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Annual Report on Competition Policy Developments in Ireland
--2015--

15-17 June 2016

This report is submitted by Ireland to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held 15 - 17 June 2016.

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**COMPETITION AND CONSUMER PROTECTION COMMISSION
ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN IRELAND
--2015--**

EXECUTIVE SUMMARY

1. 2015 was a significant year for the Competition and Consumer Protection Commission ('the CCPC'); it was the first twelve months as a new organisation. The purpose of the establishment of the CCPC was for one organisation to have a 360-degree market perspective and to be equipped with powers to tackle the issues affecting consumers, businesses and the economy, both at the consumer transaction level and at the market structure level.

2. The CCPC's enforcement action is underpinned by the analysis of evidence gathered through the information we compile on markets across the economy. To guide our work and ensure it has the greatest possible impact we apply a set of prioritisation principles, which allow us to strategically target our activities. In addition to publishing these principles in 2015, the new organisation also published a Statement of Strategy for 2015-2018. These documents ensure that the work we do is targeted at the areas of greatest harm to consumers and that our decision-making processes are transparent.

3. In 2015, significant resources were devoted to developing the right structures, policies and prioritisation principles to ensure that the organisation reaches its potential. Investing in our people was also a central priority, despite a high level of vacancies in the organisation. Staff were provided with the opportunity to develop new professional skills in a number of areas, including investigative techniques. We also invested a lot of time and resources in developing an organisational structure which utilises the skills and expertise of our staff to the greatest extent possible.

4. As an organisation, we are committed to making a significant impact where it is needed most. We have begun a substantial recruitment campaign to fill the gaps in the organisation, and with a growing complement of committed and expert professionals, we have a good blue print for success. We are very confident that the structures we have built combined with our strategic focus and the strengthening of resources will result in an even greater impact. In the year ahead, we will continue to work towards our mission to make markets work better for consumers, business and the wider economy.

1. Changes to Competition Laws and Policies, Proposed or Adopted

1.1 Summary of new legal provisions of competition law and related legislation

5. The Competition and Consumer Protection Commission was established on 31 October 2014. It was formed from the amalgamation of two previously existing bodies – the National Consumer Agency and the Competition Authority.

6. Under the Competition and Consumer Protection Act 2014, the CCPC was given responsibility for ensuring compliance with new Regulations, which govern aspects of the contractual relationships in the grocery sector, between food and drink suppliers, on the one hand, and retailers and wholesalers, on the other. In 2015, the CCPC commenced the resourcing of this new function, which took effect from 30 April 2016.

7. In 2015, following on from EU legislation in relation to alternative and online dispute resolution (ADR / ODR), the CCPC was assigned responsibility for assessing applications from bodies who wish to be notified as ADR entities under the new EU regime and for the enforcement functions related to Online Dispute Resolution.

1.2 Other relevant measures, including new guidelines

8. There were no other relevant measures.

1.3 Government proposals for new legislation

9. There were no other Government proposals for new legislation.

2. Enforcement of competition Laws and Policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

2.1.1 Summary of Activities

10. One of our core functions is to enforce competition law and to take legal action when we believe the law has been broken. Our enforcement work can be divided into two categories:

- The first relates to hardcore cartels. These are treated as criminal breaches of competition law. As cartels are a criminal breach of the Act, they need to be proven beyond a reasonable doubt. Where we have enough evidence of a criminal cartel agreement, we refer a file on that case to the Director of Public Prosecutions (DPP) for prosecution on indictment. On conviction before the courts, individuals can face prison sentences, and both individuals and companies can be fined.
- The second relates to abuse of dominance and anti-competitive agreements which do not amount to a cartel, for example vertical agreements. These are treated as civil breaches of competition law. Under Irish law, in civil cases the CCPC can only seek a declaration that the behaviour is unlawful, and in injunction directing the undertaking to do, or not to do, certain things. There is no provision for fines in civil cases.

2.1.2 Criminal Investigations

11. Following an investigation into allegations of anti-competitive activity in the industrial flooring sector in 2015, the DPP decided that an individual and undertaking should be charged with entering into a bid rigging agreement.

12. In 2015, the CCPC also announced details of a new Cartel Immunity Programme, which revised and enhanced the provisions available to the CCPC to uncover this form of criminal activity. The new programme removes the previous bar on an instigator company qualifying for immunity, but maintains the ban on immunity for a company that coerced others to join or remain in the cartel. The programme also enhances legal certainty for those applying for immunity, and is more closely aligned with the EU Model programme.

2.1.3 Non-cartel investigations

13. Along with investigating breaches of competition law relating to cartels, the CCPC also investigates suspected anti-competitive conduct, which does not fall within the definition of a cartel. In 2015, much of our resources were concentrated on an investigation into allegations of anti-competitive behaviour in the bagged cement industry. This led to five inspections by almost 40 CCPC staff searching the premises of undertakings involved in the bagged cement sector.

14. Investigations and proactive activity in 2015 resulted in a number of positive outcomes for the CCPC. These included:

- The CCPC secured binding commitments from Europe's largest booking agent, Booking.com. The commitments allow accommodation providers in Ireland to offer cheaper rates through different online agents and to consumers who contact them directly – for example by e-mail, over the phone, face-to-face or via the “members only” section of their websites. Booking.com offered consumers a “Best Price Guarantee”, whereby it guaranteed to match lower rates for the same room found elsewhere. Until the CCPC's intervention, this guarantee was underpinned by a “Price Parity Clause”, which required hotels to guarantee that they would make their best rates available to Booking.com, and that cheaper rates could not be found elsewhere. Where a consumer found a cheaper rate elsewhere, the hotel was obliged to fund the cost of the Best Price Guarantee, i.e. the difference between the cheaper rate and the Booking.com rate. The CCPC considered that price parity clauses restricted competition by dissuading market entry by new, low-cost online travel agents (OTAs), by preventing hotels from discounting rooms which would otherwise lie empty, and by dampening price competition between OTAs. Booking.com may continue to offer a “Best Price Guarantee”; however, it must now fund the cost of any claims under the Best Price Guarantee itself, rather than obliging the hotel to fund the cost.
- Following an investigation into alleged anti-competitive practices, the CCPC secured a number of remedial measures from a business in the funeral services sector. Funeral-related services are, by their nature, purchases that consumers have to make in the most difficult and stressful circumstances. As such, it is a sector in which transparency and compliance with competition and consumer protection law is of paramount importance. Following an investigation into anti-competitive practices by Glasnevin Trust, a provider of funeral services in the greater Dublin area, the CCPC sought a number of remedial measures from the company. These measures, aimed at mitigating the alleged anti-competitive practices, relate to the provision of burial plots, headstones and headstone foundations. Glasnevin Trust has also agreed to make its prices more transparent to consumers, and to communicate these more clearly to funeral directors, who play a significant role in this market.
- During the year the CCPC expressed concerns to the National Association of General Practitioners (NAGP) that its conduct in relation to a new medical service contract with the Irish Health Service Executive, which would provide free GP care to children under six years of age, amounted to a campaign designed to encourage members to engage in a collective boycott, contrary to EU and Irish competition law. This followed action previously taken against the Irish Medical Organisation (IMO), which resulted in undertakings to cease the activity being provided to the High Court by the IMO.

2.2 Mergers and acquisitions

2.2.1 Statistical Overview

15. 2015 saw an increase in the number of mergers notified to the CCPC with 78 mergers and acquisitions notified in 2015 compared to 41 in 2014.

16. Highlights included: six extended reviews and three Phase 2 investigations into Topaz/Esso, Baxter/Fannin and Valeo/Wardell (carried over from 2014). The CCPC's clearances for Valeo/Wardell and Topaz/Esso required structural divestments, while the clearance of the Baxter/Fannin transaction relied on a failing firm defence – a first for the CCPC and its predecessor, the Competition Authority.

2.2.2 Summary of significant cases

M/14/026 – VALEO/WARDELL/ROBERT ROBERTS

17. On 17 October 2014, the CCPC's forerunner the Competition Authority, received a notification of a proposed acquisition whereby CapVest Equity Partners II, L.P. ("CapVest") the owner of Valeo Foods Group Limited ("Valeo") would acquire sole control of Wardell Roberts Limited ("Wardell") and Robert Roberts (NI) Limited.

18. Both Valeo and Wardell/Robert Roberts are involved in the sale and distribution of food products to the retail sector in the State. The 2 phase investigation examined the competitive impact of the market on 20 separate food products and concluded that for 19 of these products the transaction raised no competition concerns. However, in one product market, namely the market for "Brown Sauce" the CCPC concluded that the transaction would result in a reduction from 3 to 2 competitors and was likely to lead to a substantial lessening of competition in that market.

19. The CCPC cleared the proposed transaction on 17 February 2015 after taking into account binding divestiture proposals submitted to the CCPC by Valeo whereby Valeo committed to divest the YR brand of brown sauce.

M/15/020 – Topaz Investments Limited / Esso Ireland Limited

20. On 14 April 2015, the CCPC received a notification of a proposed acquisition whereby Topaz Investments Limited ("Topaz") would obtain control of Esso Ireland Limited ("Esso Ireland"). The notification was pursuant to a referral decision by the European Commission under Article 4(4) of the EU Merger Regulation on 27 March 2015.

21. Both Topaz and Esso Ireland are Irish oil companies active in the retail (through both company owned/company operated petrol forecourts and dealer owned/dealer operated petrol forecourts) and non-retail sales of petroleum products in the State. Both companies lease import and logistics assets in the State connected with the marketing and distribution of fuels and petroleum products, including sea-fed terminals located in Dublin. Topaz is also active in the marketing of aviation fuels in the State.

22. On 12 August 2015, the CCPC issued a Phase 1 Determination, stating that it intended to carry out a full investigation under section 22 of the Act in relation to the proposed transaction, as it was at that stage unable to reach a determination that the proposed acquisition will not lead to a substantial lessening of competition in any market for goods or services in the State.

23. During the Phase 2 investigation, the CCPC identified competition concerns arising from the proposed transaction concerning; (i) fuel terminalling at Dublin Port – where the transaction would reduce

the number of terminal operators from 4 to 3; and (ii) a number of identified petrol forecourts where the transaction would substantially lessen competition in local areas.

24. In October 2015 the CCPC cleared the proposed transaction based on binding divestiture proposals submitted by Topaz to divest certain businesses to be acquired from Esso, namely:

- its share and interest in a sea-fed terminal located in Dublin; and
- three of its CoCo fuel retail service stations in the Dublin area.

M/15/026 – Baxter Healthcare Limited / Fannin Compounding

25. On 21 October 2015 the CCPC cleared the proposed acquisition whereby Baxter Healthcare Limited (“Baxter Healthcare”) acquired certain assets of Fannin Limited. The assets to be acquired are those used in the manufacture and supply of aseptically prepared compounded medicines (“Fannin Compounding”).

26. Following notification on the 9 June 2015, the CCPC undertook an extensive 2 phase investigation. This investigation included economic analysis of the affected markets, evidence from competitors, customers (including public and private hospitals, and the Health Service Executive) and consultation with other interested third parties (including the National Cancer Control Programme and the Health Products Regulatory Authority).

27. In the course of its review the CCPC identified certain concerns related principally to the significant reduction in competition for the commercial supply of compounded chemotherapy medicines to hospitals in the State following the acquisition. In accordance with the CCPC’s published Guidelines for Merger Analysis, the parties submitted evidence to the CCPC to support their view that Fannin Compounding is a “failing division”¹ of Fannin Limited and that the assets involved would exit the market if the transaction was prohibited.

28. The CCPC undertook an in-depth review of the failing division argument submitted by the parties; including seeking evidence from relevant third parties and engaging the services of Grant Thornton to independently examine financial information pertaining to Fannin Compounding. The CCPC concluded that Fannin Compounding satisfied each of the four elements of the failing division test. The result of this analysis was that, in the CCPC’s view, the competitive structure of the relevant market would deteriorate to at least the same extent in the absence of the proposed acquisition. The CCPC therefore formed the view that the proposed acquisition will not, of itself, substantially lessen competition in any market for goods or services in the State.

¹ The “failing firm”/“failing division” test is set out in Chapter 9 of the Commission’s Guidelines for Merger Analysis (see http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf). The failing firm argument is a defence based on a counterfactual where the target firm and its assets exit the market. It provides a defence to a merger that would otherwise lead to a substantial lessening of competition.

The Commission’s failing firm/division test has four elements – all of which must be met:

- (a) The firm must be unable to meet its financial obligations in the near future.
- (b) There must be no viable prospect of reorganising the business through the process of receivership, examinership or otherwise.
- (c) The assets of the failing firm would exit the relevant market in the absence of a merger transaction.
- (d) There is no credible less anti-competitive alternative outcome than the merger in question.

The onus rests with the merging parties to demonstrate that the firm/division meets the failing firm/division test.

2.2.3 Review of Non-notifiable Mergers

29. We are aware of one non-notified merger that did not proceed following indications from the CCPC that it was likely to lead to a substantial lessening of competition.

Kerry/Breeo Case

30. In 2008 the Competition Authority blocked the purchase of Breeo by Kerry Group, a decision which Kerry successfully appealed to the High Court. The High Court annulled the Authority's decision to block the transaction. In 2009 the Authority appealed the High Court decision to the Supreme Court. There were no developments in relation to this case in 2015.

3. The Role of Competition Authorities in the formulation and implementation of other policies

31. The CCPC promotes competition in many different ways. We highlight areas of the economy where competition is restricted, we publish reports on how competition may be improved in certain sectors, we advise Government Departments and other State agencies on competition issues relevant to their work, including procurement and tendering for public contracts, and in particular, we comment on proposed legislation and we make responses to public consultations. We promote the idea of a competition culture to the wider community through the publication of guidelines, the organisation, and participation in conferences and seminars and interaction with business organisations. In the CCPC, the Advocacy function deals with both competition and consumer protection matters and the following paragraphs set out a brief overview of this activity.

3.1 Submissions

National Transport Authority consultation on wheelchair accessible public transport

32. The CCPC has previously engaged with the NTA in relation to the provision of wheelchair accessible vehicles in the taxi sector. In 2015, the NTA initiated a consultation regarding accessibility in the licensed bus sector. The CCPC welcomed the proposed phased approach to improving accessibility in the bus sector and pointed out the importance of any specific initiatives not inadvertently impeding the development of competition in the sector - compliance costs relating to accessibility should not place private operators at a competitive disadvantage when competing with public operators and in effect become a barrier to entry.

Department of Finance consultation regarding amalgamation of Financial Services Ombudsman and Pensions Ombudsman

33. The CCPC raised concerns about the existing time limitations for dealing with consumer complaints being unnecessarily restrictive, given the long-term nature of many financial products, such as mortgages, investment products, pensions, life and payment protection insurance policies.

CORU (Regulator for Health and Social Care Professionals) regarding the code of conduct for optometrists and dispensing opticians

34. Under Irish law, the Codes of Conduct for various health and social care professionals must be reviewed by the CCPC to ensure that they do not raise competition concerns. In 2015, we reviewed changes to the Codes of Conduct for optometrists and dispensing opticians. We found nothing in the codes as written, which would be likely to prevent, restrict or distort competition.

Commission for Energy Regulation (“CER”) regarding Irish Water’s “first-fix” leak repair policy

35. CER is the economic regulator for Irish Water, the public utility set up in 2013 to provide public water / waste water services. The CCPC provided input to CER on various aspects of the proposed policy from a consumer protection perspective, relating to eligibility, timelines, prioritisation, rental properties etc.

European Commission Study regarding Public Service Obligations on public transport (Regulation 1370/2007)

36. EU Regulation 1370/2007 prompted much needed reform of Irish legislation governing the licensing of bus passenger traffic and created a platform for the development of a competitive public transport system. The Government subsequently committed to opening up 7-10% of the Public Bus Service/PSO contracts to competitive tender in 2016. The CCPC welcomed these positive developments. We expressed concern however regarding the attractiveness of routes being offered for competitive tender, the potential for the tendering process to favour incumbent operators and the attitude of the transport regulator (the National Transport Authority) towards competition in the licenced bus passenger sector.

Department of Health regarding on-line sales of non-prescription medicines

37. In 2015 new regulations were introduced in Ireland to govern the on-line sale of non-prescription medicines. The CCPC welcomed the new Regulations and noted that they provided some additional protections to consumers. We put forward some suggestions aimed at increasing the positive impact on consumers. We also proposed that the possibility of regulating on-line sales of prescription medicines in Ireland should be examined to determine how best to guarantee patient safety, while at the same time ensuring that consumers have access to the widest possible choice of suppliers and get value for money when purchasing prescription medicines.

Central Bank consultation regarding the introduction of a Central Credit Register

This initiative originated in the EU / IMF Programme of Financial Support for Ireland. The CCPC supported the creation of a central credit register as a means of enhancing consumer protection and promoting greater competition in the provision of credit.

Department of Finance consultation regarding the EU Directive on Payment Accounts

38. The CCPC considered the implementation of the Payment Accounts Directive could be a driver of greater competition in the personal current account market and facilitate consumers getting better service and value. The CCPC welcomed measures which improve the quality of information available to consumers, thereby enabling them to make more informed comparisons and facilitating switching.

Legal Services

39. The CCPC and its predecessor organisations, the Competition Authority and the National Consumer Agency, had long advocated for reform of the legal profession. The Competition Authority published a preliminary report on Competition in Legal Services in 2005, followed by a final report in 2006 (“Competition in Professional Services – Solicitors and Barristers”)². The report found that competition in legal services was severely hampered by many unnecessary restrictions on the commercial freedom of buyers and sellers permeating the legal profession. These restrictions were found to limit

² <http://www.ccpc.ie/sites/default/files/documents/Solicitors%20and%20barristers%20full%20report.pdf>

access, choice, and value for money for those wishing to enter the legal profession and for those purchasing legal services. They went beyond their stated aim of protecting the public interest, and in reality did more to shelter lawyers from further competition. They were unrelated to the maintenance of standards in legal services and offered inadequate protection to consumers.

40. A Legal Services Regulation Bill was published in October 2011. It built on recommendations made in the aforementioned report and on other recommendations made by the Legal Costs Working Group.³ Among the most important recommendations was the introduction of an independent regulator - instead of the existing system of self-regulation by the Bar Council and the Law Society. The Bill provided for the establishment of a new regulator of both branches of the legal profession to protect and promote the interests of consumers. The Bill proceeded very slowly through the Parliamentary process over a number of years, with significant and voluminous amendments made, particularly in the latter stages of the process in late 2015. The Legal Services Regulation Act was finally signed into law on 30 December 2015.

41. While not all of the CCPC concerns were fully addressed in the enacted legislation, the CCPC looks forward to the early establishment of the new independent regulatory body (the legal services regulatory authority – “LSRA”). The CCPC considers that the Act provides a basis for further reform of the legal profession and the LSRA can serve as a key driver of such reform in the coming years. The CCPC will have a nominee on the Board of the LSRA and must also be consulted when the LSRA is undertaking future reviews of the operation of the legislation.

3.2 Appearance before a Parliamentary Committee

42. Following on from previous investigation work by the CCPC into alleged anti-competitive practices in an aspect of the funeral business, the CCPC was invited to appear before a Parliamentary Committee and provide views on the necessity or otherwise for specific regulation of the sector.

3.3 Advice provided to Government Departments and Public Bodies

43. The CCPC was consulted on a range of legislative proposals being prepared for Government consideration during the year. In addition, the CCPC engaged directly with various Government Departments and provided input on topics including the following -

Government Department / Public Body	Topic
Dept. of Jobs, Enterprise & Innovation	<ul style="list-style-type: none"> • New EU regime for ADR/ODR • Consideration of exemption from competition law of certain categories of self employed persons
Dept. Justice & Equality	<ul style="list-style-type: none"> • Reform of the legal profession
Dept. Children & Youth Affairs	<ul style="list-style-type: none"> • Early childhood care and education scheme
Dept. Environment, Community & Local Government	<ul style="list-style-type: none"> • Regulations providing for the introduction of a minimum pricing regime for the collection of household waste
Commission for Energy Regulation	<ul style="list-style-type: none"> • Introduction of smart metering for domestic

³ Report of the Legal Costs Working Group, November 2005.

	electricity / gas customers
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4. Resources of the Competition and Consumer Protection Commission

4.1 Resources Overall

44. The CCPC is funded by way of an annual grant from the Department of Jobs, Enterprise and Innovation, and also an industry levy in respect of specific consumer information and education functions in the financial services sector. In 2015, the CCPC's total income was 13.2 million. This is not apportioned between competition and other functions/activities.

Table 1: Competition and Consumer Protection Commission Budget 2015

Budget	2015
Grant	€10.1 million
Levy	€3.1 million
Total	€13.2 million

Table 2: Number of employees by profession (for competition role only)

Lawyers	8 ⁴
Economists	14
Other professionals	11 ⁵
Support staff	N/A ⁶
Total Staff	33

4.2 Human Resources

45. As of December 2015, the CCPC had eighty-six staff members, covering competition, consumer protection, product safety and some other, relatively non-core function. The CCPC has commenced a recruitment project with twenty-two additional staff to be recruited across the organisation in the coming month with a view to increasing its total staff to over 100.

46. The main divisions that are responsible for specifically competition functions are as follows:

- Mergers – Four staff (but with seconded staff from other Divisions when required).

⁴ This includes four who work in specific related Divisions (e.g. mergers, competition enforcement) and four who work across both consumer and competition in our Legal Services Division.

⁵ This includes nine Investigators and two Forensic IT investigators.

⁶ Support staff are not assigned specifically to competition functions, but work across the organisation.

- Competition Enforcement – Seven staff at present. In addition, the CCPC will recruit six positions, which will bring the total net number to thirteen.
- Criminal Enforcement – Nine staff with two vacancies to be filled this year. This Division is responsible for the criminal enforcement of both competition and consumer protection law.
- Legal Services; At any one time at least two staff are dedicated to competition enforcement.

47. Finally, there are a number of internal functions that span both competition and consumer protection. These include: Legal Services (Four staff members); Regulation & Advocacy (Six staff members) and Market Insights (Four staff members). In addition, all eighty-six staff members of the CCPC are Authorised Officers who can be utilised for the purpose of conducting searches as they have the powers to inspect, secure a premises, require the provision of records, and search for and remove records.