Compecon - Competition & Regulatory E-Zine.

No.6 July 2011.

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Editorial.

Welcome to the latest issue of Compecon's Competition and Regulatory Economics EZine. In this issue we analyse the proposal to introduce civil fines for infringements of competition law other than hard-core cartels. Our second article reviews UK Government proposals to reform competition law in that jurisdiction which were contained in a consultation paper published last March. Unfortunately there is no indication that there will be a similar consultation on plans to reform competition law here. Our third article looks at proposals recently announced by the Minister for Environment, Community and Local Government to introduce a system of competitive tendering for household waste collection services. It is nice to see that some Ministers favour public consultations regarding proposed policy changes. It also begs the question of whatever happened to Fine Gael's proposal to introduce competitive tendering of bus routes. Minister Varadker has recently stated that subsidies to Dublin Bus and Bus Eireann are likely to be cut next year and that this will inevitably lead to a cut in services. In light of the severe budget constraints facing the Government it is surely incumbent on the Transport Minister to test the potential for cost savings that would minimise the need for service reductions. Greater consistency between Government Departments might be good too.

Patrick Massey

Director

Civil Fines Proposal Requires Informed Debate.

1. Introduction.

The Competition Authority has long called for the introduction of civil fines for competition law offences. [1] The possibility of introducing civil fines for non-hardcore cartel infringements of competition law was placed firmly on the agenda following last November's EU/IMF bailout of Ireland. The Memorandum of Understanding concluded between the European Commission and the Government (the MoU) included a commitment to introduce legislation to empower judges to impose fines and other sanctions in competition cases. The revised MoU terms, which were agreed last April, replaced this with a commitment that *"the Government shall bring forward legislation to strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of [TFEU]".*

The Competition Authority has recently published a paper which outlines the reasons why, in its view, civil fines are necessary. [2] The paper which was written by Gerald Fitzgerald, a member of the Authority, and David McFadden, a legal advisor at the Authority represents a welcome contribution to the debate on this issue.

The case for civil fines for nonhardcore cartel infringements is that they would deter such forms of anticompetitive behaviour, which at the moment carry no effective sanction. On the face of it, therefore, the idea appears quite attractive. There are significant downsides, however, which are not addressed in the Fitzgerald/McFadden paper and that need to be considered.

2. The Authority Proposal.

The Authority paper states:

> *"The Authority favours the introduction of civil fines that may be imposed on infringing undertakings only by a court in civil enforcement proceedings brought by the Authority as plaintiff. The Authority is not seeking power to impose administrative fines itself."* (Para 1.1)

The paper subsequently states that the Authority proposes that the courts would be empowered to impose fines in civil proceedings brought by the Authority for non-hardcore infringements of the Act. These civil fines would be enforceable by civil remedies, i.e., imprisonment would not be the default penalty for failure to pay such a fine. Hardcore cartel behaviour including price-fixing, bid-

[1] The Authority argued for the introduction of civil fines in a submission to the Department of Enterprise, Trade and Employment prior to the introduction of the Competition Act, 2002. P. Massey and D. Daly, *Competition and Regulation in Ireland The Law and Economics*, Oak Tree Press, 2003.

[2] G. Fitzgerald and D. McFadden, *Filling a Gap in Irish Competition Law Enforcement: The Need for a Civil Fines Sanction*, 9th June 2011.

rigging, market sharing and so on would continue to be subject to criminal sanctions.

Unlike a system of administrative fines imposed by the Authority, the Authority's proposal would avoid the scenario of the Authority being both the investigator and the adjudicator in non-hardcore cartel cases. There are obvious risks that any system which involves the same entity being responsible for investigations and decisions will ultimately lead to penalties being imposed on innocent parties. The proposal therefore substantially reduces the risk of false positives but would not eliminate them entirely. Nevertheless, a system of court imposed civil fines is far more preferable than an administrative fine regime.

3: The Case for Civil Fines.

The case made for civil fines in the Authority paper is relatively straightforward. The paper notes that there is no justification for hard-core cartel activity but recognises that *"the position is not so clear-cut in relation to non-hardcore conduct."* (Para 3.2) There is some disagreement in the economics literature as to whether certain practices are anti-competitive or not. The paper correctly argues that criminal sanctions are inappropriate in such cases largely because they would be too complex for juries and would be impossible to prove beyond a reasonable doubt. The paper therefore concludes that there is no effective deterrent for such behaviour.

> *"Non-hardcore infringements can, however, have serious economic effects and, in such cases, sanctions in the form of civil fines/pecuniary penalties should be available, at the Court's discretion, to offset at least some of the gains the infringing undertakings have earned from their unlawful activities and, equally importantly, to deter them and others from engaging in further infringements."* (p.28)

4: Downsides to Civil Fines.

There are inherent problems, however, with fines or other forms of penalty in circumstances when it is difficult to distinguish between innocent and harmful conduct. It is difficult to see how civil fines could successfully deter only anti-competitive behaviour when the distinction between pro- and anticompetitive behaviour is unclear. In such circumstances it is almost inevitable that the threat of fines would deter certain behaviour which is not anti-competitive and is in fact efficiency enhancing. As with any measure that reduces competition, a regime of sanctions which to some extent deters behaviour that is actually competitive will itself impose costs on consumers and the economy.

Competition law at the EU level and virtually all other Member States provides for fines for such behaviour. This is a major difference between the EU and US systems for example. The latter is based on a view that the risk of deterring competitive behaviour outweighs the benefit of deterring anticompetitive behaviour in non-hardcore cartel cases. This point is returned to below.

Central to the Authority's argument is the idea that non-hardcore infringements are inflicting significant costs on

consumers and the economy because there is no penalty for such behaviour. The paper does not produce any evidence to support this case. The Authority paper states that in most cases where the Authority has concluded that an infringement has occurred, the existing civil remedies (injunctions and/or declarations), or the threat of them *"are sufficient to bring the infringement to an end."* (p.11) The Authority has only brought a tiny number of civil proceedings in nonhardcore cartel cases. Nor has the Authority identified any instances where it decided that it was not worth bringing civil proceedings in cases where the parties refused to discontinue certain practices.

The available evidence therefore indicates that the existing remedies are adequate to put a stop to non-hardcore infringements once the Authority has raised objections. The argument in the paper is that civil fines are necessary to deter others from engaging in such behaviour.

The paper also states:

"Finally, civil penalties facilitate the settlement of cases on the basis of admissions or undertakings in a way that is not possible in the context of a criminal prosecution. Settlement of such cases is often the most efficient and satisfactory mechanism for resolving the issues in question and the availability of civil sanctions can greatly assist a competition authority in negotiating acceptable settlement terms. Equally, the absence of such sanctions inevitably diminishes an authority's ability to achieve such outcomes." (p.15)

This statement seems to imply that civil fines are required in order to give the Authority extra leverage or bargaining power when dealing with undertakings in non-hardcore cartel cases. The question is whether or not this is desirable, particularly in a context where the Authority has stated that existing remedies have proved to be sufficient to bring infringements to an end. It also raises the question of whether checks and balances are needed. Again, 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 provides transparency and exists to ensure that such agreements are in the public interest and to avoid any *"sweetheart"* deals. Third parties may object to such settlements.

In the US Airline Tariff Publishing case in 1994, the Justice Department claimed that airlines were using computer reservation systems to provide advance signals of their pricing intentions and thus to facilitate coordinated behaviour. A number of airlines reached an agreement with the Department to discontinue such behaviour, but others objected to the agreement before the court. As it happens the court sided with the Department in that case. Allowing third party objections in such cases recognises that undertakings may abuse competition law to try and hinder rivals' ability to compete.

5: When Should Fines Apply?

Fitzgerald and McFadden attempt to list the types of behaviour for which they

believe civil fines are appropriate. They note that it would be neither possible nor appropriate to draw up a comprehensive list. They suggest, however, that the types of practices that would be subject to civil fines might include:

- Resale price maintenance (RPM);
- Prohibitions on passive selling in vertical agreements;
- Sharing of sensitive commercial information by competitors which falls short of hardcore cartel
- activity;
- Discriminatory trade association rules restricting access to a trade or profession;
- Exclusionary and exploitative abuses by dominant undertakings including:
  - Refusals to supply;
  - Refusal of access to essential facilities;
  - Loyalty discounts and rebates; Exclusivity agreements;
  - Predatory pricing;
  - Discriminatory trading terms;
  - Tying and bundling.

While acknowledging that there may be other examples, the paper states that *"this list is sufficient to show that there is a range of non-hardcore anticompetitive arrangements and conduct that can seriously undermine competition and which should therefore be discouraged by the prospect of appropriate sanctions falling short of criminal conviction."* (p.10).

The list serves to illustrate the difficulties involved with having penalties for non-hardcore infringements.

The Authority itself has recognised that bundling is generally not anticompetitive.

> *"Economic theory suggests that bundling can have both procompetitive and anti-competitive effects.* ***The conditions under which bundling can have anti-competitive effects are fairly limited.***" [3] (Emphasis added).

This view of bundling is consistent with the economic literature. Such arguments apply equally in the case of tying.

The question therefore is whether financial penalties are appropriate for behaviour that is generally unlikely to be anti-competitive. It could be argued that fines would only be applied in those cases where such arrangements were shown to be anti-competitive. There will be borderline cases either way and so there will inevitably be cases where fines are imposed following an incorrect finding that the behaviour is anticompetitive. More importantly, it is also likely that risk averse firms will be deterred from engaging in such practices even though it might be efficiency enhancing rather than anti-competitive. It is worth restating the point that if fines have a deterrent effect, then they are also likely to deter pro-competitive behaviour when the distinction between pro- and anti-competitive behaviour is unclear. This problem is compounded if the

[3] Competition Authority, Merger Determination, M/05/050 *Eircom/Meteor*, 18th November 2005, para 54.

practice concerned is generally procompetitive since the cost of deterring pro-competitive behaviour is likely to outweigh the benefit of deterring the rare cases where the conduct is anticompetitive.

The fact that the Authority itself claims that such behaviour constitutes *"conduct that can seriously undermine competition and which should therefore be discouraged by the prospect of appropriate sanctions falling short of criminal conviction"* having previously stated that *"the conditions under which bundling can have anti-competitive effects are fairly limited"* serves to illustrate the scope for confusion and uncertainty that will exist if civil fines are introduced for such practices.

Refusal of access to essential facilities is an issue which is only likely to arise in a very limited number of cases. Thus, one might ask whether there is a need for any remedy beyond requiring the owner of such a facility to grant access on reasonable terms. The fact that such cases will be rare means that the need to deter others, which is the justification advanced in the paper for having civil fines, does not really apply in the case of such behaviour.

Predation involves a dominant firm choosing to incur losses in the short-term in order to eliminate a rival. Such losses can then be recouped once the target has been eliminated enabling the predator to earn super-normal profits. Why would a firm that is prepared to suffer losses to eliminate a rival be deterred from such behaviour by the (low) possibility of a future fine? Arguably it would simply regard any such fine as part of the cost of predatory behaviour. If a reputation for predatory behaviour allows a dominant firm to earn super-normal profits by deterring would be entrants, being fined for such behaviour would surely enhance such a reputation. Would any firm be willing to enter a market in competition with a dominant firm which had previously been fined for predatory pricing? Would any financial institution be prepared to lend to such a firm? In those circumstances fines for predation are only likely to deter would be entrants. Fines will not provide any redress for consumers once the predator has successfully eliminated its target.

The need in predatory pricing cases is for early intervention by the Competition Authority and the granting of interlocutory relief in order to prevent predation from being successful and to ensure that competition is maintained for the benefit of consumers.

There may be a role for fines in predation cases but only as an additional remedy to interlocutory relief at an early stage. As pointed out, the threat of a fine is unlikely to deter a would-be predator if it believes that it is going to be able to eliminate its prey. If, however, would be predators believe that predation is unlikely to succeed because the Authority would intervene promptly and obtain interlocutory relief while they also faced a realistic possibility of being fined subsequently, then fines might have some deterrent effect in predatory pricing cases. The Authority would obviously incur some financial exposure in applying for interlocutory relief as it would be liable for damages in the event that it was unsuccessful at the full trial. At present the alleged predator in such a case would have no financial exposure –

the Authority could not look for damages if it is ultimately successful. Civil fines would also address this asymmetry.

The essential point remains, however, that civil fines alone are unlikely to deter predatory behaviour. Deterring such behaviour requires that it be stopped before it achieves its objective and that is the only effective way to protect consumers in such cases. This means that the Competition Authority must be capable of and willing to intervene promptly in such cases. Otherwise civil fines will be of little use.

Some of the other items on the Fitzgerald/McFadden list are worth mentioning briefly.

Many economists would question whether RPM is anti-competitive, although in fairness it is deemed to be virtually illegal *per se* under EU competition law.

Fines for discriminatory trade association rules that restrict access to a trade or profession again raises doubts about how to distinguish innocent from harmful behaviour. There might also be issues about who would be liable to fines in such cases. Members might not be deterred from introducing such rules, if it was the association which ended up being fined, especially if the association had only limited financial resources anyway.

The list also includes information sharing that falls short of hardcore cartel behaviour. There is an extensive literature which indicates that fines have little deterrent effect in hardcore cartel cases and that the only real deterrent is criminal penalties, including imprisonment for individual executives responsible for such behaviour. Faced with a possible criminal prosecution, cartel participants might be quite happy to admit to having engaged in information sharing and pay a civil fine instead.

Faced with a choice between taking action against serious hardcore cartels, which require a criminal burden of proof, and less serious infringements where the burden of proof is lower, the incentive may be for the Authority to pursue less serious offences where there is a greater chance of securing fines.

Civil fines might actually reduce deterrence in the case of the more serious hardcore offences if the Authority diverts resources to investigating non-hardcore infringements and accepts admission of information exchanging rather than pursuing prosecutions in cartel cases. That would be somewhat ironic at a time when there appears to be a widespread public demand for tougher action to tackle white collar crime.

6: Non-Penal Fines.

Fitzgerald and McFadden argue that civil fines for competition law would be consistent with the Constitution notwithstanding the traditional interpretation of Article 38.1 as effectively prohibiting the imposition of substantial fines in civil cases. This is of course a legal question. Nevertheless, some of the arguments they advance seem odd to a non-lawyer.

For example, the paper argues that such fines would not constitute criminal sanctions because their purpose is *"deterrence rather than punishment"*. Elsewhere in the paper, however, they argue that civil fines are needed as a

sanction for non-hardcore cartel infringements.

The paper also points out that in civil actions for competition law infringements private plaintiffs can be awarded exemplary damages whereas civil proceedings brought by the Authority are *"completely devoid of any form of sanction or deterrent"*. It cites a number of English court judgements setting out the role and purpose of exemplary damages. Thus, in *Devenish Nutrition Ltd and ors v Sanofi-Aventis* the judge stated:

> *"In my judgment in antitrust cases the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anticompetitive behaviour".*

The paper cites an earlier judgment of Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary*

> *"Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter".*

7: Conclusions.

The Fitzgerald/McFadden paper is an important contribution to the debate on what is an important policy issue. The Authority deserves to be congratulated for seeking to promote such a debate. If the EU/IMF were to publish the background research which led them to conclude that civil fines should be introduced that would also facilitate a more informed debate.

The Authority paper, however, ignores a fundamental question namely whether it is desirable to introduce fines when the distinction in many cases between what is anti-competitive and what is not is highly unclear. If fines have a deterrent effect, then, when there is uncertainty as to whether behaviour is anti-competitive or not, fines are likely to deter legitimate efficiency enhancing as well as anti-competitive behaviour and as with any measure that limits competition this will impose costs on consumers and the economy. In other words, there are trade-offs involved. Civil fines are not simply a win-win option as implied in the Authority paper.

Civil fines are inappropriate when, a detailed analysis of the circumstances in each individual case is required to establish whether specific behaviour is anti-competitive or not. In those circumstances it may be worth asking whether, rather than introducing a blanket system of civil fines for all nonhardcore cartel infringements, it might be preferable instead to provide for civil fines for a small number of specific practices which are more likely than not to be anti-competitive, e.g. predatory pricing, although it must be recognised that civil fines on their own are unlikely to constitute a sufficient deterrent for such behaviour. If a dominant firm believes that it will be able to eliminate a rival through predatory behaviour it may well accept a future fine as simply part of the cost of predation. A combination of interlocutory relief and fines might

actually deter dominant firms from engaging in predatory behaviour.

Other alternatives to civil fines may also merit some consideration. The former Attorney General, Paul Gallagher, speaking at the Authority's 20th anniversary conference suggested that the Authority should be allowed sue for damages in civil actions. There might be merit in such a proposal.

The UK Government has raised the possibility that the competition agencies there might be permitted to recoup the cost of investigations from parties found to have infringed the law. (See next article). Such a measure would appear unlikely to have any significant deterrent effect. Of course, if such a remedy were possible it would arguably enhance the Authority's ability to investigate alleged infringements. Effective deterrence requires not just strong penalties but a realistic prospect of being caught.

UK Government Consults on Competition Law Reform.

1: Introduction.

The UK Department for Business Innovation and Skills (DBIS) published a consultation paper in March seeking views on possible reforms of UK competition law. This article highlights some of the key points addressed in the consultation paper.

2: The Current UK Regime.

Currently there are a number of state agencies responsible for different aspects of the UK competition law regime. The main agencies involved are the Office of Fair Trading (OFT), the Competition Commission (CC) and the Competition Appeals Tribunal (CAT).

The basic prohibitions on anticompetitive behaviour contained in Articles 101 and 102 of the TFEU are mirrored in Chapters I and II of the Competition Act, 1998. The OFT is responsible for investigating breaches of domestic and EU competition law. Like the EU Commission, the OFT investigates and decides whether or not an infringement has occurred and has the power to impose administrative fines where it concludes that there has been an infringement. Parties may appeal OFT decisions to the CAT on the merits, i.e. such appeals amount to a full rehearing of the case.

The UK operates a voluntary merger notification system. Merging parties may voluntarily notify a merger in advance requesting clearance. The OFT may also choose to investigate mergers which have not been notified. The OFT is only responsible for Phase 1 investigations in merger cases. If it concludes that there is a realistic likelihood that a merger would result in a substantial lessening of competition (SLC) it may refer a merger to the CC which is responsible for carrying out Phase 2 investigations.

The OFT can also decide to conduct a market study where it believes that conditions in a particular market have the effect of preventing, restricting or distorting competition. Where it finds

evidence to suggest that competition has been impaired it may refer the matter to the CC which is responsible for carrying out a full market investigation. Following such a market investigation the CC may impose behavioural or structural remedies designed to address the causes of the restriction on competition.[4]

Hardcore cartels constitute a criminal offence and carry a maximum jail sentence of up to five years.

A number of the UK sectoral regulators have concurrent competition law powers. They may also ask the CC to undertake a market investigation of the sector. Regulator's decisions may also be appealed to the CC.

The OFT also has a number of consumer protection functions.

3: Government's Proposed Reforms. The consultation paper notes that the current UK competition regime works reasonably well and is highly regarded internationally. It notes, however, that enforcement and merger decisions, market investigations and studies all take considerable time. It points out that the number of enforcement decisions has been quite low with only 25 decisions since 2000.[5] The paper also cites the complexity of the regime along with the relative effectiveness and efficiency with which resources are used as reasons for proposing changes.

The paper states that the Government wishes to consult interested parties on possible changes that would:

- improve the robustness of decisions and strengthen the regime;
- support the competition authorities in taking forward high impact cases; and
- improve speed and predictability for business.

The Government has indicated that its preferred option is to merge the OFT and CC, thereby establishing a new Competition and Markets Authority (CMA). At the same time, it is suggested that the OFT's consumer protection functions would be transferred to other agencies, although this proposal is the subject of a separate consultation.

The consultation paper states:

"The Government is concerned that antitrust cases take too long, and result in too few decisions, thus having less deterrent effect on anticompetitive activity than they should."

It suggests three possible options to address this.

1. Essentially retain the existing system but with some streamlining designed to speed up decisions.
2. The creation of an independent tribunal within the new CMA which would make decisions on competition law cases thus separating the investigation from the decision-making process. Appeals to the CAT would then be limited to judicial review rather than a full a review on the merits.
3. A prosecutorial model under which the OFT would conduct the

[4] In a previous issue we reported how the CC had ordered the British Airports Authority to dispose of its interest in a number of UK airports.

[5] 21 of these involved Article 101 type cases with just four Article 102 type cases.

investigation and then bring cases for infringement before the CAT.

The voluntary merger notification scheme means that some anticompetitive mergers avoid review. In many cases where the OFT decides to investigate a merger which has not been notified, the merger has already been completed by the time the investigation is launched. The paper has sought views on whether there should be a mandatory notification scheme for mergers. It has also suggested that if a voluntary regime were retained, the CMA could be given enhanced powers to order the parties to stop integration of the businesses pending the completion of its investigation.

In the case of market investigations, the consultation paper proposes that the CMA's powers would be enhanced by enabling it to investigate specific practices in a number of markets. At present the CC is confined to investigating markets individually although similar practices may be causing competition problems in more than one market.

The existing UK regime allows certain designated bodies to make supercomplaints to the OFT. Such rights are largely confined to consumer groups at present. The paper proposes that such rights might be extended to bodies representing SMEs.

The Enterprise Act, 2002, criminalised hard-core cartels by making it an offence to *"dishonestly"* enter into agreements to fix prices, restrict production or supply, share markets and rig bids. To date there has only been one successful criminal cartel prosecution in the UK. The consultation paper nevertheless states:

> *"A 2007 report by Deloitte for the OFT suggests that the cartel offence has begun to have the desired effect: competition lawyers and companies surveyed by Deloitte said that criminal penalties have a higher deterrent effect than other sanctions applicable to anticompetitive conduct."* (para 6.4)

The paper notes, however, that the dishonesty provision makes it difficult to bring successful prosecutions. The paper outlines four alternative tests indicating that the Government's preferred option is to remove the dishonesty requirement while instead providing that criminal penalties would not apply to agreements made openly. Specifically, it proposes amending the legislation to provide that no offence would be committed if customers were told about the arrangements to fix prices, limit production or supply or share markets or customers at or before the time of purchasing the relevant product. The paper states that this would provide customers with the option of going to another supplier. This seems like a rather strange proposal. Presumably if firms were to form cartels and inform customers of the fact, the CMA would promptly intervene and fine them for so doing so that there would be no point in forming an overt cartel.

Another interesting proposal in the consultation paper is the suggestion that the CMA should be able to recover the costs of investigations in infringement cases. Such recovery would be limited to cases where an undertaking was found to have committed an infringement and would be limited to the cost of investigating the particular undertaking

rather than the full cost of the investigation. Such a proposal would require a change in the legislation as there is currently no legislative provision which would allow this.

4: Conclusion.

The UK Government approach in initiating a consultation on possible reform of UK competition legislation is in contrast to the approach followed by successive Irish administrations. Although successive Irish Governments have indicated their intention to revise the legislation and, in particular, to merge the Competition Authority and the National Consumer Agency, they have not engaged in any public consultation regarding their proposals.

Plan to Introduce Competitive Tendering for Waste Collection.

1: Introduction.

The Department of the Environment, Community and Local Government (DoECLG) last month published a consultation document on its proposals to introduce a system of competitive tendering for household waste collection services. This follows the inclusion of a commitment to introduce competitive tendering for household waste collection services in the Programme for Government. The proposal envisages that service providers *"will bid for the right to provide waste collection services in a given area, for a given period of time and to a guaranteed level of service, including a public service obligation in respect of a waiver scheme for low income households."*

The Consultation Paper states that the volume of household waste in 2009 was more than 1.6 million tonnes. It estimates that approximately 128,000 tonnes (8%) of household waste is not collected. 70% of the household waste that was collected in the State was sent to landfill. The State is required to drastically reduce the volume of waste being sent to landfill or face substantial fines under the EU Landfill and Waste Framework Directives.

The Department paper states that the proposed restructuring of household waste collection markets should be considered in the wider context of national waste policy. A new national policy framework is due to be in place by the end of this year following the completion of a review process.

2: The Case for Change.

The paper states that waste collection is a transport service, effectively involving the collection and transportation of waste from individual households to transfer stations or directly to waste disposal or treatment facilities. It points out that there are a number of separate geographic markets for household waste within the State.

Traditionally local authorities were the only bodies that collected household waste. This has changed considerably in recent years with private sector firms having gained a considerable share in some household waste collection markets, although the position varies across the State. In some areas local authorities no longer provide household waste collection services and some of them sold these businesses to private firms. In other areas the local authority is still the only service provider. There are some areas which have no household waste collection service at all. Local authorities are responsible for issuing and policing waste collection permits. Only firms which have such permits are permitted to collect waste.

According to the paper it is potentially possible to have a number of competing undertakings provide household waste collection services in any given area. It notes that in many areas, competition *"is not as vibrant as is preferred, due partially, perhaps, to the economic characteristics of household waste collection as a service."* (p.5) It points out that many householders are faced with a waste collection monopoly and do not have a choice of service provider, while in others there is no provider. In contrast, particularly in some of the larger urban centres, there are multiple service providers operating on the same collection routes and the Paper states that this *"has both cost and environmental downsides."* (p.5).

The paper proposes restructuring the market by introducing franchise bidding for household waste collection services. Under this system *"an arm of the State, such as a regulatory agency or a local authority"* would conduct a tender process under which the successful bidder would be awarded exclusive rights to provide a waste collection service in a given area, for a given period of time. Tenders would specify the level of service to be provided, e.g., collection frequency, and *"measures intended to help ensure that preferred environmental outcomes are achieved, such as requiring the collection of categories of segregated waste."* (p.5).

3: Why Ban Competition?

The Consultation Paper states that the proposed new national waste policy framework *"will be founded on a firm, evidence-based understanding of the many scientific, economic and social issues".* (p.2). Policy decisions should obviously be evidence based. The Consultation Paper unfortunately fails this test.

> At the outset the paper states:
> *"A number of informed commentators have remarked on **perceptions** of high prices for household waste collection services, which **may be** accounted for, **in part at least**, by the current structure of household waste collection markets. **If** costs, and therefore, prices are unnecessarily high then we must seek to reduce those costs, if necessary by restructuring markets."* (p.1 emphasis added).

There are several problems with this statement.

First, is there any actual evidence that the price of household waste collection services is excessive? Some effort should have been made to gather

evidence on actual prices rather than basing policy on a *"perception"*.

Second, if prices were actually found to be excessive, then what evidence is there to suggest that this is due to the structure of the market? There are differences in market structure between markets. The issue, therefore, is whether high prices are associated with any specific market structure.

If costs are excessively high, then obviously policy should seek to address this issue. There is no evidence or case advanced anywhere in the paper to show that the proposal would actually reduce costs.

The paper correctly points out that many countries operate competitive tendering for household waste collection. Beyond that, however, there is no analysis of overseas experience.

The rationale for introducing competitive tendering in the household waste collection business rests on claims that the industry is characterised by economics of density.

> *"One reason for structuring household waste collection markets in such a way is because of what is known as the economy of density of household waste collection. In short, the additional cost to a service provider of collecting from a household on a given street, when that company is already collecting waste from other households on that street, is very low. From society's perspective, due to the existence of economies of density, it is wasteful for more than one service provider to provide a service in that area."* (p.6)

The evidence on this point was addressed at length in the High Court judgment in the *Panda* waste case. Considerable economic evidence was presented to the court showing that in major urban areas the savings arising from having a single service provider due to economics of density were actually quite small and more than outweighed by efficiencies generated as a result of on-street competition. The evidence indicated that each of the four Dublin local authority areas was capable of sustaining at least three competing firms.

The Court heard evidence that on-street competition had reduced charges and led to the introduction of higher quality services. Similarly, the Competition Authority, in a submission to the Department in 2010, accepted that in large urban areas where on-street competition was possible, it had resulted in lower prices, improved service quality and fostered innovation.

The Consultation Paper implicitly recognises that one of the problems with competitive tendering regimes is that they tend to favour incumbents. There might be competition during the initial round of tenders, but incumbency advantages are likely to discourage rival bidders in future rounds. Thus, one of the consultation questions asks:

> *"What measures, if any, should be taken to help ensure that a winning bidder does not have a significant advantage over competing bidders in the subsequent tender process?"*

There is nothing wrong with inviting suggestions for ways of addressing this problem, but it is reasonable to expect the Department to have considered possible solutions before bringing forward this proposal.

4: Comment.

The Minister's decision to institute a public consultation process on the proposal to introduce competitive tendering for household waste collection services which is contained in the Programme for Government is welcome. There are problems with the proposal. The evidence indicates that on-street competition is possible in large urban areas. It also suggests that in such areas, the density effects are quite small. Where competition in the market is possible, competition for the market constitutes an inferior solution. Over time it is likely to result in higher prices, lower service quality and discourage innovation.

The situation in rural areas is very different. In such cases on-street competition is unlikely and there may be grounds for introducing competition for the market through a competitive tendering process. It must be recognised, however, that careful attention is required to ensure that such arrangements result in genuine competition for the market over time.

The fact that some areas currently have no household waste collection service suggests that such services are not commercially viable. In those cases, it is likely that a subsidy would be required in order to ensure the provision of such services.

There are several problems with the analysis contained in the consultation paper. Of course, arguably one of the reasons for having a consultation process is to identify potential flaws. The evidence suggests that a one-size-fits-all policy is not what is required in the case of household waste collection services. There does not seem to be a case to intervene in markets where there is on-street competition. Rather competitive tendering should be limited to rural areas where there is currently only a single provider or, as in some cases, no service provider at all.