COMPECON – COMPETITION ECONOMICS

SUBMISSION TO DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT ON THE REVIEW OF THE COMPETITION ACT, 2002.

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EXECUTIVE SUMMARY.

This submission was prepared by Compecon in response to the request by the Minister for Enterprise, Trade and Employment for submissions on the Competition Act, 2002.

The submission makes a number of proposals which are summarised below.

Penalties.

1. The current system of criminal penalties including a maximum prison sentence of up to five years is appropriate in the case of cartels, given that cartels are a deliberate conspiracy to defraud consumers. A system of fining only the companies involved in cartel behaviour represents a totally inadequate deterrent.
2. Criminal sanctions are arguably inappropriate in non-cartel cases.
3. The introduction of civil fines for breaches of competition law is not justified.

The Cartel Leniency Programme.

4. The Minister should invoke the powers under section 42(2) of the 2002 Act to direct the Authority to publish in its annual report the total number of (i) inquiries; and (ii) formal applications received under the cartel leniency programme and (iii) the number of cases in which the DPP has recommended that a prosecution should be brought. This should be done as soon as possible so that the figures could be included in the Annual Report for 2008, which perhaps could also include such information on a historical basis for previous years.

Private Enforcement.

5. There may be a case for examining the rules of discovery to ascertain if they constitute an impediment to private actions.
6. The possibility of allowing consumers a right to claim damages in the small claims court against firms convicted of participating in cartels should be examined.

Mergers

7. In the case of mergers, it is suggested that the Competition Act, 2002 should be amended to reduce the number of notifications involving cases which have no competition nexus in the Irish market.
8. The current merger notification thresholds should not be reduced.
9. Third parties should have a right of appeal against merger decisions by the Authority provided that only parties that had made submissions to the Authority could appeal.
10. The National Consumer Agency should have a right of appeal against merger decisions by the Authority again subject to the proviso that it could only appeal in cases where it had made a submission to the Authority.
11. Appeals in merger cases should be on the merits.
12. Consideration should be given to the creation of a Competition Appeals Tribunal to deal with appeals in merger cases as well as appeals against decisions by other economic regulators.

Collective Negotiations and Below Cost Selling.

13. Consideration should be given to having fees paid by the HSE to medical professionals for services set by an independent regulatory body. Specifically, it is suggested that the role of the HIA be expanded to include regulation of such fees.
14. The Authority should revisit the issue of collective bargaining as there is a real question mark, at least as far as certain groups are concerned, regarding the Authority's designating them as self-employed rather than employees.
15. There should be no specific prohibition on below cost selling.
16. Where such bans have been proposed on health grounds such as in the case of alcohol, if it is felt that there are good public health grounds for higher prices, then the appropriate mechanism for doing so is through increased taxation rather than any below cost selling prohibition.

Definition of Criminal Offences.

17. The Competition Act, 2002, should be amended to provide for the establishment of a specific cartel criminal offence in respect of individual executives responsible for an undertaking's participation in a cartel. Such an offence could be modelled along the lines of Section 188 of the UK Enterprise Act, 2002.
18. The presumption of having consented to participation in a cartel in an undertaking should not apply to non-executive directors. If a specific cartel offence as proposed above is not created, section 6(7) of the 2002 Act should be amended to exclude non-executive directors.

Role and Functions of the Competition Authority.

19. The legislation should be amended so as to require the Competition Authority to prepare an annual work plan which would specify the expected savings to consumers from each of its activities and to oblige it to publish in its Annual Report an assessment of the extent to which such targets had been achieved.
20. Following publication of its Annual Report each year it should be required to appear before the relevant Oireachtas Committee to answer questions on the achievement of the targets for the previous year together with the proposed targets for the year ahead.
21. There should be no time limits for investigations of complaints.
22. There should be a time limit of 18 months for the conduct of studies.
23. The Authority should not be empowered to decide on infringements of competition law. Such decisions should remain a matter for the courts.
24. The pay and conditions of the Chair and members of the Authority should be brought into line with those of other regulatory bodies.

1: BACKGROUND.

1.1: Introduction.

This submission was prepared by Compecon in response to the request by the Minister for Enterprise, Trade and Employment for submissions on the Competition Act, 2002.

2: EFFECTIVE SANCTIONS NECESSARY.

2.1: Introduction.

Undoubtedly one of the more interesting aspects of Irish competition legislation was the decision to introduce criminal penalties for individual company executives as well as for companies. Defining breaches of competition law as criminal offences involves two different issues.

First, the creation of criminal offences appears to have been necessitated by Constitutional requirements that sanctions can only be imposed for criminal offences.[1] On that basis imposing fines on firms for breaches of competition law required that such breaches be defined as criminal. There has been relatively little discussion of the need to fine undertakings for anti-competitive behaviour, although there has been some debate over the mechanism by which such fines should be imposed. In particular, it has sometimes been suggested that provision should be made for the imposition of civil fines for breaches of competition law. The second issue involves the imposition of penal sanctions including imprisonment on individuals. Some critics have argued that criminal penalties, particularly prison sentences are inappropriate for competition law offences. It is also claimed that the burden of proof required in criminal cases makes breaches of competition law impossible to prove.

2.2: Why Price Fixers Should Go to Prison.

It is sometimes suggested that cartel activity is not really criminal. Such views suggest a rather relaxed approach to "white collar" crime which has traditionally been the case in Ireland. As one Government Minister observed:

[1] There appears to have been some debate as to whether some mechanism could be found to provide for civil fines under the Constitution, a question which is not addressed in this submission.

> "Most people are appalled at the notion 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."[2]

Such views are seriously misguided.

Many areas of competition law constitute grey areas. In the case of cartels, however, there is virtually no room for debate regarding their object and effect. There is widespread agreement among economists that cartels are inevitably harmful. They result in consumers having to pay higher prices than they should for goods and services and impose deadweight losses on the economy in the form of reduced efficiencies.

> "Economists are almost unanimous in the condemnation of cartels, especially those engaged in price fixing, because no expert has satisfactorily established that consumers will benefit from price fixing. On the contrary, economic analysis can show that cartels are inefficient and lessen consumer welfare. It is, therefore, not surprising that antitrusters have the closest meeting of minds on the baleful influence of cartels."[3]

Cartels essentially involve managers and employees of rival businesses secretly agreeing to raise prices to their customers for the goods and services that they supply.[4] Cartels are organised and operated by individuals and companies who calculate that they stand to earn substantial profits from such behaviour. The people behind cartels are not petty crooks; they are clever sophisticated business executives who have risen to senior management positions in their companies. Cartels are a conspiracy to defraud consumers and to deny them the benefits that should result from firms having to compete with one another to win customers or as the then head of the Antitrust Division put it less subtly

[2] W. O'Dea TD, White Collar Criminals Are Getting Clean Away, *Sunday Independent,* 12.4.1998.

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

[4] The US Department of Justice estimates that a cartel will raise prices on average by ten per cent. Department of Justice, (1998), *Sentencing Guidelines Manual,* p.231.

"they are the equivalent of theft by well-dressed thieves."[5] Given that firms can earn substantial profits from engaging in cartels, serious penalties are required to deter such behaviour. The serious harm caused by cartels justifies subjecting them to more stringent penalties than other types of anti-competitive behaviour.

Fining only the companies involved is unlikely to be effective in preventing cartels. It is the individual human persons who run companies who actually make the decisions to engage in cartels. Such individuals frequently stand to gain directly from such decisions in the form of higher salaries, performance related bonuses, enhanced promotion prospects and other benefits as a result of higher profits generated from participating in a cartel. Werden and Simon, for example, observe that, in many instances, most of the monopoly rents accruing from participating in a cartel end up being captured by the workforce in the form of higher wages.[6] If only the company is subject to a fine for engaging in a cartel, it is the shareholders rather than the executives responsible who are penalised.[7] Fining the company in those circumstances will therefore have little deterrent effect. Such fines may simply be regarded as a "cost of doing business".[8]

Calvani points out that the prospect of a fine being imposed on the undertaking, perhaps some years in the future, may not be a serious concern for a company executive who is concerned with the next quarter results, particularly as the executive may no longer be employed by the firm by the time any fine is imposed.[9] As Stelzer observed:

[5] Klein, J., (2000): The War Against International Cartels: Lessons from the Battlefront, in B. Hawk ed. *International Antitrust Law and Policy*, New York: Juris Publications, p.14. Similarly, a UK Government White Paper described hard core cartels as serious conspiracies which defrauded business customers and consumers. Department of Trade and Industry, (2001): *A World Class Competition Regime,* London: HMSO.

[6] Werden, G.J. and Simon, M, (1987): Why Price-Fixers Should Go To Jail, *Antitrust Bulletin,* 24(4): 917-37.

[7] This is an example of what economists refer to as a moral hazard problem.

[8] For a detailed discussion on why prison sentences are necessary in cartel cases see Werden and Simon (1987) note 6 above.

[9] T. Calvani, (2006): Cartel Penalties and Damages in Ireland: Criminalization and the Case for Custodial Sentences in K.J. Cseres, M.P. Schinkel and F.O.W. Vogelaar, *Criminalization of Competition Law Enforcement Economic and Legal Implications for the Member States*, Edward Elgar.

> "Seriously, I believe you will find that it will be a long while before mere fines will destroy the culture of price fixing that permeates British business."[10]

There are other limitations on the effectiveness of fines on companies for engaging in cartels. If fines are set too low then there is no incentive for firms not to engage in unlawful cartel agreements, since participation is likely to be profitable even if the cartel is discovered. Advocating higher fines is no solution. Based on estimates of the likelihood of detection, the extent of cartel gains etc, Wils has calculated that the optimal level of fine would have to be 150% of the firm's turnover in respect of the cartel products.[11] Fines in cartel cases are almost never sufficiently high as to constitute an optimal deterrent and, in many cases, are considerably below this level.[12] US research indicates that, in the case of almost half of all firms found to have engaged in cartels, imposing the optimal level of fines would have bankrupted them.[13] Such an outcome is clearly undesirable, not least because it would effectively penalise all of the firm's employees, the vast majority of whom are not responsible for price fixing. More importantly imposing a fine which would bankrupt the company concerned is not a practical option. This means that setting fines sufficiently high to deter cartels is simply not credible. Thus, if penalties are limited to fines, firms will inevitably recognise that even if they are caught participation in cartels will prove profitable.

Spagnolo recognised that the level of fines imposed in EU cartel cases is "not likely to deter many cartels".[14] In the case of the lysine cartel, Connor estimated that the fines imposed on Archer Daniels Midland in the US would have negated any profits earned in

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[10] I. Stelzer lecture delivered on 15.11.2000 at No.11 Downing Street, reproduced in I. Stelzer (2001): *Lectures on Regulatory and Competition Policy,* London: Institute for Economic Affairs.

[11] Wils, W.P.J., (2002): Does Effective Enforcement of Article 82 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*. Wils subsequently suggested that the optimal level of fines should be even higher. 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.

[12] OECD, (2004): *Cartels: Sanctions Against Individuals*, Paris: OECD.

[13] Craycraft, C., and Gallo, J.C., (1997): Antitrust Sanctions and the Firm's Ability to Pay, *Review of Industrial Organization,* 12: 171.

[14] Spagnolo, G. (2006): Criminalization of Cartels and Their Internal Organization in K.J. Cseres, M.P. Schinkel and F.O.W. Vogelaar, *Criminalization of Competition Law Enforcement Economic and Legal Implications for the Member States*, Edward Elgar.

the US from participation in the cartel but the level of fines imposed in other jurisdictions, including the EU, meant that the cartel was actually profitable for ADM and its co-conspirators.[15]

There are therefore particularly good reasons to believe that effective deterrence of cartels requires that the individuals within a company responsible for the decision to participate in a cartel must face penalties. Fines for such individuals are one option. The obvious 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 fines on individuals as an alternative to imprisonment in cartel cases.[16] In New Zealand, consideration was given to the idea of making it illegal for firms to reimburse employees fined for competition law breaches.[17] The Commerce Commission recommended against that proposal on the grounds that it would constitute too great an intervention in a firm's internal affairs.[18] Even if such legislation was put in place, an obvious question arises as to how such measures could be enforced. In contrast, however, individuals cannot pass a prison sentence on to their company.

> **"cartel members frequently asked for a larger fine and non imprisonment, but not once in his time at the DoJ did anyone ask for a smaller fine and a longer sentence."**
>
> Jim Griffin, formerly Assistant Attorney General at the US Department of Justice with responsibility for antitrust enforcement

There are other reasons for believing that imprisonment is likely to provide a strong deterrent to cartel behaviour. Unlike many violent crimes, participation in a cartel is not the result of a moment's passion or transient rage. Those contemplating participating in a cartel are far more likely to weigh the benefits from such participation against the

[15] Connor, J.M., "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, 2004. Some ADM executives were also sent to prison.
[16] Department of Trade and Industry (2001) *A World Class Competition Regime,* London: HMSO.
[17] Ibid.

consequences of getting caught and, therefore, take the threat of imprisonment into account. In addition, imprisonment may be a particularly strong deterrent for white collar individuals. Further evidence that the threat of imprisonment represents a much stronger deterrent than fines for undertakings is provided by Jim Griffin, formerly Assistant Attorney General at the US Department of Justice with responsibility for antitrust enforcement "who said that cartel members frequently asked for a larger fine and non imprisonment, but not once in his time at the DoJ did anyone ask for a smaller fine and a longer sentence."[19]

The UK Government concluded that cartels constitute a serious offence meriting a strong sentence.[20] 83% of UK competition law experts favoured the introduction of criminal penalties for cartels.[21] Hammond and Penrose suggested that the maximum penalty for individuals engaging in cartels should be seven years rather than five.[22] Joshua identified the lack of criminal sanctions as a serious weakness of EU competition law.[23] Similarly Wils has argued in favour of criminal penalties for cartels.[24] He suggests that imprisonment of businessmen sends the message more effectively than fines, because:

- it is far more newsworthy and will thus attract greater publicity and be noticed more by other businesspeople.
- it sends a strong message to law abiding citizens, reinforcing their moral commitment to the rules.[25]

Whelan also argues strongly that individual criminal sanctions are necessary to deter cartels.[26] Recent reports indicate that the incoming Australian Government intends to introduce penal sentences for individuals engaged in cartels.

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[18] OECD (2004) note 12 above. In some jurisdictions such reimbursement might raise issues of possible breaches of company law, although again enforcement problems might arise.
[19] D. Morris, (2004): Chairman's Comments in C. Robinson ed. *Success and Failures in Regulating and Deregulating Utilities Evidence from the UK, Europe and the USA*¸ Institute of Economic Affairs, London, p.63.
[20] See, for example, Department of Trade and Industry (2001) note 16 above.
[21] Note 16 above.
[22] A. Hammond and R. Penrose, (2001): *Proposed Criminalisation of Cartels in the UK,* London: Office of Fair Trading.
[23] Joshua, J. (2001): Flawed Thinking About Price Fixers, *Financial Times,* 2.8.2001.
[24] Wils, W.P.J. (2006): Is Criminalization of EU Competition Law the Answer? in K.J. Cseres, M.P. Schinkel and F.O.W. Vogelaar, *Criminalization of Competition Law Enforcement Economic and Legal Implications for the Member States*, Edward Elgar.

The OECD's 1998 Cartel Recommendation recommended that Member States provide for "effective sanctions of a kind and at a level adequate to deter firms and *individuals* from participating in such cartels."[27] Baker has suggested that sanctions against individuals are the most effective element in the arsenal of enforcement tools available in the fight against hard core cartels.[28] The threat of personal sanctions, including the risk of imprisonment, may provide individuals with a greater incentive to resist corporate pressure to engage in unlawful activity.

The claim that the criminal standard of proof is too difficult to meet appears equally invalid. The DPP has successfully prosecuted a number of individuals and firms for engaging in cartels. Some of these cases were brought under the Competition (Amendment) Act, 1996, even though arguably the provisions of that Act made prosecutions even more difficult than under the 2002 Act. While the number of prosecutions has been limited, this appears to be due largely to the relatively small number of cases investigated.

It is sometimes argued that the continued unearthing of cartels in the US despite a long history of criminal penalties in that country means that the deterrent effect of criminal sanctions may be overstated. Such arguments ignore a number of factors. As Wils points out, no prison sentences were imposed against businessmen for price fixing, except in cases involving acts or threats of violence, until 1959.[29] Indeed, until the mid 1970s, price fixing was classed as a misdemeanour in the US. In 1974 the maximum jail sentence was increased from one to three years, and it was further increased to ten years in 2004. Thus, it is only in the last thirty years that cartels have been defined as a serious criminal offence or felony under US law. The change in legislation was followed by a significant

[25] Note 24 above.
[26] Whelan, P., (2007): A Principled Argument for Personal Criminal Sanctions as Punishment Under EC Cartel Law, *The Competition Law Review*, 4(1): 7-40.
[27] OECD (2004), note 12 above, p. 15.
[28] Baker, D.I., (2001): The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging, *George Washington Law Review*, 69: 715.
[29] Wils note 24 above.

stepping up of enforcement activity during the last 30 years. McAnneny reports that the number of criminal cases filed by the Justice Department increased from an average of 38 per year under the Carter administration to an average of 80 per year during the first seven years of Reagan's presidency. The US courts have also adopted a tougher attitude toward individual defendants showing a greater disposition to impose jail sentences and sentences of a longer duration. Griffin reported that the total number of individuals sentenced to one year or more in jail in the four years up to 2003, exceeded the total for the previous decade.[30] Davidow confirms that the trend towards increased jail sentences is continuing.[31]

It has also been suggested that, in the past, cartel enforcement efforts did not treat such behaviour as a serious criminal issue. For example, Joshua has observed that:

> "The variable record of the 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."[32]

The situation has altered significantly. Detection tools used in other types of criminal investigations are now routinely used in cartel cases. The lysine case signalled a clear intention "to apply tough, 'blue-collar' investigative techniques to what had formerly been treated as a gentle 'white-collar' activity."[33]

In recent years, roughly fifty percent of immunity applications received under the US Department of Justice cartel immunity programme, involved cartels that were previously unknown to the authorities. Hammond has claimed that, in recent years, parties that have approached the US authorities under its leniency programme have reported cartels that specifically did not operate in the US due to concerns about the growing level of

[30] Griffin, J.M., A Summary Overview of the Antitrust Division's Criminal Enforcement Programme, ABA Section of Antitrust Law Annual Meeting, 12 August 2003.

[31] Davidow, J., (2004): Recent US Antitrust Developments of International Relevance, *World Competition,* 27: 407.

[32] Joshua, J. (2000), *The Criminalisation of Antitrust Leniency and Enforcement: the Carrot and the Stick. A View from Europe,* International Bar Association, Amsterdam, p.7.

sanctions imposed in US cases.[34] All of this suggests that increased prosecutions of individual executives for participating in cartels are having a strong deterrent effect.

The case for criminal sanctions including imprisonment for individuals engaged in cartels is therefore a strong one. There is a growing recognition internationally that imprisonment for individuals engaged in cartels is both an appropriate response to the serious nature of such offences and is the only realistic effective deterrent to such behaviour. Consequently, the existing criminal penalties for individuals responsible for firms engaging in cartels in the 2002 Act of a fine and up to five years imprisonment should be retained.[35]

2.3: The Case Against Civil Fines.

It is sometimes suggested that a system of civil fines would represent a more effective means of enforcing competition law than the existing regime of criminal sanctions. There is a legal question as to whether a system of civil fines would be consistent with the provisions of the Irish Constitution. This issue is outside the scope of the present paper. There are strong economic arguments against civil fines.

1. Civil fines are inappropriate in cartel cases because, as described in the previous section, limiting sanctions in cartel cases to fines for undertakings will not deter such behaviour.
2. From an economics perspective, penalties in the form of fines are inappropriate in non-cartel cases, regardless of whether such fines are civil or criminal.
3. The common law tradition is hostile to having the same agency acting as judge, jury, and prosecutor, for what are arguably good reasons; although this is the regime which operates both at EU level and in other Member States.

The first two arguments apply to civil fines per se, whereas the third applies to the idea that the Competition Authority should have the power to impose civil fines.

[33] Connor (2004) note 15 above.
[34] Hammond, S., (2004): Cornerstones of an Effective Leniency Program, ICN Workshop on Leniency Programs Sydney, Australia.

In contrast to cartels, many other areas of competition law constitute grey areas. There is often a very thin dividing line between abuse of dominance and aggressive competition. Similarly vertical restraints may or may not be harmful depending on the specific market conditions in which they operate. As there is no consensus as to what does and does not constitute anti-competitive behaviour in many cases, it is arguable that penalties are inappropriate in such cases. Where investigations show such practices are anti-competitive, requiring firms to discontinue such behaviour would appear to be an appropriate remedy. Penalties may be appropriate where a firm subsequently breaches such an order.

Even where there is a high degree of unanimity that behaviour may be harmful, it is not clear that fines constitute an effective deterrent. Take predatory pricing as an example. A firm engaging in predatory pricing is prepared to incur substantial short-term losses in order to eliminate a rival. It seems unlikely that the prospect of the additional cost of a possible fine would deter it from engaging in such behaviour. Most economic models of successful predation involve firms that are engaged in various different markets so that successful predation in one market allows to firm to earn excess profits not only in that market but in others as well, i.e. – it depends on building a successful reputation as a predator. Is it really likely that potential entrants, having seen a dominant firm eliminate a would-be entrant in one market through a predatory strategy, would be encouraged to try their luck by the imposition of a fine on the predator? It would still be in the dominant firm's interest to establish a reputation for predation even at the risk of a fine.[36] New entrants are more likely to be encouraged by speedy intervention forcing the dominant firm to discontinue predatory behaviour rather than the imposition of a large fine long after a rival has been eliminated.

[35] There may be an issue with respect to non-executive directors which is considered in section of this submission.

[36] That is not to suggest that criminal sanctions are appropriate in such circumstances. The fact that such behaviour is so difficult to identify with certainty means they would be inappropriate as they would inevitably involve a high risk of false findings of guilt.

If fines have a deterrent effect, as their proponents would suggest, then, when the dividing line between what is and what is not harmful is unclear, there is a significant likelihood that firms will play safe and avoid competing too aggressively for fear of overstepping that line. In other words, fines will not only discourage anti-competitive behaviour, but they will also deter firms from competing, which is obviously the opposite of what is intended. Consequently, the threat of serious penalties in non-cartel is likely to prove counterproductive as it may discourage competitive behaviour.[37] At the very least, the threat of fines may significantly increase compliance costs for business seeking to ensure that they do not inadvertently step over the line.

Scherer and Ross point out that penalising firms for abuse of dominance rather than tackling the dominant position itself requires continuous monitoring of dominant firms' behaviour, if it is to be anything other than an occasional "lightening bolt,". They argue that:

> "It is better…to take once and (one hopes) for all whatever structural actions are needed to restore effective competition and then stand back and let market processes do their job."[38]

The Competition Act, 2002, provides that a Court may order the breakup of a firm found to have abused a dominant position.

Many commentators have observed that the fine imposed on Microsoft by the EU Commission, while large in absolute terms, is relatively insignificant, given that company's massive financial resources. Rather it is the potential for the obligations which the Commission is seeking to impose on Microsoft to allow for effective competition that is the real penalty.[39]

[37] On that basis Massey and Daly (2003) argue against penalties in the form of fines on undertakings for non-cartel practices. Massey, P. and D. Daly, *Competition and Regulation in Ireland The Law and Economics,* Dublin: Oak Tree Press., 2003

[38] Scherer, F.M. and Ross, D., (1990): *Industrial Market Structure and Economic Performance,* New York: Houghton-Mifflin, 3rd edition, p.486.

[39] Commission Decision *Microsoft*, COM(2004) 900 final, http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf. In particular the requirement under Article 5 of the decision to provide interoperability information and under Article 6 to offer a version of windows clients operating system which does not include Windows media player.

There are fundamental objections to a regime where the same agency investigates, decides, and imposes sanctions for breaches of competition law, as is the case both at EU level and in most Member States. Inevitably such a regime raises the possibility of wrongful findings of anti-competitive behaviour (false positives). It is extremely difficult for someone actively involved in a matter to view the facts with a dispassionate eye. This is the rationale behind the common law principle that one should not act as prosecutor and as judge and jury.

The Supreme Court judgment which dismissed the Competition Authority's claim that the Irish League of Credit Unions had abused a dominant position provides strong support for the proposition that the Authority should not be given power to impose fines.[40] The Authority was severely criticised by the Court on a number of grounds. Delivering the Court's unanimous judgment, Mr Justice Fennelly criticised the fact that the Authority had repeatedly altered its position observing:

> "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."[41]

He also reprimanded the Authority for failing to provide credible evidence to support its claimed market definition.

> "If it is to arise in another case, I would hope that the Authority would produce cogent factual evidence of the existence of such a product market in representation services."[42]

[40] *Competition Authority* v. *John O'Regan & Others,* High Court Kearns, J. 22 October 2004, Supreme Court 8 May 2007. ILCU is an unincorporated body and its directors were nominated as defendants. For convenience, the present paper refers to the defendants as ILCU.
[41] Supreme Court judgment at 52.
[42] Supreme Court judgment at 55.

It is worth recognising that in this instance the Authority was only required to meet the civil burden of proof and fell far short of that requirement.

The European Commission has, on a number of occasions, made wrongful findings of anti-competitive behaviour. In *Wood Pulp,*[43] for example, the Court of First instance rejected the Commission's findings on the grounds that there was insufficient evidence to prove collusion. Similarly, in *Airtours* the Court found that the economic evidence simply did not support the Commission's decision that the merger would be anti-competitive.[44]

Kolasky has pointed out that, in the US, the FCC, which, unlike the antitrust agencies, can block mergers without having to go to court, had adopted a lesser standard of proof than would be required by a court.[45] Similarly Kovacic has argued that the EU Commission has blocked mergers on occasion on the basis of evidence that would be thrown out by a US court.[46] Kobayahsi has shown that the standard and burden of proof required influence the frequency of false positive and false negative errors.[47]

A system of civil fines for some offences and criminal penalties for cartel offences would provide poor incentives for the Competition Authority. In setting enforcement priorities, the Authority would face a choice between pursuing serious infringements with an extremely high burden of proof and less serious infringements with a lower burden of proof. Faced with such choices, an agency wishing to be seen to be doing something is likely to channel resources into less serious cases because they have a higher chance of success. Over time this would create a perception that civil penalties were "working," while criminal ones were not. Pressure to substitute civil for criminal penalties for "hard core" offences would grow, although, as previously argued fining companies is unlikely to deter them from engaging in cartels.

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[43] *Ahlstrom v. Commission, (Wood Pulp),* [1988] ECR 5193.

[44] *AirTours/ First Choice v. Commission* (T-342/99) [2002] 5 CMLR 25.

[45] Kolasky, W.J., (2001): The FCC's Review of the Bell Atlantic/NYNEX and SBC/Ameritech Mergers: Regulatory Overreach in the Name of Promoting Competition, *Antitrust Law Journal,* 68(3): 771-803.

[46] Kovacic, W.E., (2001): Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy, *Antitrust Law Journal,* 68(3): 805-73.

A system of civil fines should not be introduced for breaches of competition law.

2.4: Irish Experience of Criminal Enforcement.

The Competition Act, 2002, has addressed many of the shortcomings in the former legislation, while the Authority's resources have been expanded considerably. Nevertheless, question marks remain about the paucity of criminal prosecutions. The Authority's Annual Report for 2003 stated that it was only capable of referring one cartel case per year to the DPP, while bringing a handful of civil actions.[48] The Report also indicated that 85% of complaints received by the Authority were closed without any further investigation.

It is difficult to believe that those engaged in cartel behaviour are likely to be concerned about the prospect of imprisonment when the chances of detection and prosecution are so remote.

The experience of both Ireland and the US is that criminal sanctions will have little deterrent effect if there is a perception that they will not be seriously enforced. This is supported by Posner's findings that cartels were more prevalent in the United States during periods when antitrust enforcement was lax.[49]

2.5: Conclusions.

- The current system of criminal penalties including a maximum prison sentence of up to five years is appropriate in the case of cartels, given that cartels are a deliberate conspiracy to defraud consumers. A system of fining only the companies involved in cartel behaviour represents a totally inadequate deterrent.
- Criminal sanctions are arguably inappropriate in non-cartel cases.
- The introduction of civil fines for breaches of competition law is not justified.

[47] Kobayashi, B.H., (1997): Game Theory and Antitrust: A Post-Mortem, *George Mason Law Review* 5
[48] Competition Authority *Annual Report 2003*.
[49] Posner, R.A., (1970): A Statistical Study of Antitrust Enforcement, *Journal of Law and Economics,* Vol.13, 365-419.

3: CARTEL LENIENCY PROGRAMME.

3.1: Introduction.

The Authority has instituted a leniency programme but has refused to disclose any information about its operation and effectiveness or to even provide information on the number of applications received under the programme. It is not possible therefore to fully evaluate whether or not the programme is operating successfully or whether some reforms are necessary.[50]

The term leniency programme is frequently used to describe two different types of arrangements. In the US, for example, the Department of Justice cartel leniency programme provides that the first firm to come forward with information regarding a cartel will be given complete immunity from prosecution, provided certain conditions are satisfied. The firm's executives will also be given immunity from prosecution. In effect, therefore, the US system involves the grant of immunity to the first member of a cartel to come forward. In other jurisdictions, such as the EU, for example, the leniency programme provides for a reduction in fines in return for providing information on a cartel. While the first undertaking to come forward will receive the largest reduction in fines, other undertakings involved in the cartel may also benefit from a reduction in fines.[51] The implications and incentives provided by these different types of arrangements may differ quite significantly. The Irish programme is effectively an immunity programme like the US one rather than an EU style leniency programme.

Immunity style leniency programmes attempt to apply the logic inherent in the well–known "prisoners' dilemma" game in favour of competition agencies. The US first introduced a cartel leniency programme in 1978. The programme was considered "an

[50] Massey and Daly, (2003) note 37 above, report that the Authority refused to release such information on "policy grounds".

immediate success because it resulted in several important criminal prosecutions and effectively destabilized the cartel business." Applications subsequently declined and "many corporations probably believed that the policy and the prosecution of antitrust offenders was past history."[52] The programme was substantially amended in 1993 with the introduction of leniency after the investigation had begun.

3.2: Review of Leniency Programmes.

The following table summarises the impact of leniency schemes in certain jurisdictions.[53]

Impact of Leniency Schemes in Certain Jurisdictions.

Country	Outcome
United States	1978-1993 1 Application per year. 1993- Average of 20 applications per year.
EU	1996-2002 11 cases. 2002 – 2004 34 applications.
UK	16 Applications in 2003/4.
Korea	1997-2001 1 Application.
Ireland	Competition Authority does not disclose number of applications.

The dearth of information on the prevalence of cartels obviously makes it difficult to assess the impact of leniency programmes. These results lend some support for the view that leniency programmes can assist in detecting cartels. In the case of the US the number of leniency applications has averaged 20 per annum since 1993, compared with an average of one per year over the 1978-93 period. Unless one believes that the incidence of cartels has increased twenty-fold since 1993, then the dramatic increase in the level of

[51] OECD (2001). The report notes that public announcements do not always clearly distinguish between the two different types of programmes, while some use the terms "amnesty" and "leniency" almost interchangeably. OECD, *Report on Leniency Programmes to Fight Hard Core Cartels,* Paris, 2001

[52] Klawiter D.C., (2000): Corporate Leniency in the Age of International Cartels: The American Experience, *Antitrust,* summer: 13-17.

[53] Sources: Annual Report of the Director General of Fair Trading 2003/4; EU Commission (2004); OECD (2001) note 51above.

applications being made under the US leniency programme tends to suggest that it has succeeded in significantly increasing the level of cartel detection. The decision to amend the programme to allow leniency even in cases where an investigation has begun appears to have been a major factor in the programme's success. Evidence that 50% of applications received since 1993 involved cases of cartels that were previously unknown to the authorities, i.e., cases where no investigation was underway, suggests, however, that other considerations have also been important. In spite of the apparent success of the US programme, Klawiter suggests that corporations remain reluctant to come forward and provide information "except in the most severe circumstances." One dissuading factor is the knowledge that, as a result of such actions, "there could be severe and irreparable consequences to it in the marketplace."[54] He, nevertheless, observes that firms coming forward and seeking leniency has become far more common in the US.[55]

Following on from the apparent success of the revised US programme, the EU introduced its own leniency programme in 1996. The EU programme was significantly modified in 2002 due to the low application rate under the initial scheme. Under the revised scheme, the first firm to come forward with decisive evidence may receive full immunity from fines. A second important change was the introduction of a provision for the grant of conditional immunity, which increased the degree of legal certainty afforded to applicants.[56] The revised programme would appear to have increased the level of detection of cartels within the EU.

It is generally accepted that deterrence depends on a combination of the potential penalties and the likelihood of detection. Thus, if one accepts that effective leniency programmes increase the likelihood of detection, then it seems reasonable to conclude that they also constitute an increased deterrent.

[54] Klawiter (2000), note 52 above, p.16.
[55] Klawiter (2000), note 52 above.
[56] Under the original scheme no decision was taken on the grant of immunity until the case had been decided.

The table shows that the effectiveness of leniency programmes, as measured by the number of applications can vary considerably. The initial low success rate of both the US and EU schemes illustrates the importance of designing leniency programmes carefully. Poorly designed leniency programmes are unlikely to succeed. It also demonstrates that it is important to review such programmes in order to identify ways in which they can be improved. Given the relative size of the two economies, the UK results compare quite favourably with those for the US, suggesting that important lessons regarding the design of leniency programmes can be learned from experiences elsewhere. The UK scheme appears to be closely modelled on that of the US.

A number of authors have argued that the existence of criminal sanctions for individuals can reinforce the effectiveness of leniency programmes. It is suggested, for example, that the threat of imprisonment can provide a strong incentive for individual executives to come forward. This is why, for example, the US has a leniency programme for individuals as well as for companies. The US agencies believe that the corporate leniency programme would not be as successful as it is without the risk of individual criminal prosecutions.[57] Joshua notes that the Commission does not have the tactical advantage of the obvious potential for conflict between corporate and private interests.[58]

The upsurge in EU leniency applications since the programme was amended in 2002, seems to run counter to the US argument that the threat of criminal sanctions plays a significant role in encouraging corporate leniency applications. The EU experience cannot be viewed in isolation, however. Bloom, for example, has suggested that it is the threat of criminal penalties in the US that prompts leniency applications in the US and argues that, without US criminal sanctions and active enforcement by the US authorities, there would be very few leniency applications to the EU Commission.[59]

3.3: Ireland's Cartel Leniency Programme.

[57] OECD (2001), note 51 above.
[58] Joshua (2000) note 32 above.
[59] Bloom, M., (2005): The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy, *Competition Policy International,* 1(1).

The Competition Authority refuses to disclose the number of applications received under its leniency programme on “policy grounds.” It is hard to understand the rationale behind this. Such information would be useful for evaluating the programme’s effectiveness. The programme, which was introduced in December 2001, is not even mentioned in the Authority’s Annual Reports for the past three years begging the question as to why the Authority seems so anxious to hide its light under a bushel.

The indications are that there have been relatively few leniency applications under the programme.[60] To a large extent the programme is modelled on the US and UK programmes, both of which, appear to have been quite successful. There is no reason to believe, therefore, that the low number of applications reflects flaws in the actual programme.[61]

The cartel leniency programme was not even mentioned in the Competition Authority’s last three Annual Reports begging the question as to why the Authority is so keen to hide its light under a bushel.

It is difficult to believe that the low level of leniency applications in Ireland is unrelated to the perception that the risk of criminal prosecution is extremely low. The OECD has pointed out that if penalties are too weak or infrequently applied, then firms may disregard offers to relax them, so that a leniency programme is unlikely to produce any significant results, unless an enforcement agency succeeds in imposing significant penalties on a cartel first.[62]

[60] A journalist who phoned the “cartel immunity hotline” in early 2005 and asked about the number of calls was told: “It doesn’t ring often, but it does ring.” *Competition*, 13(7), p.133.
[61] The programme differs from the US and UK in one important respect. As only the DPP can decide on whether or not to prosecute on indictment, it is the DPP rather than the Authority who must decide whether or not to grant immunity.
[62] OECD (2001) note 51 above.

It has been suggested by some Irish commentators that Ireland's leniency programme has not worked well because it is an immunity programme rather than a leniency programme.[63] There are questions as to whether such arrangements are feasible under the Irish legal system where penalties are solely a matter for the courts and plea bargaining would appear to be precluded. This is a legal issue which is outside the scope of the current submission. There are strong grounds for arguing that such leniency programmes do not constitute an effective deterrent to cartels.

The effectiveness of leniency programmes which provide for a reduction in fines for undertakings other than the first to come forward in return for cooperation with enforcement agencies has been questioned. Motta and Polo, for example, suggest that providing for reduced penalties actually increases incentives to collude as they effectively reduce the potential costs to firms from participation in the cartel.[64] In other words if all or most cartel participants know in advance that if the cartel is detected cooperation with the authorities following discovery will secure a reduction in fines, then the incentive to participate in the cartel is perversely increased, as such participation is more profitable. Where lower fines are limited to the first member of the cartel to come forward, such arguments would not appear to apply. No firm could be sure *ex ante* that it would be the one to benefit from leniency in those circumstances and so they could not count on receiving a lower fine.

3.3: Conclusions.

The current cartel leniency programme does not appear to be working very well. Certainly, it has given rise to very few prosecutions. One of the real problems is that there is no information available about the programme with the Competition Authority refusing to even indicate how many inquiries or applications it has received. There can be no valid justification for such a refusal. Simply disclosing the number of inquiries, the number of

[63] See, for example, *Competition* 15(7), p.132.
[64] Motta and Polo (2003). They also argue that restricting leniency to cases where no investigation has been opened completely eliminates the incentive for firms to come forward. Motta, M., and M. Polo, (2003):

formal applications and the number of cases which have resulted in formal prosecutions could in no way hinder the Authority's ability to investigate cartels. Indeed, by highlighting the existence of the leniency programme it would arguably enhance the effectiveness of the programme.

In order to establish whether or not the cartel leniency programme is effective information is required on the number of applications. This would not require any legislative changes. Section 42(2) of the Competition Act, 2002, provides in respect of the Competition Authority's Annual Report that:

> "Each report under *subsection (1)* shall contain information in such form and regarding such matters as the Minister may direct."

The Minister should invoke the powers under this section to direct the Authority to publish in its annual report the total number of (i) inquiries; and (ii) formal applications received under the cartel leniency programme and the (iii) number of cases in which the DPP has recommended that a prosecution should be brought. Indeed, it would be useful to introduce this change as soon as possible so that the figures could be included in the Annual Report for 2008, which perhaps could also include such information on a historical basis for previous years.

Leniency Programmes and Cartel Prosecution, *International Journal of Industrial Organization,* 21(3): 347.

4: PRIVATE ENFORCEMENT.

4.1: Introduction.

Since 1991 Irish competition legislation has provided private parties harmed by anti-competitive practices with a right of action.[65] Such parties may claim an injunction and/or damages and there is provision for exemplary damages. In 1996 this right of action was widened allowing parties who had suffered damage as a result of anti-competitive behaviour to sue individual directors of the undertakings concerned as well as the undertakings themselves and similar provisions are included in section 14 of the Competition Act, 2002.

The experience with private actions has been mixed. In a number of high-profile cases particularly in the early years, alleged anti-competitive behaviour was only one of the grounds cited by plaintiffs. In several of these cases the courts found in the plaintiff's favour in respect of the non-competition issues and effectively concluded that they did not need to consider the competition issue. There was some feeling that judges were uncomfortable with complex economic arguments particularly in abuse of dominance cases.

4.2: Discovery Rules May Stymie Private Actions.

Certainly, parties wishing to pursue private actions face considerable difficulties. The most important of these relates to obtaining evidence. The Irish courts have seriously limited the ability of plaintiffs in competition cases to obtain necessary documentation through the discovery process. Rejecting a request by a firm alleging that it had been the victim of predatory pricing for access to documents which might indicate a general pattern of anti-competitive behaviour by the alleged predator, Herbert J. held:

> "Even if a system of market control by the Defendants could be established by evidence it would amount in essence to a detriment to the purchasers of their products specifically and to the public generally and only incidentally, if at all, to potential competitors and then only to the extent to which the specific activities were particularly directed against them."

He went on:

> "In my judgement non-competitive business practices on the part of the Defendants, except where they can be alleged to have an identified and specific impact on the Plaintiffs, are a matter for the Competition Authority or the European Commission and are not matters with which this Court can be concerned in litigation inter partes."[66]

This view would appear inconsistent with the fact that private enforcement has been a key feature of Irish competition legislation since 1991.

Certain decisions by the Competition Authority have also not been overly helpful to parties wishing to pursue private actions. In 2003 the Authority settled a civil action against an association representing pubs in Dublin City on foot of undertakings by the association to discontinue certain practices. As part of the settlement the Authority agreed not to make any public comment regarding the case.[67] In other words it is not possible to ascertain the nature of any alleged anti-competitive behaviour or the evidence on which the Authority had relied in bringing proceedings. Such secrecy would not appear to be in the public interest and is certainly not helpful to any parties wishing to take follow on actions in the wake of actions by the Authority. In accepting undertakings, the Authority has rejected the possibility of obtaining a declaration that particular behaviour is in breach of the Act.

4.3: A Competition Small Claims Court.

[65] The Competition Act, 1991, which first introduced prohibitions based on Articles 81 and 82 provided private rights of action to parties aggrieved by anti-competitive agreements or abuses of a dominant position but gave the Competition Authority no enforcement role.

[66] *Framus Limited & ors. v. CRH plc & ors.* High Court Herbert J. unreported 12th April 2002. The judgement was subsequently upheld by a Supreme Court judgement of 22nd April 2004.

At the time of the passage of the 2002 Act, the Authority opposed the idea of establishing a form of “small claims court” to deal with minor cases. While such a body would not overcome the difficulties involved in obtaining evidence, it might provide an avenue for individual consumers to claim damages in instances where breaches of the law had already been proven. It might therefore provide an important means of redress for individual consumers in a legal system which does not allow class actions, treble damages, or contingency fees, all of which are seen as important to private actions in the United States.

The harm to individual consumers from a particular cartel is likely to be relatively small. The gains are large because large numbers are affected. It would not be worthwhile for any individual consumer to bring proceedings for damages under the existing system, even against firms that had been convicted of cartel behaviour. If the right of private action is intended to provide any redress to individual consumers for the harm suffered as a result of anti-competitive behaviour, then there needs to be an effective mechanism to enable them to claim damages. This means the system has to be designed to cope with the fact that the harm to each individual may be small.

Allowing consumers, a right to make claims in the small claims court in the case of undertakings convicted of participation in cartels is one options that might be looked at. The only other option for providing effective redress for consumers would be to establish a mechanism for class actions by consumers.

4.4: Conclusions.

- There may be a case for examining the rules of discovery to ascertain if they constitute an impediment to private actions.

[67] P. Massey and D. Daly (2004): Authority ‘decision’ against Statoil pricing strategy poses problems, *Competition,* 12(10): 243-6.

- The possibility of allowing consumers a right to claim damages in the small claims court against firms convicted of participating in cartels should be examined.

5: MERGERS.

5.1: Introduction.

Over four years have passed since responsibility for adjudicating on merger cases was transferred from the Minister for Enterprise, Trade and Employment to the Competition Authority on the coming into force of Part III of the Competition Act, 2002 on 1st July 2003.

5.2: Overview of Merger Notifications.

Table 1 provides a summary of mergers notified to the Competition Authority and their outcome for the period from 1st July 2003 to 31st December 2006.

Table 5.1: Notified Mergers 2003-6

	Notifications	Phase I	Phase II	Conditions Imposed	Prohibited	Withdrawn
2003	47	41	3	1		2
2004	81	78	3	2	1	
2005	84	82	1	6		1
2006	98	93	4	2	1	1
Total	310	295	11	10	2	4

310 mergers were notified to the Authority over the three-and-a-half-year period. Of these 295 were cleared after an initial phase I investigation. In five of these cases, all in 2006, the transaction was cleared after undertakings were offered by the parties. In one 2006 case, a merger was cleared at phase I because the Authority missed the deadline for taking a decision, although the parties according to the Authority had offered certain

undertakings and agreed to abide by them although they were under no obligation to do so. This is included in the overall total of ten cases where clearance was given on foot of undertakings/subject to conditions.

Only 11 cases went to a full phase II investigation, while three were withdrawn and one was referred to the EU Commission by the Authority. In other words, only 3.5% of all notified mergers were subject to a phase II investigation. In five of those cases the merger was cleared subject to conditions while just two mergers have been prohibited. If we assume that the six cases cleared at phase I on the basis of undertakings would otherwise have been subject to a phase II inquiry, the proportion of phase II cases would increase to 5.5% which is certainly not out of line with international comparisons.

What the overall figures do not reveal, is that many notified mergers have no impact on the Irish market. They are transactions between overseas firms where one of the parties happened to have an Irish subsidiary. Such mergers pose no concerns from a competition perspective. In reality such cases should not have to be notified and simply represent an unnecessary burden both for the Authority and for the firms concerned. The Authority has indicated that it would like to see changes in the legislation that would greatly reduce if not eliminate such notifications. It is not easy to discern from the information published by the Authority the exact number of such cases. It would be useful if the Authority published some breakdown of total merger notifications, showing the number that had no competition nexus in the Irish market. This would provide a clear indication of the extent of such notifications and also provide a clearer indication of the output of the Authority. Figures on the ratio of phase II investigations to total notifications clearly have little meaning if many of the notifications have no competition nexus in Ireland.

5.3: Assessment.

Overall, the Authority has performed well. It has dealt with a large number of merger notifications and, with one exception, has processed cases within the statutory deadlines. The real test of the efficacy of a merger control regime is whether or not it arrives at the

correct decisions. Two types of errors may arise in merger cases. The Authority might wrongly find that a harmless merger was anti-competitive, or it might fail to identify a merger that actually was anti-competitive.

The fact that only two cases have been prohibited outright of itself limits the potential number of false positives. The low refusal rate, however, raises questions about possible false negatives, i.e., anti-competitive mergers that were not identified by the Authority.

Of course, false negatives are not the only possible explanation for the low number of refusal decisions. For example, if parties recognise that anti-competitive mergers are unlikely to be approved, they may well be deterred from entering into such transactions to begin with. As against this one might anticipate that in the early stages of a new merger control regime, parties might be tempted to see if they could get anti-competitive deals past the regulator, in which case one might expect a higher failure rate in the early years of a new regime if it is working effectively. It is simply not possible to quantify how many potential anti-competitive mergers have been discouraged by the new regime.

5.4: The Notification Thresholds.

The Competition Authority has advocated a lowering of the existing notification thresholds. The case for doing so appears weak. The only justification for lower thresholds is that many seriously harmful mergers are going ahead unchecked. Unless parties voluntarily notify such mergers, thereby subjecting them to scrutiny by the Authority, it is open to the Authority and others to challenge them under section 4 and/or section 5 of the 2002 Act. There have been no such cases. At the very least the Authority should be obliged to produce detailed evidence, including specific examples, that a number of seriously anti-competitive mergers have escaped scrutiny as a result of the current thresholds being too high.

As the figures up to the end of 2006 demonstrate the vast majority of notified mergers do not pose competition concerns. The same would almost certainly be true if the thresholds

were lower. Thus, lowering the thresholds would greatly increase the number of notifications while at best only unearthing a small number of problem cases. Again, it is difficult to justify lower thresholds on that basis.

A further issue that arises in the case of a lowering of the thresholds is whether it would represent a good use of Authority resources. More notifications would obviously require that more resources be allocated to processing such notifications which means that they would not be available for other activities. Whether diverting resources from other activities to processing additional mergers would be welfare enhancing must be open to serious question. The same argument would apply were it to be suggested that the Authority's resources should be increased to handle additional merger notifications. In this instance the question is whether, if additional resources were to be provided, they would be best used by handling more merger notifications than in any other activity. Again, it would seem unlikely that this would be the case.

5.5: Appeals

The risk of wrongful decisions raises obvious questions about the need for an effective review mechanism. The 2002 Act provides the merging parties with a right of appeal. There is no provision for appeals by third parties. In effect this means that potential false positive cases are reviewable but false negatives are not. This seems to represent a serious flaw in the legislation. In other words, if the Authority mistakenly approves an anti-competitive merger, third parties, often individual consumers, who are likely to bear the cost of such an anti-competitive merger have no right of redress. This is a serious shortcoming which needs to be addressed.

At present appeals in merger cases are dealt with by the Courts. The legislation provides that the appeal may be made in respect of any issue of fact or law, although the court "shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be fact by the Authority in exercising the relevant powers under *section 22* were

correctly so accepted or found." This appears to leave very little room for an appeal on the merits.

There should be a right for concerned third parties to appeal against decisions by the Competition Authority to approve a merger. Obviously, there are dangers that such powers might be abused particularly by business rivals. The right of appeal should be subject to certain limits. In particular only parties that had made submissions to the Authority objecting to the merger should be entitled to appeal. Consideration should also be given to giving the National Consumer Agency the right to lodge an appeal on behalf of consumers, again subject to the proviso that it could only appeal if it had lodged an objection with the Authority.

The next issue is the scope of an appeal. The issue of regulatory failure has been widely recognised in the economics literature for almost 40 years. Despite this and despite the serious costs arising from regulatory failure, legislation governing regulatory bodies has largely failed to provide an effective mechanism to address this.[68] The probability of regulatory failure and the costs arising as a result require that there be an effective regime to review appeals against regulatory decisions. Such appeals should not be confined to points of law or procedure but should include a full right of appeal on the merits.

The Courts would not appear to be properly equipped to undertake detailed reviews of merger cases given the complex issues involved and the need for a speedy resolution. Consideration should be given to the establishment of a specialist appeals tribunal along the lines of the UK Competition Appeals Tribunal which would have responsibility *inter alia* for considering appeals of merger decisions by the Competition Authority.[69]

5.6: Conclusions.

[68] For a more detailed discussion on the issue of regulatory failure and the need for regulatory appeals see, Mason, R., Massey, P. and McDowell, M., (2007): *Telecoms Competition on Hold – The Need to Address Inefficient Regulation,* paper presented to Dublin Economics Workshop Annual Economic Policy Conference, Kenmare, October 2007.

At the time of the introduction of the 2002 Competition Act there was strong opposition to the proposal to transfer responsibility for merger decisions from the Minister to the Competition Authority. Four years on, one wonders what all the fuss was about. The Authority has certainly done a good job.

The main conclusion emerging from a brief examination of the 300+ mergers dealt with by the Authority in the first three and a half years of the Act is that some changes are required. It is suggested that the legislation should be amended so as

(i) To reduce the number of notifications involving cases which have no competition nexus in the Irish market;

(ii) The current notification thresholds should not be reduced;

(iii) Provide a right of appeal to third parties against merger decisions by the Authority provided that only parties that had made submissions to the Authority could appeal.

(iv) Provide the National Consumer Agency with a right of appeal against merger decisions by the Authority again subject to the proviso that it could only appeal in cases where it had made a submission to the Authority.

(v) Provide that there would be a right of appeal on the merits in merger cases.

(vi) Consideration should be given to the creation of a Competition Appeals Tribunal to deal with appeals in merger cases as well as appeals against other decisions by other economic regulators.

[69] Mason et. al. note 68 above proposed that such a body would also have responsibility for deciding appeals against decisions by the other economic regulators, although that is outside the scope of the current submission.

6: COLLECTIVE BARGAINING AND BELOW COST SELLING.

6.1: Introduction.

Many countries exempt collective bargaining agreements between trade unions representing employees and their employers. Such agreements are not explicitly referred to in the Competition Act, 2002, although it seems clear that employees are not undertakings as defined by the Act so that collective wage setting is not caught by the legislation. The prohibition on collective agreements between undertakings has given rise to two types of problems in Ireland. These relate to:

1. Setting of fees paid by state agencies, notably the HSE to medical professionals for services; and
2. Collective bargaining on pay rates for “self-employed” individuals.

The Labour Party recently sought to introduce legislation excluding such groups from the scope of the Competition Act, 2002.

6.2: Medical Fees.

In January 2006, the Competition Authority issued a consultation document on the collective negotiation of medical fees.[70] This followed the settlement of legal proceedings brought by the Authority against the Irish Hospital Consultants Association (IHCA) in September 2005. The Authority stated in the consultation paper its view that collective negotiations on fees between a representative body and a private health insurer are prohibited under Section 4(1) of the Competition Act, 2002. The Authority went on to list alternative mechanisms for setting medical fees that are unlikely to breach the Competition Act. These are:

- Fee setting by the payor;
- Application of a messenger model; and

- Contracting with hospitals.

The first of these involved the purchaser of the service, e.g., the health insurance company deciding what rates it is prepared to pay for particular services. It would then be up to each individual medical practitioner to decide whether or not to agree to provide services for the offered rate. The messenger model as outlined would involve doctors hiring a third party to act as a messenger. This third party would obtain from each doctor concerned information regarding the level of fees they would accept from an insurer for their services. They would then provide this information to the insurer who then decides how much to offer for services. The messenger would not enter into negotiations nor would it have any role in advising the insurer in respect of rates. The third option involved the insurer contracting with a hospital for the provision of medical services, it then being a matter for the hospital to agree fees with individual consultants.

Following this consultation, the Authority subsequently announced that it was unable to come up with a workable solution and effectively walked away. Subsequently the HSE argued that it was precluded from negotiating fees for the provision of services with doctors, pharmacists, and other medical professionals. This has led to considerable uncertainty and something of a stalement.

The issue here relates to instances where services are provided to consumers by the State such as medical services and medicines under the GMS scheme. The consumer receives the service or medicine for free and the State pays the cost. In the case of GMS medicines, the State pays the drug companies and pays a dispensing fee to pharmacies.

There are a number of aspects to this issue. For example, in the case of medicines dispensed by pharmacists under the GMS scheme or under the free methadone scheme there is an arguable case that the pharmacist is acting as an agent of the HSE. Agents are

[70] Competition Authority: *Consultation on Guidance in respect of Collective Negotiations relating to the setting of Medical Fees,* January 2006.

generally considered not to be independent undertakings.[71] Whether a body representing agents could negotiate agents' fees is an interesting question. This might represent one means of resolving the issue.

Negotiating rates for such services with each individual service provider is simply not practical. Nor is it clear that the HSE would seriously wish to have a multiplicity of different rates for such services.

The Minister for Health has apparently proposed that responsibility for the setting of fees for such services might be assigned to a body such as the Review Body on Remuneration on Higher Pay in the Public Sector. This would be one possible option, although it essentially implies treating the service providers as employees which may not be appropriate.

A more appropriate alternative might be to have fees independently determined by a regulator. The remit of the Health Insurance Authority, for example, could be expanded to include the regulation of fees paid to various medical professionals by the HSE. Representative bodies would appear to be entitled to make submissions to such a body. A regulator unlike a pay review body would be entitled to take account of the scope for efficiency gains and other factors in determining fee levels. Price cap regulation, for example, could be employed thereby providing the service providers with strong incentives to improve efficiency something which a pay review type mechanism is far less suited to.

6.3: Self-Employed.

Reports indicate that the Competition Authority brought proceedings against the Irish branch of Equity which is a part of the trade union SIPTU alleging that it was in breach of Section 4(1) of the Competition Act, 2002, in seeking to negotiate rates for actors

[71] It is also recognised under competition law that certain bodies may be undertakings for certain activities and not for others.

appearing in commercials. The Authority took the view that such individuals were self-employed, and that collective negotiation of rates amounted to price fixing.

The Authority's position in this case would seem to be questionable. Arguably such individuals are employees, albeit hired on the basis of very short-term contracts. For the duration of the contract, they carry out the instructions of the employer and do not pursue interests separate from those of the employer.

The Authority's stance has undoubtedly given rise to pressure to change the legislation. The difficulty is that other groups are likely to take advantage of this to try and secure exemptions for themselves. Indeed, it is difficult to see how this issue could be resolved by legislative changes that would not result in a weakening of competition law.

There appears to be a case, however, for arguing that the Authority needs to revisit this issue. The Authority has previously accepted that music composers can conclude collective agreements with music users which implicitly involves some degree of price fixing, although this is merely an ancillary consequence of collective agreements for which there is a legitimate justification. In other words, entities which far more clearly constitute undertakings can sell their product collectively, while other individuals are effectively precluded from selling their labour collectively, solely because the nature of their employment is casual.

6.4: Below Cost Selling Bans

The Competition (Amendment) Act, 2006 abolished the Restrictive Practices (Groceries) Order 1987. The best-known provision of the Order was its prohibition on below cost selling. The case against the Order has been set out extensively elsewhere and is not discussed at length in the present submission. Below cost selling bans restrict competition, harm consumers and are unwieldy.

The Minister for Justice has recently expressed an intention to introduce a ban on below cost selling of alcohol. According to reports this would appear to be targeted at off licence premises. It is suggested that such a measure is justified on public health grounds. Whether or not some measures to restrict alcohol consumption are justified on public health grounds is beyond the scope of the present submission. A below cost selling ban, however, would appear to be a poorly designed means of achieving the stated public health objectives.

Regulation frequently restricts competition in many sectors of the economy by limiting entry, or by conferring monopoly rights on incumbent firms, or in some other fashion. Such effects may be unavoidable as there may not be a less restrictive way to achieve what is a desirable public policy objective, or they may simply reflect a failure to fully evaluate the consequences of regulatory interventions. It is also the case that regulations are sometimes introduced with the specific intention of restricting competition because of pressure and lobbying by vested interests. Such regulations are often claimed to be in the wider public interest, although this is not in fact the case. Regulation also tends to favour particular types of activity and, thus, benefit certain sectors of the community at the expense of others. If the aim is to reduce alcohol consumption, it is questionable that a ban on below cost selling by off licences would achieve that end. Despite declines in recent years, most alcohol consumption in Ireland is still due to on-sales. Of course, such a restriction would reduce competition and benefit certain businesses at the expense of others and increase profits of both on and off licence premises.

If it is considered desirable to reduce alcohol consumption and one believes that higher prices will bring about such a result, then the appropriate response is to increase alcohol taxes rather than a ban on below cost selling.

6.5: Conclusions.

The issue of collective negotiations needs to be addressed in respect of:

1. Fees paid by state agencies, notably the HSE to medical professionals for services; and
2. Pay rates for certain “self-employed” individuals.

In the former case, it is submitted that consideration should be given to having such fees set by an independent regulatory body. Specifically, it is suggested that the role of the HIA be expanded to include regulation of such fees. In the latter case, the best solution would be for the Authority to revisit the issue. Its current position seems misguided and may give rise to further pressure to weaken competition law. There is a real question mark, at least as far as certain groups are concerned, regarding the Authority’s designating them as self-employed rather than employees.

Below cost selling bans are anti-competitive and should not be introduced. Where such bans have been proposed on health grounds such as in the case of alcohol, if it is felt that there are good public health grounds for higher prices, then the appropriate mechanism for doing is through increased taxation rather than any below cost selling prohibition.

7: THE CRIMINAL OFFENCES.

7.1: Introduction.

Section 6 of the Competition Act, 2002, 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 81(1) are committing an offence subject to criminal sanctions. Section 7 creates the offences of breaching section 5(1) or Article 82.[72] The 2002 Act thus provides that breaches of Articles 81 and 82 constitute criminal offences.

The Act distinguishes between what are commonly referred to as, "hard-core" competition 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-
>
> - 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,
> - limit output or sales, or
> - 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

[72] Section 5(1) repeats the provisions of Article 82 except that it refers to a dominant position within the State or any part of the State. Reference to a substantial part of the State was dropped during the course of the passage of the legislation through the Oireachtas. According to Department briefing notes this was to make it easier to prosecute such cases. See P. Massey and D. Daly (2003) note 37 above.

regarded by customers as interchangeable or substitutable in terms of their characteristics, price and intended use or purpose.

In the case of offences under Sections 6 and 7, other than those specified under section 6(2), a firm 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. 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 guilty of an offence as well and may be subject to similar penalties. Under Section 6(7), a director or key decision maker[73] of an undertaking found to have committed an offence under section 6 or 7 is presumed to have consented to such behaviour unless they can prove otherwise.

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 imprisonment 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.[74]
- The provision of a maximum prison term of five years means that individual company executives suspected of engaging in such behaviour may be arrested 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.[75]

7.2: The Case for a Specific Cartel Offence.

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

[74] This represents a significant change compared with the previous legislation, the Competition (Amendment) Act, 1996, which provided for a maximum jail term of up to 2 years in respect of all offences. Under the 2002 Act prison sentences do not apply to the non-hard-core offences, although the Competition Authority sought the retention of imprisonment of up to two years for such offences.

[75] 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 Hammond and Penrose, (2001) note 22 above.

The 2002 Act addressed many of the shortcomings that were contained in the Competition (Amendment) Act, 1996. It strengthened the Authority's search powers, in particular enabling it to seize original documents; to enter private homes as well as company premises; and to use reasonable force to gain entry if necessary. Increasing the penalties for executives in cartel cases indicates a recognition that such practices cause serious harm to the community at large. It also means that individuals accused of engaging in such behaviour can be detained and questioned by the police for up to 12 hours. Nevertheless, some problems remain.

The presumption in section 6(2) of the Competition Act, 2002, that 'hard-core' activities have the object of preventing, restricting or distorting competition represents a partial move towards the US position where 'hard-core' cartel activities are regarded as illegal per se. Under US law, the prosecution need only prove the existence of a cartel agreement and the defence is precluded from trying to show that such conduct was justified. The position was summarised by the US Supreme Court in Northern Pacific.

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[76]

This approach minimises the costs of enforcement and maximises deterrence, while the risk of errors can be reduced by limiting the rule to behaviour that is clearly harmful.[77] The Hilmer Report advanced similar arguments in favour of the retention of Australia's per se prohibition on price fixing.

> "The current per se prohibition of price fixing is warranted on the basis that the occurrence of efficiency-enhancing price fixing agreements is rare, that the benefits of identifying and permitting efficiency enhancing price fixing agreements in a

[76] *Northern Pacific Railroad Co. v. US,* 356 US 1 (1958), 5.

[77] On this point see Denis, P.T., (1991): Focusing on the Characteristics of *Per Se* Unlawful Horizontal Restrants, *Antitrust Bulletin,* 36(3): 641-50 and Wood, W.C. (1993): Costs and Benefits of *Per Se* Rules in Antitrust Enforcement, *Antitrust Bulletin,* 38(4): 887-902.

> court setting are outweighed by the enforcement and judicial costs of a competition test and the benefit from the certainty induced by such clear rules."[78]

The Competition Act, 2002, stops short of making cartels illegal per se by defining a specific cartel offence. Providing a specific definition of what constitutes the offensive behaviour reduces the scope for the defence to argue that a particular activity is not caught by the offence. [79]

In addition, section 6(3) of the Act provides that a defendant can claim that an agreement, which is contrary to Article 81(1) (or Section 4(1)), satisfies the four conditions contained in Article 81(3). The effect of section 6(3) is that juries may be required to assess complex economic arguments and will, at the very least, greatly increase the length and complexity of cartel cases.

As Joshua observed, Article 81 "is ill-suited to form the basis of a criminal charge".[80] The fact that Article 81 applies a bifurcated test and that the exemption requirements are part of the Treaty pose obvious difficulties. The CFI has stated that, as a matter of law, there are no anti-competitive agreements which could not be eligible for exemption.[81] In spite of this, the then head of DG Competition, argued that so-called "hard core" restrictions such as price fixing could not satisfy the requirements for exemption so that "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." [82]

Before the 2002 Act was passed, the Authority Chairman criticised the failure to include a good definition of hard-core cartel offences in the legislation.[83] The Authority originally

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[78] Hilmer, F.G., (1993): *National Competition Policy: Report by the Independent Committee of Inquiry,* Canberra: Australian Government Publishing Service.
[79] For a discussion on the merits of creating a specific cartel offence see Hammond and Penrose, (2001) note 22 above.
[80] Joshua, J. (2001) note 23 above.
[81] Case T-17/93 *Matra Hachette v. Commission* [1994] ECR II-595, para 85.
[82] Schaub, A., (2001): Continued Focus on Reform: Recent Developments in EC Competition Policy in B. Hawk (ed.) *International Antitrust Law and Policy,* New York: Juris Publications, p.76.
[83] *Competition*, 11(1) 9.

argued that section 6(3) should not apply to the "hard core" category of arrangements. Section 188 of the UK Enterprise Act 2002 creates a specific cartel offence. This provision was included to avoid the need to have complex economic evidence presented to juries.[84] It would appear to provide a way around the difficulty posed by the exemption provisions in the EU Treaty.[85] The Competition Authority subsequently proposed including a similar provision in the Irish Act, but the Department advised the Minister against this on the basis that: "The UK system is different."[86] No argument was put forward to support this alleged difference.

The failure to introduce a specific offence along the lines provided for in Section 188 of the UK Enterprise Act, 2002, constitutes a serious weakness in the Irish legislation. It would appear that in the case of cartels operating in both Ireland and the UK, a criminal prosecution would be easier to bring under UK legislation.

7.3: Position of Non-Executive Directors.

The combined effect of sections 6(7) and 8(6) is that directors including non-executive directors of a company engaged in a cartel commit an offence by consenting such participation and such consent is presumed unless the individual can prove otherwise. This appears to put non-executive directors in a particularly difficult position. Their duty essentially is to protect the interests of shareholders not to act as a surrogate law enforcer by the State. The legislation, as worded, means that non-executive directors face the risk of criminal prosecution if the undertaking of which they are a director has been involved in a cartel. This seems wholly inappropriate and is a disincentive for individuals to take on such a role.

[84] Department of Trade and Industry, (2001) note 16 above.
[85] Hammond and Penrose (2001) note 22 above argued that the creation of a specific cartel offence would go a considerable way to reducing the opportunity for defendants to advance Article 81(3) arguments, while not entirely eliminating the possibility of their doing so. For a detailed discussion of the cartel offence in the UK Enterprise Act, 2002, see R. Whish, (2004): *Competition Law,* 5th edition, London: Butterworths.
[86] Department of Enterprise, Trade and Employment, Memorandum to Tanaiste Re: Amendments to Competition Bill, 2001, 11 February 2002.

This issue ought to be addressed. This could be done by excluding non-executive directors from the relevant sections of the Act. Of course, creating a specific cartel offence without any presumptions would appear to be a better solution.

7.4: Conclusions.

The Competition Act, 2002, should be amended to provide for the establishment of a specific cartel criminal offence in respect of individual executives responsible for an undertaking's participation in a cartel. Such an offence could be modelled along the lines of Section 188 of the UK Enterprise Act, 2002. The presumption of having consented to participation in a cartel in an undertaking should not apply to non-executive directors. If a specific cartel offence is not created, section 6(7) of the 2002 Act should be amended to exclude non-executive directors.

8: ROLE AND FUNCTIONS OF THE COMPETITON AUTHORITY.

8.1: Introduction.

The main functions of the Competition Authority outside the area of mergers are set out in Section 30(1) of the Competition Act, 2002 as follows:

> "(*a*) to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition (which may consist of, or include, a study or analysis of any development outside the State);
>
> (*b*) to carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any breach of this Act that may be occurring or has occurred;
>
> (*c*) to advise the Government, Ministers of the Government and Ministers of State concerning the implications for competition in markets for goods and services of proposals for legislation (including any instruments to be made under any enactment);
>
> (*d*) to publish notices containing practical guidance as to how the provisions of this Act may be complied with;
>
> (*e*) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions;
>
> (*f*) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy;
>
> (*g*) to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition."

The Authority's functions are quite wide ranging, and it is not suggested that they need to be expanded.

The Authority's performance, however, has been mixed. As previously stated, its record in handling merger notifications since responsibility for merger decisions was transferred

to it has been good. In contrast its enforcement record has been quite patchy. It has made wide use of its powers to undertake studies but in several cases, these have taken years to complete.

8.2: The Need for Regulatory Accountability.

The Competition Authority like other regulatory agencies is a monopoly. The economic literature on regulation recognises that regulatory bodies tend to pursue their own agendas and that proper mechanisms of reporting and accountability are necessary to ensure that regulators act in the public interest. Ironically, it is also the case, as Yarrow observed, regulatory agencies "have much weaker incentives to improve their own performance efficiency".[87]

Poor regulatory decisions and ineffective competition law enforcement impose significant costs on consumers and undermine the competitiveness of firms in the traded sectors of the economy.

> "It matters greatly, therefore, who the decision-makers are, how they go about their business, and to what scrutiny they are subject".[88]

The existing legislation fails to provide an effective means for ensuring the accountability of the Authority. It is required to produce an Annual Report and may be summoned to appear before relevant Oireachtas Committees.

In its annual work programme, the UK competition authority, the OFT, is required to estimate how much money each of its activities will save consumers. In its annual report it is required to compare the outturn for the year in terms of consumer savings against the targets set in the work programme. A similar obligation should be imposed on the Competition Authority. Such a requirement would oblige the Authority to consider how any proposed activity would contribute to the overall goal of saving money for

[87] Yarrow, G., (1999): MMC Retrospect and Prospect in M. Beesley ed., *Regulating Utilities: A New Era* London: Institute of Economic Affairs p.35.

consumers. Following publication of its Annual Report each year the Authority should be required to appear before the relevant Oireachtas Committee to review its performance, in particular to assess the extent to which it has achieved the consumer savings targets set for the year and the proposed targets for the following year. It is hardly too much to expect an agency which has regularly criticised inefficient practices by others to clearly set out its objectives; quantify the expected benefits; and subsequently report on the extent to which these have been achieved.

It is hardly too much to expect an agency which has regularly criticised inefficient practices by others to clearly set out its objectives; quantify the expected benefits; and subsequently report on the extent to which these have been achieved.

8.3: Time Limits for Investigations.

It has been suggested from time to time that the Authority should be obliged to complete an investigation into any complaint within a specified time frame. Such proposals do not adequately take account the nature and complexity involved in investigations into anti-competitive behaviour. It is hardly intended that a strict time limit should be imposed on the Authority to carry out a criminal investigation into a serious cartel. It would make no more sense to do so than to have legislation requiring the Gardai to complete an inquiry into a murder or a bank robbery within a specified period of time. Imposing time limits for investigations would simply encourage the taking of shortcuts and, if implemented, would increase the likelihood of cases being closed without being adequately investigated.

[88] Yarrow, G., (2002): Competition Policy: Its Purpose and Scope, *Economic Affairs,* 22(4), p.2.

The position with respect to studies is somewhat different, however. As noted, many of these have taken several years to complete. This is totally unsatisfactory. The legislation should be amended to provide for a maximum time limit for a study of 18 months.

8.4: Decision Making Powers.

Unlike the EU Commission and competition authorities in many other Member States, the Competition Authority is not responsible for deciding on infringements of competition law. That is a matter reserved for the Courts in Ireland. The role of the Authority is to investigate alleged infringements and where necessary to bring court proceedings or refer the matter to the DPP. The Authority's role in bringing proceedings was summarised by the Supreme Court:

> "The Authority has not made any decision other than to institute proceedings. It identifies market conduct and invites the Court to condemn it. There is no *prima facie* legal presumption in favour of the Authority's view. The Authority carries the normal civil burden of proof."[89]

It has been suggested elsewhere in this submission that the Authority should not be given power to impose fines on parties for breaches of competition law on the grounds that combining the role of investigator, prosecutor and decision-maker increases the likelihood of wrongful findings of guilt. For similar reasons, the Authority should not be empowered to decide on infringements of competition law. Having to put a case before an independent judge provides a strong disciplinary mechanism which should be retained.

8.5: Status of the Competition Authority.

The position of the Competition Authority vis a vis other regulatory agencies needs to be addressed as a matter of urgency. The Chairman and members of the Authority are paid less than the corresponding individuals on the various regulatory agencies such as the CAR, CER and ComReg. It is wholly incongruous that the position of the Chair and

[89] Supreme Court judgement at 38.

members of the regulatory body charged with overseeing all sectors of the economy is considered to be less important in terms of salary and responsibility than the corresponding posts in agencies which have responsibility for a single industry or sector. The recent report of the Review Group on Higher Remuneration in the Public Sector recommended that a new position of Commissioner should be established in respect of the members of the various regulatory agencies. The Chair and members of the Authority should be brought into line with the corresponding positions in other regulatory agencies.

8.6: Conclusions.

- The legislation should be amended so as to require the Competition Authority to prepare an annual work plan which would specify the expected savings to consumers from each of its activities and to oblige it to publish in its Annual Report an assessment of the extent to which such targets had been achieved.
- Following publication of its Annual Report each year it should be required to appear before the relevant Oireachtas Committee to answer questions on the achievement of the targets for the previous year together with the proposed targets for the year ahead.
- There should be no time limits for investigations of complaints.
- There should be a time limit of 18 months for the conduct of studies.
- The Authority should not be empowered to decide on infringements of competition law. Such decisions should remain a matter for the courts.
- The pay and conditions of the Chair and members of the Authority should be brought into line with those of other regulatory bodies.