# Criminalising Competition Law Offences – A Review of Irish Experience.

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## 1: Introduction.

Ireland was one of the first countries outside the United States to introduce a comprehensive set of criminal sanctions for breaches of competition law. Some other European states had, or have since, introduced specific cartel offences but since 1996, all of Ireland's competition law prohibitions have attracted both criminal penalties and civil remedies. Ireland is thus somewhat unique in that all breaches of competition law constitute criminal offences. There are three aspects of the Irish situation which merit some comment.

First, the Irish decision to criminalise cartels can be explained, at least in part, by the fact that the Irish Constitution effectively provides that penal sanctions, including fines, may only be imposed in the case of criminal offences.[1] In other words in order to impose fines on undertakings for engaging in "hard-core"[2] cartel behaviour, such behaviour must be defined as criminal. It is probably fair to say that the case for imposing financial sanctions on undertakings found to have engaged in "hard-core" cartels is generally accepted. If one accepts that proposition then the Irish decision to introduce criminal offences, at least with respect to undertakings, can be simply explained as the only way under the Constitution by which fines could be imposed on undertakings found to have engaged in hard-core cartels. In these circumstances further debate on the merits or otherwise of criminalisation is probably superfluous. The only real issue is how this regime has worked in practice.

Second, Irish competition law also provides that executives of undertakings which have engaged in hard-core cartel behaviour may be subject to both fines and imprisonment. This aspect of the decision to introduce criminal sanctions clearly cannot be explained as being necessitated by the provisions of the Constitution. Rather it reflects a deliberate political decision that criminal penalties should apply to individual business executives deemed to be responsible for the hard-core cartel behaviour of the undertakings which they effectively

[1] See, P. Massey and J.D. Cooke (2011), Competition Offences in Ireland: The Regime and its Results, in C. Beaton-Wells and A. Ezrachi eds. *Criminalising Cartels Critical Studies of an International Regulatory Movement*, Oxford, Hart Publishing.

[2] The term "hard-core" cartel is generally applied to activities such as price-fixing, bid-rigging and market-sharing, activities which economists would normally describe as cartels. One reason for applying the term "hard-core" to such cartel behaviour is because in some OECD countries, at least, the term cartel was applied to all forms of agreements between undertakings both horizontal and vertical rather than being limited to the traditional economic definition of a cartel. As Harding points out, however, such language can also be seen as conveying a strong degree of moral censure. The term "hard-core" cartel is used throughout this paper to avoid any possible confusion. C. Harding, A Pathology of Business Cartels: Original Sin or the Child of Regulation?

control. In terms of the debate on whether or not criminal sanctions are appropriate for competition offences, it is this aspect of the Irish position which is probably most relevant.

The third feature of the Irish situation, which deserves comment, stems from the fact that the European Union approach to competition law also favours financial sanctions for undertakings which are found to have engaged in non-hard-core cartel behaviour including certain vertical agreements and abuses of dominance. In this respect the EU approach differs from the position in the United States. Again, the reason why such behaviour is defined as criminal under Irish law can be explained by the fact that, if Ireland was to follow the EU approach and impose fines on undertakings for such behaviour, then this required that such behaviour be defined as constituting a criminal offence. From an economics perspective, however, there is a reasonable question as to whether fines are appropriate in such cases, which is further complicated if the only way that such fines may be imposed is by defining such practices as criminal. Serious questions arise regarding the practicalities of criminalising non-hard-core cartel behaviour.

The balance of this article is structured as follows. The historical development of competition law in Ireland is described in the following section. The case for criminalising hard-core cartels in the sense of imposing criminal penalties on individuals for engaging in such behaviour is set out in section 3. Section 4 then analyses the Irish experience with criminalisation of hard-core cartels. Non-hard-core cartel cases are discussed in section 5. Some conclusions are outlined in section 6.

**2: The Evolution of Irish Competition Legislation.**[3]

A form of competition law based on the control of abuse principle was originally introduced in Ireland with the passage of the Restrictive Trade Practices Act, 1953. According to Hogan this legislation reflected a cautious approach due to the fact that it was novel in Ireland at that time.[4] It should be noted, however, that the Irish legislation pre-dated similar legislation in the UK, which was not introduced until 1956, and the Treaty of Rome. During the Dail (Parliamentary) debates on the 1953 Act, the then Minister indicated that consideration had

[3] For a more detailed description of the development of Irish competition law see, P. Massey and D. Daly, (2003), *Competition and Regulation in Ireland The Law and Economics*, Cork, Oak Tree Press and Massey and Cooke (2011) at note 1.

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

been given to introducing a prohibition-based regime based on the provisions of the US Sherman Act but ultimately this option was rejected in favour of a control of abuse model.[5]

From 1953 until January 1986, a system of price control existed alongside competition legislation. Although the legislation was amended on several occasions, its basic features remained largely unchanged for almost 40 years. Although the Fair Trade Commission (FTC) recommended the introduction of a prohibition-based regime based on Articles 85 and 86 of the Treaty of Rome in 1977, it was another 14 years before such legislation was introduced.[6]

> "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."[7]

The Competition Act, 1991, radically reformed Irish competition law introducing a prohibition-based system modelled on what were then Articles 85 and 86 of the Treaty of Rome. The legislation introduced two broad based prohibitions which have remained in place:

- A prohibition on anti-competitive agreements between undertakings;[8] and
- A prohibition on the abuse of a dominant position by one or more undertakings.

The legislation provided that any party aggrieved by such behaviour could bring legal proceedings seeking an injunction, declaration and/or damages including exemplary damages. The Minister was also given the right, which has never been exercised, to bring proceedings seeking an injunction and/or declaration. The Competition Authority established under the Act had no enforcement powers, its role being confined to granting exemptions and negative clearances to agreements notified to it. Thus, a major shortcoming of the 1991 Act was the lack of any effective enforcement regime.

> "One of the most consistent criticisms of this legislation was the inadequacy of the enforcement procedures."[9]

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[5] Massey and Daly (2003) at note 3. For a more detailed discussion on the extent to which Irish competition policy has been influenced by both the US and EU, see P.M. Lyons, P. Massey, and M. McDowell, (2011), Boston v. Berlin: A Half-Century of Irish Antitrust, in *Evolution of Competition Laws and their Enforcement, A Political Economy Perspective*, London, Routledge.

[6] Fair Trade Commission, (1991), *Study of Competition Law*, Dublin, Stationery Office.

[7] OECD, (2001), *OECD Reviews of Regulatory Reform. Regulatory Reform in Ireland*, Paris, OECD, p.16.

[8] As with Article 101 the prohibition also applies to decisions by associations of undertakings and concerted practices.

[9] P. Charleton and M. Bolger, (1998), The Competition (Amendment) Act, 1996: Extending the Criminal Law, *The Bar Review*, 214, (March).

In 1994 the then Government introduced a Bill to amend the legislation to allow the Competition Authority to bring civil proceedings before the Courts in respect of breaches of Sections 4 and 5 of the 1991 Act. The Bill, however, contained no provision for penal sanctions, including fines, and would have merely allowed the Authority to obtain declaratory and/or injunctive relief, that is to say, a declaration that a defendant had infringed the prohibition or that a particular agreement or concerted practice was void and an injunction to restrain its continuance. Following a change of administration, the new Government announced on taking office that consideration would be given to:

> "… strengthening of the Competition Authority by giving it enforcement powers and by enabling the Courts to impose stiff fines on those found to be engaging in unfair competition."[10]

While not specifically stated, it was generally assumed that fines would only be imposed on undertakings.

It was subsequently announced that the amended Bill would not only introduce fines for companies found to be in breach of the Act but would also provide for fines and terms of imprisonment for the executives of such companies.[11] The Competition (Amendment) Act, 1996, thus provided that breaches of both sections 4 and 5 of the 1991 Act (essentially the domestic law equivalent of Articles 101 and 102) constituted criminal offences. It provided for a maximum penalty in case of a conviction on indictment in both cases of ir£3m or 10% of turnover in the case of undertakings and a similar fine and/or up to two years imprisonment in the case of directors and managers of such undertakings. Ireland thus became somewhat unique in criminalising all infringements of competition law.[12]

The 1996 Act clearly represented a radical departure from the rather cautious approach adopted by successive Irish administrations over the preceding 40 years. The extent of this

[10] *A Government of Renewal*, Dublin, Stationery Office, December 1994.
[11] P. Rabbitte, (1995), Opening Address by Mr Pat Rabbitte TD, Minister for Commerce, Science and Technology at Conference on Competition Policy and Regulation, Trinity College, Dublin, 16.6.1995.
[12] In the case of other jurisdictions which have criminal penalties, such sanctions only apply in respect of "hard-core" cartels. The reason for criminalising all competition law breaches was the generally accepted view that Constitutionally penal fines could only be imposed for criminal offences, i.e. the Constitution precludes administrative or civil fines. As pointed out, however, this Constitutional requirement does not explain the decision to introduce penal sanctions for individuals.

shift is probably best summed up in a contribution to the debate on the 2002 Act by Desmond O'Malley TD, who was the Minister responsible for introducing the original 1991 Act.

> "I wanted to bring in criminal sanctions but I could not get the Cabinet to agree and, even if it had, I do not think I would have got the House to agree."[13]

During the debate on the 1996 Act, the Minister announced the establishment of the Competition and Mergers Review Group (CMRG) to review competition and merger legislation. The CMRG concluded that criminal sanctions were appropriate, at least for "hard-core" cartels.[14] The Competition Act, 2002, was subsequently enacted.[15] The main change introduced by the 2002 Act, from the point of view of the present paper, was that it distinguished between "hard-core" cartel activities such as price-fixing, market sharing and bid-rigging and other types of anti-competitive behaviour. The maximum penalty for individuals in the former case was increased from two to five years while prison sentences were abolished for non-hard-core cartel offences, although the Competition Authority lobbied for the retention of prison sentences of up to two years in such cases.[16]

The relevant provisions of the Competition Act, 2002, may be summarised fairly briefly. Sections 4 and 5 of the Act mirror Articles 101 and 102 TFEU save that they contain no reference to effects on inter-State trade.[17] The Act anticipated the reforms introduced to the EU regime by Regulation 1/2003 by abolishing the system of notifying agreements to the Competition Authority in order to obtain a negative clearance or exemption under national competition law.

The criminal offences are set out in sections 6 and 7 of the 2002 Act. Section 6(1) provides that undertakings which enter into, or implement an agreement, or make or implement a decision by an association of undertakings, or engage in a concerted practice that is prohibited by section 4(1) of the Act or Article 101(1) are committing an offence subject to

[13] *Competition,* Vol.11(3), p.70.
[14] Competition and Mergers Review Group, (CMRG), *The Final Report of the Competition and Mergers Review Group*, Dublin, Stationery Office, 2000.
[15] The 2002 Act repealed both the 1991 and 1996 Acts.
[16] Massey and Daly (2003) at note 3.
[17] Section 5(1) of the 2002 Act refers to a dominant position within the State or any part of the State. The 1991 Act more closely followed the EU Treaty formulation by referring to a substantial part of the State. The reference to substantial was dropped during the course of the passage of the 2002 Act through the Oireachtas. According to Department briefing notes this was to make it easier to prosecute such cases. See Massey and Daly (2003) at note 3.

criminal sanctions. Section 7 creates the offences of breaching section 5(1) or Article 102. The 2002 Act thus provides that breaches of Articles 101 and 102 also constitute criminal offences. Such provisions were included in anticipation of the decentralisation of EU competition law. As with breaches of national law the Act also enables the Authority to bring civil proceedings for breaches of Articles 101 and 102.

The Act distinguishes between "hard-core" cartel offences and all other competition offences. Thus Section 6(2) provides that:

> "In proceedings for an offence under *subsection (1)*, 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."

Subsection (7) defines "competing undertakings" as undertakings that do or can provide goods or services to the same applicable market, that is, goods or services which are regarded by customers as interchangeable or substitutable in terms of their characteristics, price and intended use or purpose.

In the case of the section 6(2) offences, Section 8 provides that an individual:

> On summary conviction may be fined a maximum €3,000 and/or imprisoned for up to six months; and
>
> On conviction on indictment may be fined up to €4m or 10% of turnover and/or imprisoned for a maximum of five years.

The provision of a maximum prison term of five years means that individual company executives suspected of engaging in such behaviour may be arrested by the Gardai (police)

and held for questioning for up to 12 hours. This addresses a major weakness in the previous legislation where there was no effective power to question individuals.[18]

In the case of offences under Sections 6 and 7, other than those specified under section 6(2), an undertaking may be fined up to €3,000 on summary conviction, and up to €4m, or 10% of turnover, whichever is greater, on conviction on indictment. Similar fines may be imposed on individual managers and directors of such undertakings. Section 6(6) provides that, for the purposes of determining liability for an offence under section 6, any act done by an officer or employee of an undertaking in connection with the business of the undertaking shall be regarded as an act done by the undertaking.[19]

Under section 8(6) a director, manager or other similar officer or person who purports to act in such capacity, who consents to or authorises an undertaking to contravene section 6 or 7 is also guilty of an offence. Section 8(7) then provides that an individual who was a director or key decision maker[20] in an undertaking at the time the undertaking committed an offence under section 6 or 7 is presumed to have consented to the commission of the offence unless they can prove otherwise.

The Act provides that it shall be a good defence in the case of offences under section 6 to show that the arrangements in question satisfied the exemption criteria which replicate those in Article 101(3). This applies to both "hard-core" and non-hard-core offences. It was claimed at the time the legislation was enacted that this would greatly complicate criminal prosecutions of "hard-core" cartels, although this has not proved to be a major problem to date.[21]

[18] The decision to provide for a penalty of up to five years imprisonment for engaging in cartels under the UK Enterprise Act also appears to have been prompted, in part, by a desire to provide for a power of arrest in cartel cases. On this point see A. Hammond and R. Penrose, (2001): *Proposed Criminalisation of Cartels in the UK,* London: Office of Fair Trading.

[19] Section 7(3) sets out a corresponding provision in respect of the section 7 offence. These provisions would appear to preclude an undertaking mounting a defence that its employees or officers acted without the knowledge or approval of the undertaking.

[20] The section refers to a person whose duties "included making decisions that to a significant extent could have affected the management of the undertaking".

[21] See, for example, Massey and Daly (2003) at note 3. When the legislation was being drafted, the Competition Authority argued in favour of creating a specific cartel offence along the lines set out in the UK Enterprise Act, 2002. The Minister's civil service briefing recommended against such an approach simply saying that: "The UK system is different." Department of Enterprise, Trade and Employment, Memorandum Re: Amendments to Competition Bill, 2001, 11 February 2002.

**3: The Case for Criminalising Cartels.**

As previously noted, the case for fining undertakings for engaging in cartels does not appear to be seriously in dispute. The discussion on whether or not criminal penalties are appropriate for cartel behaviour is therefore primarily concerned with whether criminal sanctions, either in the form of fines or imprisonment, should be imposed on private individuals. There is an extensive literature which supports the view that imprisonment represents an appropriate sanction for "hard-core" cartels.[22]

Three broad arguments haven been advanced in the literature for criminalising cartels:

- Fines may constitute an insufficient deterrent for firms;
- The lack of individual penalties may give rise to a moral hazard problem; and
- Cartels are clearly far more harmful than other types of anti-competitive behaviour and thus merit more serious penalties.

Given that firms can earn substantial profits from engaging in cartels, serious penalties are required to deter such behaviour. Fines that are set too low are unlikely to provide an adequate deterrent. In deciding whether or not to participate in a cartel, an undertaking will weigh the likely gains against the likely sanctions that may arise if the cartel is detected. The firm has noting to lose from participating in a cartel if fines are limited to the level of cartel profits since the cartel may go undetected. The optimal level of fine therefore is equivalent to the additional profits earned from participating in the cartel multiplied by the risk of detection. In other words, if there is a 10% chance of detection, then fines must be ten times cartel profits in order to provide an adequate financial penalty. Based on EU cartel cases,

[22] See, for example, G. Werden and M. Simon, (1987), Why Price-Fixers Should Go To Jail, *Antitrust Bulletin* 24(4), 917; J. Joshua, Flawed Thinking About Price Fixers, *Financial Times*, 2 August 2001; D.I. Baker, (2001), The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging, *George Washington Law Review*, 69: 715; W.P.J. Wils, (2002), Does Effective Enforcement of Article 81 Require Not Only Fines on Undertakings but also Individual Penalties, in Particular Imprisonment?, in C.D. Ehlermann (ed.): *Effective Private Enforcement of EC Antitrust Law*; W.P.J. Wils, (2006), Is Criminalization of EU Competition Law the Answer?, in K.J. Cseres, M.P. Schinkel and F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement Economic and Legal Implications for EU Member States*, Edward Elgar; P. Whelan, (2007), A Principled Argument for Personal Sanctions as Punishment Under EC Cartel Law, *The Competition Law Review*, 4(1), 740; D.I. Baker, (2009), An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and Whether to Restrain Abusive Monopolists, *European Competition Journal*, 5(1),19; and G. Werden, (2009), Sanctioning Cartel Activity: Let the Punishment Fit the Crime, *European Competition Journal,* 5(1), 19.

Wils calculated that the optimal fine would have to be 150% of the firm's turnover in respect of the cartel products.[23]

Empirical research indicates that fines in cartel cases are almost never sufficiently high as to constitute an optimal deterrent and, in many cases, are considerably below this level.[24] In the international lysine cartel, Connor estimated that the fines imposed on Archer Daniels Midland in the US would have negated the profits earned in the US from participation in the cartel but the level of fines imposed in other jurisdictions were lower than the profits earned by ADM and its co-conspirators in those countries.[25] While opposing criminal sanctions, Spagnolo reported that the level of fines imposed in many EU cartel cases was "not likely to deter many cartels"[26] Fines that are too low may simply be regarded as a cost of doing business and are likely to have little deterrent effect. Arguably this problem could be overcome if it were simply a matter of increasing fines in hard-core cartel cases. US research indicates, however, that imposing the optimal level of fines in cartel cases would have bankrupted almost half of the firms involved.[27] At the very least, as Werden suggests, undertakings are unlikely to have sufficient liquid assets to pay fines set at the optimal level. He points out that in the case of undertakings whose business is largely confined to the cartelised market even total liquidation of the undertakings would generally not raise sufficient funds to pay such a fine. Thus, in many cases it may well be that imposing the optimal level of fine is simply not a practical option in which case fines will have little deterrent effect.

The moral hazard problem arises because decisions to participate in cartels are made by individual human persons who run companies. Such individuals may gain directly from such decisions in the form of higher salaries, performance related bonuses, enhanced promotion

[23] Wils (2002) at note 22. Wils (2006) at note 22 concedes that such calculations assume that being found guilty of participation in a cartel has no adverse impact on firms' goodwill or public image, which may not be universally plausible. Werden (2009) at note 22, however, suggests that the optimal fine in cartel cases would need to be double the undertaking's turnover in the relevant market.
[24] OECD, (2004), *Cartels: Sanctions Against Individuals*, Paris, OECD, 2004.
[25] J.M. Connor, (2004), Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation (1996), in L.J. White and J.E. Kwoka (eds.), *The Antitrust Revolution Economics, Competition and Policy*, Oxford, Oxford University Press. Some ADM executives were sent to prison in this case.
[26] G Spagnolo, (2006), Criminalization of Cartels and their Internal Organization, in K.J. Cseres, M.P. Schinkel and F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement Economic and Legal Implications for EU Member States*, Edward Elgar. It should be noted that fines in EU cartel cases have increased significantly in recent years.
[27] J.L. Craycraft and J.C. Gallo, (1997), Antitrust Sanctions and the Firm's Ability to Pay, *Review of Industrial Organization*, 12: 171.

prospects and other benefits due to the higher profits accruing to their company from participating in a cartel. Even if the firm is subsequently fined such individuals may face no sanction in circumstances where competition legislation does not provide for individual penalties. The prospect of a fine being imposed on their employer at some future date may not unduly concern a company executive who is preoccupied with the next quarter results, particularly as the executive may no longer be employed by the firm when any fine is imposed. Werden observes that when executives face no penal sanctions themselves, they may find it in their interests to engage in cartel activity that is not necessarily profitable for their employer.[28]

One possible way of addressing the moral hazard problem would be to fine individuals who organised cartels.[29] The difficulty with such fines is that the individual's employer may reimburse them, thus negating the deterrent effect. For this reason, the UK Government rejected the option of proposing fines on individuals as an alternative to imprisonment.[30] In New Zealand, the idea of making it illegal for firms to reimburse employees fined for competition law breaches was considered but rejected as constituting too great an intervention in a firm's internal affairs.[31] An obvious question arises as to how such measures could be enforced in practice. In contrast individuals cannot pass a prison sentence on to their company.

Becker's seminal work on the economics of crime argued that decisions on whether or not to engage in criminal activity will take full account of the potential costs and gains so that individuals will only engage in criminal behaviour if the expected gain exceeds the potential cost.[32] It may be argued that many criminals do not make such careful calculations. In contrast to criminal actions undertaken in the heat of the moment, or because an opportunity has presented itself, those contemplating participating in a cartel are far more likely to weigh the benefits from such participation against the consequences of getting caught and, therefore, are likely to take the threat of imprisonment into account. Imprisonment may be a particularly strong deterrent for white collar individuals. Baker suggests that individual sanctions

[28] Werden, (2009) at note 22.
[29] Dutch competition legislation provides for administrative fines of up to €450,000 for individual executives involved in cartels.
[30] Department of Trade and Industry, (DTI, 2001), *A World Class Competition Regime*, London: HMSO.
[31] OECD, (2004) at note 24.
[32] G Becker, (1969), Crime and Punishment: An Economic Approach, *Journal of Political Economy*, 76, 169. This literature suggests that fines can be set sufficiently high to deter criminal behaviour.

including imprisonment constitute the most effective enforcement tools available in the fight against cartels.[33] Reflecting on his experience in the Antitrust Division, he observed:

> "The cartel conspirators to whom I have been exposed never seem to have worried about corporate shareholders being hit with large fines and damages as a result of their activities. Rather, to the extent that they did worry, their concern was about being exposed and punished themselves."[34]

Wils argues that imprisonment sends a strong message to law abiding citizens, reinforcing their moral commitment to the rules. It also sends the message more effectively than fines, because it is far more newsworthy and thus attracts greater publicity and is likely to be noticed more by other businesspeople.[35]

Rosenboom found that participation in cartels had a negative effect on Dutch business executives' career prospects, although this was not true of the construction industry where he suggests the business culture might have been more tolerant of such behaviour.[36] The fact that participating in a cartel might negatively affect one's career prospects is likely to have some deterrent effect but, as the Dutch construction sector experience demonstrates, this will only arise where the business culture regards such behaviour as unacceptable. In contrast, Rosenboom notes that involvement in cartels may enhance managers' career prospects if shareholders believe that cartels are not easily detected and would therefore prefer managers who increase share values by participating in cartels.[37] Whelan, for example, points out that reasons advanced for cartel behaviour by undertakings included the fact that "subordinates did not believe that company management actually wanted to respect the law".[38] He argues that failure to hold individuals responsible for unlawful actions "reduces somewhat the moral force of the cartel law rules, thereby undermining deterrence effects."[39] Criminal sanctions may reinforce moral opprobrium for such behaviour.

One way of adversely affecting the career prospects of executives who engage in cartel behaviour would be to disqualify them from acting as company directors. Such provisions

[33] Baker, (2001) at note 22.
[34] Baker, (2009) at note 22.
[35] Wils, (2002) at note 22.
[36] N.S.R. Rosenboom, (2012), Career Development After Cartel Prosecution: Cartel Versus Non-Cartel Managers, *Journal of Competition Law & Economics*, 8(1), 145.
[37] *Ibid.*
[38] Whelan, (2007) at note 22 p.27.
[39] *Ibid.,* p.24.

exist under the UK Enterprise Act. Irish competition law contains no specific disqualifications sanction. However, the Competition Authority may apply to have individuals convicted of competition law offences disqualified from acting as company directors for a period of time. The effect of such sanctions may be more limited in the case of small undertakings which predominate in a small country like Ireland. Particularly in the case of family-owned concerns it might be exceedingly difficult to enforce such sanctions. An individual disqualified from acting as a director might still exercise effective control through having a family member act in their stead, thus limiting the deterrent effect of such measures.

Cartels are considered to merit harsher penalties than many other practices because they are far more clearly and unambiguously harmful to consumers. There is widespread agreement among economists that cartels are inevitably harmful and result in consumers having to pay higher prices for goods and services and impose deadweight losses on the economy.[40] The OECD has described cartels as "the most egregious violation of competition law".[41] In contrast there is often a very thin dividing line between abuse of dominance and aggressive competition. Similarly, it is recognised that vertical restraints may or may not be harmful depending on the specific market conditions in which they operate. There is therefore a strong economic case for applying much tougher penalties for "hard-core" cartels than for other competition law infringements.[42]

Critics argue that criminal penalties, particularly prison sentences are inappropriate for competition law offences. This may partly reflect a benign view toward "white collar" crime, something that is not unknown in Ireland. In a 1998 newspaper article, a Government junior Minister wrote:

> "Most people are appalled at the thought of somebody being robbed on the street and will support custodial sentences for criminals who steal just a few pounds in this direct physical manner. However, pulling a stroke and stealing millions by shuffling bits of paper and crunching numbers is regarded as, somehow, not quite criminal."[43]

[40] The US Department of Justice, (1998) for example, estimates that a cartel will raise prices on average by 10%. United States Department of Justice, (1998), *Federal Sentencing Guidelines*, Washington DC, Department of Justice. Whelan (2007) at note 22 estimates that EU cartels have raised prices by between 28 and 54%.
[41] OECD, (2004).
[42] For that reason, Massey and Daly (2003) at note 3 argued against penalties in the form of fines on undertakings for non-cartel practices. This point is addressed below.
[43] W. O'Dea T.D., White Collar Criminals Are Getting Clean Away, *Sunday Independent*, 12.4.1998.

The perception that cartels are not criminal may also reflect a wrongful perception that it is a victimless crime, which ignores the fact that cartels harm consumers by raising prices. Harding, for example, has argued that criminalisation is inappropriate because it is difficult to quantify the harm caused by cartels and because such harm is widely diffused so that individuals may be unaware that they have suffered any harm. Similar arguments could be advanced in the case of ATM card skimming, for example, where it may be difficult to estimate the full extent of the harm caused, while individuals who do not check their bank statements closely may not realise that money has been stolen from their bank accounts.[44] As Stelzer observed:

> "As price-fixers are illicitly lightening the pockets of consumers every bit as much as any highwayman ever did, I see no distinction, except perhaps in the stringency of the security required in the prisons to which they may be sent."[45]

Harding also argues that criminalisation is inappropriate because, in the past, cartels were regarded as acceptable in many European countries. Wils notes that, prior to the Second World War, "cartels were a wide-spread and fairly esteemed institution in Europe".[46] Cartels are by no means the only type of behaviour that is viewed in a more jaundiced light today than was the case previously. Whether the past acceptance of cartels in Europe was based on a belief that they were benign as Harding suggests, or whether in fact such treatment reflected the fact that Government had effectively been "captured" by business interests and is worth considering.[47] Harding further suggests that criminalisation is inappropriate because cartels may have beneficial effects, a claim for which there is virtually no support in mainstream economics.[48]

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[44] A similar argument could be advanced, for example, where an individual manages to skim a small amount from all the accounts in a bank by hacking into its computer system. It is difficult to see how the fact that none of the customers noticed the extremely small amount stolen from them or the difficulty involved in calculating the extent of the illicit gain would justify treating such behaviour as non-criminal.

[45] I. Stelzer, (2001), *Lectures on Competition and Regulatory Policy,* London: Institute of Economic Affairs, p.38.

[46] Wils, (2002) at note 22, p.328.

[47] In this regard it should be noted that in the inter-war years some of the European countries that adopted a benign approach to cartels had totalitarian regimes which were supported by large scale industrial cartels. In 1933 legislation requiring compulsory cartelisation was enacted in Germany. K. Stockman and V. Strauch, (1984), *World Law of Competition Vol.5 Federal Republic of Germany*, New York, Mathew Bender. Capture rather than a mistaken belief in the benign nature of cartels would seem the more likely explanation in those cases at least.

[48] Harding at note 2 cites claims that cartels promote stability and protect employment, for example. While such claims are sometimes advanced by business there is no economic basis for them. Similarly, it is suggested that cartels prevent "cut-throat" competition, the implication being that a limited amount of competition is acceptable but that cartel actions designed to curb competitive "excesses" are somehow acceptable. Such populist arguments may be advanced by vested interests to justify harmful behaviour and might appear superficially plausible, but they do not stand up to careful scrutiny. There is no economic basis for such claims.

It is sometimes suggested that the European approach to cartels takes more account of potential economic benefits in contrast to the "dogmatic and unforgiving" approach of the US.[49] It is true that the bifurcated nature of Article 101 means that it is at least theoretically possible to claim that hard-core cartel behaviour could in certain circumstances satisfy the requirements of section 101(3). Such arguments ignore the widespread consensus among economists that cartels are almost never efficiency enhancing. This point was acknowledged by the then head of DG Competition.

> "In the case of hardcore restrictions, however, the conditions [for exemption] will not be met. Horizontal price fixing, for example, creates no objective economic benefits, no benefits are passed on to consumers, and the restriction is in any event disproportionate. Consequently, although Community law does not formally work with *per se* prohibitions in respect of which no defence can be raised, there is no practical difference. Hardcore restrictions do not fulfil the four conditions of Article 81(3)."[50]

Another argument advanced against criminalisation is that cartels are still being unearthed in the US despite the fact that such behaviour has been criminalised there for more than a century. This, it is suggested, constitutes clear proof that criminal sanctions have little or no deterrent effect on hard-core cartels. A simple response to such arguments is that criminal penalties have arguably failed to deter all sorts of criminal activity. A more detailed analysis indicates that such arguments are flawed and are based on an inaccurate picture of US experience. Baker points out that it actually took almost a century from the passage of the Sherman Act before custodial sentences became the norm for individuals involved in cartels in the US.[51] Breaches of the Sherman Act were originally designated as misdemeanours. Prior to 1974 custodial sentences in cartel cases were extremely rare except in cases where violence or coercion were employed.[52] In that year Congress amended the Sherman Act designating cartel offences as felonies and increasing the maximum jail term to three years. The 1982 Federal Sentencing Guidelines "limited judicial discretion to treat 'nice' white-

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The use of phrases such as "cut-throat" demonstrates that both sides of the debate are apt to resort to pejorative language to advance their case.

[49] See, for example, Harding at note 2, p.46.

[50] A. Schaub, (2002), Continued Focus on Reform Recent Developments in EC Competition Policy in B. Hawk (ed.) *International Antitrust Law & Policy*, New York, Juris Publications, p.44.

[51] Baker, (2009) at note 22.

[52] Werden, (2009) at note 22, Wils (2002), at note 22.

collar criminals more tolerantly"[53] and permitted prosecutors to appeal sentences that are below the Guidelines. It is only over the past 20 years that business executives have been jailed in the US on a regular basis for engaging in "hard-core" cartels.

It is difficult to ascertain the extent, if any, to which the literature on criminalising cartels influenced the then Irish Government's decision to introduce such penalties in the 1996 Act. Without having access to the relevant Cabinet papers, any attempt at an explanation must be somewhat speculative. The decision did not stem from any public review of the legislation, although as pointed out such a review was instituted after the 1996 Act was enacted. Undoubtedly experience of the 1991 Act generated a widespread feeling that some enforcement mechanism was required. That might explain a decision to introduce fines for companies but not the more radical option of imprisonment for individuals. The latter decision may simply have reflected a wider concern about the lack of serious penalties for white collar crime generally and a need for politicians to be seen to be addressing that issue.[54]

**4: Has Ireland's Criminalisation Experiment Worked?**

Following the passage of the 1996 Act, the Competition Authority initially exercised its new enforcement powers by bringing a number of civil actions in cases involving alleged cartels. For example, the Authority brought civil proceedings against the Irish Road Haulage Association; Irish Travel Agents Association; the Irish Veterinary Union; the Licensed Vintners Association (LVA) - which represents the majority of publicans in the Dublin area; the Vintners Federation of Ireland (VFI) - which represents the majority of publicans in the rest of the country; a number of dairies and major national supermarket chains in a case relating to the pricing of milk; and a number of drinks wholesalers. All of these cases were ultimately resolved by the parties concerned giving undertakings to the Court not to engage in certain behaviour in the future.[55]

[53] Baker, (2009) at note 22, p.160.

[54] Ireland has experienced a number of corporate scandals over the past 20 years which has resulted in a growing public demand for effective action to be taken against various forms of "white-collar" crime. See, for example, J. McGrath, Prosecution of Alleged Financial Crimes is Imperative, *Irish Times*, 26th March 2012.

[55] Undertakings furnished to the courts are legally binding on the parties concerned and breaches of such commitments constitute contempt a court. In 2009 the Authority brought further proceedings against the LVA for a breach of undertakings given by it in the earlier proceedings. The High Court found that by advising its members to freeze prices, the LVA was in breach of its earlier undertaking and was thus in contempt of court.

Since 2000 some 50 prosecutions have been brought by the Competition Authority all involving alleged cartels. These prosecutions have resulted in 32 convictions to date of which four were for summary offences and the remainder procured on indictment.[56] These figures include convictions of both undertakings and individuals. While these numbers look impressive, it must be borne in mind that cartel cases by their nature involve multiple defendants. Thus, these cases involved just four separate cartels. In two other cases which were prosecuted on indictment, the defendants were acquitted by the jury. Given the ratio of convictions secured to acquittals the criminalization initiative would appear to have been successful. It must also be noted that the majority of successful convictions have been the result of guilty pleas.

As pointed out the decision to criminalise cartels was due in part to the fact that this was the only way constitutionally that fines could be imposed on undertakings for engaging in such behaviour. While at the time many commentators suggested that successful criminal prosecutions of undertakings would prove impossible, such views have been proved wrong. To the extent that a number of undertakings have been successfully prosecuted and convicted criminalisation has worked.

Of course, in the context of the general debate on the appropriateness or otherwise of criminalising cartels, the issue is whether criminal sanctions against individuals have been successful. Not only have individual directors of undertakings being convicted but, in a number of cases, officers of trade associations have been convicted for aiding and abetting a criminal offence. The Supreme Court has also ruled that an individual executive may be prosecuted for cartel behaviour, even if the undertaking employing him has not been convicted of involvement in the cartel.[57] To date no individual has actually been sent to prison for cartel behaviour. Individuals convicted have been fined but only suspended jail sentences have been imposed, although in one case a convicted individual was subsequently jailed for failing to pay a fine. In a number of cases, however, judges have given very clear

[56] Competition Authority Annual Report 2009. In one case three defendants avoided convictions when the judge in the Circuit Court applied the Probation Act.

[57] This issue arose in *DPP v Hegarty*. In this case Mr. Hegarty challenged the proceedings being brought against him on the grounds that no proceedings were ever brought against the undertaking that employed him and his employer had thus never been convicted of any competition law offence. The Circuit Court referred these issues to the Supreme Court for adjudication. The Supreme Court ruled that Mr. Hegarty could be prosecuted even though his employer had never been charged let alone convicted of cartel behaviour. Judgment of McKechnie, J., *DPP v Pat Hegarty*, Supreme Court judgment 28th July 2011. The criminal trial in this case subsequently commenced on 1st May 2012.

indications that individuals convicted of engaging in cartels could expect to spend some time in prison.

For example, imposing sentence on Mr. Denis Manning who pleaded guilty to one count of aiding and abetting a cartel involving Ford motor car dealers, Mr. Justice McKechnie said:

> "This type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime: and while society has an interest in preventing, detecting, and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned were liable to be defrauded, and many surely were by the scheme and by the practices which unashamedly this cartel operated. These activities have in my view done a shocking disservice to the public at large."[58]

While he imposed a suspended sentence in that particular case, the trial judge went on to state:

> "In my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases. Firstly, such a sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances, have the same force where individuals are concerned. Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater co-operation in cartel investigations against, and quite frequently against their employers. Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be an enormously powerful deterrent and finally, the imposition of the sentence for the type of category of persons above described can carry a uniquely strong moral message. Accordingly, there are in my view some immensely powerful reasons to custodise an individual who has been found guilty under the Competition Act."[59]

[58] *DPP v. Manning* (unreported, Central Criminal Court, McKechnie, J., 9 February 2007). See Competition Authority *Annual Report 2007*, p.7.
[59] *Ibid.,* p.6.

The number of successful criminal prosecutions is not the sole test of the effectiveness of the legislation. More important may be the cultivation of an improved awareness on the part of the public of the benefits of competition and efficient markets as well as greater deterrence of anti-competitive behaviour in the business community. There is literally no way of knowing whether or not the introduction of criminal penalties in 1996, and the strengthening of such penalties in 2002 had any major deterrent effect. This is because cartels by their nature are secretive. One cannot quantify the number of cartels that decided to shut up shop and how many were discouraged from getting off the ground in the first place by the introduction of criminal penalties.[60]

It must also be recognised that deterrence depends not just on the level of penalties but on the likelihood of being caught, prosecuted, and convicted. In this respect one must be less sanguine. The Competition Authority for some time now has repeatedly stated that it is only capable of mounting one criminal cartel investigation per year. In 2010 it indicated that it may be unable to achieve even this level of enforcement.[61] This obviously greatly reduces the deterrent effect of criminal sanctions since it means that the chance of being subject to such penalties is close to zero. The fact that a low likelihood of detection reduces deterrence, however, certainly does not constitute an argument for abolishing criminal sanctions. The risk of being caught must be real which requires a high level of enforcement. Legislating for tough penalties without backing such measures up by providing adequate resources for effective enforcement is simply political posturing.

The criticism is sometimes advanced that the Authority in its cartel cases has tended to target small firms and ignore larger ones. In this respect, some latitude must be afforded to the Authority. In order to bring a successful criminal prosecution, it is necessary to have sufficient evidence to prove a case beyond a reasonable doubt. Thus, decisions to investigate and ultimately to prosecute depend on the quality of evidence available in a particular case rather than the size of potential defendants. In terms of establishing credibility, it was important that the early prosecutions were successful. Nevertheless, the perception has emerged that the Authority is more likely to go after small firms than larger ones, which is unhelpful.

[60] In the case of other more publicly visible crimes, e.g., bank robberies, one can evaluate the effectiveness of increasing penalties, increased levels of policing etc in reducing the number of such crimes.
[61] Competition Authority, *Annual Report, 2010*, Dublin, Competition Authority.

The Competition (Amendment) Bill, 2011, proposes to increase the maximum prison sentence for individual executives in cartel cases from five to ten years. It also provides for increased fines and proposes that the Probation of Offenders Act, 1907, will not apply to individuals or companies convicted of competition law offences.[62] The Bill is designed to satisfy one of the conditions of the EU/IMF bailout which requires that Ireland provide for more effective sanctions for breaches of competition law. The rationale for increasing the maximum prison sentence for those engaged in cartels from five to ten years is difficult to understand. If there is little or no enforcement, increasing penalties will have little if any deterrent effect. US experience also indicates that relatively short jail sentences represent an adequate deterrent in cartel cases. For "white collar" professionals the short, sharp, shock of a limited prison sentence can prove quite salutary. Lengthy sentences obviously involve greatly increased costs to the State (of incarcerating such individuals for lengthy periods) with little extra benefit. The problem with regard to cartel cases in Ireland is too little enforcement not inadequate penalties.

**5: Non-Cartel Cases.**

If the experiment of criminalising cartels can be said to have worked reasonably well, subject to the caveat regarding the level of enforcement, the same can most certainly not be said of non-cartel cases including abuse of dominance. It is generally accepted in Ireland that criminal sanctions are a non-runner in such cases by virtue of the fact that it would be virtually impossible to prove such cases to a jury beyond a reasonable doubt because the distinction between what is pro- and anti-competitive is unclear and is the subject of extensive debate in the economic literature.

The Competition Authority has long argued for the introduction of a system of civil fines in non-cartel cases.[63] It appeared from the original November 2010 Memorandum of Understanding agreed between the Government and the Troika that the Authority was about to have its wishes granted. The 2011 Bill, however, makes no provision for the introduction of civil fines because such provisions would be unconstitutional. It appears that the

[62] Note the Probation Act will not apply to all competition law offences, not just cartel cases.
[63] See, for example, G. Fitzgerald and D. McFadden, D., (2011), Filling a Gap in Irish Competition Law Enforcement: The Need for a Civil Fines Sanction, Competition Authority, mimeo.

Government has concluded that holding a referendum on this issue is not a priority, despite what the Authority might say.

Fitzgerald and McFadden argued that civil fines for competition law would be consistent with the Constitution notwithstanding the traditional interpretation that it effectively prohibits the imposition of substantial fines in civil cases. This is of course a legal question. Nevertheless, some of the arguments they advanced seem contradictory to a non-lawyer. They argued, for example, that such fines would not constitute criminal sanctions because their purpose was "deterrence rather than punishment". Elsewhere in the paper, however, they argue that civil fines are needed as a sanction for non-hardcore cartel infringements.

Massey and Daly pointed out that imposing fines or other forms of penalty in circumstances when it is difficult to distinguish between innocent and harmful conduct, which is the case for non-hard-core cartel behaviour, is problematic.[64] It is difficult to see how civil fines could successfully deter only anti-competitive behaviour when the distinction between pro- and anti-competitive 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 non-hard-core cartel behaviour. This is a major difference between the EU and US systems. The latter is based on a view that the risk of deterring competitive behaviour outweighs the benefit of deterring anti-competitive behaviour in non-hardcore cartel cases.[65]

It is not at all clear that the lack of penalties in non-cartel cases constitutes a serious weakness in Irish competition law. Fitzgerald and McFadden stated 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

[64] Massey and Daly, (2003) at note 3.
[65] Baker, (2009) at note 22, argues, however, that US courts have taken the concern about deterring pro-competitive behaviour too far and loaded matters too heavily in favour of defendants in such cases to the extent that section 2 of the Sherman Act is virtually inoperable.

infringement to an end."[66] The Authority has not identified any instances of non-hard-core cartel behaviour where it decided that it was not worth bringing civil proceedings even though the parties had refused to discontinue certain practices.

The Authority has actually rarely used its civil enforcement powers in non-hardcore cartel cases. Its approach, in some instances, to vertical restraints comes close to a *per se* legal standard.[67] Lawyers have publicly expressed concern that there is no point in making complaints to the Authority. Thus, as in the case of cartels, arguably the real problem is not the lack of effective sanctions but a lack of enforcement. The only abuse of dominance case in which the Authority has gone to court was an action against the Irish League of Credit Unions which was ultimately rejected by the Supreme Court, which was extremely critical of the Authority.

> "It is not altogether surprising that the Authority had failed to provide a convincing analysis of ILCU's activities as being anti-competitive. The history shows that it has changed its position in relation to ILCU on several occasions. It was permitted finally to change its stance from that advanced in the statement of claim only because Mr Collins decided not to object, believing that this radical change of position demonstrated the lack of credibility in the Authority's case. It certainly seems to me to undermine confidence in the Authority's consistency." [68]

The paucity of abuse of dominance cases brought by the Irish Competition Authority is in stark contrast to the situation at EU level and in many other Member States. In this regard the Authority's approach is closer to the US than the EU.

As previously noted, in a number of past cases where the Authority brought civil proceedings and the parties agreed to discontinue certain behaviour, the Authority required them to give undertakings to this effect before the courts. This had the effect of making such undertakings legally binding meaning that any subsequent breach would constitute a contempt of court. This enabled the Authority, for example, to successfully bring contempt proceedings against the LVA after it had advised its members to freeze their prices in response to the downturn in economic activity in 2008. The Authority has been prepared to accept written undertakings

[66] Fitzgerald and McFadden, (2011) at note 63, p.11.
[67] See, for example, P. Massey, (2010), Authority Still Vertically Challenged on LPG, *Competition*.
[68] *Competition Authority* v. *John O'Regan & Others,* Supreme Court 8 May 2007 para 52. The author was an expert witness for the ILCU. For a more detailed analysis of this case see P. Massey, (2008), A League of Their Own: Landmark Supreme Court Judgment Clears Irish League of Credit Unions of Abuse of Dominance, *World Competition*, 31(2).

from parties to settle cases in more recent times. Undertakings given to the Authority, unlike those given to the court, are not legally binding. Arguably, therefore, the Authority has abandoned a potentially significant sanction in non-cartel cases. It appears, however, that this may soon be rectified. The Memorandum of Understanding between the Government and the ECB/EU/IMF Troika dated 12th February 2012 provides

> "Following the introduction of amendments to the Competition (Amendment) Bill at Committee Stage, the authorities will seek to introduce an amendment allowing commitments by an undertaking to the Competition Authority to be made a rule of court having due regard to Ireland's constitutional framework."[69]

**6: Some Conclusions.**

Competition law has been beefed up considerably in Ireland over the past 20 years. Criminalisation of cartels has worked reasonably well, despite dire predictions when such provisions were introduced. There appears to be no demand that criminal sanctions should be abolished in "hard-core" cartel cases. It is difficult to see, however, that there is a case for increasing the maximum prison sentence in cartel cases from five to ten years.

It appears to be widely accepted in Ireland that criminal cases in non-cartel cases are a non-runner. One might therefore argue that this reality should be accepted and criminal sanctions should be abolished for non-hard-core cartel cases. Of course, this would mean that fines could not be imposed on undertakings for such behaviour and this would appear to be incompatible with the requirement that effective sanctions should be available for all breaches of both Article 101 and 102. Nevertheless, it might be appropriate to drop individual criminal sanctions for non-hard-core cartel behaviour.

The real problem in the case of both cartels and other infringements of competition law in Ireland is the lack of enforcement. The Authority argues that it is unable to bring enforcement proceedings because of a lack of resources. It should be noted that, although it has seen its staffing levels decline significantly in recent years, staff numbers are still above their 2002 levels when it was more active on the enforcement front. That is not to say that there may not be a valid case for increasing the Authority's resources. More enforcement activity is likely to have a far greater deterrent effect than increasing penalties. Nevertheless, it is incumbent

[69] EU/IMF, *Programme of Financial Support for Ireland*, 12th February 2012, p. 9. Available at http://www.finance.gov.ie/documents/publications/MOU/MOUjan2012.pdf

on an agency which constantly urges others to operate more efficiently to ensure that it uses its own resources efficiently. This requires some form of effective external scrutiny of the Competition Authority. The Authority should be obliged to show how its activities are benefiting consumers and the economy. The OFT in the UK is required to value the benefits accruing to consumers on foot of its various actions, although if such measures were introduced it might be preferable that such evaluations should be conducted by an external body rather than the Competition Authority itself. In one notable case some years ago the Competition Authority announced that, as a result of its investigations, the Irish Kennel Club had amended its rules in respect of dog show judges. It may well be that such intervention was justified and that it constituted an effective use of the Authority's resources, although without actual evidence on the costs and benefits involved it is difficult to come to nay conclusion in this regard. Suffice to say that many practitioners would probably subscribe to the view that there were many far more serious issues deserving the Competition Authority's attention.

One further issue is the scope for private enforcement under the Irish legislation. Originally the stated intention at the time of the passage of the Competition Act, 1991, was that private enforcement was to be the primary enforcement mechanism.[70] Such hopes have not been realised. The 2011 Bill proposes that where cases have been successfully brought by the 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. This is obviously designed to facilitate private follow-on actions for damages. Of course, such a measure can only be successful if the Authority brings enforcement actions. There are also implications, particularly for the Competition Authority's handling of non-cartel cases. If the Authority accepts out of court settlements rather than seeking declaratory relief in such cases it will deny private litigants the opportunity of availing of this provision in the Bill.[71]

[70] Massey and Daly, (2003) at note 3.
[71] Beaton-Wells, (2009) expressed similar concerns regarding the settlement policy of the ACCC. C. Beaton-Wells, (2009) Australia's Criminalization of Cartels Will it be Contagious, 4th Ascola Conference, Washington DC 16-17 June, mimeo.