BOSTON V. BERLIN

Fifty Years of Irish Antitrust

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"Good competition policy cannot be bought on the cheap and pays for itself many times over." (Stelzer, 2001).

Introduction.

In calendar terms, 2003 constitutes a significant milestone in the history of Irish competition law. It is fifty years since Ireland's first antitrust legislation, the Restrictive Trade Practices Act, 1953, was enacted, and by a rather neat symmetry it also marks the 25th anniversary of the introduction of merger controls in the form of the 1978 Mergers Act. The fact that such significant milestones have virtually passed us by, largely unnoticed, may itself constitute an apt commentary on the importance that has been attached to competition policy in Ireland for much of its fifty year history.

I: Anti-trust: Boston v Berlin: meaning?

US anti-trust and mergers control is primarily driven by efficiency considerations. Even where distributional issues have been considered, these have in general been concerned with the impact on the quantum of consumer surplus rather than the distribution of surplus. The initial legislation was aimed at curbing the exercise of monopoly power and the creation of concentrations. Even the Robinson Patman Act, with all its flaws, was concerned with what was seen as an efficiency issue, namely the implications of price discrimination, and the impact of these on competition.

By contrast European competition policy has its roots in what is, in the end, a political objective, namely the integration of the economies of the member states of the EEC, now the EU. It is (correctly) seen as a powerful means to that end, but in a sense it has been the case that a purely competition-orientated system has never fully emerged within the EU. In terms of the implicit goals of policy a casual examination of Article 81 of the Amsterdam treaty and its shadow, the Irish competition acts, makes clear that other aspects of public economic policy will in principle be considered in relation to the permissibility of agreements.

In this respect, the Boston v Berlin debate may be restated in terms of the primacy of conventional economic efficiency argumentation in implementing policy, whether in relation to narrowly defined competition policy or in terms of market structure policy through merger controls. Boston stands for the exclusion of criteria other than economic efficiency; Berlin stands for recognition of other policy objectives in executing policy. The latest incidence of this approach may be seen in the decision on the block exemption in the motor trade. What inspired this was the primacy of integration rather than simply taking steps to ensure that price discrimination was impossible.

There is another aspect to the issue. That is the approach adopted in investigation, analysis and adjudication. The long history of US regulatory policy and jurisprudence over a century is marked by a recognition of the need for rigorous economic analysis as the core methodology in policy implementation. This has not been without error: consider the Cellophane fallacy. But at least since the Second World War the procedure adopted has given primacy to economic reasoning and what would be recognised as expert economic evidence in reaching findings. Courts and regulators have not sought to determine standards that are divorced from economics in terms of analysis and evidence. By contrast, consider the wholly unsatisfactory approach of the Commission and the ECJ to dealing with the concept of dominance. Or (until very recently) consider the approach to market definition, an approach that in some cases has flatly contradicted standard economics: e.g., the banana fallacy, or the approach adopted in relation to whether or not fizzy table water was in a market on its own.

In looking at the development of the Irish anti-trust regime in terms of this title for the paper, it is these matters that we have in mind.

II Background

It has been pointed out in a book by one of us (Massey and Daly, 2003, ch3), that in terms of the rest of the world at the time, the original piece of "anti-trust" legislation in Ireland was quite radical and appears in many ways to indicate an intellectual legacy that owes far more to Boston than to Berlin. At the time of the 1953 legislation it stood alone in Europe, although presumably there was some indication by then of likely developments in Germany, where the US as hegemonic occupying and treaty power in the Federal Republic was instrumental in creating the Bundeskartelamt in 1957.[1] There is no evidence that this process had any direct effect on the decision to introduce the Restrictive Trade Practices Bill in 1952 (passed into law in 1953).

Compared with US based anti-trust law, the RPT Act of 1953 was very limited in its scope. It did not start from an existing list of prohibited practices, nor create or extend a list, but merely established a mechanism for examining market activities in terms of their competitive consequences with a view to legal or administrative actions to regulate them where necessary. It could be called an extreme rule of reason approach. It may be thought of as an overall limited discretionary market regulation approach.

However, if this was a conservative amendment to the law as it stood, in terms of Irish economic policy its motivation was quite radical, and is clearly the same as that which underlay the edifice of US legislation, regulation and jurisprudence. Explicitly, the Government was operating on the basis that as far as possible full and free competition in domestic markets was in the public interest, that market structures derived from self regulation by producers should be viewed with deep suspicion and that agreements between firms that limited competition were injurious to the public good, now identified in terms of consumer interests.[2]

That was in historic terms a truly radical departure from the policy consensus in most European countries in the period after the end of the Second World War, a consensus that may be said to have its origins in Bismarckian economic policy in Prussia and the First Reich. The protectionist and interventionist approach espoused in Weimar Germany was espoused by both right and left political extremes in the 1920s and became the prevailing orthodoxy in academic and policy circles as a consequence of the impact of the Great Depression in the 1930s.[3] In Ireland in the 1930s restriction of competition might be said to be the core value of economic policy, which was based on extended protection for domestic producers and encouragement of co-operative behaviour between them. By the 1950s, both politically and economically most of the economies of Western Europe were operating under an unprecedented level of direct and indirect state control and influence over resource allocation as between uses and over consumption patterns through market suppression and

[1] Equivalent legislation was not introduced in the UK until 1956.
[2] This comes across quite forcefully, for example, in Minister Lemass' speech to the Dail on the legislation.
[3] Wils (2000, p.328) observes that: "Before the second world war, cartels were a wide-spread and fairly esteemed institution throughout Europe."

direct provision.

In this context the RPT Act in Ireland was not just a replacement of producer interests by consumer interests (at least in principle) as the objective of policy. It was, in effect, a challenge to the view of the need for and primacy of structural industrial policy to maximise economic welfare as a consequence of the generalised acceptance that unregulated competitive markets did not have this outcome. The logic was inescapable. If market competition between producers increases economic efficiency, it is hard to see how market competition in the realm of resource allocation does not achieve much the same end.

Hence, with the introduction of the RTP Act in 1953, while for a further forty years industrial policy continued to dominate state intervention in economic life in Ireland, its primary objective, the maximisation of employment through raising net output, now had a rival as a goal of policy. That rival lay in the explicit recognition that competition between suppliers is the means whereby the potential capacity of the economy to produce goods and services is harnessed to maximise economic welfare, with its implicit corollary, namely that in general competitive markets are efficient, a corollary that undermines the role of the state as engine of economic development.

The Boston v Berlin dichotomy is undoubtedly simplistic and procrustean, but, accepting the terms of the debate, we may conclude that in its origins Irish competition policy is firmly at the Boston end of the spectrum.

That, of course, was in principle. The execution of policy in the following thirty plus years did not fully reflect the implicit ideological challenge contained in the grounding competition legislation. This failure may be seen as due to fundamental failings in the 1953 Act and subsequent legislation in terms of the creation of the necessary institutions with the required powers, and to a failure fully to create legal standards of behaviour that would be enforced.

III The Three Ages of Competition Policy in Ireland

It is, we think, useful to divide Irish experience with competition policy since 1953 into three periods. The first, between 1953 and 1978, is the period in which, despite some amendments, anti-trust was still basically confined to the approach taken in the 1953 Act. The second, from 1978 to 1991, was the period in which the state accepted the need to complement the original control of abuse regime, with some direct intervention to deal with anti-competitive structural and behavioural developments in the Irish market sector. The third is the period from 1991 to the present. In this the state introduced piecemeal a fully articulated set of legislative and institutional provisions designed to enforce a competition policy regime that was consonant with an understanding of the importance of competitive structures and behaviour on the one hand, and the treaty driven legal regime in which the country found itself as a result of membership of the original EEC in 1973 and the EC (now EU) Single Market Programme of the late 1980s and early 1990s on the other.

(i) 1953-1978: The Age of Restrictive Practice Regulation: Behavioural Policy

The basic framework for competition policy was that created by the 1953 Act, although the organisational structures and some of the legal provisions were amended in subsequent legislation, the general arrangements in 1978, and the manner in which policy was implemented, changed in reality very little in the quarter century after the 1953 Act. The foundations of policy lay in the establishment of a mechanism of uniquely public law enforcement. Governmental action was needed in order to give expression to the perceived need for intervention to deal with anti-competitive practices.

The system was entirely reactive in effect, and did not involve the establishment of any legally binding set of rules on behaviour that were binding on firms *ex ante*. It did not create any sanctions for anti-competitive behaviour *per se*. Sanctions were limited to any failure to comply with a regulatory requirement on behaviour that emerged from the operation of the competition policy regime. In this respect, the sanctions were those that resulted from a failure to comply with the law as handed down rather than for behaving anti-competitively. A recent controversy may help make this point clear. A TD was sent to jail in Dublin recently not for obstructing bin-collection by blockading roads but for contempt of court in refusing to promise to refrain from blockading roads to obstruct bin collection in the future. The sentence was not imposed for what had been done (or might be done in the future) but for not promising to comply with a binding court decision. Blockading roads or otherwise obstructing bin collection has not in general become *per se* illegal as a result of that decision and sentence.

The Fair Trade Commission, the regulatory advisory body, established under the Act had the power to issue advisory "fair trade rules" that might have some moral suasion effect, but had no legal obligation attached to them.

The 1953 competition regime was limited in scope in that (with the exception of distribution) it did not apply to the services sector (until 1972, but even then did not apply to banking and some other services). Services were not fully covered until 1987, well into the second period under consideration. The regime relied on recommendations of the Fair Trade Commission, arising from investigations or complaints, being accepted by Government and being the subject of regulatory orders made by the relevant Minister. The regime was pretty ineffective, in that only a limited number of such orders were ever made.[4] Institutional changes (e.g., the Restrictive Practices Commission and the Examiner of Restrictive Practices after 1972) and legislative changes (the various Restrictive Practices Acts) did not change much in the operations of the system. Little attention was given to enforcement of the legislation by successive ministers.

In terms of creating competitive behaviour the regime established in 1953 achieved relatively little. Perhaps, in the light of some recommendations it did make this is just as well. It has to be remembered that when it did recommend changes in regulations these were not always and obviously pro-competitive. Instances are the messing around with petrol stations in the 1970s and the egregious Groceries Order of 1987. Walsh (1974) has argued that the banning of RPM following the 1956 enquiry into the grocery sector had a significant impact as it enabled supermarkets to develop far more quickly than might otherwise have been the case. The legislation certainly did not shake large volumes of anti-competitive agreements out of the trees as claimed of the UK 1956 Restrictive Practices Act.

Despite the formal basis of the 1953 regime in a recognition that competition was a necessary condition for maximising economic welfare, the reality was that right up to the 1980s

[4] Arguably the only Orders that had any significant impact were the various Groceries Orders and Motor Fuel Orders.

politicians and bureaucrats actually behaved as if they considered competition to be more or less irrelevant, and direct regulation of business to be the necessary condition for eliminating the welfare costs of abuse of market power. It will be remembered that (and especially in the 1970s) the central mechanism in micro policy for Government was considered to be price control orders, which were widely used to establish permissible prices for anything from frozen peas to petrol. The OECD (2001, p.16) noted:

> "In the 1970s, instead of proceeding with comprehensive legislation on competition, reliance was placed on such mechanisms as the *National Prices Commission* to monitor, and occasionally to try to control prices."

As regards structures, the fact was that for all practical purposes there simply did not exist any effective pro-competition policy lobby in Ireland, and this was reflected in an absence of any effective regulation aimed at limiting market concentration. Again, the reality was that far from wanting to curb concentration, if we may assume that what happened was accepted, Government had precisely the opposite in mind. It mattered little that banking was excluded from FTC supervision when the Government was happy to preside over the concentration of 90% of the banking sector in the state into two equal sized groups in the middle 1960s. Brewing was similarly affected with Guinness absorbing Smithwick, Cherry and McArdle. Power, Jameson, Bushmills and Cork Distilleries had Government blessing in forming Irish Distillers. And in the construction sector at the end of this period the Irish Cement and Roadstone merger gave us CRH. The creation of large "domestic" players (national champions) took priority over competitive supply of products or services.

To summarise on all this: the theoretical and ideological foundations of the policy regime as enacted into law from 1953 onwards might at first seem to suggest that Boston rather than Berlin constituted the appropriate benchmark for policy here. Its manifest failure, however, to displace industrial policy and producer interests as the dominant factor in policy delivery suggests that the net effect of the legislation was close to zero or even negative. Against the background of the operations of the Monopolies and Mergers Commission in Britain after 1956 (from which both politicians and bureaucrats could have learned much) what was actually done here was pitiful. In so far as policy in the EEC up to this point was similarly ineffective (other than as affected by the need to remove protective barriers) it might well be said that regardless of the fine words with which the Irish regime was introduced in 1952-53, the reality was that a totally European lack of interest in an effective competition policy regime was the main characteristic of what took place here.

(ii) 1978-1991

The passing into law of the Mergers, Takeovers and Monopolies (Control) Act of 1978 may be seen as the beginning of an effective and activist policy regime in the area of anti-trust.[5] This judgement is based on three aspects of the provisions of that Act. The first is the creation of a legal regime that prohibited or permitted a merger or acquisition on the basis of stated economic criteria that included (but were not confined to,) standard "competition" concerns. The second was the provision for the undertaking of an objective, third party analysis where this appeared to be required. The third was the creation of a defined set of circumstances in which the provisions of the Act become applicable (in effect, economic importance thresholds). It was, therefore, a generally applicable set of rules governing structural changes

[5] The legislation followed a report by the Restrictive Practices Commission (1975) which warned of growing concentration in many sectors of the economy and the resulting risk of oligopolistic behaviour.

in markets arising from mergers and acquisitions.

If that had been the end of the matter it would be possible to view the 1978 Act as marking what would now be called a shift towards Boston and away from Berlin. Indeed, it would be doubly a shift to Boston, in that it was obviously a reflection of what would later be called the Harvard approach rather than the Chicago approach to the issue of structure and economic policy. However, when the criteria are examined, the shift is more apparent than real.

While it provided for mandatory notification of mergers and acquisitions that exceeded the threshold requirements, it did not automatically trigger an independent economic analysis. A proposed acquisition could go ahead by default if no ministerial objection was forthcoming, or on the basis of ministerial approval without reference to any economic analysis by the Examiner of Restrictive Practices/Restrictive Practices Commission (later the Competition Authority). Hence, whether or not the Act became effective in the sense of examining and then adjudicating on a proposal in an objective fashion depended in the first place on a political decision to trigger the process.

Perhaps even more important (because Ministers might reasonably be presumed to lean towards some form of investigation) was the fact that competition criteria were explicitly to be relegated if other objectives of Government economic policy were held to require it. Despite being a piece of legislation that established an objective for applicability and for evaluation that reflected contemporary standard economic analysis of the effects of, and motives for, concentration in markets, and a similar basis for approval or rejection of a merger, the reality was different. That reality was that where politically desirable it was always in effect possible to over-ride standard economic criteria in reaching a decision. The Minister was not required to give any reasons for not referring a merger for examination. Prior to 1991 reports on referred mergers were not published. Massey (2001) points out that the proportion of mergers referred over the 1991-2001 period was only one third that recorded over the 1979-90 period and was considerably lower than under the US, UK and EU regimes.

The continued willingness of the Government to intervene to support producer interests where economic analysis left no doubt that this was the object of the intervention during this period is exemplified by the 1987 Groceries Order that has already been mentioned. Its core is a ban on "below cost selling", although when examined closely this turns out to be a misnomer, since it is actually a ban on reselling at below supplier invoice price. This aspect alone meant that even as it stood the Order was highly selective in its application. Its declared object was to prevent what amounted to price predation by large retail multiples in the groceries sector that would threaten the survival of smaller and more traditional retail outlets.[6] It also banned some forms of promotional spending by manufacturers (so-called "hello money"). The beneficiaries from this were smaller groceries and, arguably, small domestic manufacturers who were unable, they said, to hold onto shelf space in supermarkets as a consequence of the willingness of larger, foreign based manufacturers to offer incentives to supermarkets to stock their offerings.

The other obvious indicator of the real concerns of Government underlying market

[6] Various authors have suggested that deep discounting of a limited range of products rather than offering lower prices across the board represents a rational competitive strategy for multi-product grocery retailers. See, for example, Bliss (1998), Hosken et al. (2000) and Chevalier et. al. (2003).

intervention during this period was the continuing refusal to permit competition in that area of the economy that was actually directly under its own control, the commercial public sector. It is now obvious that in the network industries that composed the main corpus of this sector it was only the steady pressure for market liberalisation under the EC Single Market programme that forced the Government initially to move towards introducing competition and subjecting these entities to commercial pressures.

(iii) 1991 – 2002

Against this background, the introduction of the Competition Bill in the Dail in 1990 has the appearance of signalling a sea change in competition policy. Formally, it simply brought the conceptual apparatus of EU competition law as derived from the Treaty of Rome into domestic law. However in two respects the bill (which became law in 1991) substantially changed the competition regime in a much wider sense. In the first place it created a statutory right for aggrieved parties to use the courts to enforce the law by seeking injunctive relief and/or suing for damages in cases in which it could be shown that agreements between undertakings or abuse of a dominant position resulted in damage to a person or undertaking. In the second place it created an authority that had clearly defined economic analysis functions that would operate as a central element in the implementation of policy.

In doing the first of these, however, it could also be said that all it was doing was creating a new tort. The point here is that tort law primarily creates a legal remedy permitting private enforcement of private rights. This has led to a serious misunderstanding of the nature and purpose of competition law that is widespread in the business community. To an economist this is summed up in the statement that damage to a competitor is not the same as damage to competition.

The purpose of the policy regime (if it really is a competition policy regime) is to protect and encourage competition by regulating firm behaviour in markets and by restricting the development of anti-competitive market structures through agreements, mergers or acquisitions. By and large that means restricting the permitted range of profit enhancing actions by firms. Private agents, including firms, however, have no incentive to enforce "competition" unless diminished competition affects their profits. In general this is not likely to be the case.[7] Hence, the "public good" of competition is unlikely to be optimally served by private enforcement of private rights. Instead, private enforcement will be directed to preventing damage from actions by others. However, damage to competitors is part and parcel of competition. It follows that there is a perverse incentive operating here. Private agents are encouraged to have recourse to law under the Competition Act to undermine the competition that the act is supposed to protect. There is a clear risk that courts, not fully understanding the issues involved, may be persuaded to reach decisions in such matters that are anti-competitive. What is beyond dispute is that economists and lawyers have earned substantial fee incomes arising from this misunderstanding.

The 1991 Act did permit some form of public enforcement through the courts. While the Minister had a right to bring civil actions, no such actions were brought. The Competition Authority could make a finding in respect of an abuse of dominance at the request of the

[7] The general tone of the Dail debates on the legislation indicate that it was envisaged that private enforcement meant primarily enforcement by firms, rather than consumers.

Minster and the Minister could make an order and seeking to have it enforced by the courts.[8] In the lifetime of the Act this never happened. Other than that, the Authority was in effect limited to policing agreements notified to it, through which function further possibilities for private enforcement might be created. The Authority itself, observed at a relatively early stage that:

> "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, *Annual Report 1993*, p.13)

The principal weakness in the Act, the lack of public enforcement, was the subject of remedial legislation in 1996. The 1996 Act created a public civil enforcement procedure whereby the Authority could seek injunctive action by the courts where it regarded the law as being broken, or take a civil action seeking a declaration that would enforce the law. It could not sue, not being an injured party. More fundamentally, the 1996 Act introduced a criminal law procedure whereby the Authority could send papers to the DPP seeking the latter to bring a criminal prosecution.

In terms of the Boston v Berlin debate, the 1996 Act on paper shifted the Irish regime decisively towards the US model in that it introduced the prospect of criminal penalties being inflicted on transgressors. The European model, untrammelled by the niceties of the common law, had always permitted the Commission to impose fines (although these could be appealed to the ECJ and later to the Court of First Instance). Imprisonment, however, was, and remains, unavailable, unless a transgressor refuses to obey a court order. The concept of a breach of the competition code being a criminal act in itself may be present in some state legal codes, but is not a basic feature of the EU competition regime.[9]

The 1996 Act could be said to be "full of sound and fury, but signifying nothing" in so far as it actually achieved anything. Only one successful prosecution was brought, and that was at the summary jurisdiction level of the District Court. That case concerned an undeniable technical breach of the law (a distributor of petrol providing fuel to an outlet while requiring that a minimum retail price be charged). This a per se offence. The fact that it was done in order to permit the outlet to continue to slightly undercut other outlets in the same town counted for nothing!!! There have been at least three major investigations of price fixing, in which there was strong prima facie evidence of wrongdoing.[10] In one case the DPP, for reasons that have not been made public, refused to prosecute. In the other, while it has not yet been dropped, there has been a remarkable delay in the matter coming to a head. (See below) The disappointing aspect of this is that (apart from a handful of civil actions) the extraordinary powers of search and investigation afforded the Authority under the 1996 Act have yielded virtually nothing in terms of exposing and punishing anti-competitive agreements or abuses of dominant positions. It is, of course, possibly the case that in this great little country no such offences are being committed, due to the attractiveness of other

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[8] This provision seems to have been something of an anomaly as both the Minister and private parties had a right to bring court actions in cases of alleged abuse of dominance.

[9] In some other EU Member States bid rigging constitutes a criminal offence. Under the UK Enterprise Act, 2002, engaging in a cartel is a criminal offence carrying a maximum sentence of up to five years imprisonment for individuals.

[10] This seems to be a logical inference since all three were referred to the DPP.

forms of white-collar crime. The Authority's Annual Reports, however, indicate that up to the end of 2002 it had received 338 complaints of alleged cartels. It may well be that many of these were unfounded, but even discounting a high proportion of these complaints would still leave a significant number of cases, while it is highly likely that many more had managed to avoid attracting attention.

Undoubtedly the failure to provide adequate powers and resources was a major contributor to this outcome. Massey and O'Hare (1996) warned that one of the consequences of assigning responsibility for criminal enforcement to specialist bodies such as the Authority, rather than the Gardai, was that it undoubtedly entailed a significant "running-in" period while staff in such agencies got up to speed with criminal investigation procedures. Arguably if such a body has a high staff turnover then this "running-in" period may become a permanent feature. Joshua (2000, p.7) observed that:

> "The variable record of the [US] Justice Department in prosecuting big cartel cases in the past was on one view at least attributable to its then (possibly over-gentlemanly) preference for using enquiry methods more appropriate to civil litigation over crime detection tools."

This has undoubtedly changed over the past 20 years as the FBI now handles the investigations. Similarly in the UK criminal investigations of cartels are a matter for the Serious Fraud Office.

Massey and Daly (2003) cite internal Authority documents obtained in response to FOI requests which indicate that the files that were referred to the DPP had lain dormant in the Authority for more than a year due to a lack of staff.[11] They also reveal that in one instance books of evidence were prepared and charges drafted at the DPP's request some two years ago but nothing seems to have happened since. Many civil actions, instituted in 1998 and 1999 have never gone to trial. Commenting on this, at a conference last week, one lawyer indicated that the feeling among commercial law firms in Dublin was that, if they delayed matters long enough, the Authority would give up. (Power, 2003). By the Authority's own admission large numbers of complaints received in earlier years were closed without investigation due to past resource constraints.

Perhaps this will change as a consequences of amendments to the investigating powers of the Authority under the 2002 Act, but so far there is little evidence of it, apart from a summary prosecution of a number of farmers for blockading a ship carrying grain. The Authority also recently announced that the Irish Kennel Club had agreed not to deter penalise or discipline members and judges if they took part in rival shows.

In December 2001 the Authority and the DPP announced that they had agreed a cartel immunity programme, whereby the first firm engaged in a cartel to come forward and provide evidence would obtain immunity from prosecution, provided certain conditions were satisfied. The Authority's website instructs would-be applicants to phone a given number between 10 am and 4pm. [Any individuals stricken with a late night crisis of conscience must rely on the Samaritans]. The Authority has stated, however, that it will not, as a matter of policy, disclose the number of leniency applications that it has received. This is in contrast to the practice in jurisdictions such as the US and UK, for example. It is hard to see how simply revealing information on the number of applicants and the number of prosecutions, if any, could harm investigations. Such information would, however, enable one to assess the

[11] The key point being that undue delay in bringing a prosecution can constitute grounds for acquittal.

effectiveness of the programme. Quite simply we need to know if this programme is working and, if not, why not. Such information should not be secret.

The Authority has placed great weight on "competition advocacy". While undoubtedly advocacy is important, it is unclear that it is an adequate substitute for more vigorous enforcement. The OECD (2001) estimated that pub deregulation would reduce drink prices by around 3%. The US Department of Justice estimates that cartels raise prices by an average of 10%.

By settling civil actions on foot of undertakings given by the parties rather than seeking declaratory relief, the Authority has passed up on the opportunity both to establish legal precedents and to illustrate to the public the sorts of practices companies have engaged in. The latter would surely have helped build greater support for competition law by providing practical examples.

Another notable feature of the 2002 Act was the decision not to create a specific cartel offence. Rather it includes presumptions that price fixing is anti-competitive but that defendants can nevertheless seek to justify such criteria. This is considerably at odds with the US model where price-fixing is illegal per se, i.e. the prosecution is required to prove that there was an agreement to fix prices, it does not have to adduce economic evidence to show that such behaviour is harmful. A similar approach has been taken in other common law jurisdictions, most notably the UK where the Enterprise Act, 2002, creates a specific offence of participating in an agreement to fix prices. The UK DTI (2001) took this approach in order to avoid the need to have complex economic evidence presented to juries in such cases. The Authority proposed including a similar provision in the 2002 Act but the Department advised the Tanaiste against it on the basis that: "The UK system is different."[12]

In the end, therefore, we are left with the conclusion that the reality is that we have nothing comparable to the US regulatory regime operating here where cartel or abuse of dominance matters are concerned. However, in one respect the 2002 Act has both on paper and in reality shifted us towards the economics driven US model. That pertains to mergers and acquisitions.

The key change that has taken place has been to eliminate completely the ability of the Government to over-ride competition economics considerations in favour of industrial and social policy objectives, except for media mergers. The 2002 Act replaced the 1978 regime, and made the Authority the sole regulator of merger activity in spite of opposition from business groups and civil servants. The likelihood of another Glanbia decision has been severely reduced as a consequence. Interestingly the legislation requires the Authority to decide whether a merger will substantially lessen competition, which is the test adopted under US law, rather than the dominance test in the EU Merger Regulation. Massey (2001) argues that the SLC test is better equipped to deal with the competition issues arising in horizontal mergers.

IV The courts

What is clear about the policy regime here is that it has been largely court driven over the last ten or so years when there has been any policy at all. The liberalisation of taxis and

[12] Department of Enterprise, Trade and Employment, Memorandum to Tanaiste Re: Amendments to Competition Bill, 2001, 11 February 2002.

pharmacies in recent years came about as a result of private court actions or threats of action rather than any intervention by the State. This raises the question as to how the courts have performed as policy implementers.

We are not here concerned with the efficiency of the courts in reaching decisions, but the willingness of the courts to deal with economic analysis and to reach findings based on it. Since there have been so few cases decided under the acts from 1991 to date, or under European competition law in Ireland, there is a clear risk attached to drawing general conclusions.

That said, here they are.

First of all, the high intelligence of most High Court judges has meant that despite an absence of formal training in economics, they have shown that what economists would regard as acceptable conclusions can be reached. That said, it is unfortunately the case that not all are happy to entertain, or able to comprehend, economic argumentation, especially if backed by econometric analysis. A major exception to this was the Masterfoods v Unilever (Ireland) case heard in 1992. The decision analysed the economics evidence and found that the plaintiff had failed to prove the contention that freezer exclusivity constituted an anti-competitive agreement or that it constituted a barrier to entry. Unilever had counter-claimed for an invasion of their property rights in their freezers. The judge upheld this claim. Two years later, in the Ballinderry Hospital case, the same judge found for the plaintiff and against the VHI on administrative law and similar grounds, although a substantial portion of the evidence given was to substantiate or rebut a charge that VHI had abused a dominant position as a health insurer.

A reading of the judgement in Masterfoods does not suggest that the judge was at all comfortable in dealing with statistical analysis (in this case concerning estimates of cross price elasticity of demand) although his ability to absorb qualitative economic analysis was impressive. In this respect we can see that if we are relying on courts to implement the law (as in the US) rather than administrative procedures, a potentially serious issue arises in terms of comprehension of statistical evidence and of its limitations.

In Chanelle v Pfizer (1998), the judge was able to understand and accept the defence arguments concerning relevant product markets and dominance in a dispute over veterinary pharmaceuticals distribution. However, the argument that a refusal to supply was possibly a mechanism to discourage entry into manufacturing of generic competitors for pharmaceuticals coming off patent appears to have passed him by.

In the *Humphrey* case, where the High Court overturned the Government's original botched attempt at taxi liberalisation, thereby opening the door to competition, the judge observed that:

> "A quantitative restriction not alone affects the right of citizens to work in an industry for which they may be qualified *but it also manifestly affects the right of the public to the services of taxis and, indeed, restricts the development of the taxi industry itself.*" (Emphasis added).

These cases suggest that despite their lack of professional economics training, judges can absorb evidence in a way that permits reasonable decisions on economics matters to be reached. The main problem, as noted, is familiarity with statistical inference and econometrics.

There are, unfortunately, exceptions. In another, relatively recent case, that for obvious reasons will not be named, the opinion of those on both sides was that about three days of court time were taken up in what amounted to giving the judge a crash course in basic economics. This was of little impact in terms of the decision reached.

The courts have effectively decided that particular judges should deal with future competition cases. Three judges have been nominated to deal with such matters in the High Court and one each in the Circuit and District Courts.[13] This suggests considerable willingness on the part of the judiciary to come to grips with the issues involved and is a most welcome step.

Conclusion.

On Monday of this week, the business page of the Irish Independent carried an article, which argued that introducing competition in electricity had failed and that, rather than comply with EU obligations to liberalise the industry, we should have taken the French approach and sought to defend the incumbent monopolist. Many would consider that this is precisely what we have done in Ireland and that is why so-called liberalisation has delivered few benefits. Similarly, although it is just over a year since the Competition Act, 2002, significantly increased the penalties for cartels, there appears to be a clear view among the legal community that criminal penalties have failed. The reality, to paraphrase Chesterton, is that like Christianity, competition has not really been tried. Stelzer (2001, p.79) observed that “it will be a long while before mere fines will destroy the culture of price fixing that permeates British business.”[14] Similarly it will take the equivalent of a few competition “Lester Piggotts” to discourage such behaviour in Ireland. Arguably further measures are required to make this happen.

- There is a need to assess the effectiveness of the Authority’s leniency programme, which requires, as a starting point, that the Authority disclose information on the number of applications.
- Procedures must be put in place to ensure that the sorts of delays, which have occurred in criminal investigations in the past, are not repeated.
- The UK Competition Act, 1998, requires the OFT to state clearly in its annual work programme, how much it expects its activities to save UK consumers. The Authority should be subject to a similar requirement and be required to report the extent to which it has achieved those targets.
- A more radical proposal, which might be considered, would be to shift closer to the Boston model and transfer responsibility for criminal investigations of cartels to the Gardai with the Authority offering economic support where required. The Authority would retain power to bring civil actions in non-cartel cases along with its other functions, making it the equivalent of the US Federal Trade Commission.

[13] It appears, however, that the District Court judge nominated will not preside in the Authority’s summary prosecution of a number of IFA members.

[14] See also Werden and Simon (1987) on the case for criminal penalties for individuals engaged in cartels.

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