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*Submission to the Consultation Process and Report by the
Competition Authority/Health Insurance Authority (HIA)*

Competition in the Irish Private Health Insurance (PHI) Market

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Introduction

The substantive analysis in this submission to the Consultation Process on the Irish PHI Market is built around 4 Figures. These demonstrate this simple truth: measures to deliver anything other than cosmetic improvements in the competitive environment are simply not feasible within the existing PHI market structure and regulatory arrangements. Such measures are the equivalent to giving the deck chairs on the Titanic a fresh lick of paint. An anti-competitive PHI regime, reinforced by a discriminatory and flawed regulatory regime and which has been authoritatively criticised as illegal under the EU Treaty and unenforceable, is fatally holed below the waterline. It has all the makings of yet another major policy debacle, being played out in slow motion in the teeth of the requirements of the EU Internal market and at enormous cost to consumers and competition-led capacity building in Irish healthcare.

The Consultation Process in this Joint Competition Authority/ Health Insurance Authority (CA/HIA) process reflects the primacy of policy rhetoric and political intransigence over the realities necessary to secure the kind of regulatory reform¹ to deregulate PHI and increase competition, compliant with Ireland's obligations under EU Treaties—particularly the Third Non-Life Directive (TNLD).

Section I comprises of an evaluation of the data set out in the following four Figures.

Figure I sets out some key issues regarding the Terms of Reference, which bear directly on outcomes of this Consultation relating to the scope, or otherwise, for creating increased competition in PHI. In particular, it compares the Tanaiste's Statement of 23rd December 2005, made in the context of her decision to implement Risk Equalization (RE), with the Terms of Reference subsequently announced for this CA/HIA Consultation process.

Figure 2



Figure 3 reinforces the argument set out in Figure 2, by demonstrating the nature and underlying causes of the skewed and unfair “Playing Field” for entrants, from the perspective of Consumer and Solvency/Financial Stability.

Figure 4 provides, at least in outline form and for the first time, the nature, extent and scale of competitive disadvantage, in terms of authorization and regulation requirements, confronting new entrants to Ireland's PHI Market.

Section 2 distils the data in the preceding figures in order to generate a number of evidenced-based Propositions which directly address the underlying issues which impede and subvert the working of the EU internal market in respect of PHI.

¹Blöndal, S., Pilat, D., (1997), The Economic Benefits of Regulatory Reform, OECD, ECONOMIC STUDIES, 7, 28. see also “Towards Better Regulation”, Government of Ireland, Department of An Taoiseach—an incisive mainstream policy perspective on competition but one from whose scope, PHI was excluded by Government.

Section 3 sets out in summary form, the “O’Malley Critique”. That is, the arguments set out by the (former) Minister responsible for Insurance Regulation during the course of the Health Insurance (Amendment) Bill, 2001. In his landmark speech Mr. O’Malley warned, on the basis of authoritative EU arguments, that the legislation was unequivocally contrary to the TNL, the Treaty and was illegal and unenforceable. His critique has never been effectively rebutted. This is, in itself, indicative of a sustained policy failure to comply with the Treaty and facilitate real competition in the PHI market.

A necessary starting point for an analysis of measures to increase competition in the Private health Insurance (PHI) market is the nature of the prevailing market structure, including Public Governance and Regulatory arrangements. These determine, in large part whether, or not, there is a ‘level playing field’ on which competition is feasible and whether the market is contestable.

More generally, **Figures 3 and 4** set out existing arrangements in relation to regulation and governance, as between the different market participants; namely, the State owned Vhi and the sole entrants into the market BUPA Ireland (1996) and Vivas (2004). They provide some insights into the core question of whether, or not, the Consultation process, ostensibly designed to identify ‘measures to further (sic) increase competition’, can be regarded as meaningful.

Figures 3 and 4 constitute a template shaped by a number of factors. These include key elements of competition theory, the State’s obligations under the Treaty, the EU Internal Market as well as relevant Directives notably the Third Non-life Directive (TNLD). The template was also designed to provide some guidance regarding whether, or not, the prevailing ‘market’ arrangements including regulation, governance and policy, facilitate or frustrate the operation of the Treaty as well as the implementation of the E.U Internal Market.

At the heart of the paper is the core question of whether the mandate of the relevant EU Commission’s Insurance Directives and reform programmes (including in particular the Financial Services Action Plan (FSAP) and Competition Policy can operate with Ireland’s PHI market.

The analysis in (recently endorsed by EU Finance Minister) provides a ‘screening’ mechanism within which to evaluate whether national competition policy, as it operates and is implemented across the Irish economy- and, more importantly, all other sectors of Financial Services- can permeate the PHI ‘market’. This in turn, provides a basis for evaluating whether Irish regulatory arrangements in the PHI ‘market’-specifically those relating to Financial Stability, Consumer Protection and ‘Best Practice’ in Public Governance-uphold, or undermine, the EU Internal Market and the interest of the consumer.

Theory and International ‘Best Practice’ would suggest indicate that one looks for five features in such arrangements.

- Legal Certainty including unequivocal compliance by the State with its obligations under EU Treaty and Internal Market.

- Consistency across the regulatory arrangements for overlapping related health protection products.
- Simplicity in authorisation and regulatory oversight in the interest of both the Consumer and the strength and efficiency of the market.
- Equality in the treatment of the market participants. This means non-discriminatory treatment and a broadly equivalent regulatory ‘burden’
- Competition. In this regard “The Competition Authority has made known in many varied circumstances that competition is the best protector of consumers interests”²

The Irish State has a particular responsibility in this regard. Vhi has been described as “an arm of government social policy”³. On the one hand, it owns and directs the dominant player which exercises significant (overwhelming) Market Power (SMP) in the PHI Market. Equally, and on the other hand, a presumption in favour of new entrants into the PHI market would reflect international ‘Best Practice’ and would also be consistent with the approach of the Irish State in all other sectors of financial services, most notably in connection with the International Financial Services Center (IFSC).

Section 1 Some Issues Regarding the Terms of Reference

The State, on the 23rd December 2005, announced the implementation of RE. There are a number of arguments that could be made against the decision on technical grounds. There are also-as will be shown below- principles-based arguments against the decision. These are not relevant to the Consultation process and will not be developed.

More immediately, however, there are five major issues which (**see Figure 1**) arise in connection with the terms of reference and which are directly relevant to this Consultation process:

- Why was Private Health Insurance (PHI), which is a sub-set of Non-Life Insurance under the relevant EU Directives, excluded from the 2005 investigation by the Competition Authority into Non-Life Insurance.
- The announcement of an investigation into “competition” in the PHI Market was made by the Minister simultaneously with the decision to implement RE. However, the Irish PHI ‘Market’ has ostensibly been ‘open to competition’ since 1994. Developments in the post 1996 (a full decade) period increasingly been raised questions as to the seriousness of the intent, on the part of the State to promote competition in PHI. Specifically, the ‘Market’ is arguably more restrictive now than it was prior to ‘deregulation’ and the existence of barriers to entry, (see below) have been acknowledged even by Government.

² “Submission to the Health Insurance Authority- Risk Equalization in the PHI Market in Ireland” (Isolde Goggin- Director of Regulated Markets Divisions), Competition Authority, May 2005

³ Cooper, M., Smyth, S., (1997), Relationship between VHI and civil servants far from healthy, New Focus, The Sunday Business Post, 5th Jan., 14.

Figure 1:- Comparison of Tānaiste Statement of 23rd December 2005, in the Context of Implementing RE and the Terms of Reference Subsequently Announced for the Competition

<u>Tānaiste (23rd Dec. 2005)</u>	<u>Competition Authority –HIA Terms of Reference</u>	<u>Comment-Note</u>
[The Minister] “has sought and received Government approval for Legislation designed to ensure that the Vhi operates under similar conditions as applied to other Insurers in the market”	Absence-in a study supposedly to promote competition as envisaged under TNLD and Treaty-of any <u>specific</u> reference to the necessity of equality of regulatory treatment and to address the <u>demonstrable differences that presently exist</u> (Table 4) which are both notable and conspicuous.	No mention in T of R Almost 15 years ago the Vhi noted “it is essential that Vhi should also be placed on an identical footing with it’s private sector competitors as regards all dimensions and aspects of regulation of the Healthcare Insurance industry” (Annual report 1992, P. 4)
“Competition Authority and the HIA to Report within 6 months on further (sic) measures to encourage competition”. “... the strategy or strategies which might be adopted in order to create greater balance in the share of the market held by competing Insurers” (<i>italics added</i>)	“Make recommendations for change to any enactment or admin. practice that is limiting competition in PHI... <i>to the detriment of consumers</i> ”(italics added) “...[Make] recommendations to encourage competition...and /or other Strategies to improve the functioning of the Health Insurance Market that would benefit consumers” (<i>italics added</i>) “Identify duties that could be assigned to the [HIA] under existing legislative provisions and additional functions that might be possibly be assigned to the [HIA]”	Question-how long does it take to place all participants on an “identical footing”? Tānaiste,s Statement is <u>unequivocal</u> regarding measures to encourage ‘competition’ by contrast, T of R is <u>equivocal</u> (‘and/or’) and appears to infer that limitations on competition might not be to the detriment of consumers (contrast this with Sutheland (1996), O’Malley (2000) and CA website and submission to HIA.
“The Government has approved the drafting of a Bill to amend the existing Vhi Acts. The Tānaiste advised the Oireachtas at the end of June (2005) of her intention to bring such proposals to Government”	<u>Comment-Note</u> [Announcements to legislate for a change in the corporate status of Vhi have a long and undistinguished record of not happening] Reference to ‘relevant sub-markets’ of PHI	No mention in T of R of creating “greater balance in (Market Shares) The ‘and/or’ implies that ‘other strategies to improve the functioning of the PHI Market’ might be an alternative to competition. This is contrary to the TNLD. Importantly, no mention whatsoever of an enhanced role for HIA in Tānaiste statement-such a proposal is wholly contrary to sound regulatory practice
		Not mentioned by Tānaiste

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- More specifically, why did successive Ministers wait until the actual RE commencement decision of 23rd December 2005 to announce an investigation by the Competition Authority, which is the competent National Authority to investigate competition in specific sectors and industries? The need for such an investigation has been obvious for a number of years, not least because

both entrants into the Irish PHI Market have been impelled to seek redress, in terms scope to compete and build their market presence from the EU.

- What was the reason why the investigation was committed to both the CA and the HIA. There has never previously been such a joint investigation by the Competition Authority.
- What is the reason for the very significant differences between, on the one hand, the wording of the Minister in the statement of 23rd December 2005 and the Terms of Reference finally announce for the joint CA/HIA investigation.

Regarding the last point, Figure 1 sets out some of the more significant differences between the two. Each is important. One stands out:

“Identify duties the could be assigned to the [HIA] under existing legislative provisions and additional functions that might possibly be assigned to the [HIA]”

There is no such mention of this in the Minister’s original announcement. Such an inclusion in the Terms of Reference is, it will be argued below, at best contrary to sound – and mainstream Irish- regulatory practice.

More fundamentally, there is an issue regarding whether or not the Minister for Health and Children has the statutory power to initiate an investigation under the Competition Acts, since these come under the remit of the Minister for Enterprise Trade and Employment. There is, equally, the issue of the extent and scope of the HIA’s remit in relation to competition. These points, and those noted above, have a bearing on the purpose, and status, of the ‘Joint Investigation’.

Section 2.1

[REDACTED]

[REDACTED]

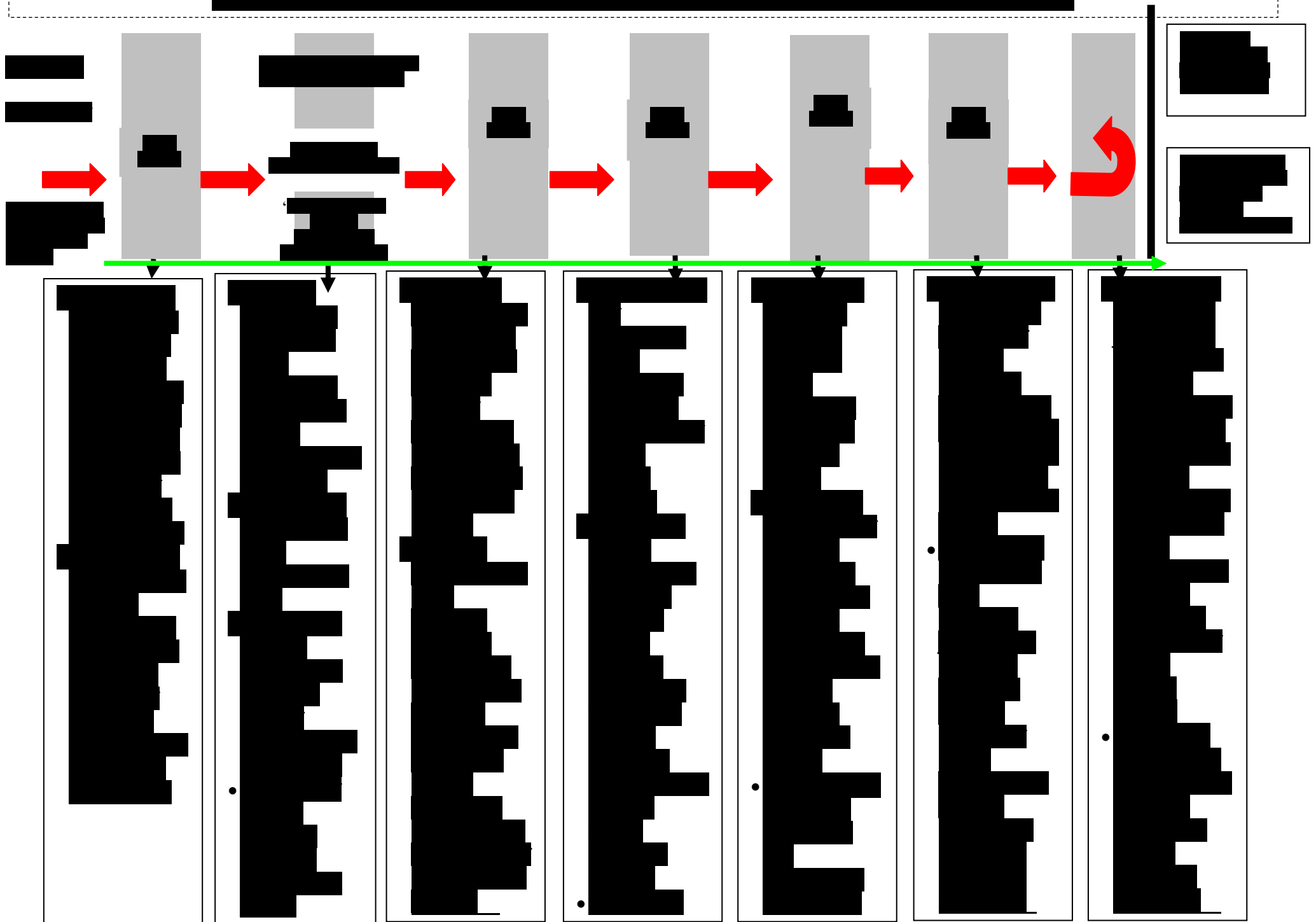
[REDACTED]

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[REDACTED]

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Figure 2.



Section 2.2 Lack of Competition and the 'Skewed' Playing Field for PHI

Figure 3 below sets out, in diagrammatic form, the nature of the “Playing Field” for recent, and prospective, entrants into the Irish. The core idea of Figure 3 is this. Competition (and contestability) requires a ‘level playing field’. That is the central purpose of the EU Internal Market. Such a situation can be characterized diagrammatically as the thick black vertical line, in Figure 3.

There are a whole range of anti-competitive forces embedded into the very fabric of the Irish PHI market, including regulatory arrangements that have *skewed* this black line, to create the dysfunctional, discriminatory, anti-competitive and far from level playing field that now characterize the Irish PHI market. The ‘level playing field’ envisaged by the TNLD has been shifted to the red diagonal line.

In reality, these anti-competitive forces can be categorised under two headings: Solvency/Financial Stability and, on the bottom left-hand side of Figure 3, Conduct Business/Consumer Protection.

Each of the individual forces are self-explanatory. The extent of Market Dominance of the Vhi is contrary to the TNLD. The extent of the Vhi’s Significant Market Power (SMP) goes against the grain of European Competition law and jurisprudence. Competition can only be effective in the context of multiple insurers, with broadly equivalent market shares and who negotiate **sustainable** reimbursement rates with Independent Hospitals. These conditions do not exist in the Irish PHI market. Sheehan (2005), for example, who is uniquely authoritative both as a Clinician and a developer of Independent Hospitals aimed at increasing capacity and equality of access, has criticised the exercise by the Vhi of its Dominance in determining reimbursement rates, for Independent/Private hospitals⁷.

The impact on Consumer/ patient welfare is clear. There is no level playing-field. The (Black vertical) line has been wholly skewed towards the (Red diagonal), with significant welfare costs in terms of lack of consumer choice and subversion of scope for competition by perspective EU Insurers, made possible by the TNLD.

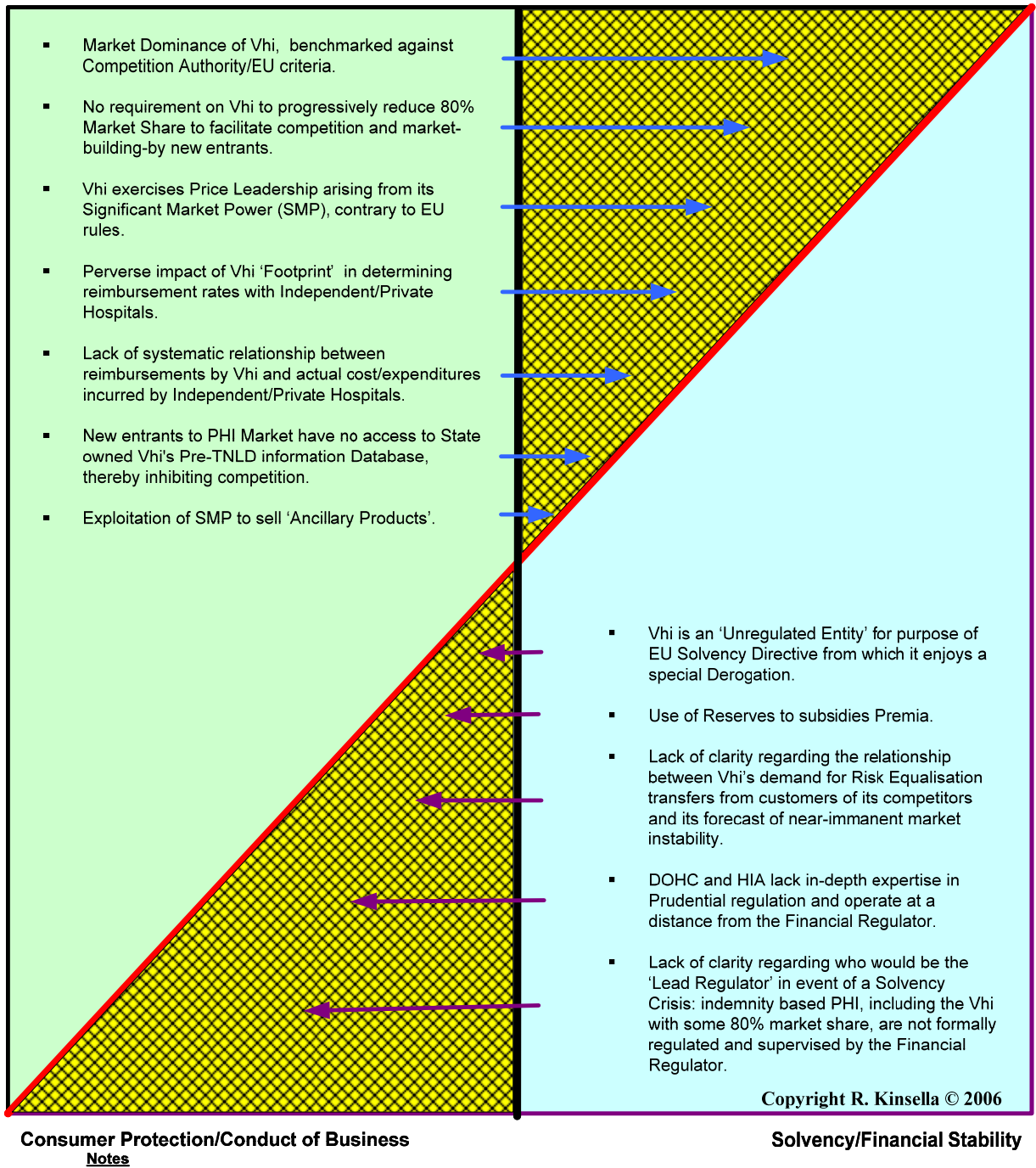
Figure 3 demonstrates that the sheer extent of skewness in the ‘market’ in favour of Vhi, makes discussion of measures to increase competition largely academic. The picture is one that is anathema to the EU Commission as the Guarantor and monitor of the implementation and effective operation of the Treaty and the Internal Market⁸.

⁷ Wood, K., (2006), Clinical Conflict, The Sunday Business Post, 19th Feb., pg 19.

See also, Mitchell, S., (2006) VHI in dock over reimbursement rates, The Sunday Business Post, A rebuttal of this argument is set out in “Vhi’s sole purpose is to serve its members” Irish Times, Aug. 2nd. 2005

⁸ This is particularly evident when considered in the broader context of the EU Finance Ministers (FSAP) and the post-FSAP strategy of a genuinely Single Market in Financial services-from which PHI in Ireland, is uniquely within the EU, semi-detached.

Figure 3:- Skewed and Unfair 'Playing Field' for New Entrants into Irish Health Insurance Market, and for PHI Consumers



Section 2.3 Fragmentation and Discrimination in Authorisation and Regulation and Reporting

Figure 4 sets out arrangements for the authorisation, regulation and supervision of PHI in Ireland. These arrangements encompass Indemnity-based insurance, Hospital Care Plans, Permanent Health Insurance as well as Critical Illness products. These are all, to a greater or lesser extent, substitutes/ complementary products. Indemnity-based products account for by far the greatest coverage of Health/Illness products. The statutory basis for authorisation and regulation in this whole field is extraordinary complex. This is important since it bears directly on the issue of the privatisation of the Vhi. If, in practice, this complexity is a reason for apparent continual deferral of privatisation – which would facilitate structural competition – it should be acknowledged and addressed. This has not been the case. A change in the Corporate Status of the Vhi (which has been called for by the Vhi itself) has been regularly announced but never implemented.

Table 4 sets out eight headings by which existing authorization, regulatory and reporting arrangement can be evaluated to benchmark equality of treatment of the State owned Insurer compared with its competitors. In other words, in fact, ‘greater competition and reporting in the interest of the consumer’ is a practical possibility in the Irish PHI Market.

Impact of RE

The first heading looks at the impact of Risk Equalisation (RE). This is the core regulatory artefact of the PHI ‘market’. The Vhi **inevitably** benefits from this feature: existing and prospective market participants are **inevitably** disadvantaged. Transfers are one-way. The scheme operates in a way that effectively levies a ‘rent’ on competitors to the already Dominant State-owned Insurer with all of its in-built advantages of scale economics, informational advantages, continued exemption from EU Solvency requirements- the last mentioned being wholly indefensible on prudential grounds and ensuring non-discrimination among ‘Market’ participants.

It is acknowledged by Government- and the Competition Authority-itself that RE constitutes a barrier to entry. This, in turn, greatly limits the *contestability* of the PHI ‘market’. There is irrefutable evidence that major EU Insurers, who operate across the EU and, indeed globally, have been deterred from entering the Irish PHI market and giving fractional effect to the Internal Market.

RE is neither necessary – the PHI Market and the Vhi has continued to grow – in the absence of the imposition of RE - nor is it ‘proportionate’, in the terminology of Article 54 of the TNLD.

Significantly, Goggin⁹-in the Competition Authorities’ submission to the HIA- has noted the issue of ‘proportionality’ as it relates to the regulation of the PHI Market in Ireland. The importance of ‘proportionality’ in financial regulations-and its relevance to the development of fair, orderly and Competitive Markets- is widely recognised.

⁹ Competition Authority Submission to the HIA

There are two dimensions to this. The first has been well expressed by the Chairman of the UK's Financial Services Authority who has recently made the point that:

“Regulation depends not only on legal powers but on the effective, proportionate and fair exercise of these powers”¹⁰.

The importance of this authoritative perspective hardly needs underlining in relation to its relevance to the adoption by the Irish Authorities of RE.¹¹ This leads to a second point, namely, the lack of proportionality of Risk Equalisation *as a market intervention mechanism in itself*. There is an over-whelming case for arguing that there is a built-in disproportionality in RE itself. This is because it generates outcomes, in terms of ‘Required Payments’, which would, if implemented, have the impact of generating losses on a scale sufficient to drive the competitor to the dominant State-Insurer out of the Irish ‘Market’. Such an outcome would be wholly contrary to both the spirit and letter of the TNLD and Treaty. RE is, quite simply, *in itself*, and in its *impact* on the PHI ‘Market’, disproportionate. It fails this crucial test, which is acknowledged both in the Competition literature both in Ireland, and also in the wider EU.

More generally, it is only necessary to point out that, in terms of this Consultation exercise, whatever ‘measures’ could be advanced to increase competition within the existing ‘market’ are, logically, insignificant compared with the negative competitive impact for of new entrants presently deterred by RE - into the market.

¹⁰ UK Financial Services Authority (FSA) Annual Report 2004/5, page 5.

¹¹ It is equivalent to a six-monthly prospect of a ‘nuclear’ option for competitors to the State, creating ongoing uncertainty and wholly at odds with the wide variety of regulatory/supervisory interventions developed and utilised by the Financial Regulator

Figure 4 Authorisation and Regulation of Ireland's Fragmented PHI and Related Products

Authorisation and Regulation of Ireland's Fragmented PHI and Related Products Regime: The Scale of Regulatory, Compliance and Competitive Disadvantage			
Indemnity-based PHI (Non-Life)			
Regulation of:	Vhi¹	BUPA Ireland²	Vivas³
• Impact of RE	Inevitably Benefits <i>from</i> RE	Prospectively <i>exposed to</i> RE	Prospectively <i>exposed to</i> RE
• "Too big to Fail"	De-Facto preferential support from Government	Fully exposed to Competitive Pressures	Fully exposed to Competitive Pressures
• Solvency	Unregulated entity ⁴ Re: EU Solvency Directive	Full EU Solvency Requirements	Full EU Solvency Requirements
• Other "Financial Stability Issues"	DOHC	UK Financial Services Authority (FSA)	Financial Regulator (IFSRA)
• Conduct of Business	DOHC	Financial Regulator (Partial Role for HIA)	Financial Regulator (Partial Role for HIA)
• Funding of Regulator	DOHC (Partial role for HIA)	Levy to HIA Levy (Prudential) to FSA Levy (Consumer) to Financial Regulator	Levy to HIA Levy (Prudential and Consumer) to Financial Regulator
• Licensing of Intermediary/Agency	VHI Authorised as a Multi-Agency for Travel and Dental Products	Not permitted, as a "Insurance" undertaking to also act as an Agent	Not permitted, as a "Insurance undertaking" to also act as an Agent
• Reporting Requirements	Not required to file returns with the Financial Regulator Annual Report laid before Oireachtas Returns to HIA	BUPA Insurance Limited files returns to the FSA (UK). Also provides statistical data to the Financial Regulator (IRL). Returns to HIA	Regulated by the Financial Regulator-statutorily obliged to submit annual returns under the Insurance Acts and Regulations. Also required to submit quarterly management accounts. Returns to HIA
• Hospital Cash Plans	Cash Plans are Risk-rated and authorised and regulated by the Financial regulator. They include both UK and Irish companies which were left largely unaffected by the Health Insurance Acts (i.e. no Risk Equalisation). The Provision of the Friendly Society Act 1896 (also apply in respect of Cash Plans of small Trade-based providers.		
• Permanent Health Insurance	Life Insurance Product regulated by the Financial Regulator or the FSA (UK)		
• Critical Illness	Life Insurance Product regulated by the Financial Regulator or the FSA (UK)		

Notes

1 Vhi is not subject to supervision or regulation by the Financial Regulator under the EU Non-Life Insurance Directive on foot of a derogation granted to Government under the First Directive (73/239/EEC). It is authorised as Multi Agency intermediary by virtue of "broker arrangements" in place with a Travel insurer (Europ Assist) and a Dental insurance provider (De Care Dental).

2 BUPA Insurance Limited is authorised and supervised by the FSA in the UK. By virtue of its arrangements for the Irish branch, established under EU Directives, its agent BUPA Ireland Limited, is authorised as a Multi agency intermediary by the Financial Regulator.

3 VIVAS Insurance Limited (trading as VIVAS Health) is authorised as an Insurance Undertaking by the Financial Regulator and is subject to its supervisory framework.

4 The Consumer levy is based on the Irish risk business written and is payable by BUPA Insurance Limited. In addition BUPA Ireland are subject to a prudential levy in their capacity as a Multi Agency Intermediary.

¹ The Consumer levy is based on the Irish risk business written and is payable by BUPA Insurance Limited. In addition BUPA Ireland are subject to a prudential levy in their capacity as a Multi Agency Intermediary.

“Too Big to Fail”

The second heading relates to the “Too Big to Fail” doctrine in competition economics. By reason of its ownership by the State, and the market Dominance it has attained and maintained as a result, *the Vhi is effectively immune to failure*. This is not the case with its existing or prospective competitors. This is not, therefore, a ‘competitive’ Market in terms that would be set out in a first year Economics text book, much less understood by EU and/or Global Institutions.

There is an additional key point Standard competition theory demonstrates that a failure of a financial institution, especially one with Significant Market Power, generates ‘negative externalities’. This is the basic rationale for financial regulation, notably Solvency. For obvious reasons, it is particularly applicable to single largest Non-life insurer, (with 1.5 million customers) in the State. The continued exemption of the State-owned Insurer from the Solvency regime is inexplicable and represents a potential threat to Financial Stability

The Vhi uniquely benefits from the *de facto* application of the “Too Big to Fail” doctrine. It follows that the State policy of continuing to maintain Vhi under the control of the Department of Health and Children (DOHC), rather than transferring it to the Financial Regulator (which is responsible for Life and all other forms of Non-life Insurance), constitutes a *de facto* form of protectionism.

This is because, in reality, any real hint of a failure would result in an immediate (and very necessary) transfer of responsibility for resolving such a crisis to the Financial Regulator. Maintaining the status quo of the 1957 Act allows the Vhi to leverage off its relationship with the DOHC, for the mutual benefit of both but at the cost of disadvantaging competitors who enjoy no such special relationship or immunity from failure.

Solvency

The third heading relates to Solvency. Vhi is an ‘unregulated entity’ for the purposes of EU Solvency Directives Solvency is core to effective regulation and also to the existence of a harmonised ‘level playing field’ for all competitors within the “market”. Provisions to ensure the Solvency of the Vhi were not built into its structure. Under the First EU Directive (73/239/EEC), the State obtained a Derogation in regard to the Solvency regime that applied to all other Non-Life insurers in Ireland and in the (then) EEC. In the light of the absolutely central importance of Solvency Standards for Financial Stability, this policy was, at best, misguided.

The completion of the EU Internal Market provided an opportunity to remedy this potential threat to Financial Stability. So, too, did the Third-Non-Life Directive, since this **required** the dismantling of State- monopolies and a level playing for all Non-Life-Insurers. These opportunities to improve the same solvency requirements on all particulars were not availed of by the State; *de facto* discriminatory treatment in favour of the State owned body was, at best, maintained.

The imposition of the same solvency requirements for all Market participants could have been enacted in the Health Insurance Act, 1994. The fact that the State chose not to do so is reflected in the withering and authoritative criticism of Sutherland in his Preface to Massey and O'Hare's definitive study on 'Competition Law and Policy in Ireland' (1996).

“Too many unjustified monopolistic restrictions remain, which inhibited the emergence of genuine Competition [in the State controlled Sector] in... Health Insurance [and]... the economy generally, and consumers and tax-payers in particular, pay dearly for the inefficiency and subsidies. Not only have successive Governments delayed the introduction of meaningful competition in these [including Health Insurance] areas, but they often added insult to injury by seeking derogation from highly desirable European laws ... Sham arguments are advanced to suggest that these economic are not suitable for Competition¹².”

The PHI White Paper, 1999 provided yet another opportunity to bring the Solvency regime enjoyed by the Vhi into line with that imposed on its competitors, and all other Non-Life Insurers. The White Paper did provide, *inter-alia*, for the State to inject additional capital into the Vhi to help it achieve EU solvency levels (and to adhere to EU Solvency *regime*, which is the more important issue) were quietly dropped. Such a policy would, of course, have constituted a State Aid. Instead, responsibility for Vhi's achieving solvency levels was, *in effect*, transferred via a RES 'tax' to the Vhi's existing and prospective competitors.

A new corporate status for VHI provided for in the White Paper would have required adherence to EU Solvency Standards. Significantly, proposals for RE were legislated for in the Health Insurance (Amendment) Act, 2001. But not proposals for privatisation, which are at the heart of competition in the PHI Market.

The enactment of the Central Bank and Financial Services Authority of Ireland Act, 2004 provided yet another opportunity for regularizing the Vhi Solvency regime and placing it on a level footing with that of its competitors. Once again the State did not avail of this opportunity: instead, while legislating for a Single Regulator, and transferring responsibility to it for all (RE) Insurance authorisation and regulation, the State opted to continue to leave the Solvency of the Vhi, and the regulation of its PHI business, to the DOH.

The Minister of Health and Children's Statement, of Dec 2005 setting up this present Consultation process, appears (tho this needs to be confirmed) to push the matter of Vhi's compliance with all provisions of the Solvency Directives, (including, importantly, SolvencyII) a further six years into the future.

Combined with this, as it was in the White Paper 1999, are proposals by the Minister for legislation to change the Corporate Status of the Vhi. Such proposals are amongst the most “announced” in recent legislative history. It is regularly rolled- out

¹² Massey and O'Hare *op cit*

to provide a ‘fig leaf’ to what Sutherland called as far back as 1996 “a protectionist mentality” on the part of the State and which is still clearly evident ten years.

The continued exemption of the Vhi from the EU Solvency Directives imposed on its competitors, from other EU Markets, is indefensible. It provides a competitive advantage to the Vhi. The arguments against such an exemption, on the grounds of effective regulation, Financial Stability and a ‘level playing field’ are so compelling- and the opportunities for the State to have regularized this most important of prudential factors have been so numerous-that it is difficult to avoid the conclusion that the State has, over the years, been deflected from its responsibilities for ensuring Financial Stability in the PHI market, including a harmonised regime for all competitors.

Other ‘Financial Stability’ Issues

The scope for competition and measures to increase competition are constrained by the overriding need to ensure Financial Stability. This is true for Ireland as well as internationally. ‘Financial Stability’ is a wider concept than Solvency, or in the case of Banking, Capital Adequacy *post* Basle II. It embraces Governance, Internal controls, Risk Management broadly defined and, more generally, Ethics.

The effectiveness of authorization, regulation and supervision underlying Financial Stability depend on a number of factors. They include the depth of expertise and experience of the regulatory authorities, operating within an environment characterised by an exponential growth in the scale and complexity of financial services products, services and systems. This includes the need for and a commitment on the part of the Financial Regulator, to a culture of “World Class” standards, continual networking with counterparts in other jurisdictions and with international coordinating bodies. This is simply not possible for the DOHC and/or the HIA. In the case of Ireland, the necessary expertise is centralized in the Financial Regulator. Ad-hoc cooperation in this instance between the Financial Regulator and the HIA is a ‘second-best’ solution, as well as being contrary to the principal of a single Financial Regulator.

The nature and quality of the dialogue by the regulator with institutions under their supervision is equally important: an independent but “High Trust” relationship is important- which, in turn, feeds back into whether, or not, the supervisory arrangements are of the highest international standards. The Financial Regulator meets these criteria. Arrangements for the authorization, regulation and reporting in regard to PHI do not. This, it would seem, is the price the State is willing to pay to sustain a PHI regulatory regime that is, in any event, almost certainly contrary to the EU Internal Market

Figure 4 highlights the fact that, while Vivas and BUPA Ireland are supervised **in the totality of their business** by the Financial Regulator and the UK Financial Services Authority (FSA), **this is not true for Vhi**. The detail is set out in Table 4 (although, in fact, even the detailed table provides only a partial insight into the complexity of the arrangements).

But what is clear is that the DOHC, directly and indirectly, have primary responsibility for Financial Stability (including solvency) in regard to Vhi and also Consumer Protection (see below). This is misconceived. The expertise of the DOHC is in Healthcare and, since the Health Act 2004, in policy development and oversight. It is **not** in Financial Services regulation and in maintaining Financial Stability. This is why the Terms of Reference for the Consultation process-which envisages possible *additional* powers for the HIA (and which are not mentioned in the Ministers original announcement) could be construed as, at best, opportunistic and problematic. Both the HIA and the DOHC lacks the necessary regulatory capabilities, expertise and networks. The consequences (and costs) of this for the DOHC were reflected in the Medical Malpractice insurance debacle, which was allowed to fester over a long period before erupting in 2004.

There are also the issues of ‘regulatory overlap’ between the Financial Regulator and the DOHC/HIA. This is an important issue, since such overlap creates vulnerabilities within the system.

Also, important is the issue of the additional compliance costs of dual/overlapping systems. The estimation of such costs, which ultimately fall on Insurers and, more specifically on consumers, is addressed in the UK as an important theme (see FSA Annual Report 2004/5, page 9). This issue has not begun to be addressed in the context of PHI in Ireland.

Included in Financial Stability, as noted above, is the whole issue of Governance. In this instance, Public Governance. A distinguished former Secretary General of the DOHC has described the Vhi as “an arm of Government policy”, as indeed it is¹³. The State, via the Vhi, not alone determines capacity in the PHI ‘Market’ but also charges and, by extension, premia. The State makes the occasional acknowledgement of the need to remedy this glaring deficiency in Governance, arising from its multiple roles-and then continues as it always has. Indeed, analysis shows that the PHI ‘market’ has been more oppressive and state intervention even more pronounced to the detriment of competition **since** the TNLD. Measures to “further (sic) increase competition in the interest of the consumer” are simply “crowded out” in this environment. The illegal and misconceived legislation that detached PHI from the wider set of Non-life insurance has consequently emasculated the spirit and letter of the EU Internal Market in PHI and its overriding aim of increasing competition within, and across, the EU.

Conduct of Business

‘Conduct of Business’ includes in particular, Consumer Protection. Two points can be made under this heading. The first is the fact that while the Vhi is regulated by its owner, and sponsoring Department, in the case of BUPA Ireland and VIVAS, responsibility rests with the UK and Irish Financial Regulators, respectively, with a partial role for the HIA.

The second point related to the Conduct of Business rules, insofar as they relate to Consumer Protection. The Financial Regulator has a national and

¹³ Cooper, M., Smyth, S., *op cit*

international remit in this field. Consumer Welfare in Insurance and Banking in Ireland in recent years has been demonstrably improved because of the educational, information, monitoring and enforcement of the Consumer Protection Directorate of the Financial Regulator. Vhi indemnity based PHI product regulation operates outside of this regime. This is indefensible.

The dangers, as well as the and potential for discriminatory treatment arising from this situation, are highlighted by the fact that the Vhi operated “ancillary business” for several months before *retrospectively* obtaining the necessary authorisation as a Multi-Agency Intermediary from the Financial Regulator. It is not unreasonable to speculate on the reaction of the State, if a competitor to the Vhi was responsible for such an oversight. Ten years previously, the DOHC did not exercise its right to evaluate BUPA Ireland’s initial product offerings contributing to the sorry debacle that marked the transition of PHI to a ‘so called’ competitive market, under the TNLD. In the middle of this came the MedMal insurance debacle which would have been inconceivable had PHI Insurers operated under the remit of the Financial Regulator. The need for transferring responsibility away from the DOHC and to the Financial Regulator – even if it diminished State Control is overwhelming on prudential grounds.

More generally, the fragmentation of responsibility for Conduct of Business contravenes the core Principles of Consistency, Simplicity, Equality and Competition, set out at the beginning of this submission. Consumers are deprived of an integrated Conduct of Business regime across the spectrum of complementary products from which they may wish to choose. Equally, the fragmentation – so obvious in Figure 4 - prevents existing and prospective competitors from competing with the dominant State Insurer on a level playing field.

Reporting/Compliance Burden

It is clear from Figure 4 that licensing arrangements, as well as the Reporting/Compliance burden, differs significantly as between Vhi and those seeking to compete with it on a supposedly EU-driven ‘level playing field’. The difference in respect of levies and reporting requirements are particularly notable. Newly established entrants, or those seeking to operate on an ‘EU Passport’, are very disadvantaged. The costs, both financially and in terms of management time, are considerable.

In any other sector of financial services in Ireland, legislation to extend the commercial powers of the Vhi, such as have occurred in e.g. Travel Insurance, would be subject to a Regulatory Impact Analysis (RIA); a key feature being “Stress-Testing” in regard to, inter alia.

The competitive advantage enjoyed by the Vhi under these headings further compounds their advantages in other areas. These include scale, market share, capacity to allow new business to ‘leverage’ of its PHI business (including its staff, infrastructure and marketing).

What all of this means is that for the Ministers/ DOHC to talk of measures to ‘further (sic) competition’(!) in such a one-side and discriminatory environment is simply rhetoric, to which the State itself has apparently become desensitized.

Hospital Cash Plans

Hospital ‘Cash Plans’ are, from a consumer perspective, an alternative complement to indemnity-based PHI insurance. The important point to note about Cash Plans, as highlighted in Figure 4, is that they are Risk-rated, as well as being authorized and regulated by the Financial Regulator. Importantly, they existed within the Irish ‘Market’ prior to the TNLD. This highlights the lack of consistency in the PHI regulatory arrangements. There is a related point. While, as noted, Risk-rated ‘Cash Plans’ were already available to the Irish consumer prior to the TNLD, they could, in practice be ignored by the State since they did not threaten the Vhi market. It goes wholly against the grain if competition, innovation and choice—which are at the heart of the EU Internal Market that a new entrant into an ostensibly deregulated market should, by simply combining indemnity based insurance with a pre-existing product, be confronted with a wholly negative reaction by the state both directly and by means of a *de facto* regulatory system.

In any analysis of measures to increase competition in the Irish Health Insurance Market, it is necessary to point out that competition first came to Ireland through the establishment of BUPA Ireland. Their initial proposition was a basic indemnity product, with, discretionary “add on” Cash Plans. This ‘unbundling’ is not alone a feature characteristic of innovative Financial Markets; it was entirely congruent with the objectives of affordability and a more progressive (as opposed to regressive) product offering than was then available in the Mid 1990’s.

Having first reportedly failed¹⁴ to examine BUPA Ireland’s Product Regulations, the State *retrospectively* objected to their product offering, generating a massive political—“the end of civilisation as we know it”—reaction. With a 40-year lead into competition, and *de facto* monopoly power, reinforced by exceptionally high retention rates, this was the response to the first market entrant to challenge the State’s hegemony in PHI (and by extension, encroach into the whole Healthcare Sector). It was extraordinary and calls into question the existence of any intent, or strategy, on the part of the State to proactively embrace the EU Internal Market in PHI.

¹⁴ Seekamp, G., Harding, T., (1997), Chaos rules in ‘new era’, Analysis, The Sunday Business Post, Jan 5th, pg.6. In the same addition on pg 5, Mark O’Connell, Political Correspondent of the TSBP provides a more detailed analysis. Mary Ellen Synan “Absurd Old Argument” (1997). More recently, the eminent surgeon Maurice Nelligan has made the same point: “I read this morning that the Health Insurance Authority (HIA) is proposing to levy €21m which is to be transferred to the Vhi, under the Risk Equalisation Scheme. This baffles me, we are constantly hearing that we need competition in the Insurance Industry and the lack of such competition is a main factor in high insurance premiums. I can think of no way more calculated to drive Companies out of this wonderland environment than this daft, and in my humble opinion, immoral practise., Nelligan, M., “Taking a Risk on Health” The Irish Times, March 22nd. 2005, page 5.

In an analysis of developments at that time (1997) Mary Ellen Synan made the point trenchantly:

“No Minister should be allowed to coercive monopoly-let Alan Greenspan define just what that is: one protected from the disciplines of the Capital Markets by franchise, subsidies and special privileges from Government regulators”-just as no businessman should be allowed a coercive monopoly. Such a monopoly is always wrong and harmful to the rights of individuals”

In this regard, it is easy to overlook the fact that, had BUPA Ireland not established - and then re-launched in 1997 - the TNLD-related competition would have been a ‘dead letter’ for more than a decade. The Vhi’s monopoly would have been wholly maintained, notwithstanding the provisions of the TNLD. The establishment of VIVAS in 2004 provided a second entrant who, in little more than a year, felt impelled to seek redress from the EU Commission. This notably increased the market entry and market building phase of Vivas, who confront significant increases the diversion of management time as well as legal costs, in order to challenge the continued Market Dominance of the State. Its is difficult to construe such an environment as anything other than anti-competitive with the state-owned incumbent leveraging its advantages, set out above.

A final point on ‘Cash Plans’, which, tho they are substitutes/complements for PHI indemnity products, are authorized and regulated by the Financial Regulator-who does not, however, have responsibility for [the largest provider of] indemnity (PHI) Products. This fragmentation is contrary to the core principles set out at the beginning of this paper, including Simplicity for the consumer and Competitive equality for insurers, across the *whole* health insurance market.

Permanent Health and Critical Issues

The last two Headings of Table 4 relate to Permanent Health Insurance and Critical Illness policies. In terms of the remit of the Consultation Process, the two key points of note are

- Both of these are **Life** products, in contrast to (Indemnity) PHI and Hospital Cash Plans that are **Non-Life** products.
- Both are regulated by the **Financial Regulator**.

Again, there is the issue of the lack of simplicity and fragmentation of authorization and regulation of PHI; the far from robust platform on which the State has sought to maintain its hegemony in the PHI Market. More generally, consumers are confronted by an extraordinarily – and wholly unnecessarily-complex regime that militates against the development of a competitive and contestable market characterized by the Principles of Consistency, Simplicity, Equality and Competition outlined at the outset of this Paper.

In passing, it should be noted that this very complexity also serves to highlight the difficulties of legislation to change the corporate status of the Vhi as a necessary condition for ensuring effective competition in the Irish PHI Market; notwithstanding periodic State/Ministerial statements, when convenient, to the contrary.

Set alongside this is another point. Risk Equalisation has been advanced, since 1994, by the State as essential for the stability of what is deemed to be a “Community Rated” market, albeit its definition of ‘Community Rated’ remains unclear. Notwithstanding the clamour the over the last decade State/Vhi for the implementation of RE over the last decade, its absence has neither impeded the growth of the Vhi’s membership or its total Reserves.

‘Community Rating’ (CR) is a means to an end. It is not an end in itself. It is a (rapidly failing) response to the dysfunctionality an insurance scheme setup by the State and, equally, the increasingly evident failing on th part of the State to deliver acute healthcare in a timely manner, on the basis of medical need. It is not the only- nor necessarily the best-way of achieving affordable healthcare for individuals in older age cohorts. The State has failed to examine, and debate, alternatives, which might allow the PHI Market to function like any other Non-life market. The ‘Sacred Cow’ of CR facilitates the State in pursuing its objective of seeking to enforce RE to subsidise its State-owned insurer. In so doing, it discriminates against lower-income younger individuals and families for whom a fair and competitive market is their best guarantee of affordability of treatment and access.

The requirement of TNLD in regard to the process of legislating to eliminate State-monopolies- to change in the corporate status of the Vhi- (basically its privatization)- is a ‘dead letter’. A protectionist mind set, encompassed in legislation, has created a RE regime that is contrary to the EU Treaty and the TNLD, and whose effects are wholly at variance with national competition policy, almost a decade and a half since the TNLD.

Ireland should by now have a competitive PHI Market operation within an integrated and non-discriminatory, and even handed appropriate regulatory regime. It doesn’t. We now turn to why this is the case.

Section 3.

Drawing on the analysis setout above, some key propositions regarding the scope for increasing competition in the Irish PHI Market are set out below.

Proposition 1.

The existing market structure “crowds out” scope for measures to increase competition in PHI. This is evident from two realities. Firstly, the decision by a number of potential EU/Global Insurers **not** to enter the Irish market: nothing is better calculated to increase competition than new entrants. Theory, and experience, attests to this.

Secondly, both of the entrants who have entered the market very quickly had to adapt to the reality of a hostile policy and regulatory environment, a hostility that is wholly unique in any other section f the Irish financial services sector.

The extent of the hostility can be measured from the circumstances surrounding BUPA Irelands establishment in 1996, culminating in its case now before

the European Court of Justice (ECJ). It is equally reflected in VIVAS being impelled, within a year of its establishment in 2004, to divert its attention from market building, to taking action against the State/VHI within the European Commission.

Proposition 2.

The PHI market structure is the outcome of a deliberate and sustained effort by the State to protect its wholly owned monopoly insurer – which should have been deregulated at the very outset of the TNLD - against the competition pressures which are at the heart of the EU Internal Market and, more specifically, the Third Non-Life Directive (TNLD).

The genesis of this effort is interesting. The VHI's Annual Report for 1991/2 records (Pg 4):

“We will also be working closely with Government in drafting legislation... in connection with the implementation of the TNLD”

The responsibility for legislating for the EU Single Market in PHI is a matter for Government: what was a monopoly was to be made a market: open, competitive and contestable. It is difficult to see how the dominant State-owned insurer could work closely with Government ‘in drafting legislation’ which would simultaneously give potential rivals an even break or a level playing field

This resonates with Sutherlands’ (1996) arguments that:

“restriction on competition, be they the result of anti-competitive behaviour by firms or induced by state controls or monopolistic practices are inimical to true competitive. The harm they do to our economic life is significant.”

Indeed. In the Vhi’s Annual Report of 1997 set down a ‘marker’, which was to be a central plank if the State/Vhi campaigns for RE: *“In a competitive market there is a danger that insurers may compete for the low-risk younger end of the market”*. Despite inferences being made since then regarding ‘cherry picking’-in support of strident requests for the immediate implementation of RE - there has never been a scintilla of evidence that Vhi’s competitors were engaged in such a practice. Ironically, the Vhi *itself* stated in its Annual Report for 2000 that, as part of a wider strategy aimed at customer retention, *it* was targeting younger customers.

A tone of what comes across as ‘alarmist’ in regard to the Vhi’s financial performance-as part of its wider push for the implementation of RE-is evident as far back as 1996. It was characterised by, on the one hand, welcome and commendable evidence of strong financial performance and, on the other hand, of occasional dire warnings, for example, of the imminent implosion of Vhi, and/or the PHI Market and the Irish Healthcare system, if RE were not *immediately* introduced¹⁵. It is relevant to quote just one example of this:

¹⁵ Smyth, S., (1996) VHI on Brink of Insolvency, says financial director, The Sunday Tribune, 29th Dec. 17,52,1

“The introduction of RE is essential and urgent if the market is not to become destabilised by insurers competing for low-risk customers... any further delay in its full implementation or any watering down of the RE poses extremely serious risks not only for VHI.. and the PHI market but for the entire national health system (Vhi Annual Report 2001).

The extent of the States “*protectionist mentality*” was reflected in the additional commercial powers granted to the Vhi under the Health Insurance (Amendment) Act, 2001, which required setting aside the very specific restrictions regarding any such an extension incorporated in the 1994 Regulations. The same legislation *did*, however, provided for the imposition of RE transfers on the Vhi’s competitors.

Today, there is a real prospect of a return to the status quo ante - a State owned monopoly provider of PHI. This would represent an almost unthinkable triumph of State protectionism over the intent of the Treaty, the TNLD and the efforts of the EU Commission to implement the EU Internal Market.

Proposition 3

Arrangements for the authorization, regulation and supervision of PHI and related Health Insurance products are fragmented militate against market efficiency and pose a threat to Financial Stability, as well as being inimical to interests of the Consumer.

Proposition 4

These, and other factors, make it difficult to take seriously the announcement by the Minister of the *Joint* Competition Authority/HIA analysis on measures to “further” (sic) encourage competition” in the Health Insurance Market. The need for an analysis by the Competition Authority is palpable. Notwithstanding this PHI was excluded from the Competition Authority, investigation into, the Non-Life Sector. It was similarly ‘ring-fenced’ from the Policy Document “Towards Better Regulation” issued in 2003 by the Taoiseach’s Department. All of this calls into question the timing of this Consultation process. It certainly provided a useful ‘distraction’ from the decision by the Minister (the technical justification which must be left to one side) to commence RE.

This perspective is reinforced by the fact that the Report is being carried out jointly with the HIA. The Competitive Authority, as the competent statutory body in this field would, as a matter of course, liase with other bodies in any such investigation. However, this is, so far as can be reliably established, the first occasion in which the State has arranged that a joint Market investigation be carried out by the Competition Authority. The substantial differences in the remit of the Report as set out initially by the Minister in 2005 and subsequently in the actual Terms of Reference, raise serious concerns. If the Competition Authority was entrusted to carry-out amongst many others-an investigation into Non-life Insurance, why was it not entrusted by the Minister to carry-out an investigation into competition in one sub-sector of Non-life insurance; which is dominated by a State-owned Insurer through which the State exercises control, which subverts competition across the sector.

More generally, it is difficult to take seriously any State initiative such as that announced by the Minister 23rd December 2005, when it announced in the wider context of measures to give the Vhi another six years to attain EU Solvency requirements.

In support of this Proposition, consider the following statement in the Vhi Annual Report, **1992!**

“...The creation of the Single European Market (and) related National and EC Competitive legislation require that the Vhi monopoly status and its exemption from the solvency margins be terminated by the middle of 1994... it is essential that Vhi should also be placed on an identical footing with its [prospective] private sector competitors, as regards all dimensions of regulations of the Healthcare insurance industry” .

The core issue today, as the data so clearly demonstrate, is not about the Vhi having equality with its prospective private sector competitors; it is the latter who have, in the teeth of the spirit and letter of the EU Internal Market been denied, for well over a decade, the opportunity to compete on equal terms with a State-owned quasi-monopoly.

Fourteen years on from the Vhi Annual Report, 1992, the Minister, in her Announcement of 23rd December 2005, states that she has-

“written today to the Chairman of the Vhi advising him that the Government...obliging the company to build up its reserves to the level necessary to achieve authorization as an insurer within six years” [i.e. extend the exemption of the Vhi from EU Solvency requirements for another six years !]

From a position in 1992, where the State-Vhi anticipated the more or less immediate termination of its monopoly, and termination of *its exemption from the solvency margins by the middle of 1994*, we have **regressed** to a position, in terms of competition, where the Minister in 2005 envisages granting Vhi an **additional** six years to achieve compliance with the EU solvency regime (the position with Solvency II is not clear– except that Vhi’s competitors will be require to comply with the prospective Directive).

Equally, from a position in 1992 where the State-Vhi argued that *it is essential that Vhi should also be placed on an identical footing with its [prospective] private sector competitors, as regards all dimensions of regulations of the Healthcare insurance industry”* , the Minister, **some fourteen years later**, in her announcement of 23rd December 2005, announcing this present Consultation on competition in PHI, solemnly stated that she has written to the Chairman of the Vhi requiring it to *“operate under similar conditions as apply to other Insurers in the market”*.

This equivalence of wording, over a period of thirteen years, demonstrates either massive incompetence in advancing competition and a level playing field as a strategic objective at the heart of the EU Internal Market, or contempt for the spirit and letter of the TNL, the rights of consumers and for equality of treatment across all market participants in Ireland’s PHI Market.

How could one take seriously, or attach any credibility to, the stance of the State in relation to promoting ‘further (sic) competition’ in PHI in these circumstances? Shakespeare is not frequently cited in competition economics. But it is difficult to see the sustained repetition by the Irish State of long jaded clichés passing for policy, as other than “a tale told by an idiot, full of sound and fury, signifying nothing”.

The purpose of the TNLD is to increase competition in, and the contestability of, the Irish PHI Market. The Irish State has not implemented the TNLD in a manner consistent with the objectives of the EU Single Market and the Treaty. Quite the contrary (see below). Unless, and until, the State does this – or is constrained by the EU institutions to do so—talk of ‘measures to further increase competition’ will remain empty rhetoric, aimed at distracting domestic and EU Policy makers from a *de facto* continuation of Protectionism for a State body.

Finally, the *Joint Competition Authority/HIA* market investigation stands as an apt metaphor for State policy on PHI. The Competition Authority and the HIA each have distinctive mandates, reflecting, inter-alia, the mind-set behind the legislation bringing them in to being. The Competition Authority is the institutional expression of a recognition by the State, in the words of Massey and O’Hare (1996) of ‘the important role that an effective competition policy (underlining added) could play in the promotion of economic welfare’. It is, they point out, predicated on EU Competition law, in particular Articles 85 and 86 of the Treaty of Rome.

By contrast, the HIA was established under the Health Insurance (Amendment) Act, 2001. This Act, during its passage through the Dail, was characterised by Desmond O’Malley – who, as Minister for Industry and Commerce, was responsible for the authorisation and regulation of Insurance and served as a Chairman of the relevant EU Council of Ministers – as ‘a draconian regime which is designed to stifle competition’ (underlining added) and would, he asserted, be rejected by the European Union.

It is difficult to understand the reasoning behind the Joint investigation in terms of competition economics.

Section 4 The O’Malley Critique of RE

The Health Insurance (Amendment) Bill-providing for the RE regime and the powers of the HIA-were debated by the Dail in 2000/2001. Mr. Desmond O’Malley spoke during the Second Stage of the Bill.

In support of his own informed view, Mr O’Malley cited the analysis of the former Director-General of the Commissions legal services and, subsequently, of the Competition Directorate, Professor Klaus Dieter Ehlerman. The latter also served as a member of the Appellate body of the WTO and was, in the view of O’Malley, better qualified than anyone else in Europe to express a view on what was proposed for, and what is now contained in, the 2001 Act. Professor Ehlerman’s analysis can be briefly summarised as follows:

‘The introduction of the planned RE scheme would amount to a violation of Article 3 of the TNLD...would also amount to a violation of Article 43 of the [Treaty of Rome]...cannot be justified by Article 54 of the TNLD which) is not at all applicable to an RE scheme’.

‘A payment made according to the planned RE scheme to the Vhi or to BUPA Ireland would be a state aid that fulfils conditions of Article 87 of the EU Treaty such a payment could not be authorized by the Commission if it were a payment in favour of the Vhi which was financed by a payment or charge imposed on BUPA Ireland’.

Mr O’Malley concluded by arguing that ‘one of the leading authorities in Europe on this matter says it cannot be done. Why do the Minister and his Department pursue in trying to get this Bill through for the benefit of their own company to the exclusion of others...it would be better to come to terms with the reality of the Treaties under which we are now operating and the...regulations and directions made under them’

Much has happened since the State chose to ignore Mr O’Malley’s incisive and prescient critique. One thing is, however, clear. The protectionist, reactive response by the state to the TNLD, based on what Sutherland termed ‘sham economic arguments’, has spawned a fragmented, dysfunctional and discriminatory PHI regime, wholly contrary to the stated objectives of the TNLD and to the key Principles set-out at the outset of this paper.

This is evident in Table I and Figure I. This regime stands in the starkest possible contrast to mainstream financial services (including insurance) regulation under the Financial Regulator. Ireland’s International Financial Services Centre (IFSC) has continued to grow – a paradigm for an open, competitive and innovative sector. There could hardly be a greater contrast between the proactive regulatory dialogue between the Authorities and IFSC Companies and the dirigiste, reactive anti-competitive environment, within which Health Insurance operates. The situation is not without its ironies, particularly from an EU Internal Market perspective. Health Insurance policies are sold through IFSC companies to the international market that are not available to domestic consumers. Meanwhile, retail financial services have expanded with a large number of new entrants bringing competition and choice to consumers and strengthening financial stability.

In contrast, the PHI regulatory system has deterred prospective entrants. It has cast a long, oppressive shadow over the attempt by the only two entrants to compete with the State on a level playing field.

This asymmetry has been exacerbated by the fact that their customers have borne the cost of challenging the State’s hegemony while the Exchequer absorbs the State’s costs of defending what the most eminent authorities have deemed indefensible.

The state owned dominant insurer has experienced unprecedented growth while the continued commercial feasibility of its competitors has been subverted, forcing them to seek redress from Europe. This is the very antithesis of what the EU internal market is all about. It may well be past the point of no return.

RE was, in 1994, a hypothesis in search of evidence. When the evidence began to accumulate, particularly post 1998, it demonstrated that the Vhi, the Irish PHI 'market', could not alone survive, but grow, in the absence of RE. Noise and bluster then replaced rational argument and misleading inference was drawn from jurisdictions with quite different systems. John Maynard Keynes, arguably the most eminent economist of the 20th century, was once challenged on changing his mind on an issue. He replied '*when circumstances change I alter my conclusions. What do you do, Sir?*' The State has repeatedly shown intransigence in pursuit of policy objectives, even when the evidence/advice pointed to a compelling need to change policy. The illegal charging of elderly patients in nursing homes provide another example.

The remit given by the Minister in December 2005 to a joint CA/HIA investigation cannot be taken seriously. Measures which might be proposed to 'further' (!) increase competition could only be cosmetic and must be set against the States protectionist mindset and policy stance that has stifled competition in Health Insurance for more than a decade.

There are two centrally important issues at stake. The first related to compliance by the State with Ireland's obligation under the EU Treaties as they apply to the PHI Market. A finding of non-compliance in the ECJ and the FSAP would rightly do damage to Ireland's hard earned reputation as a highly pro-EU location for internationally traded financial services and investment.

The second issue relates to the negative effects of the States' policies not alone on consumers but also on the sustainability of the Irish Healthcare system. The writer has consistently argued over the last decade that sustainability requires a growing role for Independent hospitals. The State has begun to acknowledge this. But it fails to appreciate that its policies in relation to the PHI market – which are impelling a restoration of the monopoly of the state-owned insurer --are the very last thing that is needed to incentivise a pro-active Partnership between insurers (competing to contain costs) and Independent hospitals, that require adequate reimbursement rates.

Competition in the Irish Phi market will require a fundamental overhaul of the Irish PHI market – one that evidence-based, forward looking and compliant with the States EU obligations. It is more than time to recognise that policy since the TNLD has been fundamentally flawed

The best guarantor for ensuring competition, together with market stability, would be a transition to a mandatory health insurance system, authorised and regulated by the Financial Regulator.

