COMPETITION AUTHORITY

Competition Authority Decision of 3 April 2002 relating to a proceeding under Section 4 of the Competition Act, 1991.

Notification No. CA/5/01 – IPSO/An Post (OTC Bill Payments)

Decision No: 595

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INTRODUCTION

1.1 Notification was made on 10 May 2001 of an agreement between Irish Payment Services Organisation Limited ("IPSO"), acting on behalf of Allied Irish Banks plc, The Governor and Company of the Bank of Ireland, National Irish Bank Limited and TSB Bank Limited, on the one hand, and An Post on the other, with a request for a certificate under Section 4(4) of the Competition Act, 1991 or, in the event of a refusal by the Competition Authority to grant a certificate, a licence under Section 4(2). A Statement of Objections was issued on 29 June 2001 to the notifying parties indicating the Authority's intention to refuse to issue a certificate or grant a licence in respect of the notified arrangement and an oral hearing was held on 20 September 2001, following which Revised Heads of Agreement were submitted by the parties on 5 October 2001.

THE FACTS

(a) The Subject of the Notification

2.1 The notification concerned arrangements whereby each of the banks involved would 'migrate' over-the-counter (OTC) bill payment services from their respective branches to An Post. This would involve each such bank, as and from a specified date, ceasing or commencing to cease to provide OTC bill payment services to their customers, subject to as and from such date An Post being in a position, through its national post office branch network, to continue to provide corresponding OTC bill payment services to such customers.

(b) The Parties

3.1 In making the notification, IPSO is acting in a representative capacity, for and on behalf of Allied Irish Banks plc, The Governor and Company of the Bank of Ireland, National Irish Bank Limited and TSB Bank Limited, which are all licensed banks in the State.

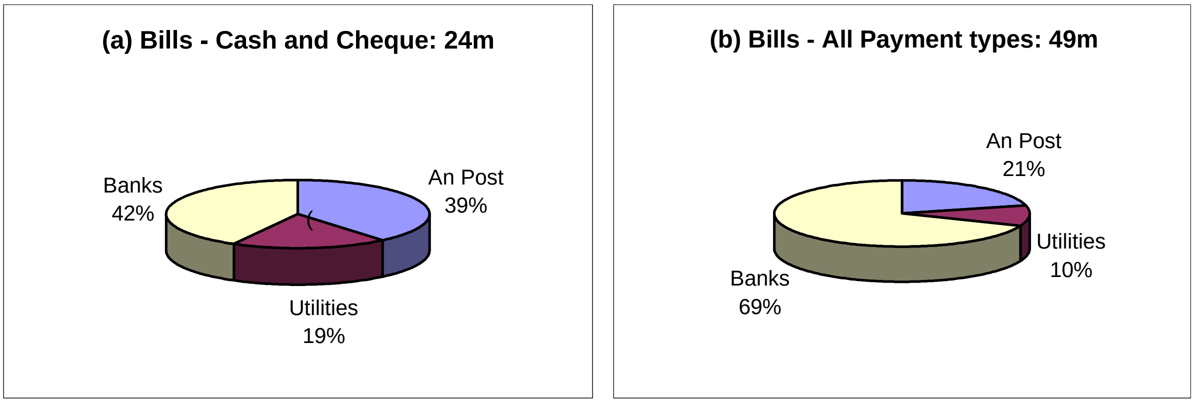
3.2 An Post is a statutory corporation established pursuant to the Postal and Telecommunications Services Act, 1983, whose shareholders are the Minister for Finance and the Minister for Public Enterprise. The principal objectives of An Post, as provided for in the Act, include, *inter alia*, the following –

- to provide services by which money may be remitted (whether by means of money orders, postal orders or otherwise) as An Post thinks fit;
- to provide OTC services for An Post's own and Government business and, provided that they are compatible with those services and with An Post's other principal objects, for others as An Post thinks fit.

(c) The Product and the Market

4.1 The parties submitted that the market affected by the proposed arrangement is that for all forms or methods of bill payment services in the State. They also submitted the following breakdown of estimated market share per type of participant in the bill payment sector, by reference to all payment methods and to cash/cheques respectively. The data in Figure 1 refers, in the case of banks, to all of the 'High Street' banks, not just to those whom IPSO is representing in this case (i.e. AIB, Bank of Ireland, National Irish Bank and TSB Bank).

Figure 1



Source: IPSO and An Post

4.2 OTC bill payments involve "in person" physical presentation of a bill (e.g. utility bills issued by Eircom, Bord Gais etc.) at a bank branch counter. The bill is paid "over the counter" by the bill payer, usually by means of cash or a cheque. The presenting bank then arranges for the corresponding debit and credit to be processed through existing inter-bank payment/clearing systems. The bill payer may also present certain utility bills for OTC payment at any post office or, if available, at the offices of the bill-issuing utility (e.g. ESB high street shops). The Authority has not been advised of the exact proportion of bills paid by cash/cheque that are paid OTC, only that the parties believe that the majority of bills paid in cash and by cheque are paid OTC.

4.3 The parties claimed that, notwithstanding the historical predominance of cash and cheque payments, over other forms of payment, in the Irish economy in general, and in regular bill payment in particular, the number and quality of non-paper based methods of bill payment had increased significantly in recent times, and now included Direct Debits, Standing Orders, Internet Bank Payments, Telephone Bank Payments, Credit Cards, Debit Cards (Laser) and Automated Teller Machines.

OTC Payments

4.4 The parties submitted that OTC payments tend to be paper-based transactions, and are more costly and less efficient to process than electronic bill payment methods. They also submitted the following data illustrating the difference in cost between such paper-based transactions and electronic bill payment methods.

Figure 2

Cost Comparison of Payment Methods

[ ]

(e) Structure of the Market

5.1 The processing of payments in the State is conducted by participating banks and financial institutions through the auspices of a number of payment systems, each of which is regulated by the Central Bank, and is constituted as a company. Examples of the latter are *Irish Paper Debit Clearing Company* (DebitCo), *Irish Paper Credit Clearing Company* (CreditCo), *Irish Retail Electronic Payments Clearing Company* (IRECC) and *Laser*. DebitCo is responsible for clearing payments in the form of debits (e.g. cheques), CreditCo is responsible for clearing credit payments, while IRECC is responsible for clearing payments in the form of electronic debits and credits. IPSO is an administrative/representative organisation for the payments industry in Ireland and, as such, is not itself a payment system. However, all ordinary and associate members of the clearing companies are also, by virtue of such membership, entitled to be members of IPSO.

(e) Government Strategies for the Information Society

6.1 The parties submitted a copy of a Government Paper[1] entitled "*Implementing the Information Society in Ireland: An Action Plan*". They cited the following extracts from that paper –

> "2. Rapid response is needed to ensure that the benefits of the Information Society can be availed of by Irish citizens and Irish businesses, thus contributing to the ongoing improvement of Ireland's society and economy."
>
> ……………………………………
>
> "30. The financial institutions will be requested to prepare proposals for appropriate systems to facilitate further deployment of electronic payments in the economy. Consultations will be held with the various interest groups with a view to agreeing mechanisms to take work forward rapidly in this area. Mechanisms to progress this area of work, involving representatives of the various interest groups, will be in place by end March 1999."
>
> ……………………………………
>
> "49. Electronic payment systems will be developed further within the public service, and clients will be encouraged to take up electronic payment options. This will reflect initiatives to promote electronic payment systems in general."

6.2 The parties stated that, in response to the Government request, and technological developments generally in the area of payment systems, the banking industry commissioned outside consultants to conduct a study in this area. The results of the study were presented to the Government by IPSO in December 1999. The parties submitted that the study's findings highlighted the predominance in Ireland of cash and cheques as payment methods, and the insufficient use (by comparison with other products) of electronic payment methods; that Ireland was lagging behind Europe and the USA in the deployment of electronic payment solutions and methods for consumers, business and Government, and that there would be significant economic benefits accruing from the increased use of electronic payment. Four key areas were identified, one of which was bill payment.

6.3 The parties also referred to a strategic review of the future of Irish banking, initiated by the Minister for Finance. The Minister's Review Group issued a Report in October 2000 entitled "*Banking Sector: Some Strategic Issues – Report of the Department of Finance/Central Bank Working Group on Strategic Issues facing the Irish Banking Sector*". They cited the following extracts from that Report –

- paper-based banking transactions (e.g. OTC bill payments) were costly for banks and their customers (page 39 of The Report);
- the key to change in the retail payments system was the development of an electronic payment option for the bulk of commercial transactions – business to business, business to customer, large and small value – and all State payments (page 39);

[1] http://www.irlgov.ie/taoiseach/publication/infosocactionplan/infosoc.htm (PN 6727) January 1999.

- Department of Finance/Central Bank were supportive of initiatives to make the entire payments system more efficient, and viewed it as important that such initiatives were progressed with all possible speed (page 39);

- Bank customers, banks and the banking system could achieve significant benefits from such development (page 39);

- The proposed "National Payments Strategy" included electronic regular bill payments (page 50);

- One of the goals of the proposed utility bill payment initiative was the truncation of the bill payment process, to be achieved by eliminating the requirement on those not using direct debit instructions to use cash or cheques to make bill payments (page 50);

- Issues identified included, inter alia, the role of An Post in any new arrangements and also the need for the banks to cooperate more closely in the area of electronic paper and clearing systems (page 50).

(f) The Notified Agreement

7.1 The arrangement notified to the Authority on 10 May 2001 comprised Heads of Agreement between IPSO and An Post dated 14th November 2000.

7.2 Under Clause 1 of the proposed arrangement, the parties agreed to co-operate in the establishment of an agreed framework to migrate bank branch-based OTC bill payments to the post office branch network. Clause 1 also stated that (the arrangement) seeks to provide a more cost effective and efficient approach to the provision of payment services for the parties, for bill issuers and for consumers.

7.3 Under Clause 2, the parties agreed to co-operate in a programme of migration of OTC bill payments from bank branches to Post Office outlets. The principal objective was stated to be to assist the movement of OTC payments to efficient methodologies as part of a co-ordinated response to the National Payments Strategy. The parties also agreed that the migration of OTC payments could be implemented on a standalone basis. An Post committed to provide free customer access to its *BillPay* service for utility companies.

7.4 Under Clause 3, the parties would establish a steering group (comprised of members from IPSO and An Post) to coordinate all cooperative payment initiatives within the context of the National Payments Strategy. They would also establish a working group to plan and implement the "OTC Migration Programme"; part of the latter group's role would be to specify those transactions for migration. Clause 3 also provided for confidentiality in respect of information shared between the parties.

7.5 Finally, the arrangement expressly stated that the Heads of Agreement (except the provision about confidentiality) did not constitute a contractual obligation on either party, but were "*a fair expression of the serious intentions of the parties to cooperate in the area covered by the Heads of Agreement*".

7.6 The proposal would involve each of the named banks, as from a certain date, ceasing or commencing to cease to provide OTC bill payment services to their customers, subject to An Post being in a position, through its national post office branch network, to continue to provide corresponding OTC related bill payment services to such customers. Where any existing bill issuer does not have an arrangement with An Post to allow for payment of bills through the An Post network, its existing bank would continue to provide OTC related bill payment services pending arrangements being put in place for the “migration” of such bill issuer to An Post in due course. The parties concluded that a bill payment counter service would thus continue to be available to consumers, and the withdrawal of OTC services by banks would be effected in an orderly and customer/consumer friendly manner.

7.7 The parties stated that the principal objective of what they termed ‘the OTC Initiative’ was to assist the movement of over the counter bill payments to more efficient methodologies as part of a coordinated response by the banks and An Post to the National Payments Strategy; An Post had already made significant investment in counter based electronic capturing bill payment technology and services, which were thus immediately available for the processing of bills migrated under the OTC Initiative.

7.8 The parties also stated that, under the Initiative, the banks and An Post would be making a concerted effort to promote the benefits of their respective electronic bill payment services to their own respective customer base, and to improve as necessary and develop those services. An Post intended to expand significantly the number of outlets at which its bill payment counter based services would be available, and open during consumer friendly hours. Thus, the Initiative would result in improved availability for, and awareness by, consumers and businesses of both counter based and electronic bill payment services on offer and available in the market generally.

(h) Arguments in Support of Request for the Granting of a Certificate

8.1 The parties claimed that neither the Heads of Agreement between them, nor the arrangements entered into pursuant thereto, constituted an agreement or arrangement between undertakings having as their object or effect the prevention, restriction or distortion of competition in the bill payment services market.

8.2 In addition, they advanced the following particular points –

- in response to Government policy, the OTC Initiative was intended to provide for the increased deployment and utilisation of efficient and cost-effective electronic or non-paper based bill payment methods, while at the same time ensuring that more traditional paper based bill payment methods remained widely available for those who wished to avail of same. Consumer demand for electronic or non-paper based bill payment methods was increasing, and the OTC Initiative would help towards meeting that demand;

- the numerous bill payment products or services in the market would not only continue to be made widely available but would also, under the OTC Initiative, be improved; in the case of non-paper based payment methods, through increased deployment and utilisation of these methods, and in the case of paper based payment methods, through the provision by An Post of OTC bill payment services, free of charge to consumer bill payers at a greater number of outlets or points of access than is currently provided by the banking branch network;

- the OTC Initiative would not adversely affect the competitiveness of the participants in the market; and it might well enhance the competitiveness respectively of An Post and the banks (vis-à-vis An Post and *inter se*) in the market and generally; in the case of An Post, by enabling its branch network to provide a wider range of OTC services, and in the case of the banks, by focusing on more cost-effective and efficient non-paper based bill payment methods to the public at large;

- the current percentage share of the market, as held by any or all of the participants in the market, would not be materially affected;

- the coordination between the banks and An Post, and also with bill issuers, was a necessary requirement in order to adequately and efficiently respond to the demands of Government and consumers towards more efficient and cost-effective payment methodologies, and to ensure greater consumer choice and service convenience for consumers on bill payments while assuring to consumers continued availability of OTC bill payment services;

- it was also necessary to ensure that a clear, consistent and timely message was given to the public at large, and thereby avoid any confusion among consumers and businesses generally;

- the OTC Initiative should result in improved availability of electronic payment methods and locations, and further would result in significant benefits for consumers; and

- the OTC Initiative would not result in or impose any restriction as to the provision of any bill payment services by or on any party to the Notification; further, bill issuers were assured of a continuing OTC bill payment service, whether from An Post or, pending migration to An Post, from their existing service bank.

(i) Arguments in Support of Granting of a Licence

9.1 If, however, the Authority considered that the OTC Initiative contravened section 4 of the Competition Act, 1991, the parties claimed that it would be appropriate to grant a licence under section 4(2) of the Act, as the OTC Initiative evidently contributed to improving the provision of bill payment services, and/or promoting technical or economic progress in the State and with reference to payment systems and methods generally, while allowing consumers a fair share of the resulting benefit; and that this was sought to be achieved in the least possible restrictive manner, without allowing for the elimination of competition in respect of a substantial part of the services in question.

9.2 In addition, they advanced the following particular points –

- consumers would obtain significant benefits arising from the Initiative, particularly improved availability of both electronic and non-electronic payment methods and locations;

- consumers who did not have a bank account, or wished to pay a bill "in person", could continue to pay bills "over-the-counter" at An Post via its national branch network (which had more branches and was open for more hours of business than the combined banking branch network); An Post also intended to increase its branch network, for bill payment purposes, by entering into arrangements with retail sites/outlets throughout the State, whether using counters or automated terminals;

- the OTC bill payment service at An Post would be free-of-charge to the bill-payer/customer;

- the Initiative would help to maintain the post office network in rural and poorer urban areas to the benefit of consumers; that network was not just a commercial network, but also provided valuable services to the public at large;

- the Initiative had been approved by Government, and was part of the wider Government-endorsed "National Payments Strategy, designed to facilitate increased employment and utilisation of technically advanced, efficient and cost-effective electronic (and generally non-paper based) bill payment methods; co-operation between banks and An Post was consistent with Government policy of improving, and moving towards wider use of bill payment systems in Ireland, while also ensuring that more traditional bill payment methods remained widely available to consumers; and

- the Initiative would not result in or impose any restriction as to the provision of any bill payment services by or on any party to the Notification.

(j) Submissions by Third Parties

10.1 The Authority received one submission in regard to this notification, from the Office of the Director of Consumer Affairs ("ODCA"). A number of the issues raised, though of concern to consumers, were not matters that the Authority, in accordance with its statutory remit, can or should take into account in reaching its decision as to whether the notified arrangement merits a Certificate or Licence. The Authority informed the ODCA that, in accordance with section 4(2) of the Competition Act 1991, as amended, the Authority's analysis of notified arrangements included, *inter alia*, an assessment of the possible adverse effects and the possible benefits that consumers might reap as a result of the notified arrangements.

STATEMENT OF OBJECTIONS

(a) The Statement

11.1 The Authority issued a Statement of Objections to the notifying parties on 29 June 2001, indicating its intention to refuse to issue a certificate or grant a licence in respect of the notified agreement.

(b) The Relevant Market

12.1 The Authority considered whether the relevant market in this case was that for all forms or methods of bill payment services in the State, as claimed by the parties, or the narrower definition of all OTC bill payment services in the State. In any case, it was clear that An Post and the banks involved in IPSO were competitors regardless of the specific market definition.

12.2 However, the Authority questioned whether the market definition adopted by the parties was appropriate. A significant number of consumers wishing to pay bills would not have easy access to electronic methods of payment, and some might not have cheque books which permitted them to make payment to the utilities directly via the postal service. As such, substitutability between these different methods was not perfect, which provided problems for a market definition encompassing all methods of bill payments.

(c) Applicability of section 4(1)

13.1 The Authority stated that the Heads of Agreement were clear as to the object of the parties in making the proposed arrangement between them – according to Clause 1 of the Heads, "*the parties agree to co-operate in establishment of an agreed framework to migrate bank branch-based OTC bill payments to the post office branch network*", and the parties had confirmed that that was the underlying purpose. In other words, the participating banks would withdraw from servicing OTC bill transactions for their customers, and An Post would endeavour to provide the same service to such customers.

13.2 The parties had submitted (Figure 1) that there were 49 million bill payments of all types (i.e. OTC, mail, and electronic) in the State, with the banks[2] accounting for 34 million (69%) of these, and An Post 10 million (21%). They had also stated that 24 million of the overall total was accounted for by *cash/cheque* payments – of which the banks had 10 million (42%) and An Post 9 million (39%).

13.3 The Authority was of the opinion that, no matter which definition of the market was chosen, the agreement was a horizontal agreement among competitors. It saw the overall arrangement as consisting of two parts; (i) an agreement between the banks involved in the arrangement simultaneously and collectively to withdraw the facility of OTC bill payments, and, (ii) an agreement between these banks as a group and An Post. The banks, through the proposed arrangement, were proposing simply to exit the OTC segment of the market for bill payments and to allow – in fact to encourage and facilitate – An Post to take up their existing market share, thus giving it substantial market power in the market for OTC payments. In the Authority's view, that would amount to market-sharing, and would contravene section 4(1) of the 1991 Act – in particular, subsection (c) thereof.

(d) Applicability of section 4(2)

14.1 Under Section 4(2) of the 1991 Act, the Authority may grant a licence in the case of any agreement, decision or concerted practice which -

> "having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not –
>
> (i) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives;
>
> (ii) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."

The Authority's Statement of Objections examined the proposal under these parameters, in turn.

Contributes to improving the provision of services

14.2 The parties had claimed that the provision of bill payment services to consumers overall would be improved by implementing the proposal. The underlying rationale for this claim appeared to be that banks would thus be able to concentrate on electronic payment methods, while consumers who wished to use OTC methods would have the facility to do so at post office outlets. Arguably, however, there had been little to prevent the banks from focusing on electronic bill payment methods to date, or trying to incentivise consumers to switch to such methods. Indeed, banks generally had been trying to encourage consumers to use electronic means of bill payment, e.g. direct debit, telephone banking etc., in recent years, and presumably many consumers had done so. Presumably also, it would be in the interests of bill issuers that as many of their customers as possible would use such means. However, the fact that consumers nevertheless still apparently preferred to make 10 million bill payments OTC through bank branches (see above), seemed to imply that banks – and indeed bill issuers – had not been overly successful in this regard.

14.3 This implied a revealed preference of consumers to pay paper based utility payments via banks, and not post offices - for every 1 payment in post office outlets, there were nearly 1.1 payments in bank branches, despite there being fewer bank branches than post office outlets

[2] But see the general *caveat* by the Authority at paragraph 5 above.

available for OTC payments. This suggested substantive benefits that consumers felt accrued to them from being able to make bill payments in banks. Thus, far from improving the provision of services, therefore, the withdrawal of this facility by the bank network would actually lower consumer welfare, as the substantial number of consumers who favoured making payment OTC in banks would face a drastically reduced number of outlets[3] that allowed them to use their preferred payment option.

14.4 The parties had also claimed that service provision would be enhanced by the agreement, citing the possibility of longer opening hours of An Post outlets as well as a greater number of outlets being available. The Authority was of the opinion that there was nothing to stop An Post from seeking further business in this area at present by taking the measures referred to above regardless of whether the banks offered OTC services or not. The Authority was also doubtful about the probability of further expansion in the number of outlets – it noted that the Flynn report on the future of the sub-post office network suggested that An Post's preferred option was to close up to 1500 sub-post offices, due to the financial position the company was in.

14.5 The Authority was also concerned about the degree of market power that An Post would possess in the OTC market. Although it appeared that Ulster Bank still planned to provide OTC bill-payment services, if the other banks withdrew, An Post appeared to have considerable market power in this market, and, given the number of people who either had a strong preference for paying OTC or did not have other payment options easily available to them, could exploit this market power to the detriment of consumers. The Authority was doubtful about An Post's statement that it would, or indeed could, maintain a price of zero for consumers, both in terms of the direct incentive to raise prices that An Post would face, and the financial difficulties, alluded to both in the Flynn report and in various Dail Debates, that it currently faced.

14.6 The Authority was also of the opinion that allowing An Post to possess such power in the market for OTC payments would discourage innovation in the processing of such payments. There had been no substantive evidence presented to suggest that An Post was any more efficient than its competitors at present, and, in any case, allowing it to operate OTC payments in the face of reduced competition would, in the Authority's view, reduce its incentives to make cost-saving innovations in this area. The market power that An Post would possess, and the reduction in the number of competitors, would also lessen considerably its incentives to consistently ensure a high quality of service to its customers.

14.7 Further, the claim of the notifying parties that the proposed arrangement was vital, in order to persuade customers to pay bills via more efficient electronic methods, appeared somewhat inconsistent with the view, simultaneously put forward by the parties, that the arrangements would result in undiminished access for customers who did wish to carry out paper-based transactions. It seemed to the Authority that the intended effect of the proposed arrangement was to restrict access to OTC bill payment services to An Post outlets, thereby effectively inducing customers to "go electronic." The Authority again noted that, if individual banks wished to encourage the use of electronic payments, they could offer incentives to customers to pay in such a manner.

14.8 Summarising, the Authority considered that (a) banks appeared to be currently preferred by most consumers for OTC bill payments; (b) the removal of this facility would lower the benefits that consumers would derive from such services; and, (c) by removing a large number of banking outlets that accept OTC bill payments, this would diminish the total number of locations available for payment, thus further reducing consumer welfare. The

[3] The Authority notes from the Websites of the bank parties that they have, between them, a total retail network of approximately 750 branches.

Authority emphasised again that all the plans suggested by An Post to improve its service appeared to be capable of being implemented whether or not other competitors were present.

Promoting technical or economic progress

14.9 The parties had argued generally that the proposed arrangement was in line with Government policy, specifically in relation to the notion of *Implementing an Information Society*, including the development of new electronic payments systems, a *National Payments Strategy* etc. (see paragraphs 6.1 to 6.3 above). Naturally, the Authority had no comments in relation to Government policy in this respect, and had confined itself to reaching a preliminary view in relation to the compatibility of the proposed arrangement with the Competition Acts. Under the heading of technical progress, while the Authority acknowledged the existence of national policies aimed at encouraging the development of new technology, the issue for the Authority was whether specific developments in this area might nonetheless harm competition.

14.10 As mentioned above, the banks had been endeavouring to encourage consumers in recent years to switch to electronic bill payment mechanisms – and indeed were continuing to do so. The Authority acknowledged that this form of payment was of lower cost, and understood the importance of developing it. In the Authority's view, however, there was nothing to prevent banks from continuing both to develop electronic innovation and to incentivise their customers to switch to using new electronic mechanisms. Thus, the Authority was not persuaded that the proposed withdrawal by banks from the provision of OTC bill payment services would, of itself, promote technical progress. Indeed, it could be argued that, if all paper-based transactions migrated to An Post from the banks, then there would be *less* pressure on the banks to increase access to electronic forms of payment. Thus the Authority did not feel that there was any reason to believe that this agreement would, in itself, promote technical progress within this market, as any incentives to engage in such technical advancement would be at least as strong without the existence of the agreement.

Allowing the consumer a fair share of the benefits.

14.11 The parties had claimed that significant benefits for consumers would result from the arrangement, and these were outlined at paragraph 9.2 above. The parties had summarised these specifically in their notification to the Authority, and they were presented in the Authority's Statement of Objections, as below, followed, in each case, by the Authority's view –

(1) *Consumers are assured continued availability of easily and more widely available counter services in order to pay bills*;

A promise that consumers would *continue* to have existing services available to them would not be regarded by the Authority as a significant extra benefit – or even net benefit – of the arrangement. In any case, as mentioned above, it seemed clear that the removal of the option to pay at banks would result in significantly fewer total outlets for consumers to pay bills OTC.

(2) *The An Post counter based bill payment service will be provided to the consumer free of charge, in contrast to the potential existing charge at banks*;

The parties had stated that An Post did not charge customers for OTC bill payment services in its own outlets, so the Authority found it difficult to see what benefit could be assumed to arise on this point in the future for such customers. If the point being made was that people who were currently OTC customers of *banks* could now make their payments OTC at Post Offices free of charge, it was unclear to the Authority that people who wished to pay their utility bill OTC in a bank were currently charged for such a service. In this context, the parties had merely stated that "<u>a bill payer who uses a bank branch counter to pay a bill is</u>

liable (at the instance of the bank concerned) to a fee or charge for processing and enabling payment of the bill", but had not provided any information about the extent of charges made by banks for this currently. On the other hand, if bank OTC customers were in fact being routinely charged a fee for this service, then, on the face of it, the fact that more customers were prepared to continue to avail of that facility at a fee (rather than free at a post office) implied a strong consumer preference for channelling their OTC utility payments through banks despite such a charge.

(3) *The An Post network would be able to receive over the counter and process a much wider range of bill payment types, across a significantly increased range of outlets (as compared to the existing number of retail bank branches) which will be open beyond and outside traditional bank opening hours;*

No evidence had been presented to the Authority that post offices could process a wider range of bills OTC than banks could. If An Post wished to expand its range of bill payment types, there appeared to be no reason why this plan should depend upon the banks referred to leaving the OTC payment system. As mentioned above, there appeared also to be considerable doubt concerning An Post's plans for expansion in the number of outlets at which bills can be paid, and, in any case, such expansion could occur regardless of whether or not An Post secured substantial market power in the market for OTC bills. The Authority also noted that the longer opening hours referred to were already available in An Post outlets – if An Post wished to open for even longer hours, it was presumably free to do so regardless of whether or not the banks concerned also offered OTC services.

(4) *The An Post BillPay service allows for quicker electronic capture of bill payments, resulting in better reconciliations for bill payers and bill issuers, and less scope for error in processing the payments*;

The parties had described in detail An Post's OTC bill payment service – *BillPay* – and claimed that this service allowed for quicker electronic capture of bill payments, resulting in better reconciliations for bill payers and bill issuers, and less scope for error in processing the payments. However, while they had also described the bank clearing systems regulated by the Central Bank etc, they had not described the banks' own systems in detail, nor had they brought forward any evidence which would allow the speed of the relative OTC systems to be assessed or compared. Thus, the Authority had to regard the claim for 'quicker electronic capture of bill payments' by An Post's system as remaining to be substantiated.

(5) *Coordinated, planned and consumer friendly communication to bill payers as to the effect of the OTC Initiative and the methods of bill payment available, will avoid confusion and frustration amongst consumers.*

(6) *More consumers will be aware of the available electronic or non-paper bill payment options as a result of the co-ordinated IPSO/An Post communication programme.*

The Authority considered that these were simply necessary prerequisites of customer relations in any sector, rather than benefits which could be claimed for the notified arrangements. For example, avoidance of confusion on the part of consumers could, in the Authority's view, hardly be claimed as a benefit. Secondly, it would, in the Authority's view, be reasonable to expect competitors in a market to market their systems effectively in any event, without the need to 'coordinate' this.

(7) *Finally, both An Post and the banks will continue to focus, and with greater emphasis, on providing consumers and the public at large with the most efficient means of bill payment, thus meeting the increasing demands of consumers and the public at large in this regard.*

Again, the Authority found it difficult to pin down what extra benefit was being claimed for consumers here. One would have expected both An Post and the banks – as with any other service provider – to be focusing on the provision to consumers of efficient services in any event. Simply continuing to do what the parties claimed to have been doing already could not, in the Authority's view, be claimed as a legitimate benefit for consumers.

Does not impose on the undertakings concerned terms which are not indispensable

14.12 In the Authority's view, Clause 3.4, which provided for confidentiality in respect of information shared between the parties, was reasonable and unobjectionable

Afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question

14.13 In the Authority's view, this issue went to the heart of the matter. As mentioned in paragraph 7.6 above, the proposal was for the banks concerned simply to withdraw as competitors in the OTC market/segment for bill payments and to allow – in fact to encourage and facilitate – An Post to take up their existing market share. Thus, competition for business in this segment would, with the apparent exception of Ulster Bank, be eliminated and – what was of particular concern to the Authority – the parties would be co-operating in such elimination.

14.14 As to whether the elimination of competition would be in respect of *a substantial part of the services in question*, that naturally depended on the market definition chosen. While the Authority had not considered it necessary to identify which specific market was the relevant market in this case, it was of the view that, in either case, the extent of the elimination of competition would be 'substantial'. If the market was the narrower one of all OTC bill payment services in the State, the banks had the largest market share (over 42%, or 10 million transactions) of the three types of market participants ie, An Post, the banks, and the utilities; by any yardstick, that was "a substantial part of the services in question". Admittedly, the proposed arrangement did not include all the banks currently supplying OTC services, but it constituted an extremely large proportion, and its share was clearly substantial. If the market definition was the wider one (as claimed by the parties) of all forms or methods of bill payment in the State, the banks' OTC transactions would still account for nearly 20% (10m out of 49m) of that market, with the banks concerned again accounting for the dominant share of that 20%. In the Authority's view, that would still represent a substantial part of the services in question.

14.15 The Authority also noted with concern provisions in the Heads of Agreement proposing the formation of a 'Steering Committee'. Other than the general statement that the Steering Committee was to " … *co-ordinate all co-operative payment initiatives within the context of the national payment initiative*," there was an absence in the Heads of Agreement of any meaningful limitations on the issues which might be coordinated by the Steering Committee. This raised the concern that the proposed structures could facilitate and encourage anti-competitive coordination between the parties involved, both in areas directly and indirectly related to the subject matter of the proposed scheme (extending potentially into coordination on all areas of bill payments).

14.16 The Authority stressed that it was the co-ordination between the banks and An Post that was key to its objections to the arrangements notified. Each bank could withdraw unilaterally, but so far, the banks concerned had not chosen to do so. The Authority was not persuaded of the substantive merits of the reasons advanced for any withdrawal needing to be collective. It was possible, given the benefits consumers seemed to associate with being able to pay bills in banks, and the strong reputational effects associated with the banking industry, that each bank involved in the arrangement feared losing customers to its competitors should it withdraw unilaterally. In the Authority's view, this was the essence of healthy competition, and a collective withdrawal would imply reduced benefits to consumers.

(e) Parties' Response

15.1 The parties responded to the Authority's Statement of Objections on 27 July 2001 and an oral hearing was held on 20 September 2001.

15.2 In their responses, the parties reiterated their view that the OTC Initiative did not contravene section 4(1) of the Act. They summarised their arguments as follows:

(a) The participating banks were simply ceasing to provide one form of bill payment service, i.e over the counter bill payment (noting that ceasing to provide a service would not usually be regarded under competition law as giving rise to market sharing), and would continue to actively compete in the bill payment market.

(b) All other forms of bill payment remained in place and unaffected from a competition perspective. None of the parties were subject to any terms which would affect or limit their freedom to provide bill payment services in the future.

(c) The participating banks were not encouraging their customers to use An Post's bill payment OTC services. For example, the proposed public information brochure relating to the OTC Initiative simply (and briefly) advised of the existence of such services.

(d) The participating banks would in fact be strongly encouraging their customers, as per the information brochure and otherwise, to switch to more efficient means of bill payment, i.e. electronic methods. These methods were readily and easily available, at least for bank customers.

(e) There were an increasing number of competitors entering the bill payment market, notably those who currently participated in prepaid utility services, for example, Alphyra and UK Paypoint. Alphyra was a substantial service provider in the prepaid market. These new market players would be competing for access to those bank customers wishing to continue to pay bills "at counter" (whether that be a traditional "branch counter" or a desk or point of payment terminal in a retail outlet or other public access area), in addition to the continuing presence of both An Post and Ulster Bank.

(f) The participating banks had no control over any decision as to whether or not bill issuers or customers would continue to use OTC services, and whether at An Post or at any other service provider.

(g) Consequently, in circumstances of a cessation of a particular service, (i) where it was now and in the future entirely a matter for bill issuers and consumers to decide what service they would engage or use, (ii) from which service provider, and (iii) in the absence of encouragement to so engage or use a particular service provider (such as An Post), it could not reasonably be said that there was any form of "market sharing" under the OTC Initiative.

15.3 Notwithstanding these arguments, if the Authority still considered that the OTC Initiative did not qualify for the grant of a certificate under Section 4(1) of the Competition Act, 1991, then the parties submitted that the OTC Initiative:

(i) contributed to improving the provision of bill payment services in the State; or if not so viewed,

(ii) contributed to promoting technical progress in the State: or if not so viewed,

(iii) contributed to promoting economic progress in the State,

whilst allowing consumers a fair share of the resulting benefits; that no terms were imposed on the parties which were not indispensable to the attainment of those objectives; and that the parties were not afforded the possibility of eliminating competition in respect of a substantial part of the bill payment services in question.

15.4 Summarising, the parties stated that –

(a) With regard to (i) and (ii) above, under the OTC Initiative all the parties committed to improving bill payment services in the State (as provided by them) particularly electronic methods of payment; and also in the case of An Post to developing more efficient and cost effective means of processing OTC bill payments. Further, there was no co-ordination between the parties of the means or indeed the plans by which such improvements would or were to be made – the only element of co-operation involved was the orderly withdrawal of the participating banks from providing OTC bill payment services in the interests of the consumer.

(b) With regard to (iii) above, the OTC Initiative had been approved by the Government as part of the wider National Payments Strategy, which was designed to promote economic progress in the State. In particular, it was intended to facilitate the better use by bill payers of more efficient and cost effective bill payment services and thereby achieve greater savings and other benefits for all concerned (including consumers).

(c) Consumers would obtain a fair share of the resulting benefits as follows:-

- through cost reductions in usage of OTC services (a zero charge at An Post, and likely to be the case for all other service providers, versus the current charge of up to €0.53 per transaction at bank). This provided some clarification concerning the issue raised earlier in 14.11(2), about whether or not the banks charged a fee for processing an OTC payment;

- an orderly cessation of OTC services by the participating banks, publicised on a national basis (at banks' own cost), thus facilitating consumer understanding, and therefore less confusion, as to what bill payment services were available at or through the participating banks;

- the fact that consumers could pay bills on a partial basis at An Post but not at banks, and that bills paid by consumers at An Post were processed and accordingly recorded as paid much more quickly than bills paid by consumers over the counter at banks;

- as a result of the planned information campaign, consumers ought to become better aware of the more efficient, cost effective and widely accessible bill payment services as were available from service providers in the bill payment market (whether electronic means at or through the bank, or electronic and OTC means at or through other service providers); this in turn ought to result in greater usage of such services by consumers;

- as many OTC bill payment customers had no choice except to pay certain bills (such as ESB bills) in banks or utility outlets, then the banks' withdrawal would contribute to opening up the market to other participants, thus giving consumers a wider choice of OTC bill payment outlets.

(d) The OTC Initiative would not result in an elimination of competition in respect of a substantial part of the bill payment market as a whole, primarily because of the changing trends in the bill payment market and the number of new entrants to that market (especially existing service providers of prepaid utility bills); and further because the OTC Initiative did not constitute the giving by the banks of their OTC market share to An Post (being a matter entirely for consumers and bill issuers to decide).

15.5 The parties wished to stress that the participating banks' rationale behind the need for co-operation was that there would be potentially widespread confusion for bill payers (and also bill issuers) should each bank withdraw from the OTC market at different stages. The parties further submitted that "*if any of the major high street banks were simply to unilaterally withdraw from the OTC market as they are fully entitled so to do, without regard to the impact that this would have on consumers and the public at large, such bank would likely face significant criticism from consumer groups and others*". The parties considered that a consistent and orderly withdrawal was in the interest of consumers, and yielded a cost advantage, over a unilateral withdrawal, to all concerned.

15.6 According to the parties, approximately 75% of bills paid at banks were only payable at banks or through utility channels and were not payable at post offices, i.e. some bill issuers did not currently allow their customers to pay through An Post. [ ] Accordingly, the parties submitted, "*for a very significant number of consumer bills, consumers who wish to make OTC bill payments have no choice except to pay [these particular bills] at bank[s]*". The parties suggested that, should the banks withdraw from providing OTC bill payments, An Post would be in a position to bid for, and possibly win, the contract for providing bill payment services from a number of bill issuers.

15.7 In contrast, An Post estimated that 80% of OTC payments made at post offices were transacted in cash. The parties believed that this showed that those customers without bank accounts preferred to pay bills at post offices, rather than at banks – this would, for example, be consistent with the receipt by social welfare recipients of their benefits through post offices.

15.8 Accordingly, the parties submitted that each of the criteria (or relevant criteria as applicable) set out in Section 4(2) of the Competition Act, 1991, were satisfied, and that therefore the OTC Initiative qualified for the issue of a licence by the Authority pursuant to Section 4(2) of the Competition Act, 1991.

(f) Oral Hearing

16.1 At the Oral Hearing, the parties further reiterated that, rather than engaging in collusive market-sharing, what they were doing was responding to Government requests in an open, public and transparent manner, by endeavouring through practical cooperation to commence the process of creating more efficient and cheaper bill payment systems and usage in the State. It was about economic, technical and indeed social progress, and promoting the interests of the common good, all in response to Government requests and initiatives.

16.2 The parties accepted that banks could unilaterally choose to cease providing OTC payment services. They pointed out that it was a matter for each IPSO member bank to decide whether to participate in the Initiative, and claimed that the non-participation of one such bank in the arrangement – Ulster Bank – was clear evidence of its voluntary and non-compulsory nature. However, the parties stood by their view that an orderly withdrawal from the service concerned was the most responsible approach and in the better interests of customers and consumers at large.

16.3 The parties further argued that the joint withdrawal was of a responsive nature, as they claimed that, in the long run, banks would individually withdraw from the provision of OTC payment services. This was because such payment services were inherently less efficient and more costly – particularly for banks, which did not have the counter technology that other competitors had – than electronic methods. Accordingly, given the high probability that a series of individual withdrawals would take place anyway, a co-ordinated withdrawal would better serve the interests of consumers.

16.4 As regards the Authority's suggestion that each bank involved feared losing customers to its competitors should it withdraw unilaterally, the parties viewed this suggestion as both surprising and unfounded. If bank customers really did prefer to pay bills at bank, then they could choose to go to or become customers of Ulster Bank, or use other OTC outlets such as post offices, retail shops, paypoints etc. The participating banks had no material concerns that they would lose customers by withdrawing OTC services, whether unilaterally or jointly. If there was such a perceived risk, then it would be a matter for each of them to continue to promote actively to their own customer base the merits of using other (e.g. electronic) methods of bill payment.

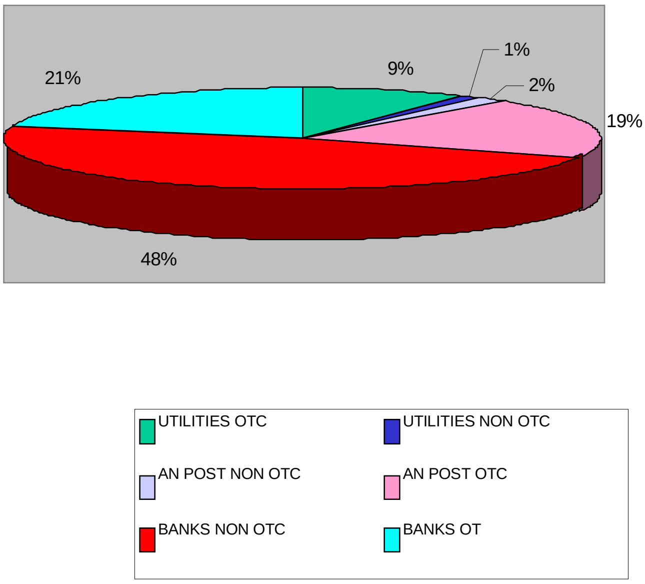
16.5 As regards the Authority's contention that joint withdrawal of a service amounted to market-sharing, the parties claimed that simple cessation of a service would not usually be regarded as a form of market sharing.

16.6 Aside from that, the parties stated, first, that approximately 70% of bills paid at bank counters are paid by cheque and the balance in cash. The parties submitted that persons presenting cheques for bill payment are by definition bank customers and therefore have access to all other means of bill payment offered by their bank, including electronic methods. Thus, contrary to the Authority's view, the great majority of consumers who paid bills at bank counters do already have access to electronic payment methods.

16.7 Second, the parties claimed that, using the European Commission's rationale in the *Dutch Bank Giro* case, once consumers discovered that another payment method was cheaper, it could be presumed that they would switch to using it. The Initiative was designed to help consumers become more aware, and accordingly use, cheaper – indeed no cost – and more efficient means of bill payment.

16.8 A third point was that OTC transactions at bank represented 21% of the total bill payment market; for non-bank customers they represented only just over 6% of the total bill payment market. Even if the narrow market definition of the "OTC segment", the figures were 29% and 13% respectively. Thus, the parties submitted that in reality what was "up for grabs", if at all, was only 6% of the market – hardly "a substantial part of the services in question". This, in turn, meant that the effect on the market of the banks' cessation was not remotely likely to be substantial. These numbers are displayed in Figure 3, supplied by the parties, below:

Figure 3



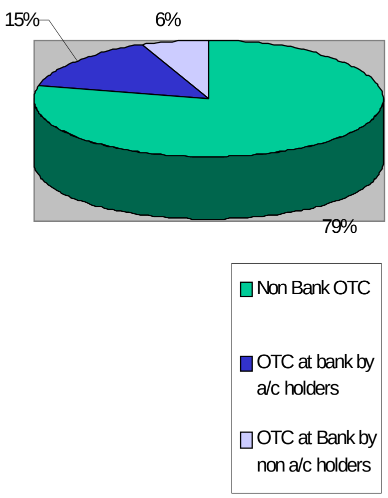
Bank OTC segment of overall market is 21%

A/c holders account for 70% of Bank OTC's

(ie 70% x 21% = 15%)

Non A/c holders account for remaining 30% of Bank OTC's

(ie 30% x 21% = 6%)



16.9 Fourth, the parties considered that there was no real evidence to conclude, as the Authority had done, that there was a consumer preference to pay bills at bank counters rather than elsewhere, or that consumers felt that substantive benefits accrued to them from being able to make bill payments in this way. On the contrary, the parties described the practical list of difficulties faced by consumers who tried to pay their utility bill at a bank, e.g. parking, queueing etc. An Post also conducted a demonstration of the efficacy of their payment system in order to exhibit its speed in capturing OTC payments.

16.10 Fifth, while the Initiative involved a phased withdrawal from OTC services, it was entirely a matter for both bill issuers and consumers as to which services they would engage thereafter – the parties claimed, in this context, that the Authority was ignoring the existence of other competitors in the market, e.g. Alphyra, Easons, Ulster Bank, utilities etc. They estimated that prepaid outlets exceeded total bank outlets by a ratio of 10:1; prepaid outlets exceeded total An Post outlets by a ratio of 1.75:1. A prepaid outlet is one where customers buy a certain amount of a service in advance of actually using it.

16.11 Sixth, the banks were not encouraging or facilitating An Post to take up their existing market share, as concluded by the Authority - although they acknowledged that the Heads of Agreement notified did envisage a migration of bank branch-based OTC bill payments to the post office network. The parties submitted that, in reality, the implementation of the agreement and the OTC Initiative comprised or boiled down to a proposed Information Leaflet, which contained nothing more than limited statements of fact. If the Authority considered that references to An Post in the Leaflet constituted “encouragement” or “facilitation” by the banks, the terms of the Leaflet could be amended. The Authority asked for further clarification on this point – if it was the case that the arrangement boiled down to an Information Leaflet (which it had not previously seen), what arrangement was actually before the Authority for consideration? The parties clarified that the banks had no contractual arrangements with An Post, and that any commitment to An Post was not binding. They agreed to revert to the Authority at a later date on the current status of the Heads of Agreement, and to make clear what was dependent on the Agreement and what was not.

16.12 As regards the *impact on consumers* of the Initiative, the parties again maintained that, contrary to the Authority’s preliminary view, there was no consumer preference, as such, to pay at bank versus at a post office or other payment outlet – in fact, it was the other way around, particularly for cash payments.

16.13 Second, the Initiative would not result in a drastic reduction in outlets for OTC bill payments, since nationwide bill payment counters or computer terminal networks would still be available through An Post, Ulster Bank, at least some utilities etc. In fact, they predicted that the number of outlets available would actually expand, to fill the gap left by the banks’ cessation.

16.14 Third, they stated that both continuing and new competitors would “in all probability be providing a far better consumer service, and on a nationwide basis” (e.g. no fee charged, better technology, quicker settlement, better opening hours).

16.15 Fourth, the parties stood by their view that a joint but phased withdrawal of bank OTC services, together with a public information campaign, would be better for consumers than intermittent unilateral withdrawal, and would reduce the scope for mass confusion.

16.16 Finally, they repeated their claim that the Initiative does have a role in promoting technical and economic progress, both of itself and as part of the National Payments Strategy; they pointed, in this respect, to “the top-down flow of the estimated savings to the economy arising from” the Strategy.

(g) Post-Hearing Developments

17.1 The parties reverted to the Authority by letter dated 5 October 2001. They restated that there were, in essence, two elements to the OTC Initiative –

(a) As and from a specified date, the participating banks would cease to provide OTC services in circumstances where other service providers could provide, or currently provided, a similar service. This would involve two phases in the terms set out in the original Notification. This was designed to ensure, as far as practicable, continuity of service to OTC customers.

(b) The other element of the OTC Initiative involved the notifying parties participating in a joint information programme, as per the information leaflet already supplied. The leaflet simply advised of the withdrawal of OTC services and other options available for bill payment. To the extent that the leaflet contained references to An Post, the parties were willing to amend it to refer generically to OTC service providers, or to An Post and other OTC service providers, should the Authority so require.

17.2 The parties reiterated their belief that a co-ordinated cessation by the participating banks of OTC services was better for consumers and the public at large. The banks would not be encouraging, facilitating or allowing An Post to take up their market share. Indeed, in contrast, the banks were, and would be, actively seeking to retain their own customer base and to encourage all of their customers to use electronic bill payment methods. It would entirely be a matter for consumers and bill issuers to decide what bill payment methods to choose and what service providers to engage. As explained at the Hearing, there was already a considerable degree of competition and potential competition in the OTC segment of the bill payment market.

17.3 In terms of any suggestion that the participating banks might or should offer financial incentives to customers to switch to electronic payment methods, this would be a matter for each bank and not the subject for discussion by the Steering Group.

17.4 The Authority had also queried the activities of the Steering Group referred to in the Heads of Agreement. In essence, the parties explained, the role of the Steering Group was to provide a specialised and expert forum for contact by Government and others (including consumer representatives such as the Office of the Director of Consumer Affairs) with the payments industry and to analyse what improvements and developments could be made to payment mechanisms or systems in the context of the National Payments Strategy, such as (1) the OTC Initiative, (2) Electronic Debit Authority, (3) universal access to electronic payment methods, (4) Electronic Bill Presentation and Payment, and other initiatives that might arise under the National Payments Strategy. The activities of the Steering Group would not involve the co-ordination of market activities by the participants – bearing in mind that banks currently provided the same or similar payment methods to the public at large. To the extent that any proposed initiatives arising from the workings of the Steering Group, and any working groups under it, involved any competition law issues, it would be a matter for the parties to ensure that such initiatives complied with competition law (as the parties had done in the case of the OTC Initiative by notifying it to the Authority).

17.5 However, following the Oral Hearing, and bearing in mind the comments and queries of the Authority, the parties had now replaced the (originally notified) Heads of Agreement dated 14th November, 2000, with updated and revised Heads of Agreement dated 5th October, 2001, and these were now submitted for consideration by the Authority. The Notification (and Response) by the parties should thus be read with reference to the revised Heads.

(h) Revised Heads of Agreement

18.1 The Authority has compared the Heads of Agreement originally notified with the Revised Heads of Agreement submitted on 5th October. For convenience, **Box 1** below summarises the original Heads, and the text that follows describes the Revised Heads.

Box 1

Clause 1 of the original Heads of Agreement ("the Agreement") stated the Scope of the Agreement as being that the parties "*agree to cooperate in establishing an agreed framework to migrate bank branch-based OTC bill payments to the post office network*". **Clause 1** also stated that the Agreement formed part of the parties' response to the National Payments Strategy, and that it sought to provide a more cost effective and efficient approach to the provision of payment services for the parties, for bill issuers and for consumers.
Clause 2.1 stated that IPSO and An Post "*agree to co-operate in a programme of migration of OTC bill payments from bank branches to Post Office outlets*"; under **Clause 2.2**, the principal objective was stated to be to assist the movement of OTC payments to efficient methodologies as part of a co-ordinated response to the National Payments Strategy.
Clause 2.3 provided that, while the parties sought co-operative agendas on many aspects of the National Payments issue, they agreed that "*the migration of OTC payments can be implemented on a standalone basis*".
Clause 3.1 provided that the parties would establish a steering group (comprising members from IPSO and An Post) "*to coordinate all cooperative payment initiatives within the context of the National Payments Strategy*". This steering group would (**Clause 3.2)** establish a working group "*to plan and implement the OTC Migration Programme*"; part of the Working Group's mandate was to be "*to specify those transactions for migration*"). Under **Clause 3.4**, the parties would agree at Steering Group level "*an interim PR position*"; an external PR specialist would also be retained to develop a "*comprehensive PR/Marketing campaign*", the costs to be shared equally between the parties.
Finally, both parties agreed that the Heads of Agreement did not constitute a contractual obligation on either party, but were "a fair expression of the serious intention of the parties to cooperate in the area covered by the Heads.

18.2 **Clause 1.1 of the Revised Heads of Agreement** ("the Revised Agreement") omits any reference to a "migration programme", and now describes the Agreement as being –

> "designed to provide a framework to facilitate an expert and co-ordinated response by the banking sector in the State (through the auspices of IPSO as its representative organisation) and, as applicable, An Post, to the request by Government to the payments industry to develop, on a co-operative basis, more efficient and cost-effective payment methods in the State for all concerned".

Through this framework, the parties will (new **Clause 1.2**) –

> "explore possible initiatives with a view to implementing the National Payments Strategy (NPS), subject to consultation with relevant interested parties and to compliance with all legal and regulatory requirements",

the first such initiative being the OTC Initiative (new **Clause 1.3**).

18.3 **Clause 2.1 of the Revised Agreement** still provides for a Steering Group; however, this will now *initially* comprise members from IPSO and An Post. Moreover, this Group will establish *specialist* working subgroups with, "*as applicable, representatives from the institutions which wish to participate in any NPS initiatives*

The role of this Steering Group is now stated to be (new **Clause 2.2**) –

> "to provide a specialist forum for contact by Government and others with the payment industry and to oversee the analysis, implementation and review of specific NPS initiatives, such as (1) the OTC Initiative, (2) Electronic Bill Presentation and Payment Initiative, (3) Electronic Debit Authority Initiative, (4) a Universal Account Initiative (i.e. access to electronic payment methods for all), and any other initiatives as may arise under the NPS."

Clause 2.3 states that the Steering Group will ensure that its workings, and the workings of each subgroup established by it, comply with all legal and regulatory requirements (including without limitation, competition law). Any costs or expenses as may be incurred are to be subject to approval by the Steering Group, and shall be payable by participating institutions on a fair and equitable basis.

18.4 **Clause 3.1** restates the principal objective of the Initiative, i.e. "to assist the movement by the public at large to using more cost effective and efficient bill payment services".

New **Clause 3.2** states that the Initiative will involve –

> "(1) the banking sector (or those banks participating in the Initiative) providing for a phased withdrawal of bank counter paper based bill payment services, subject to the banks being satisfied, so far as practicable, that customers (including bill issuers and consumers) can access OTC bill payment services from other service providers, including, without limitation, An Post,
>
> (2) an IPSO public information programme to advise of the withdrawal of bank OTC services and the availability of all other forms of bill payment in particular electronic means and methods."

New **Clause 3.4** states that the role of An Post will be limited to participating in the IPSO information programme.

18.5 **Clause 4.2** restates that the parties will agree at Steering Group level "*an interim PR position*"; and the retention of an external PR specialist to develop a "*comprehensive PR/Marketing campaign*", the costs to be shared equally between the parties, while **Clause 4.3** reconfirms both parties' agreement that the (Revised) Heads of Agreement do not constitute a contractual obligation on either party, but are "a fair expression of the serious intention of the parties to cooperate in the area covered by the Heads".

ASSESSMENT

(a) Applicability of Section 4(1)

20.1 The Authority notes the parties' statements prior to, during, and subsequent to, the Oral Hearing, to the effect that the role of An Post in the proposed arrangements is now intended to be limited to participation in the proposed "information programme" (see, for example, paragraphs 48(c), 50(d), 62 above). However, while the Revised Heads of Agreement submitted to the Authority appear, on the surface, to have reduced the role of An Post in the arrangement – and certainly the previously specific and exclusive nature of this – the fact remains that a specific role is still foreseen for An Post in the arrangement before the Authority. Several Clauses of the Revised Heads – for example Clauses 1.1, 2.1 and 3.2 – still refer to An Post specifically, and it will still be participating in the proposed information programme. Further, it will both participate, and partly pay for, the Steering Group to be created, as well as the proposed PR/Marketing campaign intended to be launched. Thus, the Authority must still consider An Post as having a significant role to play in the arrangement; if this were not so, it would have been open to the parties to exclude any reference to An Post in the Revised Heads of Agreement.

20.2 The IPSO participating banks have also specifically reconfirmed their intention to effect a collective and phased withdrawal from the OTC bill payments market. This is still fundamental to the Authority's objections to the agreement. The Statement of Objections referred to the possibility that a bank would not withdraw unilaterally for fear of losing customers to its competitors. The Authority is of the opinion, and indeed the parties directly referred to this possibility in their presentation at the Oral Hearing, that a withdrawal might prove unpopular with a bank's customers. However, a collective withdrawal, which, by ensuring that a customer who leaves their bank will not be able to obtain the same service with a competitor, removes much of the threat of losing customers. As such, there may be no effective check to the withdrawal of a service, and thus it is the collective nature of the agreement that saves the participants from the normal competitive consequences of their actions. The European Commission, in its decision on CECED (Case iv.F.1/36.718 CECED, OJ L187/47, 26.7.2000), found that an agreement among the members of an international association of, manufacturers of domestic appliances and national trade associations, *inter alia*, to cease producing and/or importing into the Community certain categories of washing machines, had the object of restricting or distorting competition within the meaning of Article 81(1) of the EC Treaty.

20.3 In these circumstances, the Authority is of the view that the revised arrangement notified to it (i) comprises an agreement between the banks involved in the arrangement simultaneously and collectively to withdraw the facility of OTC bill payments, and, (ii) involves a non-contractual agreement between these banks as a group and An Post. As such, the Authority considers that the proposed revised arrangement would contravene Section 4(1) of the 1991 Act. It would note, however, that objection (i) is a core objection to the agreement, and that, by itself, the complete removal of An Post from the agreement would not imply that the agreement did not violate Section 4(1).

(b) Applicability of Section 4(2)

21.1 The Authority has carefully considered all the arguments raised by the parties to the effect that, if the Authority should still be minded to refuse to issue a Certificate in respect of the revised arrangement, it should nevertheless grant a Licence in respect of it.

Contributes to improving the provision of services

21.2 The Authority notes the parties' comments that consumers do not necessarily have a preference to pay OTC at banks rather than post offices. Of all the OTC payments, nearly 75% are payments of bills that are not payable OTC in post offices. As such, the Authority accepts that it is difficult to distinguish a clear preference for consumers to pay at banks rather than post offices. However, the fact that consumers with bank accounts – who would have access to electronic methods of payment – still apparently prefer to make approximately 7 million bill payments OTC through bank branches by cheque seems to imply that some consumers still wish to pay OTC at banks. Given this, it is difficult to see how the collective withdrawal by a number of operators of a service still demanded by a large number of consumers could contribute to improving the provision of a service.

Technical and economic progress

21.3 The Authority has not changed its view on whether the arrangements would promote technical or economic progress. It again accepts that electronic means of payment are more efficient than OTC methods, but reiterates its view that there is nothing intrinsic to the notified arrangements that promotes technical progress. The participating banks offer electronic services irrespective of whether or not they also offer the OTC payment service. There is nothing to stop the banks from promoting the uses of such services, and from engaging in nationwide campaigns to promote these services to consumers. Nor, indeed, in the Authority's view, is there anything to prevent each individual bank from realising the gains to be made from moving towards electronic payment methods on an individual basis, without the necessity for an agreement among competitors.

21.4 The parties have described in detail An Post's OTC bill payment service – BillPay – and claim that this service allows for quicker electronic capture of bill payments, resulting in a better service for bill payers and bill issuers, and less scope for error in processing the payments. However, there appears to be no reason why An Post's continuing investment in technological advancements should depend upon the participating banks leaving the OTC payment system.

21.5 The Authority is also of the view that there is nothing specific to the arrangements that would promote economic progress within the State. The National Payments Strategy, and any economic progress associated with it, depends on consumers using more efficient methods of paying bills, which, as noted above, can be achieved by properly incentivising consumers, and informing them of the benefits of such methods.

Consumers obtaining a fair share of the resulting benefits.

21.6 The cost reductions in the use of OTC services referred to by the parties do not appear to offer substantial benefits to consumers. At present they are obtaining a zero charge at An Post, so the promise of a zero charge as a result of these arrangements does not offer any gain. If consumers are being charged for paying OTC at banks, then presumably they value the service sufficiently highly as to pay 53 cent rather than avail of zero charge at An Post. If one argued that consumers did not have the option to pay certain bills at An Post, and thus would benefit from a situation where An Post had a contract for more bill payment services, the actualisation of any proposed benefit depends entirely on whether An Post wins the bill issue contracts currently held by the banks. In any case, there is no surety that An Post will sustain a zero price for OTC payments in the long-run. Thus the Authority feels there is no guarantee that consumers will be able to use OTC bill payment services free of charge under the OTC initiative.

21.7 The parties' claim that the banks' withdrawal would open up the market to other participants is not accepted by the Authority. First, the prepayment of bills is not an identical service to *ex post* payment of bills. Many prepayment systems require a credit card or other forms of credit arrangement to work at the most efficient level for the consumer. Second, any assumption that the market will be opened up to other participants only if the banks withdraw is highly arguable. If other participants, including those who offer a prepaid service, enter the bill payment market, then their success will depend upon their intrinsic efficiency and their ability to offer a more attractive service to consumers. In any case, the Authority would note that there is as yet little substantive evidence to indicate that new participants are entering, or are about to enter, the bill payment market.

Does not impose on the undertakings concerned terms which are not indispensable

21.8 In the Authority's view, the collective withdrawal by the participating banks from the provision of OTC bill payment services is not an indispensable term for the achievement of the principal objective of the OTC Initiative, as laid out in the Revised Heads of Agreement. A reduction in the use of cheques and increased consumer awareness of electronic methods of bill payment, and any of the benefits to consumers thereof, for example, are likely to go toward achieving the primary objective. The Authority is not of the opinion, however, that the complete withdrawal from the supply of this service, by a large proportion of suppliers, in a coordinated manner, is a proportionate response to the achievement of a more efficient payments industry.

21.9 The Authority also notes the parties' comments that much of the impetus for this agreement came from the Government rather than the parties themselves. However, this is not an issue that the Authority can substantively concern itself with, insomuch as the salient issues it has to consider are whether the agreement breaches Section 4(1) of the Act, and, if so whether it then fulfils all of the conditions required for the grant of a licence. As the above paragraphs make clear, the Authority considers that the Act is breached and that the conditions required for the grant of a licence are either not satisfied or could be achieved in a manner less harmful to competition.

Does not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question

21.10 In the Authority's view, this issue goes to the heart of the matter. As already mentioned, the proposal is for the banks concerned simply to withdraw as competitors in the OTC market/segment for bill payments. Thus, competition for business in this segment would, with the apparent exception of Ulster Bank, be eliminated and – what is of particular concern to the Authority – the parties would be co-operating in such elimination.

21.11 As to whether the elimination of competition would be in respect of a substantial part of the services in question, that depends on the market definition chosen. While the Authority has not considered it necessary to identify which specific market is the relevant market in this case, it is of the view that, in either case, the extent of the elimination of competition would be 'substantial'. If the market was the narrower one of all OTC bill payment services in the State, the banks have the largest market share (over 42%, or 10 million transactions) of the three types of market participants i.e. An Post, the banks, and the utilities; by any measure, that is "a substantial part of the services in question". Admittedly, the proposed arrangement does not include all the banks currently supplying OTC services, but it constitutes an extremely large proportion, and its share is clearly substantial. If the market definition was the wider one (as claimed by the parties) of all forms or methods of bill payment in the State, the banks' OTC transactions would still account for nearly 20% (10m out of 49m) of that market, with the banks concerned again accounting for the dominant share of that 20%. In the Authority's view, that would still represent a substantial part of the services in question.

21.12 The Authority stresses again that it is the co-ordination between the banks, and between them and An Post, that is key to its objections to the arrangements notified. Each bank could withdraw unilaterally from the provision of OTC bill payment services but, so far, the banks concerned have not chosen to do so. The parties' assertions that the OTC bill payment market is rapidly changing and that the OTC Initiative is paving the way for new competitors (notably those already in the prepaid payment market) involves a high degree of speculation and the Authority cannot place the same weight on such information. Even allowing for the possibility that An Post would face other competition if the banks withdrew their OTC bill payment facilities, the Authority is not persuaded of the substantive merits of the reasons advanced for any withdrawal needing to be collective. It is possible, given the benefits some consumers seem to associate with being able to pay bills OTC, that each bank involved in the arrangement fears losing customers to its competitors should it withdraw unilaterally. In the Authority's view, this is the essence of healthy competition, and a collective withdrawal could imply reduced benefits to consumers.

The Decision

22.1 In the opinion of the Competition Authority,

(a) Allied Irish Banks plc, The Governor and Company of the Bank of Ireland, National Irish Bank Limited and TSB Bank Limited are undertakings, as they are all engaged for gain in the supply of banking services. The proposed agreement will have effect in the State.

(b) IPSO represents the above-mentioned banks and is thus an association of undertakings.

(c) An Post is an undertaking, as it is engaged for gain in the supply of postal and other services.

(d) The proposed agreement between IPSO, representing the above-mentioned banks, on the one hand, and An Post on the other (Notification No. CA/5/01) notified on 10 May, 2001, under Section 7 of the Competition Act, 1991, as amended, is a proposed agreement between undertakings, and would have effect in the State.

(e) The notified arrangement would have the effect of preventing, restricting or distorting competition in the market for bill payments within the State and therefore contravenes Section 4(1) of the Competition Act, 1991.

(f) The notified arrangement does not meet all of the requirements for a licence specified in section 4(2) of the Act.

22.2 The Authority therefore refuses to issue a certificate or grant a licence in respect of the notified arrangement.

For the Competition Authority

Declan Purcell
Member
3 April 2002