A Brief Guide to Irish Competition Law.

Introduction.

The main provisions of Ireland's competition legislation are contained in the Competition Act 2002, as amended. The main features of the Irish legislation are:

- Basic prohibitions on anti-competitive behaviour, which closely follow the wording of the EU Competition rules.
- Decisions on infringements are made by the Courts.
- The Competition Authority's function is to investigate and, where appropriate, bring court proceedings.
- Breaches of competition law constitute criminal offences.
- Managers and directors of firms engaging in cartels may be imprisoned for up to 10 years.
- Parties aggrieved by anti-competitive behaviour may bring private actions for damages before the Courts.
- Prohibitions and Penalties for Anti-Competitive Behaviour.

The basic prohibitions on anti-competitive behaviour are contained in sections 4 and 5 of the 2002 Act. Section 4(1) 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". Section 5 prohibits "any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State".

The Act makes a clear distinction between practices such as price-fixing, market sharing and bid rigging on tenders, which might be described as 'hard-core' cartel practices, and other types of behaviour. The 2002 Act provided that managers and directors of firms convicted of engaging in 'hard core' cartels could be imprisoned for up to 10 years. Firms engaging in cartels and all other types of anti-competitive behaviour could be fined up to €4m or 10% of turnover whichever is greater. These penalties were increased by the Competition (Amendment) Act, 2012 (see below).

It makes obvious sense to distinguish between cartel behaviour and other practices. Cartels are anti-competitive by definition. They involve rival businesses secretly agreeing to charge higher prices to their customers and are a conspiracy to defraud consumers. Unlike many violent crimes, participation in a cartel is not the result of a rash decision in the heat of the moment. Cartels are organised and operated by individuals and companies who calculate that they can earn substantial profits from such behaviour. In contrast the effects of non-cartel behaviour are far less clear cut. Exclusive distribution and other types of vertical agreements, may in some circumstances be anti-competitive, and in others may simply increase efficiency. Similarly, there is frequently a fine line between aggressive competition and abuse of dominance.

Section 6(2) of the 2002 Act provides that:

> "In proceedings for an offence…it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to-

(a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice,
(b) limit output or sales, or
(c) share markets or customers
has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State or within the common market, as the case may be, unless the defendant proves otherwise."

Effectively this provision seeks to create a presumption that cartels are anti-competitive.

Section 6(3) provides that it shall be a good defence that "the agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives, and afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."

Such a defence is appropriate in non-cartel cases. Cartels, virtually by definition, are not efficiency enhancing and do not benefit consumers. The Act nevertheless permits defendants in cartel cases to argue that they satisfy the requirements for exemption. Undoubtedly this is likely to greatly complicate such cases and make successful prosecutions far more difficult. In the United States cartels are deemed *per se* violations of the antitrust laws and this undoubtedly facilitates successful criminal prosecutions of individuals involved in such activities.

The Act provides that where a Court finds that an undertaking has abused a dominant position, it may, either at its own instance, or on the application of the Competition and Consumer Protection Commission (CCPC), order the break-up of the dominant firm.

Investigative Powers.

The CCPC has primary responsibility for investigating alleged breaches of competition law. By virtue of the fact that the maximum penalty for engaging in a cartel is ten years imprisonment, however, the Gardai may arrest and detain individuals suspected of participating in such arrangements for questioning for up to six hours with the possibility of a further six-hour extension under the 1984 Criminal Justice Act. The absence of powers to question individuals was a major stumbling block in cartel investigations in the past.

- In addition to powers to search business premises, authorised officers may obtain warrants to search the homes of company directors, managers and other employees.
- Where a warrant has been granted authorised officers may use reasonable force to gain entry.
- Authorised officers may seize original documents during a search.
- The Act includes various presumptions regarding documentary evidence.

The CCPC is also responsible for deciding on mergers.

Competition Advocacy.

The Act provides that the CCPC may

- advise Ministers and the Government regarding the implications for competition of proposed legislation,
- advise public bodies on competition issues arising in the performance of their functions and
- identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy.

There is no requirement on public bodies to implement the CCPC's recommendations. An obvious question arises as to whether such powers can be effective in the face of extensive lobbying by vested interests.

Competition (Amendment) Act, 2012.

The 2012 Act increases the penalties for competition law infringements. The maximum fine that may be imposed on an undertaking is increased from €4m to €5m. The maximum prison sentence that can be imposed on an individual executive in respect of the "hard-core" cartel offences is increased from five to ten years. The 2012 Act also provides that a convicted party will have to pay the costs of the investigation and prosecution to the Authority.

Section 5 of the 2012 Act provides for the insertion of a new section 14B into the Competition Act 2002. This provision applies to an agreement entered into by the Competition Authority and an undertaking following an investigation

> "that requires the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the competent authority agreeing not to bring proceedings under section 14A...in relation to any matter to which that investigation related or any findings resulting from that investigation."

The CCPC may apply to the High Court which may make an order in the terms of the agreement provided it is satisfied that—

> (a) the undertaking that is a party to that agreement consents to the making of the order;
> (b) the undertaking obtained legal advice before consenting;
> (c) the agreement is clear and unambiguous and capable of being complied with; and
> (d) the undertaking is aware that failure to comply with the order would constitute contempt of court.

Before making an application for an order the Competition Authority must:

> (a) publish the terms of the agreement on its website; and
> (b) publish a notice, in at least 2 daily newspapers circulating throughout the State stating:—
> (i) that it intends to make an application,
> (ii) the date on which the application will be made, and
> (iii) that the agreement has been published on its website and give the address of the website.

An order shall not come into effect until 45 days after it has been made. Within that 45-day period subsection 5 provides that any person may apply to the High Court for an order to vary or annul the original order on the grounds that the agreement in respect of which the original order was made would require the undertaking concerned to breach a contract between it and the applicant or would render a term of that contract incapable of being performed. The Court may not make an order under subsection (5) if it is satisfied that the contract or term of the contract to which the application relates contravenes section 4 or 5, or Article 101 or 102 TFEU.

Subsection (7) provides that the High Court may vary or annul an order upon the application of either the Authority or the undertaking which is party to the agreement if:

(a) the other party consents to the application,
(b) the order contains a material error,
(c) there has been a material change in circumstances since the making of the order that warrants the court varying or annulling the order, or
(d) the court is satisfied that, in the interests of justice, the order should be varied or annulled.

Orders will cease to have effect after seven years, although the Authority may apply to have the order extended for further periods of 3 years.

Apart from making such commitments legally binding, this provision may provide greater transparency with respect to such arrangements by giving the courts an oversight role and providing some rights for third parties to object.

The provision bears some initial resemblance to the US modified final consent process, which was described in issue number 6 of our e-zine. In the US when the competition agencies reach an agreement with parties to discontinue certain practices, such agreements must be approved by a judge. This provision exists to ensure that such agreements are in the public interest and to avoid any "sweetheart" deals. Third parties may object to such settlements. It will be interesting to see how this provision will operate in practice. It might have been better if it was compulsory to have such arrangements approved by the court as happens in the US. Nevertheless, it may result in greater transparency while providing a mechanism for ensuring that settlement arrangements between the Authority and undertakings are legally enforceable.

Section 8 provides that any finding by a court that a party has infringed competition law will be *res judicata* in future proceedings. A guilty plea in a criminal prosecution will also constitute a court "finding" for this purpose. In other words where cases have been successfully brought by the Competition Authority, private parties suing for damages will be able to rely on the fact that the parties have already been found to have infringed the law by the Courts and will not be required to separately prove that an infringement has occurred.

Section 9 of the 2012 Act amends Section 160 of the Companies Act, 1990, giving the court a discretionary power to disqualify a person from acting as a director if s/he is found to have infringed the Act. Currently anyone convicted on indictment of a competition offence is automatically disqualified from acting as a director. The new provision means that the court may also disqualify an individual from acting as a director for any competition infringements outside of a conviction on indictment.

The 2012 Act also provides that the Probation of Offenders Act, 1907, no longer applies to competition law offences.

The 2012 Act amends section 14 of the 2002 Act creating a separate right for the CCPC to bring civil proceedings, thus distinguishing between private civil actions and enforcement actions brought by the Authority.