Think Competition!

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The Case for Competition.

Competition is the life blood of a market economy. In a freely competitive market, each competing business will try to attract customers by cutting its prices and increasing the quality of its products. Competition stimulates businesses to find new and more efficient methods of production. As a result consumers benefit from lower prices and better quality goods and services. Competition ensures that scarce resources are used as efficiently as possible and thus reduces costs to business and increases output and employment. In contrast business practices which inhibit competition generally lead to higher prices for consumers, reduce efficiency and lead to lower levels of output and reduce employment opportunities. Competition law is designed to prevent such anti-competitive business practices from harming consumers and the economy. The role of the Competition Authority is to investigate alleged anti-competitive behaviour and to take court proceedings where appropriate.

Competition policy has traditionally received little attention in Ireland. It is important therefore to convey the message clearly that competition is good; it is good for consumers; it is good for business; and it is good for taxpayers (and that is something I propose to talk about a length today). Let me give a few examples to illustrate the point.

Just a few short years ago all new books were sold at the same price in every outlet. In some large stores customers were discouraged from reading books. In June 1994 the Competition Authority decided that arrangements which required all retailers to sell books at a price set by the manufacturer were anti-competitive and did not benefit consumers. It was a decision which provoked some criticism with warnings by some that it would herald the end of civilisation as we know it. Since then the Net book Agreement, as it was known has collapsed in the UK and it has been found to be anti-competitive and not in the public interest by the UK Restrictive Practices Court. Among the facts the Court took into account was that the prices of mass market paperbacks had risen at something like twice the rate of inflation in recent years. As the Court put it 'It is an example of the way in which resale price maintenance can fail to keep down prices...' Today many shops discount new book titles. The store which I

referred to earlier, now provides tables and comfortable chairs for shoppers to browse through books. Consumers are benefiting through lower prices and better quality service.

Also in 1994 the Authority considered an agreement which would have resulted in Irish Distillers acquiring Cooley Distillery plc. Irish Distillers stated that their intention was to close down the Cooley distillery since it had no use for its plant or other assets. The Authority decided that this was clearly anti-competitive and refused to certify or licence the arrangement. The Cooley business has not ceased to exist, as it would have done under this arrangement. Rather it has successfully concluded a number of contracts to supply overseas markets. There is a greater choice and greater competition in the Irish whiskey market, successful export markets have been identified and are being supplied by Cooley which benefits both those employed there, who would otherwise be out of job, and contributes to the overall growth in exports and output.

Earlier this year the Authority persuaded the National Lottery to amend its trading terms so that new retailers were no longer obliged to ensure that the debts of former agents were discharged before they could get an agency to operate a National Lottery outlet. The Authority clearly saw this as an abuse of a dominant position which imposed an unnecessary barrier on individuals trying to set up a small retail business.

In my view the message is simple. Competition is good for consumers and the economy. I believe that the fact that the Competition Authority now has greater powers to take action against anti-competitive behaviour is therefore a positive development. Greater competition and more effective competition legislation undoubtedly represents a threat to the narrow sectional interests of those who benefit from anti-competitive practices. There are many who will seek to argue that their firm, business or industry should be treated differently and that they should be a special case. Such calls must be resisted.

A key feature of the Competition Acts is that they apply a broad prohibition on anti-competitive behaviour to all sectors of the economy and to all undertakings both

public and private sector. In my view this is an essential feature of the legislation and it is vital that it be maintained. Competition law, because it is broadly based, is less vulnerable to capture by special interest groups and is therefore more likely to operate genuinely in the public interest. A major problem with sector specific legislation and regulation is that such regimes, and the agencies which police them, are prone to capture by the interest groups involved. Where specific regulation is needed to deal with a specific problem, particularly a problem which the general competition law cannot deal with, it is essential that such regulation should not exclude or impede the operation of the general competition law and that the uniform application of that legislation be maintained.

What are the competition laws and what do they prohibit?

The Competition Act, 1991 sets out the basic competition rules, while the Competition (Amendment) Act, 1996 gives the Competition Authority power to investigate breaches of the law and, where necessary, to bring court actions. The main provisions of the legislation are relatively straightforward. The 1991 Act contains two basic prohibitions which are modelled on Articles 85 and 86 of the Treaty of Rome, the EU competition rules.

Section 4(1) prohibits agreements between undertakings, decisions of associations of undertakings or concerted practices which are anti-competitive. Examples of the types of behaviour which are prohibited are agreements among competitors to fix prices, share markets or to limit production and collusive tendering. Section 5 prohibits the abuse of a dominant position. Examples of the types of behaviour prohibited under this section include imposing unfair purchase or selling prices or other unfair trading conditions. Section 5 does not prohibit a dominant position, only its abuse. The Competition Acts operate alongside the EU competition rules. These prohibit anti-competitive behaviour where it has an effect on inter-state trade.

How are the Competition Laws enforced?

There are two main ways in which the competition laws can be enforced. Civil and criminal actions may be brought by the Competition Authority. In the case of criminal actions the 1996 Act provides for fines of up to £3m or 10% of turnover for firms found to have breached the law. Civil actions may also be brought under Section 6 of the 1991 Act by parties aggrieved by anti-competitive behaviour. An aggrieved party may seek an injunction, a declaration and/or damages, including exemplary damages. Such an action may be taken in the High Court, in the case of breaches of Section 4(1), and in the High Court or the Circuit Court, for breaches of Section 5.

Under the Competition (Amendment) Act, 1996 the Director of Competition Enforcement has the power to investigate alleged anti-competitive practices. The Authority has various powers to obtain information. It can summon witnesses to appear before it and require such witnesses to hand over documents in their possession. The Authority can appoint authorised officers who can obtain a warrant from a District Justice to carry out a search of business premises in order to obtain evidence of a breach of the Act. However, an aggrieved party who has made a complaint to the Authority still has the right to take a private action under Section 6 if they wish. The EU competition rules are enforced by DGIV of the EU Commission. The Commission has extensive powers to investigate allegations of anti-competitive behaviour and may impose fines of up to 10% of turnover on firms found to have breached the competition rules.

Collusive Tendering

The Authority regards collusive tendering arrangements as a serious breach of the Competition Acts and tackling such practices is one of its main priorities. I think that this is a particularly important issue for this forum today. To that end I would like to announce that the Authority has decided to launch an investigation into such behaviour. The Authority hopes to work with public sector agencies in unearthing such practices and putting a stop to them. As part of that process we have prepared guidelines to assist State agencies in detecting such behaviour. Before talking about those guidelines, I would just like to state why the Authority has taken this initiative.

The Authority is aware from its contacts with competition agencies in other OECD countries that collusive tendering or bid-rigging on public sector contracts is a common practice in many countries. The effect of such behaviour is to increase the cost to the State and to local authorities and ultimately the taxpayer, of goods and services purchased from the private sector. As a result of such behaviour the State can end up paying too high a price for goods and services, which results in increased taxes and in cutbacks of worthwhile programmes. Collusive tendering thus represents a clear example of how anti-competitive behaviour harms society by increasing costs to the taxpayer and impeding the provision of essential public services. The Authority has decided to give a high priority to investigating all complaints involving collusive tendering with a view to instituting legal proceedings where appropriate in order to ensure that the taxpayer gets better value for money. Overseas experience suggests that effective enforcement of the Competition Acts can potentially save taxpayers large amounts of money by preventing illegal overcharging on public sector contracts. To assist in this objective the Authority has produced guidelines for Government Departments, Local and Regional authorities and other bodies dependent on State funding involved in the allocation of contracts. The aim is to inform contracting authorities of the existence and importance of competition law and to explain to them what they can do to ensure its effectiveness and, in the process, save taxpayers' money.

How does Collusive Tendering cheat the taxpayer?

Collusive tendering occurs when two or more firms agree not to submit competitive prices for the supply of goods or services or when they all agree beforehand on the price they are going to tender. The effect of such arrangements is to increase the price which public agencies have to pay for goods and services, and to deprive them of the other benefits of competition. Firms can also try and achieve the same effect by other means, e.g. they may divide the country up between them and agree not to sell in each other's designated area, thereby enabling them each to set prices knowing that the other will not undercut them. Collusive tendering will almost always result in higher prices. The cost of these higher prices must be borne by taxpayers and those individuals who are affected because such behaviour diverts funds which could be

used to provide other worthwhile services to the public. Collusive tendering not only wastes taxpayers' money; IT IS ILLEGAL and may be subject to civil and criminal penalties.

The brochure which the Authority has produced describes common collusive tendering patterns that contracting authorities should be alert to. These signs are by no means conclusive evidence of anti-competitive behaviour. More investigation would be required to establish that. They may, however, be an indication of such behaviour, and the Authority would like to hear about them with a view to investigating them and taking legal proceedings where appropriate.

(a) Bid Suppression.

In "bid suppression" or "bid limiting" schemes, one or several competitors (who would otherwise be expected to tender or who have previously bid) refrain from tendering or withdraw a previously submitted tender, so that a competitor's tender will be accepted.

(b) Complementary Tendering.

'Complementary bidding' (also known as 'protective' or 'shadow' bidding) occurs when competitors submit token tenders that are too high to be accepted (or if competitive in price, then on special terms that will not be acceptable). Such tenders are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine tendering. This enables another competitor's tender to be accepted when the contracting authority requires a minimum number of bidders.

(c) Bid Rotation.

In 'Bid rotation', all vendors participating in the scheme submit tenders, but by agreement take turns being the lowest bidder. A strict bid rotation defies the law of chance and suggests collusion. Competitors may also take turns on contracts according to the size of the contract.

Subcontracting is another area for attention. If unsuccessful bidders or firms which have not submitted a bid frequently receive work from a successful main contract

bidder, the subcontracts (or supply contracts) may be a reward for submitting a non-competitive tender or for not bidding at all.

(d) Market Division.

Market division schemes are agreements to refrain from competing in a designated portion of the market. Competing firms may, for example, allocate specific customers or types of customers, so that one competitor will not bid (or will submit only a complementary bid) on contracts let by a certain class of potential customers. In return, his competitor will not bid on a class of customers allocated to him.

Allocating territories among competitors is also illegal. This is similar to the allocation-of-customers scheme, except that geographic areas are divided instead of customers.

What can you do?

Because it is necessarily secret by definition, collusive tendering is difficult to detect and to prove. For that reason the Competition Authority is dependent on complaints together with documentary information from contracting authorities and competitors. If you believe that a firm or firms are engaged in collusive tendering you can contact the Competition Authority. The contracting authority may also have a right to take action in the courts to obtain an injunction and/or damages including exemplary damages. The Authority cannot provide advice on such actions so that you should consult your agency's legal adviser if you wish to pursue such a course.

Certain patterns of conduct suggest the existence of anti-competitive behaviour. To that end the brochure includes a checklist of some factors, any one of which may indicate collusion. Contracting authorities should therefore be on the look-out for their occurrence. The guidelines are intended to assist in detecting and compiling evidence on possible collusive tendering.

Contracting authorities can assist in the enforcement of competition law not only by playing an active role in the detection of collusive bidding, but also by taking positive

steps to stimulate competition and prevent collusive behaviour. The brochure describes a number of possible steps that can be taken to achieve this end. These proposals are designed to help public agencies achieve better value for money.

The Public Sector has a tremendous stake in detecting and deterring price fixing. It is almost certainly true that some contracts are the subject of collusion or bid rigging. It is up to contracting authorities to understand the applicable law, to limit opportunities for collusion and to seek out evidence of violations for prosecution. If the vendor community realises that a contracting authority means business in relation to preventing collusive tendering, the money saved can be spent on more worthwhile projects. To that end the brochure outlines a program that a contracting authority should consider adopting as a matter of policy.

Conclusion

The introduction of the Competition Act in 1991 represented a major shift in official policy. The Competition (Amendment) Act, 1996 heralded a further step forward because it gave the Competition Authority power to enforce the legislation. An efficient independent enforcement agency is essential if the legislation is to be effectively enforced. The Partnership 2000 Agreement between the Government and the social partners includes a commitment that the Competition Authority will vigorously enforcement competition law. The Authority intends to play its part in honouring that commitment. If it is to do so, it is essential that commitments in respect of resources be honoured and that the uniform application of the legislation to all sectors of the economy is maintained.

As part of its enforcement campaign the Authority has decided to be pro-active and target what it considers to be the most harmful types of anti-competitive arrangements. One aspect of this is the decision to launch this initiative in respect of collusive tendering. The Competition Authority looks forward to working together with you to make competition enforcement a fundamental feature of your procurement activities. We warmly welcome your support and would be grateful for your views on this brochure so that we might incorporate your suggestions in future revisions. Our

aim is to work with state agencies to ensure that taxpayers get better value for money along with the level and quality of services they deserve.