

## What Has Irish Competition Policy Achieved?

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Paper Presented to Dublin Economics Workshop Annual Economic  
Policy Conference Kenmare.

15<sup>th</sup> October 2011.

## **1: Introduction.**

It is almost exactly 20 years since the introduction of the 1991 Competition Act which represented the first stuttering steps towards the introduction of a modern prohibition based competition law regime in Ireland. The legislation has been amended three times in the intervening twenty years and in recent weeks the Minister has published proposals for further reform to meet Ireland's obligations under the "bail-out" agreement. Further changes are believed to be in the pipeline. The fact that the legislation has been revised and enhanced with such frequency implies that there were serious deficiencies in the original legislation.

In seeking to answer the question "what has Irish competition policy achieved?" the present paper considers a number of issues.

1. Effectiveness of competition legislation;
2. The merger control regime;
3. Wider aspects of competition policy including the impact of Government regulation.

## **2: The Evolution of Irish Competition Legislation.<sup>1</sup>**

A form of competition law based on the control of abuse principle was originally introduced in Ireland with the passage of the Restrictive Trade Practices Act, 1953. According to Hogan (1989) this legislation reflected a cautious approach due to the fact that it was novel in Ireland at that time.<sup>2</sup> From 1953 until January 1986, a system of price control existed alongside competition legislation. Although the legislation was amended on several occasions, its basic features remained largely unchanged for almost 40 years.

"In the 1970s, instead of proceeding with comprehensive legislation on competition, reliance was placed on such mechanisms as the National Prices Commission to monitor, and occasionally to try to control, prices." (OECD, 2001)

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<sup>1</sup> For a more detailed description of the development of Irish competition law see, Massey and Daly (2003) and Massey and Cooke (2011).

<sup>2</sup> It should be noted that the 1953 Irish Act pre-dated the original EC Treaty and the competition legislation in many other European countries including the UK. Interestingly the Minister responsible for introducing the legislation, Sean Lemass, informed the Dail that the option of prohibition based system modelled on US law had been considered but rejected.

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

- A prohibition on anti-competitive agreements between undertakings;<sup>3</sup> and
- A prohibition on the abuse of a dominant position by one or more undertakings.

The legislation provided that any party aggrieved by such behaviour could bring legal proceedings seeking an injunction, declaration and/or damages including exemplary damages. The Minister was also given the right, which has never been exercised, to bring proceedings seeking an injunction and/or declaration.

A major shortcoming of the 1991 Act was the lack of any effective enforcement regime.

“One of the most consistent criticisms of this legislation was the inadequacy of the enforcement procedures.” (Charleton and Bolger, 1998)

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

“... strengthening of the Competition Authority by giving it enforcement powers and by enabling the Courts to impose stiff fines on those found to be engaging in unfair competition.”<sup>4</sup>

It was subsequently announced that the amended Bill would not only introduce fines for companies found to be in breach of the Act but would also provide for fines and terms of imprisonment for the executives of such companies. (Rabbin, 2005). Thus Ireland became somewhat unique in criminalising all infringements of competition law.<sup>5</sup>

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<sup>3</sup> The prohibition also applies to decisions by associations of undertakings and concerted practices.

<sup>4</sup> *A Government of Renewal* December 1994.

<sup>5</sup> In the case of other jurisdictions which have criminal penalties, such sanctions only apply in respect of “hard-core” cartels. The reason for criminalising all competition law breaches was the generally accepted view that under the Constitution penal fines can only be imposed for criminal offences, i.e. the Constitution precludes administrative or civil fines.

During the debate on the 1996 Act, the Minister announced the establishment of the Competition and Mergers Review Group (CMRG) to review competition and merger legislation. The CMRG (2000) concluded that criminal sanctions were appropriate, at least for “hard-core” cartels. The Competition Act, 2002, was subsequently enacted. The main change introduced by the 2002 Act, from the point of view of the present paper, was that it distinguished between “hard-core” cartel activities such as price-fixing, market sharing and bid-rigging and other types of anti-competitive behaviour. The maximum penalty in the former case was increased from two to five years while prison sentences were abolished for non-cartel offences, although the Competition Authority lobbied for the retention of prison sentences of up to two years in such cases. (Massey and Daly, 2003) Increasing the maximum prison sentence for cartels from two to five years meant that such offences became arrestable offences.

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

The case for fining undertakings for engaging in cartels does not appear to be seriously in dispute. The discussion on whether or not criminal penalties are appropriate for cartel behaviour is therefore primarily concerned with whether criminal sanctions, either in the form of fines or imprisonment, should be imposed on private individuals. There is an extensive literature which supports the view that imprisonment represents an appropriate sanction for “hard-core” cartels. (See, for example, Werden and Simon, 1987; Baker, 2001; Joshua, 2001; Wils, 2002; Whelan, 2007 and Werden, (2009).

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

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

Given that firms can earn substantial profits from engaging in cartels, serious penalties are required to deter such behaviour. Fines that are set too low are unlikely to provide an adequate deterrent. In deciding whether or not to participate in a cartel, an undertaking will

weigh the likely gains against the likely sanctions that may arise if the cartel is detected. The firm has nothing to lose from participating in a cartel if fines are limited to the level of cartel profits since the cartel may go undetected. The optimal level of fine therefore is equivalent to the additional profits earned from participating in the cartel multiplied by the risk of detection. In other words, if there is a 10% chance of detection, then fines must be ten times cartel profits in order to provide an adequate financial penalty. Wils (2002) calculated that the optimal fine would have to be 150% of the firm's turnover in respect of the cartel products.<sup>6</sup>

Empirical research indicates that fines in cartel cases are almost never sufficiently high as to constitute an optimal deterrent and, in many cases, are considerably below this level. (OECD, 2004). In the international lysine cartel, Connor (2004) estimated that the fines imposed on Archer Daniels Midland in the US would have negated the profits earned in the US from participation in the cartel but the level of fines imposed in other jurisdictions were lower than the profits earned by ADM and its co-conspirators in those countries.<sup>7</sup> While opposing criminal sanctions, Spagnolo (2006) reported that the level of fines imposed in many EU cartel cases was “not likely to deter many cartels”<sup>8</sup> Fines that are too low may simply be regarded as a cost of doing business.

US research indicates that imposing the optimal level of fines in cartel cases would have bankrupted almost half of the firms involved. (Craycraft and Gallo, 1997) Thus in many cases imposing the optimal level of fine is simply not a practical option.

The moral hazard problem arises because decisions to participate in cartels are made by individual human persons who run companies. Such individuals may gain directly from such decisions in the form of higher salaries, performance related bonuses, enhanced promotion prospects and other benefits due to the higher profits accruing to their company from participating in a cartel. Even if the firm is subsequently fined such individuals may face no sanction. The prospect of a fine being imposed at some future date may not unduly concern a company executive who is preoccupied with the next quarter results, particularly as the executive may no longer be employed by the firm when any fine is imposed.

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<sup>6</sup> Wils (2006) concedes that such calculations assume that being found guilty of participation in a cartel has no adverse impact on firms' goodwill or public image, which may not be universally plausible.

<sup>7</sup> Some ADM executives were sent to prison in this case.

<sup>8</sup> It should be noted that fines in EU cartel cases have increased significantly in recent years.

The moral hazard problem could be addressed by fining individuals who organised cartels. The difficulty with such fines is that the individual's employer may reimburse them, thus negating the deterrent effect. For this reason the UK Government rejected the option of proposing fines on individuals as an alternative to imprisonment. (DTI, 2001). In New Zealand, the idea of making it illegal for firms to reimburse employees fined for competition law breaches was considered but rejected as constituting too great an intervention in a firm's internal affairs. (OECD, 2004) An obvious question arises as to how such measures could be enforced in practice. In contrast individuals cannot pass a prison sentence on to their company.

In contrast to criminal actions undertaken in the heat of the moment, or because an opportunity has presented itself, those contemplating participating in a cartel are far more likely to weigh the benefits from such participation against the consequences of getting caught and, therefore, are likely to take the threat of imprisonment into account. Imprisonment may be a particularly strong deterrent for white collar individuals. Baker (2001) suggests that individual sanctions including imprisonment constitute the most effective enforcement tools available in the fight against cartels. Wils (2002) argues that imprisonment sends a strong message to law abiding citizens, reinforcing their moral commitment to the rules. It also sends the message more effectively than fines, because it is far more newsworthy and thus attracts greater publicity and is likely to be noticed more by other business people.

Cartels are considered to merit harsher penalties than many other practices because they are far more clearly and unambiguously harmful to consumers. There is widespread agreement among economists that cartels are inevitably harmful and result in consumers having to pay higher prices for goods and services and impose deadweight losses on the economy.<sup>9</sup> The OECD (2004) has described cartels as "the most egregious violation of competition law". In contrast there is often a very thin dividing line between abuse of dominance and aggressive competition. Similarly it is recognised that vertical restraints may or may not be harmful

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<sup>9</sup> The US Department of Justice, (1998) for example, estimates that a cartel will raise prices on average by ten per cent. Whelan (2007) estimates that EU cartels have raised prices by between 28 and 54%.

depending on the specific market conditions in which they operate. There is therefore a risk that serious penalties in non-cartel cases might discourage competitive behaviour.<sup>10</sup>

Critics argue that criminal penalties, particularly prison sentences are inappropriate for competition law offences. This may partly reflect a benign view toward “white collar” crime, something that is not unknown in Ireland. The perception that cartels are not criminal may also reflect a wrongful perception that it is a victimless crime, ignoring the fact that cartels harm consumers by raising prices.

#### **4: Has Criminalisation Worked?**

Following the passage of the 1996 Act, the Authority initially exercised its new enforcement powers by bringing a number of civil actions in cases involving alleged cartels. For example, the Authority brought civil proceedings against the Irish Road Haulage Association (IRHA); Irish Travel Agents Association (ITAA); the Irish Veterinary Union (IVU); the Licensed Vintners Association (LVA) - which represents the majority of publicans in the Dublin area; the Vintners Federation of Ireland (VFI) - which represents the majority of publicans in the rest of the country; a number of dairies and major national supermarket chains in a case relating to the pricing of milk; and a number of drinks wholesalers. All of these cases were ultimately resolved by the parties concerned giving undertakings to the Court not to engage in certain behaviour in the future.<sup>11</sup>

Since 2000 some 50 prosecutions have been brought by the Competition Authority all involving alleged cartels. These prosecutions have resulted in 32 convictions to date of which four were for summary offences and the remainder procured on indictment. (Competition Authority Annual Report 2009, p.11).<sup>12</sup> While these numbers look impressive, it must be borne in mind that cartel cases by their nature involve multiple defendants. Thus these cases involved just four separate cartels. In two other cases which were prosecuted on indictment, the defendants were acquitted by the jury. Given the ratio of convictions secured to acquittals

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<sup>10</sup> For that reason, Massey and Daly (2003) argued against penalties in the form of fines on undertakings for non-cartel practices.

<sup>11</sup> In 2009 the Authority brought further proceedings against the LVA for a breach of the undertakings given by it in the earlier proceedings. The High Court found that by advising its members to freeze prices, the LVA was in breach of its earlier undertaking and was thus in contempt of court.

<sup>12</sup> In one case three defendants avoided convictions when the judge in the Circuit Court applied the Probation Act.

the criminalization initiative would appear to have been successful. It must also be noted that the majority of successful convictions have been the result of guilty pleas.

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

It must also be recognised, however, that deterrence depends not just on the level of penalties but on the likelihood of being caught, prosecuted and convicted. In this respect one must be less sanguine. The Competition Authority for some time now has repeatedly stated that it is only capable of mounting one criminal cartel investigation per year. In fact it has recently indicated that it may be unable to achieve even this level of enforcement. (Competition Authority, 2010). This obviously greatly reduces the deterrent effect of criminal sanctions since it means that chance of being subject to such penalties is close to zero.

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

The recently published Competition (Amendment) Bill, 2011, proposes to increase the maximum prison sentence for those engaged in cartels from five to ten years. It also provides for increased fines and proposes that the Probation of Offenders Act, 1907, will not apply to

individuals or companies convicted of competition law offences.<sup>13</sup> The Bill is designed to satisfy one of the conditions of the EU/IMF bailout which requires that Ireland provide for more effective sanctions for breaches of competition law. The rationale for increasing the maximum prison sentence for those engaged in cartels from five to ten years is difficult to understand. If there is little or no enforcement, increasing penalties will have little if any deterrent effect. US experience also indicates that relatively short jail sentences represent an adequate deterrent in cartel cases. For “white collar” professionals the short, sharp, shock of a limited prison sentence can prove quite salutary. Lengthy sentences obviously involve greatly increased costs to the State with little extra benefit. The problem in cartel cases is too little enforcement not inadequate penalties.

### **5: Non-Cartel Cases.**

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

The Competition Authority has long argued for the introduction of a system of civil fines in non-cartel cases. (See, for example, Fitzgerald and McFadden, 2011). It appeared from the original November 2010 Memorandum of Understanding agreed between the Government and the Troika that the Authority was about to have its wishes granted. The 2011 Bill, however, makes no provision for the introduction of civil fines because such provisions would be unconstitutional. It appears that the Government has concluded that holding a referendum on this issue is not a priority, despite what the Authority might say.

Fitzgerald and McFadden (2001) argued that civil fines for competition law would be consistent with the Constitution notwithstanding the traditional interpretation of Article 38.1 as effectively prohibiting the imposition of substantial fines in civil cases. This is of course a

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<sup>13</sup> Note the Probation Act will not apply to all competition law offences, not just cartel cases.

legal question. Nevertheless some of the arguments they advance seem contradictory to a non-lawyer. For example, the paper argues that such fines would not constitute criminal sanctions because their purpose is “deterrence rather than punishment”. Elsewhere in the paper, however, they argue that civil fines are needed as a sanction for non-hardcore cartel infringements.

Massey and Daly (2003) pointed out that imposing fines or other forms of penalty in circumstances when it is difficult to distinguish between innocent and harmful conduct, which is the case in respect of non-hard-core cartel behaviour, is problematic. It is difficult to see how civil fines could successfully deter only anti-competitive behaviour when the distinction between pro- and anti-competitive behaviour is unclear. In such circumstances it is almost inevitable that the threat of fines would deter certain behaviour which is not anti-competitive and is in fact efficiency enhancing. As with any measure that reduces competition, a regime of sanctions which to some extent deters behaviour that is actually competitive will itself impose costs on consumers and the economy.

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

It is not at all clear that the lack of penalties in non-cartel cases constitutes a serious weakness in Irish competition law. Fitzgerald and McFadden (2011, p.11) state that in most cases where the Authority has concluded that an infringement has occurred, the existing civil remedies (injunctions and/or declarations), or the threat of them “are sufficient to bring the infringement to an end.” (p.11) The Authority has not identified any instances where it decided that it was not worth bringing civil proceedings even though the parties had refused to discontinue certain practices.

The Authority has only brought civil proceedings in a tiny number of non-hardcore cartel cases. Its approach, in some instances, to vertical restraints comes close to a *per se* legal standard. (See, for example, Massey, 2010 ) Lawyers have expressed concern that there is no point in making complaints to the Authority. Thus, as in the case of cartels, arguably the real problem is not the lack of effective sanctions but a lack of enforcement. The only abuse of

dominance case in which the Authority has gone to court was an action against the Irish League of Credit Unions which was ultimately rejected by the Supreme Court.

“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.”<sup>14</sup>

In a number of past cases where the Authority brought civil proceedings and the parties agreed to discontinue certain behaviour, the Authority required them to give undertakings to this effect before the courts. This had the effect of making such undertakings legally binding meaning that any subsequent breach would constitute a contempt of court. This enabled the Authority, for example, to successfully bring contempt proceedings against the LVA after it had advised its members to freeze their prices in response to the downturn in economic activity in recent years. In recent years the Authority has been prepared to accept written undertakings from parties to settle cases. Undertakings given to the Authority, unlike those given to the court, are not legally binding. Arguably, therefore, the Authority has abandoned a potentially significant sanction in non-cartel cases.

## **6: Mergers.**

One of the major reforms introduced in the 2002 Competition Act, was the transfer of responsibility for deciding on mergers from the Minister to the Competition Authority. This was a fairly radical reform, which was implemented in the face of opposition from business lobby groups and against the advice of officials in the Department of Enterprise, Trade and Employment, who dismissed calls for such a reform as “empire building” by the Authority. (Massey and Daly, 2003). The Authority is required to decide whether or not a proposed merger would substantially lessen competition.

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<sup>14</sup> *Competition Authority v. John O’Regan & Others*, Supreme Court 8 May 2007 para 52. For an analysis of this case see Massey (2008).

Details of mergers notified to the Competition Authority under the 2002 Act up to the end of 2010 are summarised in Table 1. 493 mergers were notified to the Authority during the relevant period. Only three mergers have been prohibited to date, although in one of those cases the Authority’s decision was subsequently overturned by the High Court on appeal.<sup>15</sup> A further 13 cases were cleared subject to conditions or on foot of commitments given by the merging parties. 467 were cleared following a Phase 1 investigation, although six of these were only cleared after the notifying parties had given undertakings.

Year	Notified	Phase 1	Phase 2	Withdrawn /Referred to EU	Conditional Clearance	Prohibited
2003	47	42	2	2	1	0
2004	81	78	2	0	1	1
2005	84	82	4	1	6	0
2006	98	93	4	1	2	1
2007	72	67	3	2	1	0
2008	38	36	2	0	0	1
2009	27	25	2	0	1	0
2010	46	44	2	0	1	0
Total	493	467	21	6	13	3

Source: Competition Authority *Annual Reports*, various years.

The objective of merger control legislation should be to prevent mergers which are likely to reduce competition while minimising the regulatory burden on harmless mergers. The legislation catches large numbers of mergers which have no competition nexus with Ireland, thus to that extent, it imposes an unnecessary regulatory burden.<sup>16</sup> Where mergers give rise to potential competition concerns, two potential errors may arise:

- The Authority may wrongly find that a merger is anti-competitive when it is not, a false positive; or
- The Authority may fail to identify a merger that is anti-competitive, a false negative.

There have only been three refusal decisions, although, as pointed out, one of these decisions was overturned. A further 13 cases were cleared subject to conditions and presumably those mergers would otherwise have been prohibited. In four of those cases the conditions imposed involved a requirement to notify future mergers, where the parties’ turnovers might fall below

<sup>15</sup> *Rye Investments Ltd. v. Competition Authority*, [2009] IEHC 140 Ireland High Court para 7.12. Available at <http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/44ebbf105a4ed34802575a1004c97d1?OpenDocument> For an analysis of this case see Massey (2011).

<sup>16</sup> A merger between two overseas firms is caught if one of them has an Irish based subsidiary even though it gives rise to no competition concerns in Ireland.

the threshold for compulsory notification. In other words the concern was that the merged firm might make future acquisitions which might be anti-competitive but which would not need to be notified to the Authority. The implication is that the merger actually before the Authority was not deemed anti-competitive. In one other case the conditions related to ancillary restrictions. Thus in eight of the 13 conditional clearance cases the merger was viewed as posing competition concerns. Combined with the three refusal decisions, this means that out of 493 notified cases, only 11 were deemed to pose competition concerns. By definition, therefore, the number of potential false positive cases is quite limited. On the other hand and even allowing for the fact that a large proportion of notified mergers have no competition nexus with Ireland, the low incidence of negative findings suggest that false negatives cannot be ruled out. Of course it could be the case that the legislation and the Authority's reputation are such that firms are deterred from attempting anti-competitive mergers in the first place. As with cartels, there is no way of measuring the extent to which the legislation might have ensured that such transactions simply never get off the ground.

One of the problems with the legislation is that merging parties have a right of appeal in the case of refusal or conditional decisions while third parties have no right of appeal in merger cases. In other words the merging parties have a right of appeal in false positive cases but there is no right of appeal in false negative cases. It is highly unsatisfactory that there is no remedy available in cases where the Authority incorrectly finds that a merger will not result in a substantial lessening of competition. This may create a bias towards false negatives.

## **7: Advocacy.**

Competition policy is concerned with a wider range of issues than breaches of the law and merger control. Government regulatory interventions can restrict and/or distort competition in all sorts of ways. The Competition Act, 2002, gives the Authority considerable powers to investigate and make recommendations for reform in a wide range of areas where regulation or other practices restrict competition.<sup>17</sup> The Authority has certainly made extensive use of these powers most notably in the case of its extensive reviews of various professions. In this regard it has been quite successful, as the Memorandum of Understanding between the Government and the Troika requires that the Government introduce legislation to give effect

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<sup>17</sup> Such arrangements would not normally come with the scope of the prohibitions contained in sections 4 and 5 of the Act.

to any of Authority's recommendations regarding lawyers and certain other professions that have not been implemented to date.

Two broad issues arise in this regard. First, the Authority report on the legal profession is somewhat flawed. It is generally recognised by economists, for example, that arrangements should be analysed using an effects based rather than a form based approach. (Gorecki, 2006). The Authority, however, arguably adopted a form based approach in its report on the legal profession.

“The fundamental point is that if self-regulating professions are left to their own devices there is little incentive for them to encourage competition in the market.”  
(Competition Authority, 2006, para 3.71).

Thus in effect the Authority concluded that the issue was not whether or not self-regulation had led to abuses, rather self-regulation was regarded as unacceptable *per se*.

In contrast a review of the legal profession in Northern Ireland carried out at around the same time, while recognising the potential for self-regulation to be abused, concluded that such abuse had not occurred. The economic justification for self-regulation recognises that independent regulators must incur very significant costs acquiring information in order to regulate the industry, while they are also prone to regulatory capture. Self-regulation means that society avoids the costs involved in acquiring information about the industry. Of course, vigilance is required to ensure that self-regulation is not used to promote the interests of the regulated. The Report contains little if any evidence of the existence of monopoly rents. There is evidence of ease of entry and exit and it is not at all clear that the outstanding Authority proposals would actually reduce legal costs.

The second issue relates to the lack of progress in competition reforms in various other sectors of the economy. It is generally recognised that complete separation of the transmission and generation businesses is required to foster effective competition in the electricity industry. (See, for example, Armstrong et. al., (1994), Massey and O'Hare (1996), Nuttall, (2000), Deloitte (2005) and McCarthy (2011)). Successive Governments have failed to grasp this nettle. The present Government has recently announced its intention to sell a minority shareholding in ESB but to allow it to retain ownership of the transmission network. This is contrary to the recommendations of the McCarthy report and many previous studies.

The sale of a minority shareholding, without structural reform, would appear to permanently exclude the latter option.

The Public Transport Regulation Act, 2009, enshrined the existing Dublin Bus and Bus Eireann monopolies in the bus market by legally obliging the newly created regulatory body, the National Transport Authority (NTA) to grant the two companies licences in respect of all of their existing routes. The Minister for Transport, Leo Varadkar T.D. recently stated:

“The reduction in the subsidy to CIE over the next few years will be in the region of a 20 per cent cut so that will have to be met through a combination of fare increases, cost-cutting and cuts to services. Obviously I favour cost-cutting over higher fares or cutting services.” (*Irish Times* 26 September 2011).

If the Minister was serious about cutting costs rather than services, scrapping the 2009 Act and introducing competition to the market would represent an obvious solution.

Thus it is those areas that are not mentioned in the provisions in the MOU designed to increase competition and thereby enhance national competitiveness and which the Competition Authority has not been pushing which are most revealing. The Bertie Ahearn strategy of cosyng up to public sector unions and protecting State monopolies from competition would appear to be still in vogue in Government buildings.

## **8: Some Conclusions and Suggestions.**

In answering the question posed in the title of this paper, I suppose the verdict has to be that the results have been somewhat mixed. Competition law has been beefed up considerably in Ireland over the past 20 years. According to the World Economic Forum (2010) Ireland ranked 25<sup>th</sup> out of 139 countries in terms of the effectiveness of competition policy. This puts Ireland behind most of our EU partners and OECD countries and suggests that there is considerable scope for improvement.

Criminalisation of cartels has worked reasonably well, despite predictions that it would not. It is difficult to see, however, that there is a case for increasing the maximum prison sentence in cartel cases from five to ten years. It appears to be widely accepted that criminal cases in non-cartel cases are a non-runner. The Government has accepted that civil fines are not possible in

non-cartel cases. It should go further and remove criminal sanctions for non-cartel cases and recognise the de-facto reality.

The real problem in the case of both cartels and other infringements of the legislation is the lack of enforcement. The Authority argues that it is unable to bring enforcement proceedings because of a lack of resources. It should be noted that, although it has seen its staffing levels decline significantly in recent years, they are still above what they were in 2002 when it was more active on the enforcement front. That is not to say that there may not be a valid case for increasing its resources or at least allowing it to replace some of the individuals who have left. More enforcement activity is likely to have a far greater deterrent effect than increasing penalties. Nevertheless, it is incumbent on an agency which constantly urges others to operate more efficiently to ensure that it uses its own resources efficiently. This requires some form of effective external scrutiny of the Authority and other regulators. The OFT in the UK is required to value the benefits accruing to consumers on foot of its various actions. The Authority should be obliged to show how its activities are benefiting consumers and the economy. In contrast to the OFT arrangements, such quantitative evaluations should be conducted by an external body rather than the agency itself. Some years ago the Authority announced that, as a result of its investigations, the Irish Kennel Club had amended its rules in respect of dog show judges. Perhaps such intervention was justified, although without actual evidence on the costs and benefits involved it is difficult to judge.

One further issue is the scope for private enforcement. The 2011 Bill proposes that where cases have been successfully brought by the Authority, private parties suing for damages will be able to rely on the fact that the parties have already been found to have infringed the law by the Courts and will not be required to separately prove that an infringement has occurred. This is obviously designed to facilitate private follow-on actions for damages. Of course such a measure can only be successful if the Authority brings enforcement actions. There are also implications, particularly for the Competition Authority's handling of non-cartel cases. If the Authority accepts out of court settlements rather than seeking declaratory relief in such cases it will deny private litigants the opportunity of availing of this provision in the Bill. A separate issue arises in cartel cases where it is individual consumers who have suffered harm. Even with the proposed amendment, it is difficult to see many individual consumers talking follow-on actions for damages because the amounts involved in each individual case are likely to be relatively small. There has been some discussion from time to time about

facilitating possible class actions. If it were legally possible, however, allowing consumers to bring actions for damages in the Small Claims Court might arguably constitute a more effective remedy and one that would not add to legal costs as it would not require the involvement of lawyers.

A number of proposals for increasing the effectiveness of Ireland's competition legislation and the Competition Authority are set out below:

- The proposal to increase the maximum prison term for cartel offences is unnecessary.
- Criminal penalties for non-cartel cases should be abolished recognising that they are unworkable.
- More active enforcement by the Competition Authority is required in both cartel and non-cartel cases.
- Consideration should be given to increasing the Competition Authority's resources or at least to replacing staff numbers lost in recent years but in turn the Authority's performance should be subject to external review and, in particular, the benefit to consumers from its activities should be measured.
- The legislation should be amended to reduce notifications of mergers which have no competition nexus with Ireland.
- Third parties should be given a right to appeal Competition Authority decisions in merger cases.
- Measures to increase competition in energy and transport might be more important in terms of competitiveness than proposed reforms of the legal profession.
- The *Res Judicata* provisions contained in the 2011 Bill could boost private enforcement but would require that the Authority bring declaratory actions in non-cartel cases rather than accepting private settlements.
- If it were legally possible, individual consumers should be able to bring follow-on actions for damages in the Small Claims Court in cases where the Authority has brought a successful criminal cartel prosecution.

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