

CompEcon Limited - Competition Newsletter.

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The Competition Bill 2001 - Summary of Key Proposals.¹

Introduction.

In July the Department of Enterprise, Trade and Employment published *The General Scheme of the Competition Bill 2001*. The key elements in the draft bill are as follows:

- Penalties for engaging in cartels would be significantly increased with provision for jail sentences of up to five years.
- Greater powers would be given to the Competition Authority to investigate such behaviour.
- Responsibility for deciding on mergers would be transferred from the Minister to the Authority.
- The Authority would also be given powers to highlight statutory restrictions on competition.

There is a striking similarity between the proposals and those included in the UK Department of Trade and Industry's White Paper on competition law published around the same time.

Changes to the Criminal Penalties.

The Bill proposes to repeal existing competition and mergers legislation. The prohibitions on anti-competitive agreements between firms and the abuse of market power by firms in a dominant position introduced in 1991 would be retained. However, a clear distinction would be drawn between practices such as price-fixing, market sharing and bid rigging on tenders, which might be

described as 'hard-core' cartel practices, and other types of behaviour. The maximum penalty for managers and directors of firms convicted of engaging in 'hard core' cartels would be increased from two to five years. The existing maximum jail sentence of two years for non-cartel offences would be abolished. The level of fines for firms engaging in cartels and all other types of anti-competitive behaviour remain unchanged at £3m or 10% of turnover whichever is greater. Fines for managers and directors of firms engaged in all forms of anti-competitive activity are retained.

It makes obvious sense to distinguish between cartel behaviour and other practices. Cartels are anti-competitive by definition. They involve rival businesses secretly agreeing to charge higher prices to their customers and are a conspiracy to defraud consumers. Unlike many violent crimes, participation in a cartel is not the result of a rash decision in the heat of the moment. Cartels are organised and operated by individuals and companies who calculate that they can earn substantial profits from such behaviour.

Just as increased penalties for engaging in cartels make sense, proposals to reduce penalties for non-cartel behaviour are welcome. Exclusive distribution and other types of vertical agreements may in some circumstances be anti-

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competitive, and in others may simply increase efficiency. Similarly there is frequently a fine line between aggressive competition and abuse of dominance. Arguably criminal sanctions for non-cartel behaviour should be revoked altogether. This would mean abolishing fines for both companies and individuals as well as abolishing jail sentences for non-cartel offences.

New Powers to Tackle Cartels.

Increasing the penalty for engaging in cartels to five years would allow the Gardai to arrest and detain suspects for questioning for up to six hours with the possibility of a further six-hour extension under the 1984 Criminal Justice Act. The absence of powers to question individuals has been a major stumbling block in cartel investigations up to now. It is also proposed to introduce a number of other provisions, which would greatly assist in cartel investigations.

- Cartels would be presumed anti-competitive thus eliminating the need to prove this point.
- In cartel cases defendants could not rely on the defence contained in the 1996 Act of not knowing that what they were doing was anti-competitive.
- In addition to powers to search business premises, it is also proposed that authorised officers would be able to obtain warrants to search the homes of company directors, managers and other employees.
- It is also proposed to introduce various presumptions regarding documentary evidence.

It is proposed to exempt certain anti-competitive agreements from penalties. To qualify an agreement must increase efficiency, bring some benefits to

consumers and satisfy certain other conditions. Cartels, virtually by definition, are not efficiency enhancing and do not benefit consumers, yet the proposals, as they stand, would permit defendants in cartel cases to argue that they satisfy the requirements for exemption. Undoubtedly this would greatly complicate criminal prosecutions of such cases. It would be far better to include a rebuttable presumption that cartels do not satisfy the conditions for exemption. In the United States cartels are deemed *per se* violations of the antitrust laws and this undoubtedly facilitates successful criminal prosecutions of individuals involved in such activities.

Reform of Merger Controls.

The Bill if enacted would transfer responsibility for deciding on mergers from the Minister to the Competition Authority. Greater transparency would be introduced as the Authority would have to publish details of all mergers notified to it and allow interested parties to comment, while it would have the power to block mergers that substantially lessen competition. The Minister would retain certain powers in respect of media mergers. Such proposals would increase transparency and should provide for better decision making. The Authority's decisions could be appealed to the Courts, raising the possibility that mergers could become bogged down in lengthy legal proceedings.

Competition Advocacy.

It is also proposed that the Authority would be permitted to advise Ministers and the Government regarding the implications for competition of proposed legislation and be able to identify and

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comment on regulatory restraints on competition in the economy. Whether such powers would be sufficient in the face of extensive lobbying by vested interests remains to be seen.

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