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Criminal Sanctions for Competition Law: A Review of Irish Experience

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Ireland's national competition legislation, like that of many EU Member States largely mirrors the basic prohibitions on anti-competitive behaviour contained in Articles 81 and 82 of the EC Treaty. Breaches of Irish competition law constitute criminal offences and, in the case of cartels, managers and directors of offending firms may be imprisoned if convicted of such behaviour. The concept of an administrative fine, which exists in many other EU Member States, is not recognised under Irish constitutional law. Penal sanctions may only be imposed on parties found guilty of a criminal offence. The Competition Act, 2002 provides that breaches of Articles 81 and 82 constitute criminal offences. This paper reviews experience of the application of national competition legislation in Ireland and assess the implications of such experience for decentralised application of EU law in Ireland. It also considers arguments for and against criminal penalties for breaches of competition law.

INTRODUCTION

The move to decentralised enforcement represents the most radical overhaul of EU competition law in over forty years. One of the interesting aspects of the new regime is the fact that, while national competition authorities will have power to apply EU competition law, they will do so using existing national enforcement procedures. Ireland's competition legislation provides that breaches of competition law constitute criminal offences and managers and directors of offending firms may face imprisonment and/or fines for such practices. The present paper argues that jail sentences are an essential deterrent in the case of cartels. There is widespread agreement that cartels constitute the most serious form of anti-competitive behaviour and the one that inflicts most harm on consumers. Arguably, therefore, dealing with cartels should be the main priority of competition agencies. It remains to be seen whether the decentralisation of EU competition law will be effective in this regard.

The new EU enforcement regime represents a welcome step forward. It continues the shift towards a competition law regime which is consistent with economic theory, a process which began with the Green Paper on Vertical Restraints.[1] This is quite important because competition law essentially attempts to implement economic policy, *i.e.* the promotion of competition, by legal means. As Whish observed:

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[1] *Green Paper on Vertical Restraints in EC Competition Policy*, Brussels, European Commission, 1997.

> Competition law is about economics and economic behaviour, and it is essential for anyone involved in the subject – whether as a lawyer, regulator, civil servant or in any other capacity – to have some knowledge of the economics concerned.[2]

Undoubtedly the success enjoyed by the US authorities in the latter half of the 1990s in exposing and penalising international cartels in a wide range of industries such as lysine, vitamins, citric acid, and graphic electrodes highlighted serious shortcomings in the efficacy of the EU regime, namely that it allowed serious anti-competitive behaviour such as cartels to go largely undetected. Indeed comments by Commissioner Monti indicate that stepping up enforcement efforts against cartels was a major objective of the reform programme.

> We are not in a position to be active on our own initiative - to go on the ground and make investigations and dawn raids and identify the really threatening hard-core cartels.[3]

The new regime, by freeing up resources at Commission level and enabling the Commission and the national authorities to pool their resources, has the potential to greatly increase efforts to crack down on cartels.

MAIN FEATURES OF IRISH COMPETITION LEGISLATION

Unlike the EU Commission and competition agencies in virtually all of the other Member States, the Irish Competition Authority cannot rule on whether undertakings have breached competition legislation and cannot impose fines. The Irish Constitution reserves such functions to the Courts. In effect Ireland's enforcement regime is more akin to the US than the EU. Although Irish competition law has provided for criminal penalties for breaches of competition law since mid 1996, it must be said, the results to date have been disappointing.

Article 34.1 of the Irish Constitution gives the Courts sole and exclusive power (subject to Article 37) to administer justice. In the *McDonald* case[4] Kenny J identified the characteristic features of a judicial function as generally involving a dispute as to violation of the law, and the imposition of a legal liability or criminal penalty which the State is obliged to enforce. Article 37 allows certain bodies other than courts to perform limited types of judicial function. Limited means that the effects of the exercise of such a function should not be unduly serious in their impact. The Supreme Court has defined a non-limited power as one that:

> … is calculated ordinarily to affect in the most profound and far reaching way the lives, liberties, fortunes and reputations of those against whom [it is] exercised.[5]

The net effect of these provisions is that fines may only be imposed on individuals and undertakings convicted of a criminal offence by the Courts. The Competition

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[2] Whish, *Competition Law*, 5th ed, London, Butterworths, 2003, p 1.

[3] *Financial Times*, 26 October 1999.

[4] *McDonald v Bord na gCon (No 2)* [1965] IR 217.

[5] *Re the Solicitors' Act 1954* [1960] IR 239.

Authority's function, therefore, is limited to investigating alleged anti-competitive behaviour. It cannot act as judge, jury and prosecutor. The power to prosecute any criminal offence on indictment is reserved to the Director of Public Prosecutions (DPP), an independent statutory officer.[6] Thus, where the Authority decides that an offence merits prosecution it can submit a file on the case to the DPP. The Authority may prosecute less serious offences at district court level and it may also bring civil proceedings to obtain an injunction and/or declaration that behaviour constitutes a breach of the Act.[7] The Authority may not sue for damages.

THE CRIMINAL OFFENCES

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[8] 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.[9] The 2002 Act thus provides that breaches of Article 81 and 82 constitute criminal offences. Such provisions were included in anticipation of the decentralisation of EU competition law. As with breaches of national law the Act also enables the Authority to bring civil proceedings for breaches of Article 81 and 82.

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-
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> (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, or
>
> (c) share markets or customers,

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[6] Prosecution of Offences Act 1974.

[7] Section 14, Competition Act, 2002, provides that any person aggrieved by anti-competitive behaviour may bring a private action against undertakings engaged in such behaviour and any director or manager of such an undertaking, to seek an injunction and/or damages including exemplary damages. Under Section 14(2) the Authority may also bring proceedings to obtain an injunction and/or a declaration that the behaviour is in breach of the Act but it cannot sue for damages.

[8] Section 4(1) of the Act repeats the provisions of Article 81(1).

[9] 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): *Competition and Regulation in Ireland The Law and Economics*, Cork: Oak Tree Press.

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 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[10] 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:

(i) On summary conviction may be fined a maximum €3,000 and/or imprisonment for up to six months; and

(ii) On conviction on indictment may be fined up to €4m or 10% of turnover and/or imprisoned for a maximum of five years.[11]

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.[12]

Under Regulation 1/2003 national competition authorities will apply Articles 81 and 82 using their existing national law procedures. The Irish Government has designated three agencies as the national competition authorities, namely the Competition

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

[11] 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.

[12] 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, *Proposed Criminalisation of Cartels in the UK,* London, Office of Fair Trading, 2001.

Authority; the Courts and the DPP.[13] It is fair to say that at the present moment in time there is some confusion as to how this will work in practice.[14]

IRISH EXPERIENCE OF CRIMINAL ENFORCEMENT

Although Ireland has had criminal penalties for breaches of competition law since 1996, the results to date have been extremely poor. Since mid 1996 the Authority has brought a handful of civil actions where it secured undertakings from parties to discontinue certain behaviour. There have been two successful summary prosecutions, i.e. prosecutions in the District Court where the penalties are relatively low.[15] Files have been sent to the DPP in four cases but there has not been a successful prosecution on indictment to date. Such results must be set against the fact that the Authority has repeatedly stated that the pursuit of cartels is its top priority. Until recently the Authority could argue that the poor outcome was due, in large part, to weaknesses in the legislation combined with a lack of resources.

The 1996 Act, which first introduced criminal penalties, only permitted the Authority to copy documents located in the course of searches, while the "best evidence" rule normally requires original documents. A more fundamental problem is the presumption that documents do not speak for themselves. In one case, for example, investigations reportedly unearthed a document indicating that the management of a company had taken a decision to increase prices and that a named executive was "sounding out the rest of the producers this week and we should know their view of the increase early next week".[16] Such documentation of itself is normally inadmissible in the Irish courts. It is necessary to have the author of the document give evidence as to the nature and origins of the document.

Similarly the lack of powers to question individuals under the former legislation proved to be another major obstacle to the successful conduct of investigations. In one case where a file was referred to the DPP, the Gardai (police) were requested to carry out a further investigation but they reported that they received "virtually zero cooperation" from the individuals that they interviewed. Many of these difficulties have been addressed by the 2002 Act, although some weaknesses remain, a point which is considered below.

The Authority's resource problems reached such a crisis level in 2000 that its Annual Report for that year described it as "barely operational".[17] The Tanaiste [Deputy Prime

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13 SI 195/2004. The District Court, Circuit Court, High Court, Court of Criminal Appeal and Supreme Court are all listed as competition authorities.

14 Mackey, 'Which Hat Should I Wear Today? Reflections on the Courts as Competition Authorities: Ireland's Implementation of Regulation 1/2003' (2004) 13(1) *Competition* 22-4.

15 In one case a small oil company pleaded guilty to fixing prices while in the second six farmers were convicted of a violation of Section 4(1) of the Act, i.e. engaging in an anti-competitive agreement.

16 *Sunday Business Post*, 30 June 2002. The story also reported that two producers agreed to share markets with one agreeing to withdraw from one county and the other reciprocating.

17 *Competition Authority Annual Report 2000*. In February 2000 the author requested the Tanaiste (Deputy Prime Minister) to assign responsibility for the Authority's enforcement functions to another member of the

Minister] in response to a parliamentary question indicated that she was 'aware that the Authority's staffing has placed considerable constraints on its capacity to deal with new complaints.'[18] One Dublin lawyer commenting on the work of the Authority observed that:

> If you make a reasonable complaint to them, you have to tell your client they will probably turn around and say they're not going to take any action. They are only taking the really high-profile cases. But if they got the budget and they got the people that would all change.[19]

A memo written by the Authority Chairman in March 2002 indicated that because of resource constraints, files recommending criminal prosecutions in cartel cases had lain dormant in the Authority for more than a year.[20] Not surprisingly no successful prosecutions were brought on foot of those investigations.

Although many of the legislative and resource problems have been addressed, the indications to date do not suggest that a dramatic upsurge in enforcement activity is likely. In one case, books of evidence were prepared and charges drafted at the direction of the DPP[21] but, almost two years later, no prosecution has been brought and, in a recent reply to a parliamentary question, the Tanaiste indicated that a criminal prosecution was no longer being pursued.[22]

The Authority's Annual Report for 2003 states that in a full year it expects to produce:

- One full cartel investigation leading to enforcement proceedings; and
- A handful of civil actions.

This is in spite of an increase in staff of 85%, the assignment of two Garda Detective Sergeants to the Authority to assist in cartel investigations and the fact that additional Garda have been made available for participation in searches. The Report also indicates that 85% of complaints received by the Authority were closed without any further investigation.

The Authority has instituted a leniency programme but has refused to disclose any information even in respect of the number of applications received. It is not possible therefore to evaluate whether or not the programme is operating successfully or whether some reforms are necessary.[23]

Authority on the grounds of inadequate resources. In April 2000 the Authority had a total of only 14 members and staff.

18 Dail Debates, 12 October 2000. Since 1997 the Tanaiste has had responsibility for the Authority.

19 Rating the Regulators, *Global Competition Review*, April/May, 2000, at 28.

20 Massey & Daly, *Competition and Regulation in Ireland The Law and Economics,* Cork, Oak Tree Press, 2003.

21 *Ibid.*

22 *Dail Debates* 6 April 2004. The Authority Chairman subsequently informed a hearing of the Oireachtas (Parliamentary) Public Accounts Committee that the DPP had not taken any decision on the matter. Public Accounts Committee hearing of 22 July 2004.

23 Massey & Daly, *Competition and Regulation in Ireland The Law and Economics,* Cork, Oak Tree Press, 2003, report that the Authority refused to release such information on "policy grounds".

PRIVATE ENFORCEMENT IN IRELAND

One of the objectives of Regulation 1/2003 is to boost private enforcement of competition law. Since 1991 Irish competition legislation has provided private parties harmed by anti-competitive practices with a right of action.[24] 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 plaintiffs 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.

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.[25]

The author would respectfully suggest that this is inconsistent with the Commission desire to encourage greater private actions as a mechanism for enforcement of competition law.

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[24] 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.

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

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.[26] 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. Effectively in accepting undertakings the Authority has rejected the possibility of obtaining a declaration that particular behaviour is in breach of the Act.

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.

WHY PRICE FIXERS SHOULD GO TO PRISON

Undoubtedly one of the more interesting aspects of the Irish legislation was the decision to introduce criminal penalties for individual company executives as well as for companies. 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. The lack of successful criminal prosecutions is cited in support of this contention.

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. 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.[27] They 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 "they are the equivalent of theft by well-dressed thieves."[28]

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

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[26] Massey and Daly, 'Authority 'decision' against Statoil pricing strategy poses problems' (2004) 12(10) *Competition* 243-6.

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

[28] Klein, 'The War Against International Cartels: Lessons from the Battlefront', in Hawk, ed, *International Antitrust Law and Policy*, New York, Juris Publications, 2000, 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, *A World Class Competition Regime,* London, HMSO, 2001.

are not petty crooks; they are clever sophisticated business executives who have risen to senior management positions in their companies. Given that firms can earn substantial profits from engaging in cartels, serious penalties are required to deter such behaviour.[29]

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 individual 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. 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.[30] Fining the company in those circumstances will therefore have little deterrent effect. Such fines may simply be regarded as a "cost of doing business".

There are other limitations on the effectiveness of fines on companies for engaging in cartels. 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. 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.

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 fines is that the individual's employer may reimburse them, thus negating the deterrent effect. In New Zealand consideration has been give to the idea of making it illegal for firms to reimburse employees fined for competition law breaches.[31] This in turn raises the question of how such measures can be enforced. In contrast, however, individuals cannot pass a prison sentence on to their company.

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. Unlike many criminal actions undertaken in the heat of the moment, 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, take the threat of imprisonment into account. In addition, imprisonment may be a particularly strong deterrent for white collar individuals. The DTI reported that 83% of UK competition law experts favoured the introduction of criminal penalties for cartels.[32] Hammond and Penrose expressed the opinion that there was a case for a higher maximum penalty of up to seven years.[33]

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[29] For a detailed discussion on why prison sentences are necessary in cartel cases see Werden and Simon, 'Why Price-Fixers Should Go To Jail' (1987) 24(4) *Antitrust Bulletin* 917-37.

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

[31] Department of Trade and Industry, *A World Class Competition Regime,* London, HMSO, 2001.

[32] *Ibid.*

[33] Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK,* London, Office of Fair Trading, 2001.

Until the mid 1970s, price fixing was classed as a misdemeanour in the US. Over the past decade, the Department of Justice has successfully prosecuted an average of thirty five people a year. The Department's cartel immunity programme has resulted in many firms coming forward, admitting their participation in cartels and providing evidence against their co-conspirators. In recent years, roughly fifty percent of immunity applications received under the programme, involved cartels that were previously unknown to the authorities, suggesting that increased prosecutions of individual executives for participating in cartels are having a deterrent effect.

Of course if one accepts the argument that jail sentences for executives are necessary to deter cartel behaviour, then the lack of such penalties both at EU level and in many Member States suggests that EU competition law is unlikely to be wholly effective in deterring such behaviour. Undoubtedly that constitutes a serious problem. Joshua identified the lack of criminal sanctions as a serious weakness of EU competition law.[34]

Obviously an EU criminal code is some way away as this is an area where member States guard their powers jealously. It is therefore unrealistic to expect that such provisions would be put in place to deal with cartels. This is particularly true given that in many Member States "price fixing" is just not perceived as a crime. This may be because of a benign view toward "white collar" crime, something that is not unknown in Ireland. As one junior Irish Government Minister observed:

> 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.[35]

The perception that cartels are not criminal may also be attributable to the wrongful perception that it is a victimless crime. The reality is that cartels filch money out of consumers' pockets just like other fraudsters.

A third factor is the Commission's past history whereby most of its time was devoted to dealing with requests for negative clearances and exemptions. This may have fostered the perception that competition law was mainly about satisfying somewhat technical and arcane regulations rather than about preventing conspiracies that cost EU consumers large amounts of money. As Joshua put it:

> No doubt in the climate then prevailing, prosecuting big cartels was not given the priority it now enjoys. Whatever the public perception of the iniquities of conspiratorial behaviour may have been, governments, officials, experts, economists and perhaps even the judiciary seriously underestimated the harm that cartels were causing to the free economy.[36]

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[34] Joshua, 'Flawed Thinking About Price Fixers' *Financial Times,* 2 August 2001.

[35] O'Dea TD, 'White Collar Criminals Are Getting Clean Away' *Sunday Independent,* 12 April 1998.

[36] Joshua, '*The Criminalisation of Antitrust Leniency and Enforcement: the Carrot and the Stick. A View from Europe',* International Bar Association, Amsterdam, 2000, mimeo at 3.

Arguably such perceptions remain.

Regulation 1/2003 by providing for the decentralised application of EU competition law and allowing Member States to apply it using their existing national law procedures means that individual Member States may impose such sanctions. Of course having criminal sanctions in only some Member States inevitably limits the deterrent effect of such sanctions. A potentially more fundamental problem is that the Commission is likely to want to grab the biggest cases for itself and prevent those Member States that wish to from imposing criminal sanctions. As Joshua warned:

> The perverse result in Britain [and Ireland] would be that double-glazing salesmen fixing prices in the local pub could go to jail, while the biggest pan-European cartels would at most risk administrative fines on companies. Clearly, justice would fall into disrepute quickly if the smallest cases were the ones receiving the stiffest penalties.[37]

CIVIL FINES NOT THE ANSWER

The Irish Competition Authority has sought powers to impose fines on parties for breaches of Articles 81 and 82.[38] Such calls have been rejected by the Government. The reasons why civil fines for companies are unlikely to deter cartel behaviour have already been outlined. A system of civil fines for non cartel behaviour, however, gives rise to problems of a quite different sort. First, 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. Second 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.

Non-price vertical restraints, such as exclusive distribution agreements, cannot automatically be described as either pro or anti-competitive, and a detailed analysis based on the individual market circumstances in each case is required. Similarly, it is widely recognised that there is frequently a fine line between aggressive competition and abuse of dominance. As there is no consensus as to what does and does not constitute anti-competitive behaviour in such cases, penalties would appear to be inappropriate. 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

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[37] *Ibid.*

[38] If it could be shown that there was a requirement under EU law to have a system of civil fines then this would override the Constitutional prohibition on such fines.

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.[39]

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. Even if it does not actually discourage competitive behaviour, 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 advance a further argument against imposing penalties in abuse of dominance cases. They 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.[40]

Massey[41] argued that Article 82 should be adjusted to allow for structural adjustment where appropriate, and Regulation 1/2003 gives the Commission power to impose such a remedy.[42] Many commentators have observed that the fine recently imposed on Microsoft by the Commission, while large in absolute terms, is relatively insignificant, given that company's massive financial resources. Rather it is the potential for the

[39] 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.

[40] Scherer & Ross, *Industrial Market Structure and Economic Performance*, 3rd ed, New York, Houghton-Mifflin, 1990, p 486.

[41] Massey, 'Reform of EC Competition Law: Substance, Procedures and Institutions', in Hawk (ed), *International Antitrust Law and Policy,* New York, Juris Publications, 1996, reproduced in Hawk (ed), *Reform of EU Competition Law,* New York, Juris Publications, 2002.

[42] Article 7(1) provides that the Commission may impose any behavioural or structural remedies necessary to bring an infringement to an end. Section 14 of the Competition Act, 2002 provides that the Irish courts may order the break up of a firm found to have abused a dominant position.

obligations which the Commission is seeking to impose on Microsoft to allow for effective competition that is the real penalty.[43]

There are more 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 closely 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. Although, from a common law perspective this appears unfair, the ECJ has rejected the suggestion that this approach is contrary to the rules of natural justice.[44]

The European Commission has, on a number of occasions, made wrongful findings of anti-competitive behaviour. In *Wood Pulp,*[45] 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.[46] In the UK, where the OFT has power to impose fines, the Competition Appeal Tribunal found fault with the OFT's decisions in three of the first five appeal cases referred to it.[47] In the Czech Republic cases against six oil companies have twice been overturned on appeal.[48]

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.[49] 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.[50] Kobayahsi has shown that the standard and burden of proof required influence the frequency of false positive and false negative errors.[51] This suggests that what is required is a more fundamental reform along the lines suggested

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43 Commission Decision *Microsoft*, COM(2004) 900 final. 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, at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf

44 Cases 100/80 etc *Musique Diffusion Francaise SA v Commission* [1983] ECR 1825.

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

46 Case T-342/99 *AirTours/First Choice v Commission* [2002] 5 CMLR 25.

47 *Global Competition Review,* 15 August 2003. In fairness it should be said that over time relatively few decisions have been appealed, the OFT has been overturned primarily in relation to the size of fines imposed, and the initial experience may reflect a learning process.

48 *Global Competition Review*, 7 May 2004.

49 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.

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

51 Kobayashi, B.H., (1997): Game Theory and Antitrust: A Post-Mortem, *George Mason Law Review* 5

by Montag who proposed that responsibility for initial decisions in infringement cases be transferred from the Commission to the Court of First Instance.[52]

In Ireland's case, 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 a very 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.

PROBLEMS WITH THE 2002 ACT

The 2002 Act addressed many of the shortcomings that were contained in the Competition (Amendment) Act, 1996. It has 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. It has also introduced a number of presumptions regarding documents which should enable them to be introduced as evidence without need to establish proof of authorship. Increasing the penalties for individual 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.[53] 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.[54]

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52 Montag, 'Problems and Possible Solutions from a Practitioner's Point of View', in Hawk (ed), *International Antitrust Law and Policy*, New York, Juris Publications, 1998.

53 According to statements made by the Authority Chairman to the Public Accounts Committee the arrest power has not been used in the two years since the 2002 Act came into force. Public Accounts Committee Hearing of 22 July 2004.

54 *Northern Pacific Railroad Co v US,* 356 US 1 (1958), 5.

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.[55] 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 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.[56]

The Irish legislation stops short of making cartels illegal *per se* and of 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. [57]

More importantly section 6(3) of the Irish 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.

The fact that Article 81 applies a bifurcated test and that the exemption requirements are part of the Treaty pose obvious difficulties in this regard. The CFI has stated that, as a matter of law, there are no anti-competitive agreements which could not be eligible for exemption.[58] 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."[59] As Joshua observed, Article 81 "is ill-suited to form the basis of a criminal charge".[60]

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

[56] Hilmer, *National Competition Policy: Report by the Independent Committee of Inquiry,* Canberra, Australian Government Publishing Service, 1993.

[57] For a discussion on the merits of creating a specific cartel offence see Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK,* London, Office of Fair Trading, 2001.

[58] Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 85.

[59] Schaub, 'Continued Focus on Reform: Recent Developments in EC Competition Policy', in Hawk (ed), *International Antitrust Law and Policy,* New York, Juris Publications, 2001, p 76. On the other hand Wils argued that on one reading, "Article 81(3) is nothing but a codified form of the American rule of reason", Wils, 'The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No.17', in Hawk (ed), *International Antitrust Law and Policy,* New York, Juris Publications, 2001.

[60] Joshua, 'Flawed Thinking About Price Fixers', *Financial Times,* 2 August 2001.

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.[61] The Authority originally 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.[62] It would appear to provide a way around the difficulty posed by the exemption provisions in the EU Treaty.[63] 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."[64] The failure to introduce a specific offence along the lines provided for in Section 188 of the 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.

Criminal penalties also raise the question of the rights of individual suspects. As noted individuals may be arrested and detained for questioning for engaging in cartels. Such individuals have the right to refuse to answer questions. In contrast section 31 of the Act provides that the Authority may summon witnesses to appear before it and examine them on oath. An individual refusing to take an oath and to answer questions put by the Authority shall be guilty of an offence. The Supreme Court has held that evidence obtained in this way would not be admissible against such individuals.[65] Similarly evidence given on oath before the Authority would not be admissible in court against the undertakings concerned as it would constitute hearsay. Rather such individuals would have to be prepared to voluntarily give such evidence in court. In spite of these difficulties, the Authority practice has been to use the section 31 powers rather than the arrest powers in its investigations of cartels.[66]

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61 *Competition*, 11(1) 9.

62 Department of Trade and Industry, *A World Class Competition Regime,* London, HMSO, 2001.

63 The Hammond and Penrose report 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. Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK,* London, Office of Fair Trading, 2001. For a detailed discussion of the cartel offence in the UK Enterprise Act 2002, see Whish, *Competition Law,* 5th ed, London, Butterworths, 2004.

64 Department of Enterprise, Trade and Employment, Memorandum to Tanaiste Re: Amendments to Competition Bill, 2001, 11 February 2002.

65 *In the matter of National Irish Banks Limited and the Companies Act 1990,* [1999] 1 ILRM 321. It is quite clear from the European Court of Human Rights judgement in *Heaney & McGuinness v Ireland,* 21 December 2000, that legislation requiring answers which are incriminating infringes the right to silence and thus the right against self incrimination which is implicit in Article 6 of the European Convention on Human Rights. Similar issues arose in *Saunders v United Kingdom* (1996) 23 EHRR 313.

66 The Authority's Annual Report for 2003 records, for example, that it issued a total of 69 summonses, while, as noted previously, no individuals have been arrested in the two years since the Act came into force. An Authority press release cited a member of the Authority as stating that it relied "heavily on the testimony and statements of persons" attending before it in investigating potential price-fixing cartels and other breaches of competition law. Competition Authority press release 4 August 2004 available at www.tca.ie

As noted previously, the Competition Authority and the DPP have instituted a leniency programme for those engaged in cartels. While the Authority has refused to disclose even the number of applications for leniency it has received, the existence of criminal penalties under Irish (and UK) law is a factor to be taking into account by parties considering making leniency applications. Where an undertaking is granted leniency by the DPP, the immunity against prosecution applies to individual executives of the undertaking.

CONCLUSIONS

Historically EU competition law has been overly bureaucratic with far too much of the Commission's resources being absorbed in dealing with notifications while serious infringements such as cartels, have gone undetected. Regulation 1/2003 should increase the effectiveness of EU Competition Law by increasing the resources available to pursue serious anti-competitive behaviour and eliminating the need to deal with innocuous behaviour. Nevertheless, the absence of criminal penalties in the form of prison sentences for individual executives responsible for engaging in cartels remains a serious weakness in EU competition law. It is important, therefore, that the Commission does not prevent those Member States that wish to do so from imposing such sanctions,[67] particularly in the most serious cases, in order to maximise deterrence.

Longer term, however, deterring cartels requires a fundamental reform along the lines proposed by Joshua involving the establishment of a single European Cartel Authority with the power to investigate and prosecute serious hard-core cartels before an independent court.[68] In this regard the failure to seriously debate such a measure represents something of a missed opportunity. As Stelzer observed:

> 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.[69]

It seems to this author at least that such views apply with equal force throughout the EU.

It must be recognised that tough penalties, such as those contained in Ireland's Competition Act, 2002, by themselves, will not deter anti-competitive behaviour, if people believe that there is little likelihood of being caught. The prospect of the Competition Authority bringing one cartel case per year suggests that the likelihood of getting caught for engaging in such behaviour is extremely remote to say the least. Far too much of the Authority's efforts have been channelled into undertaking sectoral studies rather than enforcement, which is obviously a great comfort to those engaged in cartels. In enforcement terms its time that the Authority got off the ditch and started delivering results on the pitch.

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[67] By utilising the procedure envisaged by Article 11(6) of Regulation 1/2003.

[68] Joshua, 'Flawed Thinking About Price Fixers', *Financial Times,* 2 August 2001.

[69] Lecture delivered on 15 November 2000 at No 11 Downing Street, reproduced in Stelzer, *Lectures on Regulatory and Competition Policy,* London, Institute for Economic Affairs, 2001.

The success of EU decentralisation ultimately depends on national authorities rising to the challenge of applying EU law. Obviously this requires that such agencies have adequate resources; that legislation provides for effective penalties but perhaps, most important of all, as Irish experience illustrates, there must be a desire to root out serious anti-competitive behaviour.