The New Competition Act

BY

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Paper presented to Dublin Economics Workshop annual economic policy conference, Kenmare, 19th October 1991.

The author is a member of the Competition Authority. Any views expressed herein are those of the author and do not purport to represent the views of the Authority.

Introduction.

'The blunt-toothed lion of existing Irish competition law, the Restrictive Practices Act, is set to be quietly put out of its misery'.

That was how one lawyer heralded the the introduction of the new Competition Bill earlier this year in an article in Business and Finance. (May 2 1991) 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. In practice, however, there is often a gap between rhetoric and action in this area. Thus support for the principle of competition is frequently qualified by the proviso that it should be 'fair competition'. At times it appears that what is being proposed under the latter guise is a form of non-competitive sport involving no losers.

Given the widespread support which exists for competition one might wonder why we need to have competition laws at all. Unfortunately, as Adam Smith 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) Of course this observation does not apply to the current gathering. Certainly in this respect economists can claim to be true to their principles, as the profession has not sought to impose entry barriers or engage in other restrictive practices over the years. I do not, therefore, expect the Irish Economics Association to be among the applicants for a licence or certificate under section 4 of the Competition Act.

This makes my task today somewhat easier as I don't believe that I need to spend too much time outlining the benefits of competition, and why competitive markets are to be preferred, to a gathering of economists. Instead perhaps I would like to concentrate on the Competition Act, how it fits into the overall competition policy framework and consider some of its potential implications.

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 of an industry. The other extreme to a perfectly competitive market was one characterised as having a single producer, a monopoly. Without dwelling excessively on the point, orthodox theory argued that a monopoly would result in higher prices and lower levels of output than a perfectly competitive market.

The failure of perfect competition to hold in many real world instances led to the development of alternative models of market structure. Chamberlain (1933) introduced the idea of monopolistic competition. In such models competition is largely confined to non-price areas. It is argued that monopolistic competition may, in fact, be wasteful. Examples of such wasteful competition are excessive product differentiation and advertising. A further neo-classical refinement in modelling industrial structure and behaviour is provided by oligopoly theory, first raised 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.

In sum then economists generally regard competition as superior to monopoly. The fact that most markets are oligopolistic in character, however, means that there is a significant risk of collusion. 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 has two broad features:

(1) to prohibit or restrict certain undesirable kinds of market conduct; and

(2) to encourage or shape market structure along competitive lines so that desirable conduct and performance are more likely to occur.

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 control is a precautionary measure, to prevent firms eliminating competitors by taking them over and achieving a dominant position, which they can later abuse.

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 Austrian school takes an even more extreme view. The key element in this model is that innovation in the form of new product development results in the innovative firm securing a temporary monopoly. The monopoly profits which accrue to the firm are essential, it is argued, in order to encourage firms to develop new products. The consumer benefits from ongoing innovation and product development. Competition, according to the Austrian model, is a dynamic process with temporary monopoly profits attracting the entry of new firms, encouraging product innovation, with new products taking market share from existing products.

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. In a market that approximates perfect contestability, it is true, we believe matters can be left to take care of themselves. Small numbers of large firms, vertical and even horizontal mergers and other arrangements which have traditionally been objects of suspicion of monopolistic taint and worse, are rendered harmless and perhaps even beneficent by the presence of contestability. But that observation is no whitewash and establishes no presumption, one way or the other, about the desirability of public sector intervention in any particular market of reality. For before anyone can legitimately use the analysis to infer that virtue reigns in some economic sector and that interference is therefore unwarranted, that person must first provide evidence that the arena in question is, in fact, highly contestable.' (Baumol and Willig, 1986, p.9)

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. 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 any 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 indicated recently 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.

Under the old legislation the Minister could not make an Order until the FTC had conducted a formal inquiry. In practice different laws applied to different sectors of the economy. As the FTC (1991) noted in its Study of Competition Law, 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 shortcomings of the legislation had significant economic implications. In a speech in January of this year, the Governor of the Central Bank pointed out that; 'The absence of any real competition in many sectors of the Irish economy makes it all the more necessary to bring external pressures to bear, through the exchange rate, as an anti-inflationary measure.' (Doyle, 1991 p. 49). In effect, this implies that the costs of maintaining low inflation were borne largely by the tradable sector because of a lack of competition in other sectors. This highlights some of the wider macroeconomic implications of competition policy.

The former legislation was, therefore, cumbersome, applied different rules to different sectors of the economy and was ineffective in ensuring competitive markets. It is hard to disagree with the Minister's view that; 'The old system in my view and that of nearly everybody was unsatisfactory', (O'Malley, 1991, p. 1).

The Competition Act 1991

The Competition Act is a radical departure in Irish competition legislation. It incorporates 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 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. 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. This is to be welcomed, for in the words of John Stuart Mill, one of the great classical economists:

'To be protected against competition is to be protected in idleness, in mental dullness; to be saved the necessity of being as active and as intelligent as other people; and if it is also to be protected against being underbid for employment by a less highly paid class of labourers, this is only where old custom, or local and partial monopoly, has placed some particular class of artisans in a privileged position as compared with the rest; and the time has come when the interest of universal improvement is no longer promoted by prolonging the privileges of a few". (1848, p. 142).

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. While it may be difficult to define an elephant, it is easy to recognise one. As my colleague Mr. Lyons (1991, p. 11) noted; 'It is difficult to define competition, and it is often difficult to recognise it'. 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 whole area of industrial structure and competition has, I believe, received little attention from Irish economists. This is in spite of the fact that Edgeworth, one of our most famous economists, was responsible for some of the major pioneering work on oligopoly theory. The new Act will hopefully lead to considerable research work by Irish economists on these issues.

The role of the Competition Authority

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 cost of such a restriction, the agreement can be exempt 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 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. In order to obtain a licence or certificate, an agreement must be notified to the Authority.

The Authority may grant licences to categories of agreements. This is 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 been related 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, p. 80), 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 that collusive tendering to be a practice 'which is never justifiable'. (Para. 9.30).

The Authority is required to publish details of its decisions in respect of agreements notified to it. The fact that its decisions will be subject to public scrutiny and, ultimately be challengeable in the courts provides an incentive to ensure that all of its decisions will be based on thorough and rigorous analysis. The Authority is, of course, an independent body.

Under the Act there is no possibility of obtaining an exemption for an abuse of a dominant position.

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 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. 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.

The Act changes some of the requirements for notifying mergers to the Minister, while increasing the penalties for failure to notify. 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, 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.

In addition, the Act requires that the Authority give its views on the likely effect of the proposed merger or take-over on the common good in respect of:

(i) continuity of supplies or services,

(ii) level of employment,

(iii) regional development,
(iv) rationalisation of operations in the interests of greater efficiency,
(v) research and development,
(vi) increased production,
(vii) access to markets,
(viii) shareholders and partners,
(ix) employees,
(x) consumers.

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

Some Implications of the Act

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).

With this in mind, I would like briefly to consider some EC decisions which raise issues of interest to economists.

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. 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.

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."

Here the US Courts have tended to take a different view applying more objective cross-elasticity test. Economists may well have some sympathy with the sentiments expressed by Hogan.

"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." (Hogan, 1991, p. 9). As Schrank and Roy (1991) point out, however, the use of cross price elasticities also poses some problems.

No market share has been set to define a dominant position. Instead 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".

It is indeed possible that an abuse itself could be construed as evidence of the existence of a dominant position.

We must wait and see how Irish Courts will deal with the Act. Will they be influenced more by economic analysis than EC precedents, where the two appear to diverge? How will the Courts handle concepts like contestability, cross-elasticity and barriers to entry? Indeed we must recognise that economists thinking on competition is constantly changing and developing and one wonders whether the Courts will take on board new theoretical developments where this would entail overturning established precedents. In this respect US experience has shown the Courts to be receptive to new departures in economic theory with respect to competition. There are uncertainties arising from this new legislation, but this is probably an unavoidable consequence of undertaking an essential overhaul of our legislation.

The Act undoubtedly imposes some compliance costs on business. Not least there is the fee for notifying agreements to the Competition Authority. Of course, firms have

entered into agreements which they feel are beneficial to them and in notifying agreements they are seeking to be allowed retain such agreements even though they may involve some restriction of competition. I think one could advance a strong argument for ‘user-pays’ in these circumstances. More generally, by reducing anti-competitive behaviour, the Act should lower business costs generally. One hopes that such reductions in costs will outweigh any compliance costs imposed on businesses by the Act.

Enforcement of the Act

One of the novel features of the Act 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 in the High Court under section 6. This aspect of the legislation has been criticised. It is argued that bringing complaints to Court will prove ‘costly compared with the option of a cheap convenient complaint to the Competition Authority’ (Cregan, 1991, p. 12). There is a question of incentives here. The option of a cheap convenient complaint to the Authority may simply mean that the Authority would receive a vast number of complaints, many of which may not involve any breach of the legislation. An additional risk is that by the time the Authority decides that there is a genuine grievance, it may be too late for the party concerned. On the other hand, individuals whose livelihood is threatened by anti-competitive practices are likely to act without delay, if they believe they have a strong case.

Hopper and Sharpe, (1983, p. 40) point out that American research suggests 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. Section 6 also allows the Minister to take an action to obtain an injunction in the case of a breach of either section 4 or 5.

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 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.

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