Investigation and criminal prosecution of cartels should be normal task for Garda

SENTENCES NEED TO BE RAISED TO FIVE YEARS, SO MAKING OFFENCES ARRESTABLE

Patrick Massey and Daragh Daly[1]

The Informant is the title of a book by *New York Times* reporter Kurt Eichenwald that tells the inside story of the US investigation of the International Lysine Cartel. It is an excellent book, written in the style of a thriller and makes for gripping reading even for those with little or no interest in antitrust. Readers who attended the Competition Authority conference on leniency last November will have seen secretly recorded videos of meetings of the Lysine Cartel. This investigation resulted in several major companies paying massive fines, while three senior executives of US multinational Archer Daniels Midland went to jail. The most striking lesson to emerge from the book is that the investigation, including the making of the secret recordings, was carried out by agents of the Federal Bureau of Investigation.

Privately officials in the Department of Justice's Antitrust Division admit that the involvement of the FBI has made a major difference to cartel investigations. This raises the question why, in Ireland, investigations of criminal offences under the Competition Acts are not carried out by professional criminal investigators, namely An Garda Siochana, using all the powers normally afforded for the investigation of serious criminal offences.

Cartels Will Only be Deterred by Tough Penalties

A cartel can be viewed as a deliberate conspiracy to defraud consumers by pushing up prices. Cartels are anti-competitive by definition, yield no offsetting benefits and are almost invariably harmful. Cartels can be distinguished from other types of anti-competitive behaviour. For example, vertical restraints such as exclusive distribution agreements may or may not harm competition and may produce some offsetting benefits depending on the specific circumstances in which they operate.

Unlike many violent crimes, participation in a cartel is not the result of a moment's passion or transient rage. Cartels are organised and operated by individuals and companies who stand to earn substantial profits from such behaviour.

Cartels almost certainly cost Irish consumers hundreds of millions of pounds every year. That is several times the amount involved in the DIRT inquiry. It is obvious that the only effective deterrent is a system of competition law enforcement that contains serious penalties. Given the provisions of the Irish Constitution that means criminal penalties. It must be emphasised that cartels are a deliberate conspiracy to defraud the public and

[1] Article co-authored with Daragh Daly.

therefore merit serious punishment. Civil proceedings represent a totally ineffective mechanism for dealing with cartel behaviour.

There Must be a Significant Likelihood of Being Caught….

Of course, we recognise that tough penalties alone are not sufficient. Effective deterrence also requires a significant likelihood of being caught. There is ample evidence that business will disregard laws that are not effectively enforced, as demonstrated by the DIRT affair and the McDowell report which noted that 'Irish company law has been characterised by a culture of non-compliance'.[2] The report also noted that the creation of almost 260 offences under Company Legislation without any appropriate enforcement mechanism was not an effective policy measure for ensuring such compliance. US experience also shows us that cartels flourish when antitrust enforcement is lax.

It is almost five years since the Competition (Amendment) Act, 1996 introduced criminal penalties for undertakings that breach Sections 4 and 5 of the 1991 Competition Act and for the managers and directors of such undertakings. No parties have yet been prosecuted on indictment under the 1996 Act. However, the Authority has stated that files on three investigations have been referred to the DPP and the outcome of these is still awaited. Thus, it may still be premature to argue that the introduction of criminal sanctions has failed. However, the authors' experience of cartel investigations is that the Authority's powers are insufficient for the investigation of criminal offences.

Proper Investigative Powers Need an "Arrestable" Offence

The current legal position in regard to criminal liability is set out in the box below.

Peculiarly while the provisions of the Act create very severe potential financial penalties against individuals convicted of this offence it does not make such an offence an "arrestable offence," which is defined in section 2(1) of the Criminal Law Act 1997 as:

> *"an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence."*

If competition offences were arrestable offences, then under section 3 of the 1997 Act:

> *"(3) Where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.*
>
> *(4) An arrest other than by a member of the Garda Síochána may only be effected by a person under subsection (1) or (2) where he or she, with reasonable cause,*

[2] *Report of the Working Group on Company Law Compliance and Enforcement,* Dublin, Stationery Office, 30 November 1998.

suspects that the person to be arrested by him or her would otherwise attempt to avoid, or is avoiding, arrest by a member of the Garda Síochána".

In addition, if the Competition Acts provided for a potential penalty of at least five years for conviction on indictment then the provisions of the Criminal Justice Act 1984 would apply and in particular section 4 which states, inter alia, as follows:

"(1) This section applies to any offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and to an attempt to commit any such offence.

(2) Where a member of the Garda Síochána arrests without warrant a person whom he, with reasonable cause, suspects of having committed an offence to which this section applies, that person may be taken to and detained in a Garda Síochána station for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which he is taken on arrest has at the time of that person's arrival at the station reasonable grounds for believing that his detention is necessary for the proper investigation of the offence.

(3)(a) The period for which a person so arrested may be detained shall, subject to the provisions of this section, not exceed six hours from the time of his arrest.

(b) An officer of the Garda Síochána not below the rank of superintendent may direct that a person detained pursuant to subsection (2) be detained for a further period not exceeding six hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence."

Company Law Offences "Arrestable"

Some interesting points arise in respect of the foregoing provisions. It is clear that in respect of all "serious" crimes under the criminal law the legislature has seen fit to provide for the involvement of An Garda Siochana in the investigation and to give the Garda statutory powers to detain individual suspects for at least 6 hours with the possibility of a further six hour detention. Incidentally, during the debates on the 1996 Act, Mr Des O'Malley TD, then in Opposition, proposed an amendment providing for a power to detain suspects for 48 hours.

The impact on suspects or potential suspects who are or may be so detained is to create a clear message that breaches of such legislation is a "serious" matter and is a clear signal that there will be adverse consequences from non-compliance with such legislation. This "get tough" signal was adopted in the McDowell report in its recommendations for Garda involvement in investigations involving the Office of Director of Corporate Enforcement so that non-compliance with Company legislation will allow for powers of arrest and detention for questioning of suspects who are non-compliant.

Tide Has Turned Against White-Collar Crime.

Do breaches of Competition legislation warrant a similar approach? Undoubtedly the tide has turned in regard to public opinion for penalties which should be meted out for perpetrators of what is perceived to be "white collar crime." The practice in US antitrust enforcement is to regard cartel behaviour as a criminal offence and other antitrust cases as civil matters. Economic arguments and outlooks change with changing government administrations and academic thought, but there is a constant view that cartels are always harmful to consumer welfare. This view is now being implicitly adopted at EU level in the reform process of the enforcement of Articles 81 and 82 of the Treaty, and no doubt reflects the Commission's embarrassment that the Lysine Cartel (punished first in America) involved some large European companies.

In short, it is not difficult to establish that cartels are *per se* harmful to consumer welfare while a rule of reason approach is more appropriate in other cases. Where the rule of reason approach applies it is more difficult to say that alleged activity by undertakings should be considered to be an offence "beyond reasonable doubt" and that there was a clear criminal intention on the part of individuals engaged in such activity.

The Competition & Mergers Review Group (CMRG) Report recognised the difficulties posed by the lack of powers to detain and question suspects. It recommended that such powers should be introduced. The mechanism proposed by the CMRG, however, is rather cumbersome and in our view potentially less effective than the alternative, which is to increase the maximum penalty to five years. Approval of a Garda Superintendent would be required for any arrest under the CMRG proposal. This raises the issue of additional proofs; e.g. the Superintendent would have to give evidence of authorising such an arrest and the reasons for doing so. It would also prevent a Garda arresting an individual on the spot, e.g. where during the course of a search incriminating evidence was found in the individual's possession. The CMRG proposal involves introducing a novel form of arrest procedure rather than simply bringing competition legislation within the remit of established procedures. It therefore increases the possibility of legal challenge to such novel procedures. In addition, the CMRG proposal would technically create an arrest power for any breach of Section 4 and 5 even though, in our view, non-cartel behaviour should not be subject to criminal sanctions.

If the legislature wishes to have an effective policy of criminal enforcement for appropriate breaches of competition law, then the application of the views expressed in the McDowell report might well be viewed as persuasive. We would go further and suggest that as a first step the legislation should identify which offences under competition legislation warrant more severe criminal sanction. The US approach might well be instructive in this regard. In our view an increased penalty of five years imprisonment would only be appropriate for cartel type practices. Non-cartel behaviour should no longer be subject to criminal penalties.

Is it a job for the Garda?

Massey and O'Hare noted a growing tendency in Irish legislation to create new white-collar criminal offences and give responsibility for their prosecution to bodies other than

the Gardai.[3] They pointed out somewhat prophetically that this tends to delay prosecutions as such agencies tend to have a 'running in' or learning period. One of the present authors noted in a speech to the Authority's leniency conference last November that one of the reasons why the Authority brought civil rather than criminal prosecutions in its early cases was due to the fact that its staff had no experience of criminal investigations. Where the agency suffers high staff turnover the 'running in' period may continue indefinitely.

The argument for assigning responsibility for investigations of particular criminal offences to an agency other than the Gardai is that particular specialist knowledge is required and only a specialist agency would be in a position to investigate such matters. At first glance one can see how such an argument could apply to competition matters. However, we believe that this assumption is overly simplistic. Undoubtedly the investigation of a cartel requires a significant economic input. However, it primarily requires specialist knowledge of how to conduct a criminal investigation.

Powers to detain and question suspects are essential for the conduct of cartel investigations. Such powers could and should only be discharged by members of An Garda Siochana. In our view this is appropriate, as they are the professionals who are trained in interview and investigative techniques. Thus, at the very least, the introduction of such a power would require that gardai be assigned to work with the Authority on criminal investigations. The Deloitte and Touch Review of the Authority has in fact recommended the assignment of gardai to the Authority. However, we would argue that, rather than seeing cartel investigations as a matter for competition experts with some Garda input, the reverse is the case. Cartel investigations should be carried out by experienced criminal investigators with some input from competition experts.

In essence we are suggesting that responsibility for cartel investigations should be transferred to an expanded Garda Fraud Bureau which could recruit a small number of economists to assist with such investigations. The Authority would retain responsibility for non-criminal matters as well as other activities such as mergers and advocacy, as proposed by the CMRG, where it has the necessary specialist skills to do the job. There would be a separation of functions rather like that between the Justice Department and Federal Trade Commission in the US.

There are other reasons why responsibility for cartel investigations should be transferred to the Garda. International experience suggests that certain types of cartel such as bid-rigging may also involve fraud by officers of the purchasing entity. The latter would clearly come within the ambit of the Garda. Similarly searches of computers may disclose evidence of other criminal activity such as child pornography. While this has not occurred up to now, it seems unfair to put Authority personnel, untrained in dealing with such maters, into a situation where they might uncover such material. This also raises a wider point that Authority personnel who are essentially civil servants may not be comfortable with the idea of conducting searches. US experience, including the Lysine Cartel itself, shows that cartel cases can arise in the context of other criminal investigations.

[3] P. Massey and P.O'Hare, (1996), *Competition Law and Policy in Ireland*, Dublin, Oak Tree Press.

Computer forensics is expanding rapidly. A small agency such as the Authority is not capable of keeping up to date with developments in this area both in terms of equipment and expertise. There is little point in conducting a search of premises to look for documentary evidence if one is unable to conduct a thorough search of the computers located there. The Garda on the other hand require such capabilities to conduct investigations in a range of areas such as fraud investigations and investigations by the Criminal Assets Bureau.

Speaking at the Authority's leniency seminar the Attorney General, Mr Michael McDowell, stated that the Company law Review Group "had no doubt that if you want to produce convictions, it's entirely self-deluding to think it can be done without An Garda Siochana". He went on to state that "police by themselves, are more or less useless, unless they have powers" and "for police to have powers of arrest and questioning – sentences had to be five years or more."[4]

Conclusion.

We do not subscribe to the view that criminal prosecutions of cartels are impossible and that administrative fines should be introduced. However, we believe that successful criminal prosecutions require adequate powers and resources, and that means control by the Garda and a maximum penalty of five years imprisonment.

We recognise that the work of bringing a case to trial can be extremely tedious and frustrating but consider that proposals to move the goalposts to make it easier to impose penalties are not an alternative to allocating sufficient powers and resources to carry out investigations effectively. Similarly administrative fines do not ensure deterrence against cartel behaviour. Even if constitutionally possible they would simply involve the firms that were engaged in such conduct making a risk assessment of their potential gains from the cartel, against their potential fine and the risk of detection.

BOX

Competition (Amendment) Act 1996. Under section 2 of this Act cartel type behaviour between undertakings is a criminal offence. Section 3(4)(a) of this Act goes on to state:

> *"Where an offence under section 2 of this Act has been committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as the undertaking shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence".*

The penalties upon conviction are stated in section 3(1) to be:

> *"(a) on summary conviction—*

[4] *Competition* Vol.9 Edit.9 p222. The Attorney General indicated that he was making these comments in a personal capacity.

(i) to a fine not exceeding £1,500, or

(ii) in the case of an individual, to such a fine or, at the discretion of the court, to imprisonment for a term not exceeding 6 months or to both such fine and such imprisonment,

(b) on conviction on indictment—

(i) to a fine not exceeding whichever of the following amounts is the greater, namely, £3,000,000 or 10 per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction, or

(ii) in the case of an individual, to a fine not exceeding whichever of the following amounts is the greater, namely, £3,000,000 or 10 per cent. of the turnover of the individual in the financial year ending in the 12 months prior to the conviction or, at the discretion of the court, to imprisonment for a term not exceeding 2 years or to both such fine and such imprisonment".