SOME IMPLICATIONS OF THE COMPETITION ACT

BY

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Introduction.

I would like to begin by congratulating the authorities here in UCG for their initiative in establishing this new Centre for Economics and Law. I hope that it will generate a lot of useful research in the area of competition policy, an area which until now has been largely neglected by Irish economists. It is quite ironic that this should be so, given that one of our most famous economists, Francis Edgeworth, played a major role in developing theories of company behaviour, upon which much of the thinking on competition policy is based.

Certainly the new Competition Act represents a significant change and, hopefully, an improvement in Irish competition law. Let me say at the outset, that I believe that measures to enhance the degree of competition in the economy are welcome as they should benefit consumers and the economy generally, by reducing the costs of doing business in Ireland.

Competition is, publicly at least, favoured by the majority of business people. Given the widespread support which exists for competition one might wonder why we need to have competition laws at all. Unfortunately, as Adam Smith one of the founding fathers of economics noted 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.' (Smith, p.232). Hopefully that observation is not true of today's gathering.

My primary intention this afternoon is to consider some of the main implications of the Competition Act. Before doing so I would like to spend some time outlining why I believe promoting competition is desirable and why we needed a new Competition Act to achieve this end.

The Role of Competition Policy

There has been, and continues to be, much economic research into competition. Traditional economic theory tended to focus on the idea of perfect competition, it being recognised that, while the necessary conditions for perfect competition were rarely fulfilled in practice, it nevertheless represented a useful yardstick against which to assess the actual observed structure and performance of an industry. The opposite extreme to a perfectly competitive market was one characterised as having a single producer, a monopoly.

The failure of perfect competition to hold in many real world instances led to the development of alternative models of market structure which resembled the situation in the real world more closely. Chamberlain (1933) introduced the idea of monopolistic competition where firms produced differentiated products which were substitutes for one another. Such firms were seen to compete in areas other than price. It is argued that monopolistic competition may lead to wasteful competition in the form of excessive product differentiation and advertising. A further neo-classical refinement in modelling industrial structure and behaviour is provided by oligopoly theory, first developed by Cournot (1838). Oligopoly models of industrial structure and behaviour are generally regarded as the closest approximation to conditions in the real world. Oligopolistic markets are characterised as having a relatively small number of firms. The essential feature of oligopolistic markets is that the firms are interdependent and recognise this fact. The interdependence of firms means that collusion represents a constant real or potential threat in oligopolistic markets. (Clarke, 1985). Collusive arrangements mean that firms in a particular industry may, in effect, act like a single monopolist.

Economists generally regard competition as desirable because it puts pressure on firms to operate at their most efficient level. This in turn leads to higher output and lower prices for consumers. Competition in the domestic economy will also benefit firms competing in international markets by lowering the cost of their inputs. Lower costs should lead to increased output and greater employment in those firms competing in international markets.

Before going any further, I think it is important to explain why economists tend to regard increasing efficiency as so important, as it is not altogether clear to many non-economists why this should be so. As Alan Blinder (1988, p. 16) put it, 'economists have failed to articulate their reasons for worshipping at the shrine of efficiency, in which case we ought to do more missionary work'. If as Blinder argues, one accepts that it is better to produce more goods and services than less and that the resources available to us are scarce, then the aim should be to make the economy more efficient. It is important to dispel the myth that economists are obsessed with increasing efficiency for its own sake. Inefficiencies involve costs in the form of lower output, less employment opportunities and reduced standards of living for the community.

In sum then economists generally regard competition as beneficial. The fact that most markets are oligopolistic in character, however, means that there is a significant risk of collusion with a consequent lessening of competition. In addition, firms in certain industries may enjoy a monopoly position and may use their market power to the detriment of consumers. These considerations essentially form the economic rationale for Government intervention by way of legislation designed to prevent anti-competitive behaviour. It is important to remember that Government cannot force firms to compete by legislative or other means, all it can do is try to prevent them engaging in anti-competitive behaviour, in the hope that this will suffice to produce the benefits of competition.

Generally, legislation aimed at preventing anti-competitive behaviour focuses on the conduct of firms and the structure of the industry. In the conduct field, we are concerned with restrictive business practices, whether practices by a group of firms jointly, or by a firm in a dominant position. Essentially, restrictive business practices are arrangements between supposedly independent firms, which should be competitors, the arrangement being designed to concert their activities in the market. On the structural side, we are interested in the monopolist or the firm in a dominant position, and in the process of concentration or the acquisition of market power, especially as it is affected by mergers.

Merger controls exist to prevent firms reducing the degree of competition in the market by eliminating competitors (horizontal mergers), while takeovers of suppliers/customers (vertical mergers) may present an opportunity to prevent competitors from purchasing raw materials or selling their output. Conglomerate mergers, involving firms in different sectors, may not have a direct effect on competition, but the parent may use profits in one industry to cross subsidise attempts to dominate another industry.

While the rationale underlying competition policy appears to be firmly based in neo-classical oligopolistic theories of industrial structure and behaviour, it is worth noting that some economists question the rationale for competition policy. The 'Chicago School' do not view highly concentrated market power as necessarily a problem. Instead they tend to stress the benefits of economies of scale and superior efficiency accruing to larger firms, and argue, on the grounds of allocative efficiency, that a concentrated market structure is preferable to a more competitive one. Consequently they argue that elements of conduct and market structure do not in fact provide a case for Government intervention. (Burke et. al. 1991).

The traditional neo-classical emphasis on market structure has also been challenged by the proponents of contestability theory, first promoted by Baumol et. al. (1982). Essentially contestability theory asserts that market structure is not important. Provided it is easy for firms to enter and exit a market, then the only way for existing firms in an industry to deter new entrants, is to operate at the level of price and output which would arise in a perfectly competitive market structure.

'Contestability theory does not, and was not intended to, lend support to those who believe (or almost seem to believe) that the unrestrained market automatically solves all economic problems and that virtually all regulation and antitrust activity constitutes a pointless and costly source of economic inefficiency. (Baumol and Willig, 1986, p.9).

Allocative efficiency and contestability arguments have had a significant impact on the application and enforcement of competition policy in many countries. Contestability theory arguments have been accepted by US courts in assessing whether a firm is, in fact, in a dominant position. The Federal Trade Commission in the Echlin Manufacturing Corporation case ruled that:

‘An attempt to exercise market power in an industry without entry barriers would cause new competitors to enter the market. This additional supply would drive prices back to the competitive level. Indeed, the threat of new entry can be as potent a procompetitive force as its realisation. As the Supreme Court has recognised, the presence of potential entrants on the fringe of a market can prevent the exercise of market power by the incumbent firms even if the potential entrants never actually enter the market.

The Australian courts also appear to have taken on board the arguments raised by contestability theory. In the highly important Queensland Wire case, Mason CJ and Wilson J stated that: ‘a large market share may well be evidence of market power.... but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power’. (ibid, p. 154). The Australian Trade Practices Commission pointed out, however: ‘If the incumbent corporation perceives that new entry is unlikely and acts with disregard for potential competitors, then it is not to the point that new entry is feasible’. (ibid, p. 155).

The Case for a New Competition Act

Legislation to prohibit restrictive business practices in Ireland was first enacted in 1953 although many sectors of the economy were not covered by the legislation. The legislation was based on what is known as the ‘control of abuse’ principle. Some services were added by the 1972 Act, while the 1987 Act removed all the remaining exemptions apart from the local authorities. From 1953 until January 1986 a system of price control existed alongside competition legislation.

The legislation suffered from a number of limitations. Enquiries had to be carried out on a trade-by-trade basis by the Fair Trade Commission (in its various guises), into allegations of restrictive or anti-competitive practices. The Commission then reported to the Minister, recommending what measures, if any, might need to be incorporated into a Restrictive Practices Order for the trade concerned. If the Minister accepted the Commission’s recommendation he/she had to have the Order approved by the Dail. Thus, after 38 years, Restrictive Practices Orders were in operation for 11 trades covering, according to the Fair Trade Commission (1991), about 35% of total consumer expenditure. Several trades were the subject of repeated enquiries, as the emergence of new or previously undetected practices, required a fresh inquiry culminating in a new Order. The Minister has indicated that he intends to publish the Commission’s Review of the 1987 Groceries Order shortly. This Review is the 8th investigation of the grocery trade carried out under the terms of the various Restrictive Practices Acts. There were also several investigations into the distribution of motor fuels.

Prior to 1987 the Minister could not make an Order until the FTC had conducted a formal inquiry. Different laws applied to different sectors of the economy. As the FTC (1991) argued ‘it is difficult to understand why the competition laws should not be generally applicable as they are in the other countries examined in this study’, (para.

5.23(5)). The former legislation was, therefore, cumbersome, applied different rules to different sectors of the economy and was ineffective in ensuring competitive markets.

The Competition Act 1991

The Competition Act is a radical departure in Irish competition legislation. It introduces what is known as a prohibition system into Irish law. The Act prohibits and renders void all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State, or in any part of the State (S. 4). The Act also prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in a substantial part of the State (S. 5). These are the two main pillars of the Act and they are based largely on Articles 85 and 86 of the Treaty of Rome.

The main provisions of the Act became effective from 1 October 1991. At the same time most of the provisions of the various Restrictive Practices Acts were repealed. The Minister has announced that he is retaining the provisions of the former legislation necessary for the continuation of the 1987 Groceries Order, until he has had time to fully consider the FTC Review of the Order.

At one swoop all anti-competitive practices such as price fixing, market sharing, predatory pricing, etc. are prohibited in virtually every area of economic activity. In addition, all anti-competitive agreements are void under section 4(1). This provision has very serious implications. No undertakings are exempt from the provisions of the Act. One of its main effects, therefore, should be to expose to the full blast of competitive forces many firms and industries which have previously been sheltered from them.

One of the novel features of the Act from an Irish point of view is the emphasis which it places on self-enforcement. Parties aggrieved by either anti-competitive agreements or the abuse of a dominant position are given a right of action for injunction and/or damages including exemplary damages in the High Court under Section 6. My colleague the Director of Consumer Affairs has already dealt extensively with the issue of enforcement and it is not my intention to revisit it at any length. For any law to be effective it must command respect and provide a sufficient deterrent in that the risk and cost of being caught are adequate to ensure compliance. There is some US research which shows that the most potent deterrent to parties thinking of entering into a cartel or collusive agreement is the threat of private action for damages rather than action by the Justice Department. (Hopper and Sharpe, 1983, p. 40).

The Role of the Competition Authority

At the outset I would like to point out that the Authority is an independent body. The main role of the Competition Authority under the legislation is to issue certificates (of negative clearance) and licences (of exemption). The former is a statement by the Authority that, in its opinion, an agreement is not in breach of the Act i.e. it is not anti-competitive. The licence, in contrast, is a recognition that an agreement does involve some restriction on competition, but because the benefits of the agreement exceed the costs of such a restriction, the agreement can be exempted from the prohibition contained in Section 4 of the Act. This provision is identical to that contained in Article 85(3) of the EC Treaty and can be seen as an attempt to achieve some balance between the purely structural approach of traditional economics thinking on competition, and the allocative efficiency arguments of the 'Chicago school'. This provision for exemptions is one of the major differences between the EC and US antitrust legislation on which the EC rules were originally based.

The Act sets out strict criteria which an agreement which infringes Section 4(1) must satisfy in order to gain a licence of exemption. To qualify, the agreement must:
(i) contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress;
(ii) while allowing consumers a fair share of the resulting benefits;
and must not:
(iii) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives;
(iv) or afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. (S. 4(2)).

It is important to note that all four conditions must be satisfied in order to obtain the licence. Under the Act there is no possibility of obtaining an exemption for an abuse of a dominant position.

In order to obtain a licence or certificate, an agreement must be notified to the Authority using the notification form CA and enclosing the prescribed fee. Section 7(2) of the Act provides that any anti-competitive agreements which were in existence at the time of coming into force of the Act, i.e. 1 October 1991, may be notified within one year of that date. I would point out, however, that no action may be taken against such an agreement under Section 6 if it has been notified until such time as the Authority has decided whether or not to grant a certificate or licence. An agreement concluded after 1 October, 1991 does not receive such protection on notification although a licence may be made retrospective to the date of notification. Further information on notifying agreements together with the necessary application form may be obtained from the Competition Authority.

The Authority has sought to devise procedures for dealing with notifications which are fair and as transparent as possible. Each month the Authority publishes a list of the notifications it has received in a daily newspaper. This notice simply gives the notification number, the names of the parties and the type of agreement involved e.g. a distribution agreement. It invites any third parties who may wish to do so, to submit observations on the agreements. The Authority will not supply any further information concerning a notified agreement to any third party at this time.

Each notification will be examined for completeness and accuracy. If additional information is required, it will be sought from the parties in writing, and, in all cases, the parties will be informed that consideration of the case has commenced. While it should seldom prove necessary, the Authority has powers to obtain information. Information may also be sought from third parties, who could make observations on the case, though they will still not be given details of the arrangements.

An initial assessment of the case is prepared, consisting of the facts, an analysis and suggested conclusions. This is considered by the Authority. If the decision is to be favourable, the Authority intends to follow the EC practice and publish notice of its intention to grant a certificate or licence. Notice of intention will be published in a daily newspaper, and interested third parties will be able to obtain a summary of the case from the Authority for a small fee. They will be given time to submit observations. Prior to this, the notifying parties will be shown a copy of the document which will be made available to third parties. As required by the Act, Ministers concerned will also be invited to make such observations as they may wish.

If there are no observations, or they are rejected, the Authority will proceed to its final Decision. If any observations are accepted, discussions will be held with the notifying parties to secure amendment, after which a final Decision will be taken. If conditions are to be attached to the grant of a licence, they will be discussed with the notifying parties. (EC practice is that these are usually reporting conditions).

As required under the Act, the Authority will transmit a copy of the notice to be published, together with the full Decision, to the parties to which it relates. It must publish a notice of the grant of a certificate or a licence in Iris Oifigiuil, in a manner yet to be prescribed. It must also publish notice of the grant in a daily newspaper. The Iris Oifigiuil notice is likely to be fairly brief, if only for cost reasons, and so the full decision will be available to third parties from the Authority, for a small fee. It would appear to be impossible to give the reasons of the Authority unless relevant parts of the arrangements, that is those which raise issues under Section 4, are made public. Since they also have a right of appeal against a Decision to grant a certificate or licence, third parties must be entitled to obtain the full Decision.

Where the initial assessment is unfavourable, the procedure is more lengthy. The Authority will decide to refuse a certificate or licence unless offensive clauses are deleted or amended. An Authority member will then initiate written or oral negotiations with the parties. If this results in arrangements which satisfy the Authority, a favourable Decision will be taken in the manner described.

If the Authority is not satisfied, a Statement of Objections will be approved by the Authority, and transmitted to the parties. The parties will be given time to respond in writing, and they may request an oral hearing. Concerned Ministers will be invited to make submissions at this stage. The oral hearing will be before the full Authority. Following written or oral proceedings, the Authority may be satisfied, usually after amendments, and a favourable Decision can then be taken. There is thus always a middle way between grant of a certificate or licence and outright refusal.

If, on the other hand, the Decision remains negative, a final Decision to refuse a certificate or licence is taken by the Authority. The parties are informed of the refusal, and, for agreements in existence at the time the Act came into force, notice of the Decision must be published in Iris Oifigiuil. We intend to publish notice of refusal for agreements concluded after 1 October 1991 also, and to publish brief notice of all refusals in a daily newspaper. Copies of the full decision will be available to interested third parties from the Authority, for a fee.

Where the notification is for a licence if a certificate is refused, we envisage running the procedures together. If it is confirmed that Section 4(1) applies, a certificate is automatically refused, and the licence request will be considered. Parties will be informed at this stage, and allowed to comment on the refusal.

The Authority may grant licences to categories of agreements. This is the equivalent of the ‘block exemption’ given by the EC. Such licences are designed to cover similar types of agreements e.g. distribution agreements. Provided an individual agreement meets the requirements set out in the category licence, it will be covered by that licence, and there will be no need to notify the agreement separately. It has been argued that the Competition Authority should issue category licences immediately. However, this is to expect the Authority to issue a licence without even having considered the nature of the agreements which exist in practice. I think it is unreasonable to expect the Authority to issue category licences without first having looked at some of the agreements which will be covered. Certainly if a number of similar agreements are notified, I believe that the Authority would see this as indicating a need for a category licence.

There have also been calls for the introduction of "de minimis" provisions, i.e. effectively exempting undertakings below a certain size from the provisions of the Act, on the grounds that they are too small to have any significant impact on competition. As the Act stands, I am not sure that the Authority has the power to introduce a "de minimis" exemption.

I would also point out that, in its study of competition law, the (now extinct) Fair Trade Commission (1991), while favouring a "de minimis" rule was clear in its view that such a rule would not apply to ‘price fixing’ or ‘collusive tendering’ agreements. In other words such arrangements could not be exempt regardless of the size of the undertakings involved. Indeed the FTC was quite adamant in the latter case, considering collusive tendering to be a practice ‘which is never justifiable’. (Para. 9.30).

The requirement that the Authority publish details of its decisions in respect of agreements notified to it and the fact that its decisions are challengeable in the courts provides an incentive to ensure that all of its decisions will be based on thorough and rigorous analysis.

The Authority has a number of other functions which I will refer to briefly at this stage. S. 11 provides that at the request of the Minister the Authority may study and analyse, and report the results of such study or analysis relating to any method of competition, affecting the supply and distribution of goods or the provision of services. Under Section 14 the Minister, where he/she is of the opinion that there is, contrary to Section 5, an abuse of a dominant position, may request the Authority to investigate such an abuse. If the Authority concludes that there is an abuse of a dominant position, the Minister may, under this section make an order either prohibiting the continuance of the dominant position, except on conditions specified in the order, or require the adjustment of the dominant position by a sale of assets, or otherwise.

This provision has been seen by some as somewhat excessive and draconian. The power to order the break up of a dominant position should be seen as something of a final resort. The most likely outcome in the event of a firm being found to have abused a dominant position is the continuation of the dominant position, on condition that the abuse cease. The Authority also inherits the Fair Trade Commission's role in respect of mergers.

The Minister may ask the Competition Authority to investigate a proposed merger. Where a merger is referred to the Authority for consideration by the Minister, the Act provides that the report of the Authority will be published within two months of its completion, having due regard to commercial confidentiality. The Authority, in its report, is required to state its opinion as to whether or not the proposed merger or take-over concerned would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good. The Act sets out the criteria to be taken into account in assessing the likely effect on the common good.

These changes increase transparency and should therefore provide business and their financial advisers with a clearer indication of the types of mergers likely to be approved.

Some Implications of the Act

The Competition Act has not of course resolved all the problems of competition policy. In the process of enforcing the rules, many analytical and practical questions will arise. There is always a danger that anti-competitive behaviour may not be discovered or may not be realised to be anti-competitive. On the other hand, in the area of abuse of market power, the danger is of not distinguishing between genuine, though aggressive, competitive behaviour and behaviour that is intended, or is likely, to exclude legitimate and equally efficient competitors. Experience elsewhere shows that there are far more complaints about abuse of a dominant position than there are adverse decisions about them. In a major Australian competition law case, Mason, C.J. and Wilson J. pointed out that:
'Competition by its nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way... these injuries are the inevitable result of the competition section 46 (of the Australian Trade Practices Act) is designed to foster'. (Australian Trade Practices Commission, 1990, p. 6).

Consequently considerable analysis will be required in order to establish evidence of anti-competitive behaviour. It remains to be seen how Irish courts will deal with the complex economic analysis and reasoning that will underpin cases brought under the Act. While many have heralded the new legislation as a bonanza for lawyers, I think one could expect that it will generate a considerable demand for the services of economists also. The new Act will hopefully lead to considerable research work by Irish economists on various aspects of competition. In this context, the establishment of the new Centre for Economics and Law represents a very welcome development.

While the legislation represents a radical new departure as far as domestic business activities are concerned, firms engaged in trade with other EC member states have been subject to almost identical provisions contained in Articles 85 and 86 for some considerable time. It has been suggested that the introduction of untried and unfamiliar legislation may create considerable business uncertainty. However, the long operation of EC Competition Policy provides a well established system of precedents. In this context one must bear in mind that a number of Article 85 and 86 cases, with an Irish dimension, have been resolved.

There are, however, certain differences between the Irish and EC legislation. The most notable difference relates to the fact that the EC legislation has two objectives, the prevention of anti-competitive behaviour and the removal of barriers to intra EC trade. Indeed some have argued that the European Commission and Court of Justice have both given greater emphasis to trade than to competition considerations, (Hopper and Sharpe, 1983). Where EC decisions have been based on trade rather than competition grounds there is some scope for divergence between the two regimes. (See Hogan, 1991, on this point).

I would now like briefly to consider some EC decisions which raise issues of interest to an Irish audience. In the case of Section 4, questions arise as to what constitutes an agreement. As Green (1991) pointed the interpretation under EC law is quite far reaching. The form of agreement is irrelevant, it is the effect which is critical. Nor must there be a formal agreement, Article 85 and Section 4 also refer to a concerted practice. Where such an agreement knowingly substitutes practical cooperation for the risks of competition, it has been found to be caught under Article 85. In the US, the Supreme Court has taken the view that risk is an essential element of competition. Consequently even arrangements which involve pooling of market information have been found to restrict competition, in both US and EC cases (ibid).

Section 5 of the Act prohibits the abuse of a dominant position. It should be stressed that it is the abuse, and not the dominant position itself, which is prohibited. The Act therefore rejects the view that the mere large size of a firm means that it must serve the economy badly. Defining the appropriate market is likely to be a crucial consideration in such cases. The EC has tended to define markets rather narrowly, e.g. finding that the market for cola is separate to that for soft drinks generally and that the market for bananas is separate to that for fruit. Of course, defining a market narrowly increases the likelihood that an undertaking will be found to have a dominant position in that market.

The definition of the appropriate market will be a key element in the application of both Sections 4 and 5 and I would like to consider briefly how economists and the Courts in different countries have defined markets. Both the Competition Authority, in considering notifications, and the Courts will have to give detailed consideration to defining the market in each case. There are no simple clear-cut definitions of a market. 'Because economists, from Adam Smith forward, have with confidence and enthusiasm, although not necessarily with shared views, written about markets, it is plausible to expect that they would have had quite a bit to contribute to the resolution of the market-definition issue. Plausible, but erroneous'. (Horowitz, 1981, p.1). Consequently it is argued that courts have had little help from economists in defining markets, with the result that 'while paying obeisance to the relevant economics concepts, the courts have had to adopt solely legal criteria in defining the relevant market in any particular (antitrust) case' (Schrank and Roy, 1991, p. 108).

In the United States the courts have shown a greater tendency than the EC to rely on objective tests in order to arrive at a definition of a market. The use of cross-price elasticities of demand received the imprimatur of the United States Supreme Court in the Times-Picayune case and again in the famous 'cellophane' case of US v E.I. du Pont de Nemours and Company. (Schrank and Roy, 1991, p. 96). In the latter case, the majority verdict, as delivered by Reed, J., states that, in order to define a market and ascertain whether or not du Pont had a monopoly, 'what is called for is an appraisal of the "cross-elasticity" of demand in the trade'. (Breit and Elzinga, 1989, p. 209). The decision in the du Pont case has been the subject of some criticism. Indeed the minority judgement in the case states that: 'In defining the market in which du Pont's economic power is to be measured, the majority virtually emasculated Section 2 of the Sherman Act'. (ibid, p. 211).

In defining a market in the United Brands case, which is the key EC case relating to an abuse of a dominant position, the Court of Justice declined to apply a cross-elasticity of demand test, opting instead for a more subjective test which emphasised what the Court regarded as the special characteristics of the banana.

'The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling and a constant level of production which enables it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick.'

Certainly economists would favour a more objective approach. It would appear that business would also favour objective rather than a subjective approach as the former approach may be expected to result in less uncertainty. As Hogan (1991, p. 9) put it:

'Let us hope, then, that the High Court will be prepared to follow the example of the US Supreme Court in the classic decision of US v. du Pont (1953) 351 US 377 (where the cross-elasticity of demand test was applied and sanctioned as a key feature of US antitrust law) rather than that of the ECJ in United Brands.'

In addition to considering what products are included in the relevant market there will also be a need to define the geographical extent of the market. Time is a further dimension to be considered in defining a market. This is perhaps best illustrated by considering an example. Could household coal be regarded as constituting a distinct market? Consumers could after all switch to peat or wood. Households could not, however, switch from coal to oil, gas or electricity, unless they had heating systems capable of using these fuels. Clearly, however, in the long-run (and in this case the long-run may not be, as Keynes feared when we are all dead, but a matter of months), householders could install such heating systems and therefore switch from coal to oil, gas or electricity for heating purposes.

Economic theory and legal decisions from the EC and other countries can offer some guidance as to how a market should be defined. However, as Schrank and Roy (1991, p. 113) argue: ‘In practice market definition frequently involves rules of thumb and may rest on complex legal distinctions which bear little relationship to economic principles. It would obviously be helpful to have more objective grounds on which to base decisions that have such important economic consequences.’

The Act also raises questions as to what constitutes a dominant position. The ECJ in the United Brands case defined a dominant position as:
"....a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers".

There is no specific market share criterion for defining a dominant position. United Brands was found to be in a dominant position with 40-45% of the market. In the Hoffman La Roche case the ECJ overturned the Commission’s finding that La Roche could be regarded as dominant with a market share of 43%. The Commission has indicated that a dominant position can be held to exist if market share is 40-45% and may even be possible for market shares between 20 and 40%. (Cregan, 1991). Market share on its own is not the decisive factor, it is one of a number of issues taken into account in EC decisions on the existence of a dominant position.

The Commission has found that a simple refusal to supply may, in certain circumstances, constitute an abuse of a dominant position. It is also possible that the occurrence of an abuse may be used to demonstrate that a dominant position exists, on the grounds that the abuse could not be engaged in, unless the firm was dominant in the first place. (FTC, 1991, p. 50). The question of whether a firm can act without regard for the likely reaction of its competitors has also featured prominently in establishing whether or not a dominant position exists in US and Australian cases.

Some Conclusions

The Competition Act represents a major new departure in Irish competition policy. It seeks, at one fell swoop, to eliminate all anti-competitive business practices. This is certainly a tall order and the interpretation of the Act by the Courts will ultimately be crucial in this respect. The Act is likely to have significant implications for business. The main benefits of increased competition are likely to accrue to consumers. However, business should also benefit from increased competition through lower costs. In this respect the Act may prove to have extremely far reaching macroeconomic consequences. I believe that steps to increase competition by prohibiting anti- competitive practices are both welcome and desirable as John Stuart Mill, one of the great classical economists put it:
‘A limitation on competition, however partial, may have mischievous effects quite disproportioned to the apparent cause’. (1848, p. 295).

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