Tackling the 'Cosy Cartels':
The Competition Authority's Enforcement Priorities.

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Introduction.

Today's conference on the future of national and EU competition policy comes at a very opportune time. It is just over three years since the passage of the Competition (Amendment) Act in 1996 introduced a much needed system of competition law enforcement in Ireland. It is still rather early to adequately assess the effectiveness of the legislation, although I believe that a review of the Authority's activities since the passage of the 1996 Act can, nevertheless, provide some useful insights. We have also recently seen the publication by the Competition and Mergers Review Group (CMRG) of its third interim report entitled *Proposals for Discussion in Relation to Competition Law*. In addition as we have heard already this morning the European Commission in a White Paper published earlier this year has proposed the most radical reform in EU competition policy in its forty year history. Clearly therefore it is an opportune time to consider the role and effectiveness of competition legislation and while my main task today is to describe the Authority's enforcement priorities I propose to take this opportunity to make some comments in respect of both the CMRG and Commission proposals.

The Authority has consistently stated that tackling 'hard-core' cartels is its primary objective. For example, in its 1996 *Annual Report* it stated:

> 'Thus the Authority's priority has been to pursue investigations into allegations of price fixing and other 'hard-core' cartel type activities, resale price maintenance and abuses of dominance.'[1]

This view was confirmed in the Authority's *Enforcement Guidelines* published just over two years ago where it stated that it considered price fixing and other hard-core cartel activities as practices which it considered should be prosecuted criminally.

Let me just say a few brief words about why the Authority has identified the pursuit of cartels as its primary objective. Cartels essentially involve managers and employees of rival businesses secretly agreeing to raise prices to their customers for the goods and services which they supply in order to increase company profits or put less eloquently they are a scam to rip off the public. Of course it is the least well off members of society who suffer most as a result of secret deals to raise prices. In many other jurisdictions such behaviour is regarded as a form of theft. Consumers and law abiding businesses must be protected against such scams and this can only be done by having competition legislation which is vigorously enforced.

[1] Competition Authority, (1996), *Annual Report 1996,* Dublin, Stationery Office, p.12.

The priority given to tackling 'hard-core' cartels is reflected in the Authority's enforcement actions. Over the past two and a half years the Authority has instituted proceedings in a total of eight cases involving five trade associations, one professional association and more than thirty separate undertakings alleging price fixing. To date in three cases the parties concerned furnished undertakings to the Court to discontinue certain practices. The remaining cases have yet to be heard. Within the past twelve months files on three cases have been referred to the Director of Public Prosecutions with a recommendation that criminal prosecutions be brought against certain parties. There are currently a number of major investigations underway into alleged cartel behaviour. **[Refer to any new decisions to bring proceedings at next CA meeting].** The high level of complaints alleging cartels received by the Authority since the passage of the 1996 Act indicates that, to coin a phrase used by our US counterparts, 'we are operating in a target rich environment'.

I would also like to make clear that the Authority is by no means unique in identifying and targeting cartels as its number one enforcement priority. The Director of DGIV has recently stated that over the past two years it has adopted the investigation of cartels as its main priority and, in my view, the proposals contained in the recent White Paper are designed primarily to allow for greater deployment of resources in this area at the expense of more traditional, but from an enforcement point of view, less productive areas. This is a point which I will return to below. The UK authorities have also indicated that they regard their new legislation as giving them the power to tackle cartels more effectively, while the UK Chancellor Gordon Brown in his recent references to 'rip off' Britain has clearly highlighted the reasons why more effective measures were needed. In the United States the Department of Justice has engaged in a 'crusade' against price fixing over the past twenty years[2] and more recently has shifted the emphasis to tackling international cartels.

> 'Let me start with the obvious: cartel behaviour (price-fixing, market allocation, and bid-rigging) is bad for consumers, bad for business, and bad for efficient markets generally. And let me be very clear: these cartels are the equivalent of theft by well-dressed thieves, and they deserve unequivocal public condemnation. Remarkably, even today, a few lonely ideologues argue that cartels really do no harm, that they are inherently short-lived and ineffectual. As I understand their position, these misguided souls believe that the savvy cartel conspirators who spend so much time and effort creating, maintaining, and concealing their fraudulent agreements are simply deluding

[2] See, for example, J.W. McAnneny, (1991), The Justice Department's crusade against price-fixing: initiative or reaction?, *Antitrust Bulletin*, XXXVI, 3, (Fall), 521-42.

themselves in thinking that they understand their own businesses or that they could possibly have any collective effect on prices or output.'[3]

In the fiscal year which ended on 30 September last the DoJ announced record criminal fines of $1.2bn had been imposed in price fixing cases. The large numbers of complaints the continued increase in the level of detection of cartels in other jurisdictions and our own experience to date since the passage of the Competition (Amendment) Act suggest clearly to us in the Authority that cartels constitute a major problem which can only be addressed by vigorous enforcement of the legislation.

The Authority's Anti-Cartel Campaign.

The past few years have seen growing public concern regarding unacceptable business practices. There was a major public outcry followed revelations that officials in certain branches of a major bank had secretly, over a period of years, imposed extra charges on a number of their customers in order to boost the bank's profits. More recently a leading supermarket chain was convicted and fined for overcharging its customers, specifically by charging higher prices for certain products than the prices displayed. The reason why I have chosen to refer to such episodes is quite simple. In my view direct parallels can be drawn between such episodes and cartel type practices.

Cartels essentially involve managers and employees of rival businesses getting together and secretly agreeing to raise prices to their customers for goods and services in order to increase company profits. If it is considered illegal for a supermarket to charge higher prices than those displayed on its shelves and that such a practice merits prosecution and fines then, I would suggest that similar considerations apply in cases where rival firms come together and say:

> 'Let's stop all this competing with one another, after all only our customers benefit when we do that. Instead we will agree to charge higher prices, we will make more money and to hell with the customer.'

Lest anyone feel that this is somewhat exaggerated, let me point out that this is exactly how cartels operate. In a major US case just a couple of years ago, at a cartel meeting the Chief Executive of one of the participants was recorded stating the memorable lines:

> 'Our competitors are our friends. Our customers are the enemy.'

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[3] J. Klein, (1999), The War Against International Cartels: Lessons from the Battlefront, Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law & Policy, p.2.

Cartels cost Irish consumers far far more than the overcharging for which Tesco was fined. In the Tesco case it was claimed that overcharging was due, at least in part, to human error. In the case of cartels there is no human error, cartels involve systematic overcharging of consumers in a well planned and organised manner.

Many areas of competition law constitute grey areas. In the case of non-price vertical restraints it is generally recognised that these cannot automatically be described as either pro or anti-competitive but that rather a case by case analysis based on the individual market circumstances in each case is required.[4] Similarly it is frequently recognised in abuse of dominance type cases that there is often a fine line between aggressive competition and abuse of dominance. In the case of 'hard-core' cartels, however, there is virtually no room for debate regarding their object and effect and for concluding that they should constitute the number one enforcement priority.

> 'Economists are almost unanimous in the condemnation of cartels, especially those engaged in price fixing, because no expert has satisfactorily established that consumers will benefit from price fixing. On the contrary, economic analysis can show that cartels are inefficient and lessen consumer welfare. It is therefore, not surprising that antitrusters have the closest meeting of minds on the baleful influence of cartels.'[5]

Baumol has observed that cartels may involve greater welfare losses than pure monopolies, since the latter, in cutting output will close its least efficient plants, whereas the need to share output amongst all the members of a cartel means that prices must be set high enough to ensure that the least efficient firm is profitable.[6]

In addition to the fact that cartels can be regarded as almost unambiguously harmful to consumers and the general public, the large number of complaints of alleged price fixing received by the Authority since the passage of the 1996 Act indicates a clear need to tackle such behaviour. Almost one quarter of all complaint cases opened by the Authority up to the end of 1998 involved alleged price fixing or other forms of cartel arrangements (See chart). This represents a total of 109 complaints. Of course the mere fact of a complaint does not establish the existence of a cartel. As against that the fact that cartels mainly operate secretly means that there is no way of knowing how many have thus far not come to the Authority's attention. At the very least the

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[4] For a more detailed discussion on the competition implications of non-price vertical restraints see, for example, P. Massey (1998), , Competition Authority, Discussion Paper No. .

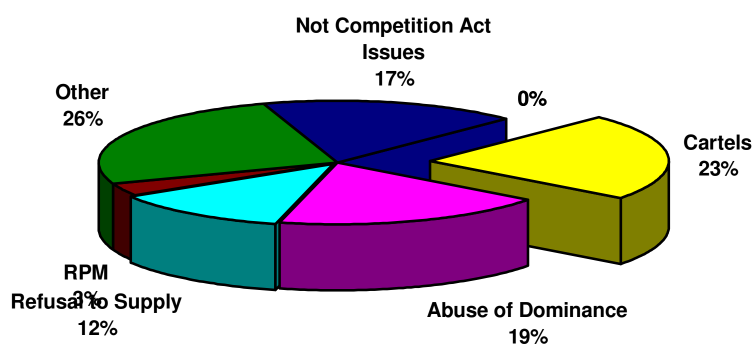
[5] W. Breit and K. Elzinga, (1989), *The Antitrust Casebook: Milestones in Economic Regulation,* Dryden, New York, p.12.

[6] W.J. Baumol, (1992)

large number of such complaints received in the past three years indicates that potentially there is a very serious problem to be tackled.

Details of Complaints Cases Opened by Competition Authority

(1.7.1996 - 31.12.1998)



I have already referred to the number of cases instituted by the Authority over the past two years, let me now say some more about those particular cases. Some criticisms were expressed that the Authority's early cases involved small undertakings. Firstly the Irish Road Haulage Association (IRHA) case had implications for all goods shipped to and from the Port of Dublin which is the most important port within the State. It accounts for more than 30% of all goods imported to and exported from the State and almost 70% of all roll/on roll/off traffic shipped through Irish ports. Can anyone seriously argue that such a case could be considered insignificant. In the case of the Irish Travel Agents' Association (ITAA) and the Irish Veterinary Union (IVU) members of both associations accounted for a large proportion of the relevant business. CSO figures show that there were 7.6m cattle in the State in June 1996. Raising the price of tests by 25 pence per cow would mean an additional annual cost of £1.9m to farmers.

Secondly the IRHA, the ITAA and the IVU had all publicly indicated an intention to engage in behaviour which appeared to contravene Section 4(1). Let me draw your attention to an example from the Authority's Annual Report for 1998. The IVU in a newsletter dated 29 March 1996 included a list of 'recommended minimum fees' and stated that it was:

> 'vital that these minimum charges are strictly adhered to subject to your normal credit policies. There should be much greater contact with and co-operation

> between neighbouring practices in this regard. The IVU branch will facilitate this.'

One year later in a newsletter dated 24th March 1997 reference was made to recommended minimum fees for other clinical services and it was stated that:

> 'It is stressed that these recommended fee guidelines are minimum standards only. However, it is the Union's view that no practice should be charging below these levels. Branches will be asked to do what they can to reproduce the co-operation seen in relation to TB fees in bringing fees up to these and improved levels. Obviously where your current fees are above this level you should continue charging as before.'[7]

I would suggest that had the Authority failed to act in the circumstances which arose in these three cases, the legislation would have been brought into disrepute. In addition, in the case of the ITAA, proceedings were only brought after the ITAA appeared to have ignored earlier warnings from the Authority and I will refer to this point again later.

Thirdly the cases which an enforcement agency might bring are determined to a significant extent by the evidence available to it. In these three cases the Authority experienced relatively little difficulty in accumulating sufficient evidence to enable it to bring proceedings. However, many cartel investigations can take time and patience is an essential attribute for a competition enforcement agency.

The Authority has instituted proceedings against both the LVA and VFI and a number of individual publicans following an investigation conducted in the latter part of 1997 and early months of 1998. These cases have yet to be heard. In addition proceedings were issued earlier this year against three dairies and two supermarket multiples following an investigation into liquid milk prices. **[I can also announce today that proceedings are being issued against seven companies engaged in the wholesale distribution of packaged beers and soft drinks, following an investigation undertaken in the first half of this year. Further proceedings may follow from this investigation. Those of you who are avid readers of a certain publication which reports on competition matters may be aware that investigations are also underway in respect of bread and motor fuels. I should point out that in the latter case the investigation was reportedly prompted by a complaint by an individual filling station owner. Well even the intrepid author of that journal does not always get it right. Investigations in this sector have been ongoing for more than two years during which time a total of fifty complaints have been**

[7] Competition Authority, *Annual Report 1998,* p.10.

received by the Authority [Check nos]. A number of other investigations are ongoing but for obvious reasons I do not propose to comment on them at this time].

It was also noted that many of the Authority's initial cases involved trade associations. I would suggest that in fact there is nothing surprising about this at all. A number of authors have pointed out that a high proportion of cartel cases in other countries involve such associations. Perhaps if I might paraphrase Brendan Behan, in the case of trade associations it appears that, all too often, the first item on the agenda is not the split but price fixing arrangements.

Let me now say a few words about how the Authority's enforcement activities have evolved over the past three years. In its first few cases, the Authority confined itself to issuing civil proceedings only, in spite of the fact that the cases involved alleged cartels. The main reason for this was because the Authority considered that it should seek to establish Irish legal precedents for the proposition that price fixing and other cartel type behaviour constitutes a breach of Section 4(1). The Authority is convinced that such is the case and EU case law clearly supports this view. Nevertheless the Authority considered it important that its initial cases be brought as civil proceedings to establish clear case law on this point.

In the event, as already noted, in all three cases the parties concerned furnished undertakings to the Court along the lines of the injunctions sought by the Authority and indeed in the IRHA case the parties consented to a Court order that between January and June 1997 they had engaged in practices which were contrary to Section 4(1). Such Court undertakings have the same legal effect as an injunction. It would of course have been open to the Authority to pursue declaratory relief in the other two cases, thereby achieving its objective of obtaining legal precedents. However, such a course of action could have left the Authority exposed to claims for costs, even if it had been successful, on the grounds that the action was unnecessary in light of the undertakings furnished by the defendants. In my view the Authority correctly decided not to expose taxpayers to such unnecessary risks, our job after all is to try and save them money.

Although the Authority arguably achieved a worthwhile objective insofar as its first cases were essentially successful, it clearly was unable to establish court precedents. In addition it became concerned that firms engaging in serious anti-competitive behaviour might believe that, if caught, the worst that would happen would be that

they would be obliged to come into court and give undertakings to discontinue certain practices. The Authority believes and evidence from other countries supports this belief, that firms will not be deterred from engaging in 'hard-core' cartels unless they believe they are likely to face severe penalties for so doing. As a result the Authority has decided over the past few months to follow the practice set out in its *Enforcement Guidelines* and recommend criminal prosecutions where it has evidence of such activity. Files on three investigations have been referred to the DPP within the past year. In addition the question of summary prosecutions where appropriate is being actively considered by the Authority.

I mentioned the ITAA case earlier on. In its 1998 *Annual Report* the Authority noted that it had initially written to the ITAA asking them not to proceed with certain measures on the grounds that they contravened the Competition Acts. The ITAA informed the Authority that it would reverse certain decisions and inform its members accordingly. The Authority subsequently concluded after a lengthy investigation that the ITAA and certain of its members had in fact engaged in behaviour which contravened the Acts. The Authority's experience in this case indicates that mere warnings are ineffective in such cases and that undertakings furnished to the Authority have no legal effect whatsoever. Consequently, while the Authority will issue warnings and seek to persuade firms to obey the law in less serious cases, in the case of cartel behaviour the Authority considers that court proceedings are the only effective remedy.

The priority attached to tackling cartels is reflected in the way that investigations are handled within the Authority. All complaints received are subject to preliminary examination. At this stage complaints which clearly do not involve issues within the scope of the Act are closed, while those suggesting possible cartel type behaviour are earmarked for priority investigation. This normally consists of a follow-up telephone call or an interview with the complainant in order to obtain as much information as possible about the alleged cartel. As in many walks of life individuals may be prompted to complain by a particular incident which they find annoying. However, unless the matter is followed up they are likely to quickly lose interest. Secondly it seems likely that direct personal contact with a complainant is more likely to yield a favourable response than a written request for information.

Further investigations may be carried out in order to establish whether or not there is evidence of cartel type activity. If these reveal *prima facie* evidence for believing that such activity is occurring, then normally an application is made for a search warrant

under Section 21. I would emphasise that the Authority only seeks a court warrant where it believes there is such *prima facie* evidence of a breach of the Acts. It is important to stress this point since there is a certain implication that the searches are in some sense carried out as a matter of routine without justification. In addition the overwhelming majority of cases where warrants have been obtained have been in respect of alleged 'price fixing' behaviour. While I am on this point I would just like to comment on media reports of complaints regarding the conduct of searches. No where has it been suggested that the Authority officers involved did anything other than act within the law. Indeed it appears in many of the reported complaints that what upset individuals was the very fact of the search taking place, in some instances people allegedly said it seemed that they were the subject of some form of criminal investigation!

Where the Authority is satisfied that there is evidence of cartel type practices it will institute proceedings. Where civil proceedings are brought the standard policy of the Authority is to at least require the parties concerned to give undertakings in court to discontinue the activity involved. Undertakings furnished in court have the same effect as an injunction and in the event that parties renege on such commitments, the Authority will then seek to have them found in contempt of court.

In addition to mounting 'dawn raids', the Authority may, under paragraph 7 to the Schedule of the 1991 Act, summon persons to appear before it, require such persons to answer questions on oath and to produce documents and records to it. This power has been invoked on a number of occasions over the past 12 months. Following the Supreme Court decision in the *NIB* case the scope and limitations of this power have been mapped out to some degree. The Authority believes that it can also constitute a useful tool for investigating cartel behaviour.

As part of its anti-cartel campaign the Authority will shortly publish a new booklet advising the public on the threat posed by cartels and informing them of practices which might indicate that a cartel is at work. The booklet will also outline how the Authority approaches a cartel investigation. The Authority believes that increasing public awareness in this way will further strengthen its drive against cartels. In this regard consumers and the general public are 'our eyes and ears'.

Let me make two simple points before I move on. Firstly I hope that I have shown here that it is the Authority's experience that cartels are a real problem in the Irish economy. Of course Ireland is not unique in that regard. Secondly all too frequently

the debate on competition law is conducted as though it was a purely technical issue and that breaches of competition law were really largely technical in nature, that somehow it is all about business executives who unwittingly commit minor technical infractions of highly complex rules. It's time to get real. Those who engage in price fixing and other cartel type practices know exactly what they are at. They are getting together to 'rip-off' the public and it is time that such behaviour was recognised for what it is.

> 'Hard-core price fixers are intentional conspiracies to steal from consumers, and the negligible probability that the outcome is efficient can safely be ignored. We also believe that erroneous findings of guilt in criminal antitrust cases are negligible.'[8]

The Commission White Paper

It is correct to state that the EU Commission Paper represents the most radical overhaul of EU competition law in almost forty years. I do not propose to say too much about the Commission proposals as these have already been dealt with at some length by Dr. Temple-Lang. Nevertheless I believe it is significant that the Commission has concluded that the notification system which has existed since 1962 does not represent an effective means of competition law enforcement and I think that CMRG needs to take the views of both the Commission and the Authority on board in this regard.

The EU notification regime has been strongly criticised in the past.

> Commission in order to find a solution to this problem: trying to involve (more) the national competition authorities of the Member States with the European Commission's work, while clinging jealously to its exclusive competence to apply Article 85(3), and to give block and individual exemptions, does not appear to be the right solution as surely this will veer towards even more discretion and, occasionally, arbitrariness.'[9]

The Commission may perhaps be reluctant to state it publicly but it would appear to onlookers that reform has been prompted by criticisms from a variety of sources including outside commentators and national authorities combined with the undoubted recent successes of the US authorities in pursuing international cartels. In the fiscal

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[8] G. Werden and M. Simon, Why Price Fixers Should Go To Prison, *Antitrust Bulletin,* Winter 1987, p.932.
[9] Supra note 35 at 410.

year which ended on 30th September last, the total value of fines imposed in cartel cases brought by the US Department of Justice amounted to $1.2bn. Massive fines have been paid by a number of EU companies for engaging in cartels which the US authorities claim operated on a world wide basis. A recent *New York Times* article revealed the breathtaking extend of the Vitamins cartel.

> 'Working together in a coalition they brazenly called "**Vitamins** Inc.," they carved up world markets and carefully orchestrated price increases, in the process defrauding some of the world's biggest food companies, including Kellogg, Coca-Cola and Nestle.'[10]

Clearly the Commission could not ignore such developments. The new Competition Commissioner, Mr Mario Monti, said in a recent *Financial Times* interview:

> 'We are not in a position to be active on our own initiative - to go on the ground and make investigations and dawn raids and identify the really threatening hard-core cartels.'[11]

Such a situation is clearly untenable. The observation by Scherer and Ross that modern competition law is very much a North American invention whose origins can be traced to the passage of the Sherman Act in 1890 seems to becoming more and more the reality.[12] In fairness, however, I think the White Paper proposals need to be viewed positively. The Commission has recently announced that pursuing cartels is now its major priority and, given the Competition Authority's own stated approach I think that this is a welcome development.

Our US colleagues have clearly shown that cartels are a major problem. Thus a mechanism needs to be found whereby the Commission and the national authorities can work together effectively to tackle cartels which harm the citizens of the European Union and deny them the benefits which the single market was designed to bring. The current situation where the Director of the Competition Directorate has publicly stated that the Commission is able to co-operate more fully with the US authorities than with the national competition authorities of the European Union in pursuing cartels makes no sense at all.

The Report of the Competition and Mergers Review Group.

I now want to turn to the recent Report of the CMRG. Again I do not propose to deal with this at any great length. The Authority has submitted its formal views on the

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[10] Tearing Down the Facade of 'Vitamins Inc.', *New York Times*, 10 October 1999.

[11] *Financial Times,* 26 October 1999.

[12] Scherer and Ross, (1990),

Report and has published its comments as a discussion paper. Today I just want to focus on three broad aspects of the Report.

Firstly as the Authority has stated elsewhere, the Report devotes far too much attention to questions of procedural detail regarding notifications and fails to ask whether in fact the notification regime can still be said to serve any useful purpose. In the light of the Commission's White Paper I believe that the CMRG needs to address that fundamental question. The Authority certainly does not believe that notifications provide a 'vital flow' of information. It is true that large numbers of agreements were notified to the Authority, particularly during the first year of the 1991 Act. However, the Authority has dealt with virtually all of the agreements notified to it (there are currently less than fifty cases awaiting a decision), concluding that the vast majority of these either were not anti-competitive or satisfied the requirements for a licence.

In addition the notification of large numbers of innocuous agreements to the Authority in its early years undoubtedly involved some unnecessary costs for private business and a further wasteful use of resources. Arguably if the competition law is based on a prohibition system with the possibility of exemption, then some official body is required to perform the task of deciding upon exemptions and there must be a system for notifying agreements to that body. The large number of harmless agreements notified may therefore be an inevitable start-up cost attaching to such a system. However, it might also be argued that an administrative regime for granting exemptions represents a somewhat bureaucratic approach. In its Annual Report for 1993 the Authority observed:

> 'From the perspective of the Government and the economy generally, the Authority's resources, limited as they are, would probably be better employed in tackling even a small number of seriously anti-competitive agreements rather than issuing formal decisions approving innocuous agreements.' [Competition Authority, 1993]

Secondly I want to deal with the Report's proposals regarding the introduction of a *de minimis* provision. The Report argues that such a rule reduces compliance and enforcement costs and therefore increases efficiency. The difficulty with such an arbitrary rule, particularly one along the lines suggested in the Report is that it would permit agreements which harm consumers and which have no redeeming features, namely hard-core cartels. Given that price fixing and other types of cartel behaviour are virtually always harmful, both to consumers and to the economy at large, there appears to be absolutely no justification for excluding such arrangements because they

happen to involve small firms. Similarly it is difficult to believe that being prevented from engaging in cartel behaviour involves any very significant compliance costs for small firms. Therefore there must be a clear presumption that there is no justification for a *de minimis* provision, at least in respect of cartels.

If a *de minimis* provision along the lines proposed in the Report were introduced then it is clear than in many small and medium sized towns virtually every class of retailer, such as pubs,[13] filling stations, pharmacists, grocery shops and so on would be free to engage in price fixing. Similarly most self employed professionals would also be able to engage in such practices. While this would obviously benefit the vested interests involved it would inevitably represent a bad deal for consumers. In this context the CMRG needs to clearly state if it believes that such cartels are acceptable and explain to consumers why they should not be protected against such rip-offs. To the best of my knowledge no jurisdiction in the OECD has a *de minimis* provision which applies to hard-core cartels.

Thirdly I want to consider the question of criminal penalties which is also discussed in the Report. The Report considers the possibility of allowing the Authority to impose fines or for the Courts to award punitive damages in civil actions brought by the Authority. However, as the Report points out neither of these options is possible under the Constitution. It is not clear why there was any need to revisit such issues as such points were well recognised at the time the legislation was first introduced. Nevertheless the essential point in all of this is the fact that it is not possible to have penalties for anything other than criminal offences under our legal system.

The Report includes a rather confusing discussion on the issue of criminal penalties while ultimately recommending their retention. For example, it refers to the fact that 'there is little tradition in this jurisdiction of prosecuting complex matters of this kind' and the complexity of such cases might deter a jury from convicting. The Authority has clearly indicated that it regards criminal sanctions as appropriate only in cases of serious breaches of the Acts, specifically those involving price fixing and other serious cartel behaviour. With the exception of Switzerland, competition law in every OECD country provides that firms engaging in cartels are liable to fines. New legislation providing for hefty fines for firms breaching competition law has only recently been introduced in the UK, primarily because a system which lacks penalties has been recognised as totally ineffective. In the US the Department of Justice has

[13] The Report states that one of the four submissions in favour of such a rule came from the Vintners Federation of Ireland who presumably wished to have their members excluded from the Acts.

argued that the statutory maximum fines for companies engaged in cartels should be increased from $10m to $100m.

Given the tone of some of the Report's comments on the subject of criminal sanctions, it is somewhat ironic that the Report refers to the US as the country with the strongest and most effective competition law regime in the World. For criminal sanctions are an essential part of the US system. It is sometimes argued that this reflects the very different tradition and approach of the US. This is to conveniently overlook the fact that vigorous criminal enforcement really only got underway in the past twenty years or so. Under the Carter administration on average 38 criminal actions were taken per year. During the first seven years of the Reagan administration this rose to an average of 80 per year.[14] Ten years ago total criminal fines for antitrust cases in the US amounted to around $20m (**check**). Last year as I said they amounted to $1.2bn. Yes there are some differences in US cultural attitudes to white collar crime, but I would suggest, the evidence indicates that the reason why the US is seen as having an effective system of competition law and the reason why the authorities have successfully pursued so many cases is because of a determination backed by a commitment in terms of resources to enforce the law.

Unlike many violent crimes, breaches of competition law do not come about as a result of a moment's passion or transient rage. Rather they are undertaken by individuals who coolly calculate the profits likely to accrue to their companies from such actions. Firms engage in price fixing because it boosts profits. Deterrence depends on the probability of getting caught combined with the likely penalty if one is caught and these factors must be balanced against the potential gain from breaking the law. Recent revelations concerning matters such as the DIRT affair clearly indicate that business will disregard laws that are not effectively enforced.

Commenting on the US Department of Justice drive against price-fixing, McAneny observed that:

> 'The results of the Division's programme have certainly been impressive when viewed in terms of the number of convictions, the amount of the fines, and the number and length of jail sentences imposed on individuals convicted of criminal antitrust behaviour. The question that remains unanswered is the effect of the Division's efforts in deterring criminal antitrust behaviour. The reason the question remains unanswered is simply that it is not possible to estimate the incidence of criminal antitrust behaviour in the economy. Some

[14] McAnneny (1991) op. cit.

crimes, such as bank robbery, auto theft, and burglary , can be counted and tracked over time. Efforts to prevent these crimes can then be evaluated by measuring the change in the incidence of such crimes in relation to any given programme initiative. In the case of criminal antitrust behaviour it is not possible to take a survey and ask people to incriminate themselves by revealing their participation in a crime. There is no way to tell how many price-fixing conspiracies, bid-rigging schemes, or market allocation plots existed at the time the Division's initiative began in 1981, how many exist today, or how many have been prevented by the Division's crusade.'

Notwithstanding such problems, research has shown that effective competition law enforcement can contribute to reducing anti-competitive behaviour. Posner (1970) found that cartels were more prevalent during periods when antitrust enforcement was lax. (C&P, p.217) Similarly Shepherd observed that in the US competition was greatly increased due to antitrust policy. (Audretsch, p.141)

In that context the CMRG comments on criminal enforcement are somewhat disappointing. Although it is true that the Report ultimately favoured the retention of criminal sanctions, it failed to give any serious consideration to addressing the many difficulties which undoubtedly arise in criminal actions and to devising ways in which they might be overcome. As the Fair Trade Commission observed in its report which recommended the introduction of the 1991 Act:

> 'One of the most potent forces in ensuring competitive markets may be an educated public opinion. There is a need to publicise the benefits of free and competitive markets so that a climate exists where those who are breaking competition laws are seen to deserve their punishment.'[15]

Finally in passing I would also refer to the fact that, although the CMRG referred to the fact that the costs involved were a serious deterrent to private enforcement, the Report also fails to make any recommendations which might address this problem.

Conclusions.

The aim of Ireland's original competition legislation, the 1953 Restrictive Trade Practices Act, according to the then Minister for Industry and Commerce, Sean Lemass was 'to smash trade rings'.[16] According to Hogan[17] the legislation reflected a

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[15] Fair Trade Commission, (1991), *Study of Competition Law,* at para 14.22.
[16] Dail Debates 31.10.1952 at col.818.

cautious approach because it was somewhat novel in Ireland at that time.[18] Such sentiments might equally be said to apply to the 1991 Competition Act and, in particular, to the absence of an effective enforcement regime. Indeed the 1991 Act was only introduced after numerous calls for a strengthening of Irish competition legislation. It has taken more than forty years to introduce an effective regime for dealing with cartels in with the introduction of criminal penalties in the 1996 Act.

It is clear, however, that three years after the introduction of the 1996 Act, that much remains to be done. It is evident from the volume of complaints made to the Authority from cases taken and from investigations carried out that there are reasons for serious concern that price-fixing and other forms of hard-core cartel activity represent a very serious problem indeed in our economy. For that reason tackling cartels remains the Authority's top priority. Consumers have a right to be protected against such behaviour and its time to convey in clear and unequivocal terms to cartel operators that:

'ITS PAYBACK TIME'.

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[17] G. Hogan, (1989), The Need for a New Domestic Competition Law, *Irish Banking Review,* (Winter), pp.34-44.

[18] It is worth noting that the similar UK legislation was not enacted until 1956.