisitions

18. **Recommendation:** The Review Group recommends that the current system of mandatory notification should continue to exist where defined financial thresholds are exceeded.
19. **Recommendation:** The Review Group recommends
- (a) the retention of the thresholds for notification based on a turnover test and the abolition of the gross assets test;
 - (b) that thresholds be set in respect of two or more enterprises involved in the merger, being the acquirer and the target enterprise, to the exclusion of the vendor;
 - (c) that a new, additional turnover test be introduced which would have the effect of excluding mergers where the turnover in the State of the parties involved is not significant. The test proposed is therefore that the merger should be notifiable if:
 - (i) the *world-wide* turnover of *each of two or more* of the enterprises involved (being the merging entities rather than the vendor) exceeds the threshold; and
 - (ii) the turnover *in the State* of any *one* of the those enterprises also exceeds the threshold. In each case, the threshold should be increased to €8 million.

- (d) The Minister should retain the power to dis-apply the thresholds in respect of particular categories of merger (so as to bring mergers in specified sectors, such as the media, within the scope of the Act even if the thresholds are not exceeded);
- (e) that banking institutions should be subject to the mergers legislation;
- (f) that the methods of calculating turnover of financial institutions provided for in the EC Merger Regulation should be adopted at the national level; and
- (g) that inter-group mergers should be exempted from the application of the Act.

20. **Recommendation:** The majority of the Group recommends

- (a) that notifiable transactions should be notified to the Competition Authority and that a two tier system be introduced allowing for a fast-track procedure for mergers which give rise to no competition concerns and a second in-depth investigation phase for those which do give rise to such concerns;
- (b) that the Competition Authority's decision that a proposed merger gives rise to no competition concerns at the first stage would be final, subject only to the Minister's review on public policy grounds;
- (c) that in the context of either phase, the parties should be entitled to negotiate with the Competition Authority, in an attempt to remedy any concerns prior to the making of a decision;
- (d) that any undertakings given to the Competition Authority in this regard should be legally binding and it ought not be open to the parties to seek to re-negotiate these undertakings with the Minister. Rather, the

Minister could endorse the Competition Authority's approach or refuse to approve the merger, even having regard to the undertakings proffered;

- (e) that the Minister would be entitled to take only non-competition public policy factors into account when departing from the view of the Authority; and that her decision should be fully reasoned and published; and
- (f) that strict time limits ought to be introduced in respect of all stages of the procedures, being three weeks for the preliminary phase, two months for the in-depth phase and a further one month for the Minister. The Minister would have one month to deal with the matter, irrespective of whether the merger was referred to the Minister after the fast-track phase one or the in-depth phase two investigation.

21. **Recommendation:** The Group recommends that the Competition Authority should apply pure competition criteria based on the test set out in the Merger Regulation. This would permit a merger to proceed provided that it “does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the State or in a substantial part of it”. This test should be written into the mergers legislation or any consolidated legislation. As regards the criteria to be taken into account by the Minister, these should relate only to public policy matters. These criteria should be specified in a non-exhaustive way in the Act and should include industrial policy, employment, regional development, environmental policy and the suitability of the proposed purchasers in the light of public policy considerations.

22. **Recommendation:** The Group recommends that Section 4 of the Competition Act, 1991 should no longer apply to mergers *per se* nor to any directly related restrictions which are notified as an integral part of the merger. The majority of the Group also recommends that Section 5 of the 1991 Act should no longer be

applicable to mergers which exceed the thresholds provided for under the mergers legislation. Such mergers would fall to be assessed under the mergers criteria and, if approved, could not then be attacked under section 5. Section 5 should, however, continue to apply to mergers falling below the thresholds, subject to two qualifications. The first qualification is that it should be possible to obtain immunity from a section 5 challenge to such a sub-threshold merger by obtaining a clearance under the 1978 Act (being the Act specifically designed for the review of mergers). Since, by definition, such mergers are not subject to the mandatory notification provisions of the 1978 Act, any notification of a sub-threshold merger would be voluntary. The second qualification is that any such action should be subject to strict time limits. Proceedings challenging a merger under section 5 should therefore be instituted by the Competition Authority or by private parties either before the consummation of the merger (where the parties become aware of the proposed merger before it is consummated) or, in the case of a consummated merger, within three months from the date of its consummation. In view of the fact that there might be delay before either the Competition Authority or a private party became aware that the merger had taken place, the latter time limit should be one which could be extended by the Court.

23. Recommendation:

- (a) The Review Group recommends that it be expressly provided that the decision of the Minister be reviewable in judicial review proceedings on the grounds among others that the recommendation from the Competition Authority was irrational or in breach of natural justice. Judicial review proceedings should be instituted within one month from the making of the Minister's decision.
- (b) The Review Group recommends that no appeal to the Courts or to an independent body on the merits should be provided for. The general principles regulating leave to apply for judicial review should apply. The Court should have power to vary the conditions imposed in the

contested decision. Appeals to the Supreme Court should be excluded save for points of law of exceptional public importance or challenges to the constitutionality of the provisions of the mergers legislation. The Competition Authority's or the Minister's file ought to be made available from the date of the relevant decision.

24. **Recommendation:** The Group recommends that the question as to who should be considered to have standing to bring judicial review proceedings should be left to the Courts to determine in accordance with the general rules on this issue.

25. **Recommendation:** The Group recommends that information relating to transactions notified to the Competition Authority be published upon their notification or shortly thereafter, that decisions taken in respect of mergers be published and that the Competition Authority and the Minister be required to publish a report on an annual basis. The Group also recommends that the Competition Authority should prescribe suitable formats for notification.

26. **Recommendation:** The Group recommends that provision be made for the procedures to be followed by the Competition Authority and the Minister in respect of notified mergers. It recommends that the parties to a transaction should be entitled to make submissions to the Competition Authority and that an oral hearing should take place if requested by the parties to the proposed transaction. The Group also recommends that, once referred to the Minister, the parties to the transaction should also have the opportunity of making submissions and of having an oral hearing. Both the Competition Authority and the Minister should have a discretion in respect of the participation of third parties in any of these procedures.

27. **Recommendation:** The Group recommends that greater flexibility be introduced into the merger control system, allowing for confidential discussions between the parties to a proposed transaction and the Competition Authority prior to notification. The Competition Authority ought not to be entitled to rely on any information obtained in the context of such pre-notification discussions in any enforcement proceedings under the 1991 Act.
28. **Recommendation:** The Group recommends that the Competition Authority enforce compliance with decisions or orders made under the Act. The Group is not of the view that it is necessary for the Director of Consumer Affairs or the Minister to bring such enforcement proceedings.

The Report Of The Newspaper Commission

Change of Ownership

29. **Recommendation:** The Group recommends that the concept of the “exigencies of the common good” as referred to in section 9(1)(a) of the Mergers, Takeovers and Monopolies (Control) Act 1978 or in any consolidated legislation should be specifically defined in the case of a proposed merger or takeover of a newspaper (or, if the Oireachtas were to enact legislation to regulate concentrations in the media sector generally, a proposed merger or takeover in the media sector) to include the five criteria identified by the Newspaper Commission (subject to compatibility with Community law) and a sixth criterion which would refer to the position of any of the enterprises involved in the proposed merger or takeover in the media market. Accordingly, the Group recommends that when assessing the permissibility of mergers or takeovers in the media sector, the Minister shall, in addition to the public policy factors generally applicable to mergers, take account of the following factors:-

- (a) the strength and competitiveness of the indigenous newspaper industry;

- (b) the plurality of ownership;
- (c) the plurality of titles;
- (d) the diversity of views in Irish society;
- (e) the maintenance of cultural diversity; and
- (f) the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises.

The Acquisition of Control over Newspapers by other means

- 30. Recommendation:** The Group recommends the adoption in Irish mergers law of the control test provided for by Article 3 of the EU Merger Regulation.

Article 3(1) of the Mergers Regulation defines a “concentration” as being deemed to arise where:-

- “(a) two or more previously independent undertakings merge; or*
- (b) one or more persons already controlling at least one or more undertakings; or*
- (c) acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or part of one or more other undertakings.”*

Articles 3(3) and 3(4) provide as follows:-

- “3 For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:*

- (a) *ownership or the right to use all or part of the assets of an undertaking;*
 - (b) *rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*
- 4. *Control is acquired by persons or undertakings which:*
 - (a) *are holders of the rights or entitled to rights under the contracts concerned; or*
 - (b) *while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.”*

The precise legislative wording to be adopted to incorporate these concepts into Irish mergers law is a matter to be addressed on legislative consolidation.

The Operation and Procedures of the Competition Authority

31. Recommendation:

- (a) The schedule to the Competition Act 1991 should be amended to provide that only persons who, in the opinion of the Minister for Enterprise, Trade and Employment have sufficient knowledge, expertise in or experience of one or more of the following, economics, competition law, public administration or business generally would be eligible for appointment to the Authority.
- (b) Permanent members of the Competition Authority should be paid salaries which are sufficient in all the circumstances to attract individuals of the necessary calibre from other areas of the private or public sector to the Competition Authority.

- (c) Any guidelines or regulations adopted in relation to conflicts of interest and future employment of senior figures in the public service should be extended to include the members of the Competition Authority and the Director of Competition Enforcement.
- (d) Paragraph 9 of the schedule to the Competition Act 1991 should be amended so that the prohibition in paragraph 9(1) should extend to any information obtained by any person while a member of or in the employment of or where acting as a consultant or advisor to the Competition Authority which information can objectively be regarded as confidential information.
- (e) Paragraph 9 of the schedule to the Competition Act 1991 should also be amended so as to give any party who suffers any loss or harm as a result of any breach of the prohibition in paragraph 9 of the schedule (as amended) the right to bring civil proceedings whether by way of damages, declaration or injunction notwithstanding the existence of the criminal sanction.

32. Recommendation: The Review Group recommends that no change be made to the possible numbers of permanent members of the Competition Authority. The Minister's power to appoint temporary members should be retained. While the circumstances under which this power should be used are primarily a matter for the discretion of the Minister, the Review Group suggests that this power should normally be used only in cases where existing members of the Competition Authority cannot function whether through illness, incapacity, absence, conflict of interest or otherwise. However, insofar as the recommendation of this report concerning the possibility of an elective hearing being conducted by a panel of the Competition Authority is adopted, the Review Group considers that experienced litigation lawyers could usefully be appointed as temporary members of the Competition Authority for the purpose of constituting part of the relevant panel. The Review Group emphasises the necessity for the panel to be both in fact and to be seen to be entirely

independent in the exercise of its adjudicatory function during the elective hearing procedure and that all reasonable steps should be taken to promote and ensure such independence. The Review Group considers that there would be a value in having any such panel chaired by an experienced litigation lawyer whose expertise and independence are undoubted with a view to building up and establishing the credibility of the panel and the elective hearing procedure.

33. **Recommendation:** The Review Group considers that with a view to strengthening both the actual and perceived independence of the Competition Authority, the Competition Authority should be given a separate vote in the allocation of the State finances and should enjoy substantial budgetary independence in the manner already enjoyed by other comparable independent agencies. The offices of the Competition Authority should ideally be located in buildings which are not shared with any other section of government.
34. **Recommendation:** The Competition Act 1991 should be amended to provide that it is an objective of the Competition Authority to give its decision on any notification to it seeking a licence or certificate in relation to section 4 of the Competition Act 1991 within four months from receiving such notification or application. A provision analogous to the time limit provisions imposed on An Bord Pleanála by the Local Government (Planning and Development) Act 1992, sections 2(2) and 2(3) should be adopted. The result of such provision would be to impose a prima facie duty on the Competition Authority to arrive at its decision on notifications within a four month period but that where it appeared to the Competition Authority that it would not be possible or appropriate to determine a notification within that period, the Competition Authority would serve a notice on the parties to that effect and the period of time in question would then be extended for the further period specified in the notice.
35. **Recommendation:** The Review Group recommends that the Minister should

by regulation prescribe the manner in which the functions of the Competition Authority are to be exercised. In this context, consideration should be given to providing for a hearing officer who would not be a member of the Competition Authority, who would chair any oral hearings held by the Competition Authority (other than the panel hearings held as part of the elective procedure) and would resolve any procedural issues which might arise in the course of that hearing or in the course of any particular notification generally. Whether or not the concept of a hearing officer is adopted, consideration could also be given to providing for an informal right of appeal on procedural issues arising within a notification process (such as controversies as to the excision of confidential information from documents) from any ruling of the Competition Authority (or the hearing officer as the case may be) on such a point to an independent person to be drawn from an appointed panel of solicitors, barristers and economists experienced in competition law matters. The regulations should also deal with:

- (a) The extent to which all notifications require to be advertised;
- (b) The type of information to be supplied with notifications;
- (c) The rights of third parties to comment and the extent to which the information contained in the notification should be supplied to them;
- (d) The statement of objections procedure;
- (e) The circumstances in which an oral hearing may/should be held;
- (f) Fees for notifications.

36. Recommendation: The Competition Acts 1991-1996 should be amended so as to require the Competition Authority to furnish detailed written reasons for all of its decisions including the reasons for the refusal of any certificate or licence. An express provision should be included that the Authority will not be deemed to be in breach of this obligation insofar as it may omit commercially sensitive information from its reasoned decisions (where any dispute on what constitutes such information can be resolved by the informal appeal to an independent person referred to in the previous recommendation).

37. **Recommendation:** Section 9 of the Competition Act 1991 should be amended to permit a party who applies for and is refused a licence under section 4(2) or a certificate under section 4(4) of the Competition Act 1991 to appeal from such a decision to the High Court in the same way as an appeal can be brought against a decision of the Competition Authority to grant such a certificate or a licence. If the recommendation that it should be possible to apply for a certificate that a particular course of conduct is not in breach of Section 5 of the Competition Act 1991 is adopted, then a similar right of appeal against a refusal of such a certificate should lie to the High Court.
38. **Recommendation:** The Review Group recommends that section 14 of the Competition Act 1991 (the Minister's power to request the Competition Authority to carry out an investigation into an abuse of a dominant position and to subsequently require the adjustment of such dominant position subject to the sanction of the Houses of the Oireachtas) be repealed. Section 6(3) of the Competition Act 1991 should be amended to make clear that, in the event that the court finds that there has been an abuse of a dominant position, the court can make any order by way of injunction or otherwise that it sees fit with a view to bringing the abuse to an end including an order (a) prohibiting the continuance of the dominant position except on conditions specified in the order or (b) requiring the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or otherwise as the court may specify. The consequential impact on the Competition (Amendment) Act 1996 and the Mergers Take-overs and Monopolies (Control) Act 1978 should be addressed in the context of a legislative consolidation of the mergers and competition legislation.

Legislative Consolidation

39. **Recommendation:** In the event of the recommendations set out in the Mergers chapter of this report being acted upon, it would be appropriate for the

Competition Acts 1991 to 1996 to be amended in order to bring the regulation of mergers within the scope of a consolidated Competition and Mergers Act. In any event, if the proposals set out in the competition chapters of this report were to be acted upon, the opportunity should be taken to consolidate the 1991 and 1996 Acts at the same time.

The Restrictive Practices (Groceries) Order 1987

40. **Recommendation:** The majority of the Review Group recommends that:
- (i) The Groceries Order be repealed;
 - (ii) Any legislation or regulation introduced in relation to the Grocery trade should not include a ban on below cost selling;
 - (iii) Some form of regulation be introduced in relation to the grocery trade which would in particular require suppliers to publish the terms on which they are prepared to trade with retailers, would require retailers to honour the credit terms on which suppliers are prepared to trade with them, would ban “hello money”, and would require retailers not to discriminate between classes of customers in respect of the products which they sell.

Appendix 1**List of Submissions**

1. An Bord Glas
2. Barry Doherty
3. BWG Limited
4. Clayton Love Distribution Limited
5. Company and Commercial Law Committee of the Law Society of Ireland
6. Competition Authority
7. Competition Policy/Mergers Division, Department of Enterprise Trade and Employment
8. David Molloy
9. Department of Agriculture and Food
10. Des Crowley
11. Diarmuid Rossa Phelan, Trinity College Dublin
12. Director of Telecommunications Regulation
13. Director of Consumer Affairs
14. Dr John Fingleton, Trinity College Dublin
15. Dr Niamh Brennan, University College Dublin
16. Dr Patrick Walsh, Trinity College Dublin
17. eircom plc
18. Eugene F Collins, Solicitors
19. Food and Drink Federation
20. Food, Drink and Tobacco Federation
21. Forfás

22. Green Isle Food Group Limited
23. IBEC
24. IBEC Competition Council
25. Independent Newspapers
26. Irish Co-Op Organisation Limited
27. Irish Farmers Association
28. Irish Multichannel
29. James Cawley, Cawley and Co, Solicitors
30. John Meade, Arthur Cox, Solicitors
31. John Temple Lang, DGIV, European Commission
32. Kathleen Walker
33. Lee McEvoy, Solicitors
34. Murray Flynn, Solicitors
35. Musgrave Group
36. National Newspapers of Ireland
37. Pat Holland, Mark Twain Limited
38. Pat Massey, Director of Competition Enforcement, Competition Authority
39. Patrick M Lyons, Competition Consultant
40. Paula O'Hare
41. RGDATA
42. Seamus F Maye, BComm
43. Sean Nolan, Solicitor
44. Siun O'Keeffe and Una Brady, University of Limerick
45. Small Firms Association
46. Superquinn Limited

47. Tadhg O'Sullivan, Vinters' Federation of Ireland
48. The Examiner
49. The Irish Times
50. The Law Society of Ireland
51. The Oireachtas Joint Committee on Enterprise and Small Business
52. The Soft Drinks Association
53. Tweedy and Co, Solicitors on behalf of Eason & Son Limited
54. William P Fagan

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