

## **Introduction.**

The main provisions of Ireland's competition legislation are contained in the Competition Act 2002, as amended. The main features of the Irish legislation are:

- Basic prohibitions on anti-competitive behaviour, which closely follow the wording of the EU Competition rules.
- Hard core cartel behaviour is a criminal offence.
- Managers and directors of firms engaging in cartels may be imprisoned for up to 10 years.
- The Competition (Amendment) Act, 2022 provided for the imposition of administrative fines.
- Parties aggrieved by anti-competitive behaviour may bring private actions for damages before the Courts.

## **Prohibitions on Anti-Competitive Behaviour.**

The basic prohibitions on anti-competitive behaviour are contained in §§ 4 and 5 of the 2002 Act. § 4(1) prohibits and renders void "all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State, or in any part of the State". § 5 prohibits "any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State". These prohibitions were first introduced in the Competition Act, 1991.

The Act makes a clear distinction 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. Hard-core cartel practices are treated as criminal offences.

There is a strong economic case for making a distinction between hard-core 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. In contrast the effects of non-cartel behaviour are far less clear cut. Exclusive distribution and other types of vertical agreements, may in some circumstances be anti-competitive, and in others may simply increase efficiency. Similarly, there is frequently a fine line between aggressive competition and abuse of dominance.

## **Penalties and Presumptions.**

The legislation provides that managers and directors of firms convicted of engaging in ‘hard core’ cartels may be imprisoned for up to 10 years. The 2022 Act increased the penalties for firms engaging in cartels and all other types of anti-competitive behaviour setting a maximum fine of up to €50m or 20% of turnover whichever is greater.

§ 6(2) of the 2002 Act, as amended, provides that:

“In proceedings for an offence...it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to-

- a directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice,
- b limit output or sales,
- c share markets or customers, or
- d engage in bid-rigging<sup>1</sup>

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.”

Effectively this provision seeks to create a presumption that cartels are anti-competitive.

§ 6(3) provides that it shall be a good defence that “the agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not - impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives, afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.”

Cartels, virtually by definition, are not efficiency enhancing and do not benefit consumers. The Act nevertheless permits defendants in cartel cases to argue that they satisfy the requirements for exemption. Undoubtedly this is likely to complicate such cases and make successful prosecutions far more difficult. 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.

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<sup>1</sup> Bid-rigging was added by 2022 Act.

The 2022 Act provides that the Competition and Consumer Protection Commission (CCPC) may impose administrative fines of up to €10m or 10% of an undertaking's turnover for infringements of both Irish and EU competition law. The Act also provides for a leniency programme. On the face of it, the administrative fines regime appears to be rather complex and unwieldy, and it remains to be seen whether it will prove to be effective.

### **Investigative Powers.**

The CCPC has primary responsibility for investigating alleged breaches of competition law. By virtue of the fact that the maximum penalty for engaging in a cartel is ten years imprisonment, however, the Gardai may arrest and detain individuals suspected of participating in such arrangements for questioning. The absence of powers to question individuals was a major obstacle in cartel investigations in the past.

In addition to powers to search business premises, authorised officers may obtain warrants to search the homes of company directors, managers, and other employees. Where a warrant has been granted authorised officers may use reasonable force to gain entry. Authorised officers may seize original documents during a search. The Act includes various presumptions regarding documentary evidence.

The 2022 Act extends the CCPC's investigative powers in hard-core cartel cases allowing it to seek a Court order permitting it to undertake video and audio surveillance, and record electronic communications in cartel investigations.

### **Miscellaneous.**

The CCPC is also responsible for deciding on mergers while the legislation also assigns it a competition advocacy role.