

Economic Commentary

The coming of age of Irish competition policy

July 2011

Synopsis

Competition is central to the effective functioning of goods and services markets across the economy, thereby playing a crucial role in competitiveness. The EU/IMF reform package for Ireland provides for specific proposals in respect of competition policy, including the implementation of outstanding recommendations made by the Competition Authority. Ireland is recognised internationally as having one of the most progressive competition policy environments of any developed economy and this extended PMCA Economic Commentary reviews the scope, potential and challenges facing competition policy in the radically changed circumstances in which the country finds itself. The wide-ranging article also includes a comparison of the resourcing of the Competition Authority *vis-à-vis* its counterparts in other jurisdictions and considers the plan to merge the Competition Authority with the National Consumer Agency, which makes sense in principle because it would knit both the demand and supply dimensions of market reform; however, the proposed merger is not without its challenges in practice. Also considered are the potentially adverse implications for competition and consumer welfare stemming (inadvertently) from the government's re-structuring plan for the banking sector. While the government is, understandably enough, concerned with ensuring financial stability, the situation where the Minister for Finance and his Department are both promoting and assessing (on competition grounds) the future structure of the banking sector in Ireland raises potentially significant concerns for personal consumers and small businesses in the years ahead.

Why competition policy?

Of fundamental importance to the performance of market-based economies, like Ireland, the UK and other developed countries, is the effective operation of their goods and services markets, including intermediate business-to-business markets as well as final retail markets where the personal consumer is the end-user.

The aim of competition policy is to make goods and services markets work better for users. When there is competition, consumers benefit from lower prices, more choice and/or enhanced quality of service; businesses also benefit because competition stimulates suppliers to be more productive, innovative and efficient.

Competition policy serves to safeguard or improve competition in markets; it does not seek to protect businesses. By helping markets to function better, competition policy is central to economic competitiveness and to helping to ensure sustainable living standards across the economy.

The widespread appeal of the merits of competition is reflected in the fact that the major emerging economies – China and India – now have in place competition laws and national competition authorities. These and other emerging markets recognise the importance of independent competition policy in facilitating an economic environment conducive to enterprise development and foreign direct investment (FDI).

Box 1: The economic foundation of competition policy

The economic foundation of competition policy is the branch of economics known as industrial organisation. IO recognises that markets tend to be characterised by imperfect competition and considers the interdependencies between firms within markets – including their incentives to compete or collude and their abilities to do so.

The roots of IO can be traced back to the Harvard economist Joe Bain in the 1950s. Bain's interest lay with the environment in which firms compete rather than the firm *per se*, and his approach was empirical rather than theoretical. His legacy includes the book *Barriers to New Competition* (1956), which illustrates, using data from US manufacturing industries, a positive relationship between the rate of profit and the degree of seller concentration in markets characterised by high barriers to entry. His measurement of entry barriers, as well as his treatment of the condition of entry in the profits-concentration relationship, is one of the achievements of this classic publication.

Bain's work laid the foundation for the structure-conduct-performance (S-C-P) paradigm, which basically holds that market structure (S) influences whether firms will compete or coordinate their behaviour (C) and in turn the performance (P) of markets in terms of profits, innovation etc. During the next two decades, the S-C-P flourished and perhaps the definitive publication of this period in the development of IO is FM Scherer's textbook *Industrial Market Structure and Economic Performance*, first published in 1970.

The 1980s and 1990s heralded the advent of the 'New IO', in which the re-discovery and development of game theory in economics helped to advance the theoretical underpinnings of IO. However, it became apparent that game theory could account for all sorts of outcomes depending on the nature and structure of the game, and its practical application was called into question. Among the noteworthy publications during this phase in the evolution of IO is John Sutton's *Sunk Costs and Market Structure* (1991), which delineates the scope of the game-theoretic approach to IO in the context of predictions that can be tested empirically.

Since the 1990s, IO, understandably enough, has become more empirically-oriented, given developments in econometric principles and software, and in the quality of data available to economists. The welcome move towards a more practical approach has helped IO to mature into what may be termed 'competition economics', which has seen a closer relationship between economics, law and public policy, and a body of knowledge of practical value.

Source: PMCA analysis of information.

The economic crisis – an ironic but unique opportunity for promoting competition policy in Ireland

In Ireland, the application of competition law and policy is carried out independently by the Competition Authority. The courts are also involved in enforcing competition law but the primary body for competition policy is the Competition Authority.

In addition, the government, through the Department of Jobs, Enterprise and Innovation, has an important role to play in ensuring effective competition policy: without a willing partner at central government level, a national competition authority risks becoming toothless and the enforcement of competition policy will lack credibility – the losers in an environment characterised by weak competition policy are consumers and businesses, and ultimately the economy itself.

As remarked on numerous occasions since the onset of the economic crisis, enhancing competitiveness represents an important part of the recovery plan from the very challenging times in which Ireland finds itself currently. Competition policy is central to competitiveness, which generally concerns reducing costs and enhancing the quality of goods and services produced.

Of particular significance is the fact that competition policy represents an economic policy lever over which the Irish government has direct control, in contrast to the traditional macroeconomic instruments of fiscal and monetary policies, which have become even more curtailed in the wake of the crisis: Ireland's membership of the euro has meant that monetary policy has been ceded to the European Central Bank (ECB) and fiscal policy has been constrained through the EU Growth and Stability Pact, even if this mechanism was weakly enforced in the run-up to the crisis. Since the crisis, and the arrival of the 'Troika' in Ireland – in the form of teams from the European Commission, the ECB and the International Monetary Fund (IMF) – what little scope the Irish government has had to adjust fiscal policy, in the form of public expenditure and taxes, has become even more limited.

The IMF is one the world's leading advocates of competition policy and its (emergency) presence in Ireland, ironically enough, represents a unique opportunity for more extensive application and enforcement of competition policy across all sectors of the Irish economy.

While it is recognised internationally that Ireland has one of the most progressive competition policy environments of any developed economy – for instance, it was among the first countries to introduce criminal sanctions against hard core cartel offences and one of the first EU Member States to adopt the purely economics-based substantial lessening of competition (SLC) test in respect of merger control – it is fair to say that recent years have seen a diminution in the application of competition policy in some respects, which is regrettable.

For example, since the passing of the Competition Act in 2002, which has been praised internationally as a far-sighted and well-designed piece of competition legislation, the Competition Authority has formulated well over 150 recommendations aimed at improving competition in a range of markets in which it has conducted detailed studies. However, the evidence bases of these recommendations notwithstanding, less than half of the Competition Authority's proposals have been implemented to date.

According to latest National Competitiveness Council (NCC) report on the cost of doing business in Ireland (June 2011):¹ “while there may be well-founded explanations for not implementing some recommendations (e.g. they may contradict other valid public policy goals), implementation of outstanding agreed recommendations should be expedited” (p. 77).

The same NCC report recommends that government departments should be formally required to consider and respond to recommendations of the Competition Authority in a timely manner, with specific timelines set down for such consideration and implementation of such recommendations, as appropriate.

In particular, the NCC proposes that the Department of Jobs, Enterprise and Innovation should coordinate a report to government on each department’s response to recommendations of the Competition Authority. According to the NCC, the report should include, from each department, specific timelines for the implementation of the recommendations by them, as appropriate, timelines for consideration of outstanding recommendations and the rationale for decisions by those departments not to implement specific recommendations. This line of advice from the NCC represents a practical proposal in respect of the concept of ‘joined-up thinking’.² It also recognises the importance of balancing the needs of other aspects of public policy against the stated objectives of competition policy.

Scope of competition policy

There are a number of related strands to competition policy and law, including (1) restrictive agreements whose object or effect is to prevent, distort or restrict competition, (2) abuse of a dominant position, (3) merger control, (4) state aid and (5) market studies, where the Competition Authority can initiate a detailed investigation on its own initiative and make recommendations designed to improve competition in markets where it finds unnecessary restrictions to competition.

In regard to (1), it is a criminal offence for firms to engage in ‘hard core’ activities, which include price fixing, market sharing and bid rigging; such offences may result in imprisonment as well as potentially substantial fines. The Competition Authority has brought successful cases in the Irish courts against business people involved in such activities and suspended sentences have been given to date. Owing to the seriousness of hard core offences, which have been described as an offence against consumers, and the duration of the law at this stage, it is probably fair to say that it is only a matter of time before the first jail term is handed down by the Irish courts (see Box 2 overleaf).³

¹ Available at: http://www.competitiveness.ie/media/NCC110623-cost_of_doing_business_2011.pdf.

² In the UK, the government must respond formally to a recommendation from the Office of Fair Trading (OFT) or the Competition Commission (CC) within a period of 90 days.

³ Whilst all breaches of competition law are criminal offences in Ireland, imprisonment attaches only to hard core offences such as price fixing, market sharing and bid rigging. The standard of proof in all criminal proceedings is to prove a case beyond all reasonable doubt. According to the Competition Authority, satisfying such a standard is likely only to be possible in the case of hard-core price fixing cases. In non-hard-core cases, the Competition Authority has tended to find it “too easy for defence counsel to raise a doubt in the mind of the jury” (see http://www.linkedin.com/groupAnswers?viewQuestionAndAnswers=&discussionID=12714898&gid=1447207&trk=eml-anet_dig-b_pd-ttl-cn).

Box 2: Criminal sanctions under Irish competition law

Cartel enforcement is the “top priority” for the Competition Authority.⁴ Over 30 criminal convictions have been achieved to date and the Competition Authority has a cartel immunity programme. This facility offers the opportunity for anybody involved in a cartel to avoid prosecution, provided the party is the first in the cartel to come forward and cooperate fully with the investigation. The Competition Authority has statutory powers to carry out ‘dawn raids’ for suspected anti-competitive practices and this can include taking away or copying diaries, laptops and other electronic equipment.

The year 2007 saw the first criminal sanctions imposed under the Competition Act, 2002. In the case concerned, an individual was convicted of aiding and abetting a price fixing cartel relating to the distribution of Ford motor vehicles. The individual was fined €30,000 and sentenced to 12 months in prison, which was suspended because he pleaded guilty and due to his age (68).

That decision signalled the Irish courts’ view that competition offences constitute serious crimes against the public. In concluding the case, the Central Criminal Court remarked that a competition offence is “a crime against a consumer and is not simply against one or more individuals”.

In the same year, other convictions and fines were imposed on members of a heating oil cartel in the west of Ireland.

The following year (2008) was an especially busy one for cartel enforcement by the Competition Authority: at year end, over 20 price fixing convictions were secured, mostly in respect of home heating oil, followed by motor vehicles and there was one conviction in relation to petrol.

Of particular note is the escalation in toughness taken by the courts for hard core offences against competition law. A company director was given a 9-month suspended prison sentence and fined €100,000 for operating a price fixing cartel in the motor industry in the Central Criminal Court in March 2009. The judge in question – Mr. Justice Liam McKechnie – warned that custodial prison sentences would be handed down in future for such cases.

In the case concerned, members of the cartel, which operated between 1995 and 2004, agreed maximum discounts from the recommended retail prices, delivery charges, accessory prices, trade-in values and export prices, and employed “pocket cards” containing agreed prices (the cards were laminated to give them extra durability and designed to fit into members’ jacket pockets). Monetary fines (of up to €1,270) were established by the cartel for deviation from the agreement and “secret shoppers” were used to ensure that the price fixing arrangement was adhered to.

The resources available within the Competition Authority to tackle hard core offences against competition law include specialist lawyers and detective members of An Garda Síochána specially assigned to the Competition Authority.

Source: PMCA analysis of information.

As well as (1), the strands of competition policy (2) and (3) above tend to be the ‘bread-and-butter’ of competition practice in Ireland and other countries.

In respect of (3), Ireland was the first country in the EU to adopt the SLC test, which entails an economic assessment of whether a transaction would result in a ‘substantial lessening of competition’. All decisions on competition grounds regarding mergers and acquisitions rest with the Competition Authority, apart from media mergers, where the decision rests with the Minister for Jobs, Enterprise and Innovation; although the legislation does permit the Competition Authority to provide advice to the Minister in respect of media mergers.

What matters in regard to strand (2) is *abuse of dominance*; competition law recognises that firms may strive to obtain a dominant position, which does not offend against competition law, but it does not accept an abuse of such a position and firms that are dominant or which may be dominant have a responsibility to ensure that they act within the parameters of the law.

⁴ Address by Declan Purcell (Chairperson of the Competition Authority) to the 20th Anniversary Conference hosted by the Competition Authority at Dublin Castle on 13 June 2011.

The strand of competition law/policy relating to state aid (4) has become more important in Ireland following the economic crisis and includes the approval of emergency public funding to the banking sector subject to the requirement that it does not offend against EC competition rules, which are wired into the national legislation but which also provide for cross-border implications.⁵

It is clear, therefore, that the scope of competition policy and law is wide-ranging and relevant to all sectors across the economy.

Other aspects of competition policy include intellectual property (IP) and competition compliance. The latter may form part of firms' risk mitigation strategies and may include, for example, the competition implications of new product developments or the 'dos' and 'don'ts' of horizontal and vertical agreements that firms may have with other firms. Competition compliance programmes may be particularly relevant to large, possibly dominant, firms in markets that have been studied by the Competition Authority.

In respect of IP, while competition and patent laws might appear, on first impression, to be at variance with each other, on closer reflection they are actually complementary because they are both aimed at stimulating innovation and competition.

Competition provisions in the EU/IMF Programme for Ireland

As provided for in the EU/IMF Programme of Financial Support for Ireland (December 2010), the Irish government is committed to introducing legislative changes that will result in the removal of restrictions on competition in "sheltered" sectors, including:

- The *legal profession*, which will see the establishment of an independent regulator for the solicitors' and barristers' professions (the Legal Services Commission), the implementation of the recommendations of the Legal Costs Working Group and the outstanding Competition Authority recommendations to reduce legal costs;
- *Medical services*, which will result in the elimination of restrictions on the number of general practitioners (GPs) qualifying and the removal of barriers to GPs wishing to treat public patients as well as restrictions on advertising in the medical profession; and
- The *pharmacy profession*, ensuring that the recent elimination of the 50% mark-up paid for medicines under the government's Drugs Payments Scheme is enforced.

In a recent update to Ireland's Stability Programme (April 2011), the Department of Finance, using a European Commission model, has estimated potentially significant impacts on gross domestic product (GDP) from removing restrictions to trade and competition in sheltered sectors such as the legal, medical and pharmacy professions. According to the Department's calculations, a 1% reduction in the price mark-up to final users is associated with an increase in GDP of 0.37% in the medium term, 0.66% in the long run and 0.79% in the very long run. These results illustrate the cumulative and long-term nature of the benefits flowing from enhanced competition.

⁵ At the beginning of June 2011, the European Commission authorised, under EU state aid rules, a six-month prolongation of guarantees schemes for credit institutions in Ireland and Spain, until 31 December 2011. The revised Irish guarantee scheme was initially approved on 20 November 2009 and extended on five subsequent occasions, including the latest announcement. In 2010, the Commission issued over 400 state aid decisions.

Box 3: Outstanding Competition Authority recommendations in the Irish legal and medical professions

After extensive study, the Competition Authority found that the legal profession in Ireland is in need of substantial reform. The profession has many unnecessary and disproportionate restrictions on competition, which need to be removed so that consumers can benefit from greater competition in legal services. The Competition Authority's final report (published in December 2006) made 29 recommendations to enhance competition in legal services.⁶

An important structural recommendation contained in this report is the introduction of an independent regulator – the proposed Legal Services Commission – instead of the current system of self-regulation by the Bar Council and the Law Society of Ireland. The Competition Authority considers that an independent regulator, for both branches of the legal profession, would be in line with 'better regulation' principles and would mirror reform of the legal profession in other countries. The new commission would independently set standards for the professional training of solicitors and barristers, and would also approve institutions that wish to provide such training, opening up the possibility that universities and institutes of technology could compete with the Law Society and King's Inns in the training of solicitors and barristers.

The EU/IMF Programme provides that, by the end of the third quarter of 2011, the government will establish an independent regulator and implement the outstanding recommendations of the Competition Authority's final report aimed at reducing legal costs. The outstanding recommendations include:

- Allow unlimited direct access to barristers for legal advice;
- Barristers should be allowed to form partnerships;
- Legal costs should be primarily assessed on the basis of the work undertaken by lawyers and not primarily on the basis of the size of the award; and
- Examine the possibility of introducing competitive tendering for the provision of legal services to the State.

The Competition Authority has considered that the restrictions on competition among GPs in Ireland affect both private and public patients: all patients have fewer GP practices to choose from and there is less pressure on GP practices to compete on price for private patients and to be innovative in the services they provide. Increased competition among GP practices may also result in better availability of primary medical services for patients, including opening hours at night and at weekends, which may serve to take some pressure off acute hospital services.

The outstanding recommendations of the Competition Authority's final report into the medical profession in Ireland (2009 and 2010), which are due to be implemented by the end of third quarter of 2011 under the EU/IMF Programme, include:⁷

- Access to General Medical Scheme (GMS) contracts should be opened up to all qualified and vocationally trained GPs, who meet general suitability criteria;
- GPs in possession of a GMS contract should be free to set up in, or move to, the location of their choice;
- Decisions to award a GMS contract in a particular area should not be required to take account of the 'viability' of existing GP practices in that area – that should be for the market to decide; and
- The marking system for awarding GMS contracts should be amended to ensure that applicants with similar levels of GP experience are awarded equal points and that applicants already in possession of a GMS contract are not treated more favourably.

Source: PMCA analysis of information.

⁶ See also 'Legal reform will bring gains all round', Opinion & Analysis article, *The Irish Times*, 12 Dec 2006. The author of that article, Dr. Pat McCloughan, Managing Director of PMCA Economic Consulting, played a leading part in the Indecon/London Economics team that conducted the background research for the Competition Authority into competition in eight professions in Ireland (architects, engineers, solicitors, barristers, medical practitioners, dentists, veterinary surgeons and opticians). The research reports, published by the Competition Authority in 2003, are available at: <http://www.tca.ie/EN/Promoting-Competition/Market-Studies/Professions.aspx>. The reader is also invited to visit <http://www.pmca.ie/2011/01/northern-ireland-barristers-offer-initiatives-to-address-competition-concerns/>, which comments on the recent initiatives offered by the barristers' profession in Northern Ireland to address competition concerns in that part of the UK, which the Office of Fair Trading believes could go further.

⁷ There are also outstanding recommendations in respect of the dentists' profession in Ireland, discussed below.

The EU/IMF Programme also specifies actions in respect of enhancing competition in open markets and encouraging growth in the retail sector. In regard to the former, the Programme specifies that the government should require the Competition Authority to “list restrictions in competition law which exclude certain sectors from its scope and to identify processes to address those exclusions”; in respect of the latter, the EU/IMF document states that the “government will conduct a study on the economic impact of eliminating the cap on the size of retail premises with a view to enhancing competition and lowering prices for consumers and discuss implementation of its policy implications with the [European] Commission services”.⁸

Role of competition in the Review Group on State Assets and Liabilities

The report of the Review Group on State Assets and Liabilities provides for the careful consideration of the competition implications arising from proposed re-structuring and/or disposal of state assets.

In relation to seaports, for example, the report recommends re-structuring the State-owned ports into “several competing multi-port companies, built around Dublin, Cork and Shannon Foynes”. It proceeds to add that: “The Competition Authority should be consulted concerning the amalgamation process” (Recommendation 29 of the 55 recommendations contained in the McCarthy Report, 20 April 2011).

Ministerial advocacy and support of competition policy

The Minister for Jobs, Enterprise and Innovation – Mr. Richard Bruton TD, who has a postgraduate degree in economics from the University of Oxford – is also an advocate and supporter of competition policy, which he views as an essential ingredient to creating the right environment for enterprise development and job creation.

The Minister will shortly be appointing a new Chairperson of the Competition Authority and up to three new Members, meaning that the Competition Authority will soon be brought up to its staff complement at its most senior level. These new appointments are another important part in the rebuilding of the Competition Authority.

Competition and regulation – the fallacy of “too much” competition

Principles

It has been suggested that “too much” competition caused the banking crisis, as banks strived to out-do each other for market share and lent uncontrollably to boost their rates of return.

This view is fundamentally flawed and misses the point about competition. The principal cause of the banking crisis was not too much or excessive competition but rather weak financial regulation, which fuelled an unsustainable property market in Ireland and a number of other EU countries.

To understand this further, it is necessary to step back and spend a little time considering the respective roles of competition and regulation more generally.

⁸ Memorandum of Understanding (MOU) between the European Commission and Ireland, p. 24 (<http://www.finance.gov.ie/documents/publications/reports/2011/euimfrevised.pdf>).

In most markets, only a little amount of economic regulation is required and competition generally serves to enhance market performance and consumer welfare. In more complex markets, however, competition may result in unintended consequences without appropriate regulation in parallel.

The rationale for regulating markets generally arises from what economists term ‘market failure’. The sources of market failure include imperfect information and mean that a market can ‘fail’ to function efficiently: it is important to note that while competition may (inadvertently) exacerbate the effects of market failure, it is not the cause of market failure.

For example, in professional services – like legal and medical services – the particular source of imperfect competition is ‘asymmetric’ information, which stems from the feature that practitioners tend to be better-informed about their clients’/patients’ problems and the solutions required to tackle the problems than the clients/patients themselves; to prevent professionals from unduly profiting from this imbalance in information, the purpose of regulating the market is to minimise the risk of unscrupulous practitioners taking advantage of users whilst at the same time seeking to ensure minimum standards of quality. However, critics take a more cynical view and consider that regulation is designed to make it more difficult to enter the profession and reduce competition among practitioners – the ‘rent-seeking’ view of economic regulation.

This raises the question about the *proportionality* of regulation required to address the source(s) of market failure (as well as the fundamental question of evidence concerning the existence of market failure in the first place). Competition policy and better regulation principles, which are closely related, are concerned about the balance of regulations designed to address market failure and their effects on competition. Do the regulations go further than is necessary to address the sources of market failure and thereby restrict competition by more than is warranted to achieve their objectives?

In the case of the Irish legal and medical professions, the Competition Authority has determined that certain regulations are disproportionate to achieving their intended aims – they go further than necessary to addressing the claimed sources of market failure, in turn restricting competition and reducing consumer welfare by more than is justified. As listed in Box 3 above, the Competition Authority considers, for example, that preventing unlimited direct access to barristers is an unnecessary restriction on consumer behaviour and, in the case of medical practitioners, the conditions attaching to the granting of GMS contracts unnecessarily restrict the number of GP practices in Ireland. Proponents of the rent-seeking hypothesis would view these regulations as cleverly designed to protect incumbents or vested interests within the professions.

A view taking shape in modern competition policy is that the onus on all groups seeking regulation should rest with the groups themselves and should be properly evidence-based, down to the claimed sources of market failure used to advocate for regulation as well as the regulations themselves and how they address the claimed sources of market failure.⁹

⁹ This view has been alluded to, for example, by the CEO of the OFT, Dr. John Fingleton, at the conference hosted by the Competition Authority in Dublin Castle on 13 June 2011.

Relevance to banking markets

Turning to banking markets, in addition to there being asymmetric information (e.g. between borrower and lender and between bank and regulator), there are also particular characteristics, which differentiate banks from other markets. These include: the fundamental importance of banking to the economy, through payments, savings and investment; and the fact that banks are inter-connected, which raises the risk of contagion and ultimately a bank run should a bank get into financial trouble or fail.¹⁰

It is therefore clear that regulation and supervision are key requirements in the operation of banking markets. So also is competition; rivalry among banks serves to provide consumers and businesses with more competitive fees, charges and rates (price benefits), greater choice (e.g. more branches, longer opening hours or online banking), quality of service (e.g. more secure online and telephone banking services) and innovation (e.g. greater range of current account or savings products tailored to different user needs).

What transpired in Ireland from the early 2000s and, which ultimately led to the banking crisis, was a situation of *improving competition* but more significantly *weak regulation*, both by design and in enforcement.

The uplift in competition saw the arrival of Bank of Scotland (Ireland) into residential mortgages and business banking, followed by the advent of ‘free banking’ (i.e. no transaction fees on personal current accounts provided certain conditions were met) as smaller competitors began to provide a serious challenge to the bigger banks. The improving competition gained momentum following a major Competition Authority study of retail banking market in 2004 and which led to the Switching Codes for personal consumers and small businesses in the next couple of years – switching costs having been identified as a competition concern during the Competition Authority’s study.

These pro-competitive developments served to benefit consumers through greater availability of banking products, and lower prices. However, the absence of an appropriate regulatory environment, which is central to the functioning of banking markets generally, meant that financial stability was being compromised. It was akin to a hotly contested football match without a referee and linesmen.

As described in the Nyberg Report into the causes of the systemic banking crisis in Ireland, published in April of this year, the supervisory and regulatory system proved to be unfit for purpose: responsibility for regulating and supervising the banks was too thinly spread, with no organisation prepared to stand up and call time on the lending and spending spree.¹¹

What occurred in the Irish banking sector – as a result of strengthening competition but weak regulation – contrasts with the situation in the professions – where there tends to be over-regulation, typically as a result of self-regulation, and weak competition.

¹⁰ Arguably another ‘special’ market is the media and, as noted earlier, decisions regarding mergers and acquisitions in the media sector rest with the Minister for Jobs, Enterprise and Innovation. The interplay between competition, plurality of ownership and (self) regulation in the UK media sector is unfolding with the News International crisis.

¹¹ See <http://www.pmca.ie/2011/04/nyberg-report-into-the-irish-banking-crisis-published/>.

Possible (unintended) adverse effects of the re-structuring plan for the banking sector

On 27 June, the Minister for Finance, Mr. Michael Noonan TD, approved the proposed acquisition by Allied Irish Banks (AIB) of the EBS Building Society (EBS). The approval was made under section 7(11) of the Credit Institutions (Financial Support) Act 2008 on the basis that the result of the acquisition will not be to substantially lessen competition in the Irish banking market. In reaching the decision, the Minister considered the views of the Governor of the Central Bank and the Competition Authority (no third-party submissions were received by the Minister). A non-confidential summary of the competition assessment will be published shortly.

Under the deal, the EBS will be a fully owned subsidiary of AIB but will continue to operate under the EBS brand. The enlarged entity will be one of the two 'pillar banks' under the re-structuring plan and will continue to receive support from the government under the Deposit Protection Scheme and the Eligible Liabilities Guarantee (ELG) scheme.¹²

Today's retail banking sector is a world apart from the one before the eruption of the banking crisis in 2008. Virtually all of the players are now under state control and the entrant bank that heralded the arrival of new competition in 1999 – Bank of Scotland (Ireland) – is gone from the market, having built a branch network to provide a range of retail banking offerings, including personal current accounts, in a few short years. The severe turnaround in the structure of the market is probably the most telling aspect of the crisis and will probably feature as a case-study on banking mismanagement on executive banking degrees and MBA courses in years to come.

The government's re-structuring plan is, understandably enough at this time, primarily concerned with financial stability and the very survival of the remaining banks. However, in the coming years, if and when the dust from the crisis eventually settles, there is a risk that the retail banking market will be beset by over-regulation and weak competition, meaning consumers and small businesses will be the poorer. This is a risk that the authorities – including the Competition Authority – will need to monitor on an ongoing basis.

Resourcing of the Competition Authority – international comparison

The table below provides an international comparison of the financial and human resources of the Competition Authorities *vis-à-vis* its counterparts in a selection of other countries.

According to *Global Competition Review (GCR)*, the Irish Competition Authority had a budget of €5.9m and staff of 55 in 2009 (the staff complement was 59). This implies a budget-per-staff ratio of €107,273, which is appreciably below the average of all countries shown (€133,830). The country with the highest such ratio is Greece (€279,221). According to the Hellenic Competition Commission in the *GCR The Handbook of Competition Enforcement Agencies 2009*, the staff count is "expected to increase in the near future with appointment of 38 new special scientific personnel" (p. 124). Even so, the budget-to-staff ratio would still be relatively high in Greece (€187,000).

¹² On 28 June, the European Commission approved the Joint Restructuring and Work-Out Plan for Anglo Irish Bank and Irish Nationwide Building Society, which will eventually see their removal from the Irish banking landscape.

Table 1: Budget and staff numbers in national competition authorities in Ireland and selected other countries (2009)

Country	National competition authority	Budget (€m)	Staff	Budget/staff ratio (€)
EU	Directorate General for Competition	78.2	738	105,962
Finland	Finnish Competition Authority	5.4	70	77,143
Germany	Federal Cartel Office	18.3	270	67,778
Greece	Hellenic Competition Commission	21.5	77	279,221
Ireland	Competition Authority	5.9	55	107,273
Italy	Authority for Competition and the Market	54	266	203,008
New Zealand	New Zealand Commerce Commission	24.5	173	141,618
Portugal	Competition Authority	8.4	83	101,205
Singapore	Competition Commission of Singapore	7.4	52	142,308
Spain	National Competition Commission	12.3	194	63,402
UK	Competition Commission (CC)	22.5	138	163,043
UK	Office of Fair Trading (OFT)	74.1	587	126,235
US	Department of Justice (DoJ)	106	773	137,128
US	Federal Trade Commission (FTC)	171.6	1084	158,303

Source: *Global Competition Review (The Handbook of Competition Enforcement Agencies 2009)*, PMCA analysis.

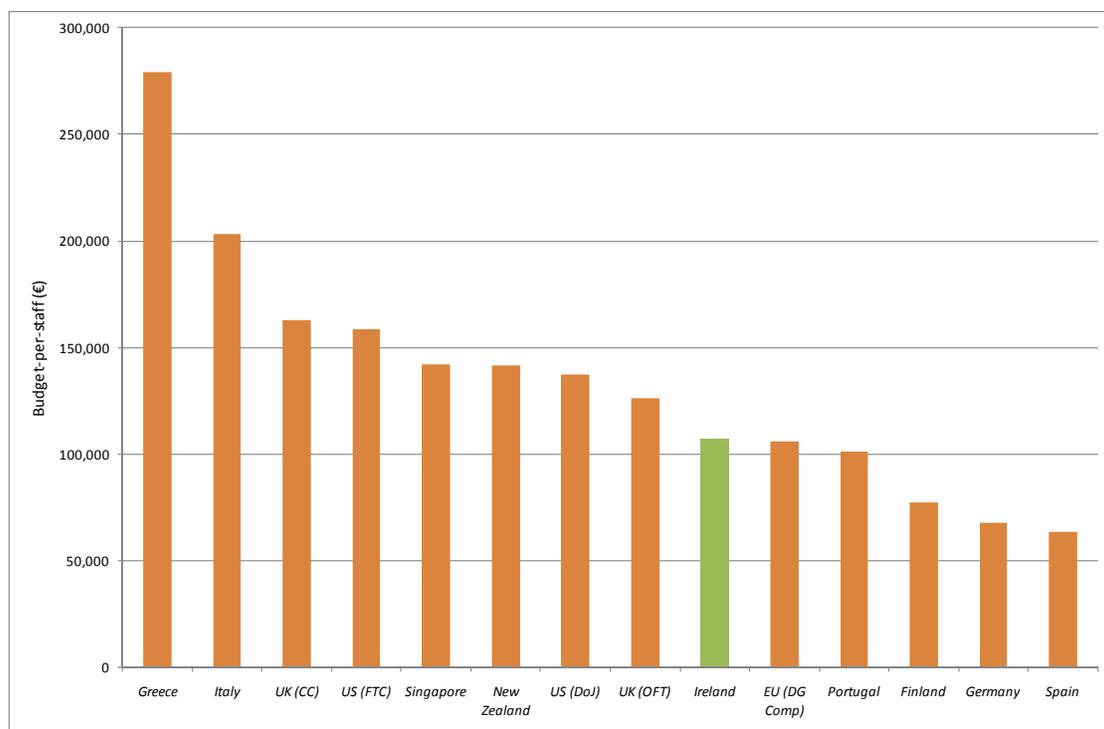
Notes: EU, Germany, Italy, Portugal and US (FTC) figures 2008; NZ budget figure July 2008-June 2009 and staff number Nov 2008; Singapore budget figure 2008 and staff number 1 Jan 2009; UK (CC) budget figure 2007; UK (OFT) budget figure 2008-2009 and staff number 31 March 2008; budget figures for non-euro authorities converted using exchange rate on 24 June 2011.

Graphical illustration of the budget-to-staff ratios in the national competition authorities is given in the chart below. Noteworthy is the position of the (Greek) Hellenic Competition Commission and the relatively low ratio observed in Ireland. In other research carried out by *GCR*, the Greek authority has had one of the lowest ratings of any competition authority in the world, whereas the Irish authority has averaged a rating of 3.5 out of 5 (i.e. 70%) in recent years, suggesting that the Competition Authority provides value for money (the *GCR* ratings are based on an independent annual survey among competition lawyers and economists, and others involved in competition policy).

According to *GCR*, the most highly regarded competition authorities include the US Department of Justice (DoJ) and Federal Trade Commission (FTC) and the UK Office of Fair Trading (OFT) and Competition Commission (CC), whose annual ratings average close to 100%.¹³

¹³ The OFT is the primary authority in the UK and the CC is the referral authority, investigating mergers and markets referred to for detailed study by the OFT. The coalition government in the UK is planning to amalgamate both authorities into a new single body, the proposed Competition and Markets Authority (CMA). The UK institutions also include the Competition Appeals Tribunal (CAT), whose functions include reviews of decisions made by the OFT and the CC in respect of merger and market references and hearing actions for damages and other monetary claims under the Competition Act 1998. In the US, the Antitrust Division of the DoJ handles criminal matters and there is a division of sectors considered by it and its sister agency, the FTC: namely telecoms, transport, computer software, financial services, energy, media and entertainment in the case of the DoJ; and healthcare and pharmaceuticals, biotechnology, autos and trucks, computer hardware and retailing of most consumer goods in respect of the FTC. The FTC operates a consumer protection as well as a competition remit.

Figure 1: Budget-to-staff ratio in national competition authorities in Ireland and other countries (2009)



Source and notes: see Table 1 (p. 11).

Challenges facing competition policy in Ireland

While ironically enough the national recovery strategy provides a unique opportunity to develop competition policy in Ireland, it is fair to say that this form of supply-side economic policy faces a number of challenges in the years ahead, mostly relating to the Competition Authority.

After suffering some heavy defeats in the courts – the *Kerry/Breeo* appeal in the High Court (2009) and the *Irish League of Credit Unions* appeal to the Supreme Court (2007) – and loss of staff (including to national regulatory authorities in Ireland, which have different pay-scales to the Competition Authority), the Competition Authority’s executive will in the coming weeks be brought up to full complement with the appointment by the Minister for Jobs, Enterprise and Innovation (Mr. Richard Bruton TD) of a new Chairperson and up to three new Members.¹⁴

It goes without saying that the significant post of Chairperson of the Competition Authority will entail an even more challenging role.

¹⁴ Under the Government's Employment Control Framework, the number of staff at the Competition Authority currently stands at just 39, with an expected further reduction to 35 by 2013.

Getting the message across

Perhaps the biggest challenge facing the Competition Authority is advocating the message of competition. As described in Shenefield and Stelzer's *The Antitrust Laws – A Primer* (2001, p. 7):

“The engine of free enterprise is competition. When competition works, the market economy functions well. Numerous sellers, vying for customers, must produce goods and services of sufficient quality, and at acceptable prices, or be driven from the field. That necessity forces them to be efficient, to buy so-called inputs – [labour] and materials – at the lowest possible prices, and to use those inputs in such a way that total production costs are kept to a minimum”.

As one of the most intuitive, yet powerful, principles in economics, preaching the good news about competition should be a straightforward task, in principle. The practice, however, can be very different, especially in a small country like Ireland with a tradition of well-organised vested interests.

The challenge of advocating the message also reflects the fact that market reform can take years – as illustrated with the professions, for example – and the fact that the main beneficiaries of competition policy – consumers – tend to be unorganised with little voice.

Proposed merger with the National Consumer Agency

The proposal to merge the Competition Authority and the National Consumer Agency (NCA), as recommended by the McCarthy Report on achieving efficiencies in the Irish public sector (2009), makes sense in principle because it would bring together, in a single organisation, both the demand and supply dimensions of market reform in Ireland. The plan would also be in keeping with the practices in the UK and US, where the highly regarded OFT and FTC each include a consumer policy remit as well as being responsible for competition policy.

A challenge in bringing together the NCA and the Competition Authority will be the amalgamation process itself. Established in May 2007, it might be thought that the NCA could be accommodated within the structure of the Competition Authority (established in 1991), which currently comprises six divisions – Cartels, Monopolies, Mergers, Advocacy, Corporate Services and Strategy.

The reality, however, is more complicated. The NCA has grown rapidly since its formation four years ago and today has a bigger budget than the Competition Authority. According to the McCarthy Report (2009), the NCA had a budget of €8.6m and a staff complement of 42 in 2009; while, as shown earlier in Table 1 (p. 11), the Competition Authority had a budget of €5.9m and staff of 55 in that year (based on GCR data).¹⁵

As well as the resource issues, including the different pay-scales between the two institutions, another challenge facing the merger between the Competition Authority and the NCA concerns their different mindsets and approaches.¹⁶ Sometimes what may appear beneficial from a consumer policy point of view may not be so clear-cut from a competition policy perspective.

¹⁵ Not to mention the further staff reduction at the Competition Authority since 2009 (footnote 14, p. 12).

¹⁶ On 5 July 2011, the Minister for Jobs, Enterprise and Innovation, Mr. Richard Bruton TD, announced that the board of the NCA would be scrapped when it is merged with the Competition Authority (<http://www.djei.ie/press/2011/20110705a.htm>).

Take for example the recent development trumpeted prominently by the NCA regarding the Dental Council of Ireland's new Code of Practice, which requires all practising dentists to display a price list for routine dental procedures. According to the NCA, the new Code of Practice will be an important step in helping consumers to make informed choices about their dental treatment.

However, from a competition policy perspective, there is a risk that price transparency in local markets characterised by barriers to entry will lead to a softening of price competition and consumers may (inadvertently) become worse off as a result of such a well-intended initiative. In other words, there is a risk that practitioners will exploit the increased price transparency to coordinate pricing and reduce competition.

Rather, the success of the NCA's initiative will depend on the removal of the remaining regulations serving to restrict competition in the dentistry profession in Ireland.

According to the website of the Competition Authority, since the publication of the final report on dentists in October 2007, *some* progress on implementing the 12 recommendations has been made but 5 recommendations remain outstanding, including: the proposed introduction of a new oral healthcare profession of advanced dental hygienists who would operate independently of, and compete with, dentists as well as among themselves; and the proposal to remove the prohibition on dentists offering discounts.

Only when *all* of the Competition Authority's recommendations to reform the dentists' profession are implemented will the NCA's initiative of improved price transparency be likely to have its intended positive effects.

Piecemeal reform of markets hitherto heavily restricted tends to have little or no significant benefits for consumers.¹⁷

Synergy

A potential synergy between the Competition Authority and the NCA arises in reform of markets where consumers have imperfect information – for example, payment protection insurance, which is typically sold as a secondary product after a consumer has purchased a primary product to which the insurance is linked, such as a car loan.

In the UK, the CC and the OFT, which comprises a consumer policy as well as a competition policy role, have played a leading role internationally in 'road-testing' remedies aimed at improving consumer welfare stemming from competition studies. The idea is to engage directly with consumers, using novel methods, such as experiments and focus groups, to help inform the most appropriate remedy proportionate to addressing the competition or consumer issue identified.

There may be potential to apply and develop this novel feature of competition/consumer policy under the aegis of the new Competition Authority/NCA in Ireland.

¹⁷ See, for example, the Indecon/London Economics Report (Part 1) (2003) on professional services available on the Competition Authority's website: <http://www.tca.ie/EN/Promoting-Competition/Market-Studies/Professions.aspx>.

Improving the effectiveness of competition policy – the economics dimension

Sound economic evidence is central to all competition work and is clear, unambiguous and does not seek sophistication merely for the sake of it: sometimes the most compelling economic evidence is the simplest because it imposes less complexity and fewer assumptions on the data.

The best competition economists are those who are able to judge the most relevant information to cases and who can present their work clearly and consistently, as well as having the armoury to deploy more advanced techniques if and when needed.

In the UK, the OFT and the CC have recently jointly published a guidance document on good practice in merger surveys.¹⁸ As well as being a helpful guide to competition practitioners – economists, lawyers and market research organisations – the initiative also provides an example of effective competition policy, in which publicly-funded institutions come together to engage in coordinated work to inform good practice – in this case merger control, where the decision of a national competition authority can have far-reaching implications.

However, the duty to good practice in competition work cuts both ways: just as there should be an expectation for the merging parties and their advisors to show their methods and results; so also should there be a willingness on the part of national competition authorities to share their analyses and assessments with the parties and their advisers, and indeed the wider public. This should be the case with the new merged competition authority/consumer agency in Ireland.

Ideally, all of the new institution's market studies and merger determinations should include, as appendices, the details of their methods, results and conclusions (where they are used in complex cases).

Concluding remarks

Competition policy has come a long way in Ireland since the establishment of the Competition Authority in 1991. Today, Ireland can boast one of the most progressive and advanced competition policy environments in the developed world. While enforcement and government backing of competition policy has ebbed and flowed over the years, the emphasis now being put on enhancing competitiveness and tackling vested interests is welcome in the wider interests of the Irish economy and points to a potentially bright future for Irish competition and consumer policy.

The proposed merger of the Competition Authority and the NCA is likely to be a positive development, although not without its challenges.

Another challenge for competition and consumer policy concerns achieving the balance between competition and regulation, and in this regard the oft-quoted maxim "competition where possible, regulation where necessary" is a useful one to remember.

¹⁸ Available at: <http://www.oft.gov.uk/news-and-updates/press/2011/52-11> (see also the PMCA news item on this initiative at: <http://www.pmca.ie/2011/04/good-practice-in-merger-surveys/>). The reader is also referred to 'St. George and the Dragon: competition authorities and the use of economics', paper presented by Peter Freeman CBE QC (Chairman of the UK Competition Commission) Comisión Nacional de la Competencia, Madrid (28 October 2010).

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PMCA ECONOMIC CONSULTING

30 Pembroke Street Upper

Dublin 2

Ireland

Tel: +353 1 234 2507

Fax: +353 1 234 2400

Email: ecs@pmca.ie

Website: www.pmca.ie

Connect on LinkedIn with PMCA's Managing Director on: <http://ie.linkedin.com/in/patmcloughan>