

The Competition Authority's Agenda – Lessons from the Past and Opportunities for the Future

Introduction

In times of economic difficulty, the effective enforcement and application of competition law is vital to the recovery process.¹ Rather than succumb to the pleas of certain industries or particular businesses hit by the recession, government departments and competition authorities should take a long term view and stand firm against protectionist policies.

This is undoubtedly the view of the European authorities and is clearly reflected in the decision to grant financial assistance to Ireland. That decision provides:

“...legislation shall be reformed to generate more credible deterrence by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty as well as **ensuring the effective functioning of the Competition Authority**. In addition, for the duration of the programme, the authorities will ensure that no further exemptions to the competition law framework will be granted unless they are entirely consistent with the goals of the Union financial assistance programme and the needs of the economy.”² (emphasis added)

Our commitment

In its most recent update to the EU/IMF Memorandum of Understanding, the Irish Government committed to the strengthening of competition law enforcement and policy in the following terms:

“Government will introduce legislation to strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union as well as ensuring the effective functioning of the Competition Authority, which will be merged with the National Consumer Agency.”³

While this is a laudable commitment, it is difficult to see how we can reconcile this commitment with what has actually been happening in Ireland. Notwithstanding the recent legislation in the form of the Competition (Amendment) Bill 2011 which was published on 29 September 2011, we have had cuts in public spending, meaning cuts to the Competition Authority's budget, the moratorium on public appointments introduced in April 2009 coupled with the departure of Authority staff members and the impending merger with the National Consumer Agency. This has meant that the Authority's resources are stretched to

¹ In particular, evidence from the Depression in the United States and the more recent recession in Japan in the 1990s has demonstrated that relaxed competition policy and enforcement serves to prolong the economic downturn and hinder growth.

² Council Implementing Decision amending Implementing Decision 2011/77/EU on granting Union financial assistance to Ireland

³ Memorandum of Understanding on Specific Economic Policy Conditionality (Second Update) (28 July 2011)

the limit.⁴ With such limited resources there must be a concern that it is becoming less likely that the Competition Authority will function effectively (as promised) and even more unlikely that competition law enforcement will strengthen.

Some concerns were highlighted by Declan Purcell (then Chairperson of the Authority), in a speech given at the Annual Irish Competition & Regulatory Law Conference in October of last year where he stated that, with the current level of resources, the Competition Authority:

- is no longer in a position to investigate and assist the DPP in the prosecution of criminal cartels to the extent they have in the past,
- will be doing well if it can conclude one major investigation in non-criminal enforcement per year,
- as regards merger review, the Authority has no choice but to respond within statutory deadlines and will probably have to do so by redeploying staff from enforcement work,
- as regards competition advocacy, the Authority is not in a position to carry out any market studies, and will have to focus on other less intensive forms of advocacy, and
- will probably have to suspend a number of enforcement investigations.

These same concerns were reiterated by the Chairperson in the Authority's Annual Report for 2010 (published 28 February 2011) and again in a speech given at the Authority's 20th Anniversary Conference in June of this year.

There may be some relief for Competition Authority officials in the recent announcement of the Minister for Communications, Pat Rabbitte, that the Government is in the process of drafting legislation which will give his Department the power to decide on all mergers and acquisitions covering broadcast, print and online media. Media mergers will no longer be notified to the Competition Authority and the Department will take full responsibility.⁵

There is undoubtedly some further (albeit limited) relief for the Authority in last week's Competition (Amendment) Bill 2011. Of particular relevance to the resources issue is the potential addition of section 11B to the 2002 Act. Section 11B provides for the recovery of the Authority's costs in the investigation, detection and prosecution of offences where a conviction is obtained.

The use of Competition Authority resources

In its Annual Report for 2010 it is stated that the Competition Authority has had to be ruthless in prioritising its resources. This is not a surprising statement given the steady decline in available resources since the introduction of the moratorium on hiring. The policy or agenda behind the prioritisation however is not clear. Given the limited resources available to the Authority, one might question the logic behind recent decisions to empty

⁴ Recent publications show that the Authority's staff numbers are almost back to 2002 levels. See "*Competition Policy, Law and Culture in 2011*", Declan Purcell (Chairperson, Competition Authority), Competition Authority 20th Anniversary Conference, 13 June 2011.

⁵ *Media mergers plan outlined*, The Irish Times - Monday, September 19, 2011.

those limited resources prosecuting certain cases. Of particular note to the writer is the recent hedgecutters trial in the Central Criminal Court in May of this year.⁶

The offences alleged against the defendants in this case, two of which were represented by Philip Lee, were that they entered into an agreement to fix a bid price for a contract being awarded by Irish Rail. The agreement was alleged to have been entered into during a meeting of the bidders in a car park which was organised by Irish Rail. On the basis of statements obtained over the course of a few months, the Competition Authority formed the view that it had sufficient evidence and referred a file to the DPP. The DPP however referred the case back to the Authority, finding that the file indicated no more than a minor offence.

The case was then taken by the Competition Authority in the District Court. However, the District Court Judge refused jurisdiction which meant that the case had to be referred back to the DPP. The case ultimately ended up in the Central Criminal Court with the defendants facing maximum penalties of €10m or 10% of turnover, 5 years imprisonment, automatic disqualification for directors and exclusion from tendering for public contracts for 5 years or more for what was originally categorised as a “minor offence”.

What is also notable about this case is that the price which it was alleged the defendants tried to fix was somewhere around €90,000 - €150,000. The price actually paid by Irish Rail for the contract (having excluded the defendants from the process) was in excess of €375,000. Given these facts, which were known to the Competition Authority at the time the decision to prosecute was taken, it is very difficult to see how any detriment to the Irish economy, its taxpayers or this particular market was a consideration in prosecuting these allegations.

The hearing of the case lasted for seven days in the Central Criminal Court, using substantial State funds and Competition Authority resources. The hearings each day were attended by the Authority’s in-house lawyer, enforcement officer and various other members of Authority staff, not to mention the resources utilised by the DPP and the cost to the Defendants in paying solicitors and Counsels fees. After a few hours deliberating, the jury acquitted the defendants.

While the District Court may have been the appropriate forum for hearing this case, it nonetheless ended up in the Central Criminal Court and it appeared that all involved were powerless to prevent this. Obviously the decision of the District Court Judge to refuse jurisdiction was instrumental in the case finding its way to the Central Criminal Court however one could also question the logic behind the Competition Authority’s decision to go after these defendants and the DPP’s decision to prosecute this type of case in the Central Criminal Court. Is this really a sensible use of scarce resources?

The Competition Authority has always made it clear that tackling cartel arrangements is a top priority and we can’t argue with that. It is undeniable that the competition rules should be enforced vigorously in times of recession, and that the detection and prosecution of cartels is a key part of this. However, it is arguably more important that competition policy is targeting

⁶ DPP v John Joe McNicholas trading as John Joe McNicholas Plant Hire, Oliver Dixon and Oliver Dixon (Hedgecutting and Plant Hire) Limited

the right people and actually making a difference to the economy, especially when the resources available are limited and potentially set to diminish even further.

What does the future hold?

Given the current state of our economy, it is crucial that better use is made of the resources available to tackle anti-competitive behaviour. There are certainly opportunities for the future by way of sanctions and deterrants, such as those contained in the Competition (Amendment) Bill 2011. However, these will also require resources. Without Government support it is going to be difficult to improve enforcement in the future.

It has already been stated by Declan Purcell that the Competition Authority is no longer in a position to investigate and assist the DPP in the prosecution of criminal cartels, which was originally a top priority for the Authority. However, there are less resource intensive ways to assist in detecting and deterring hardcore cartel type offences. Perhaps in the future the Competition Authority could be more proactive and responsive in the area of private enforcement. To this end, it is submitted that the *amicus curiae* role of the Authority could and should be utilised. In cases where private parties are themselves willing to foot the bill, gather the evidence and prove the existence of anti-competitive agreements and abuses, the Competition Authority (with limited resources required) would be well placed to act as *amicus curiae* to the court.⁷ There are a number of hurdles for private parties in civil enforcement and parties who are willing to shoulder this burden should be supported as much as possible.

Recent experience suggests that one of the greatest obstacles for a private party in taking on a cartel is the mismatch in resources. There is invariably a “David v Goliath” situation, and the damaged party seeking redress is likely to have limited or no resources and may even have been put out of business. The procedural rules of court, such as applications for security for costs against the plaintiff, and the inevitable appeals to the Supreme Court at each step in the process, are a massive hindrance to plaintiffs. This issue is currently before the courts in relation to the alleged cartel operating in the Irish cement market where the defendants have sought an order for security of costs against the plaintiff company, who is no longer in business.⁸ Obviously, given the financial standing of the plaintiff, an order for security of costs would mean an end to the plaintiff’s case. The application of the rules of court in this manner arguably amounts to a failure in the application of competition law before our national courts and appears to breach our obligations under the Commission Notice on Cooperation between the Commission and the Courts of the EU Member States, Article 10(c) of which provides:

“the rules on procedures and sanctions which national courts apply to enforce community law – must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness).....on

⁷ The court has an inherent right to appoint an *amicus curiae* (a friend of the court) where it appears that this might be of assistance in determining an issue before the court.

⁸ *Goode Concrete v CRH plc, Roadstone Wood Limited and Kilsaran Concrete* (High Court)

the basis of the principle of primacy of community law, a national court may not apply national rules that are incompatible with these principles”⁹

Orders for security of costs against plaintiffs in competition cases provide an effective remedy for dominant companies. It allows them to pursue abusive conduct and financially ruin competitors confident in the knowledge that they can apply for security of costs and prevent the case from proceeding. Even if unsuccessful in the application, they can appeal to the Supreme Court and impose significant delays and costs on the proceedings, further depleting the plaintiff's resources. It is submitted that, in the promotion of competition policy, the Competition Authority has a role and a responsibility to ensure that competition law can be enforced by private parties in the civil courts. In a climate where the resources are not available to the Authority to fully investigate suspected cartel activity, the Authority should lend support, such as by appearing as amicus, to those willing to take action to ensure that effective remedies are available. This is particularly the case where the Authority has knowledge of the issues, and accepts that there is substance to the subject matter of the proceedings.

Conclusions

Our Government has made an important commitment to strengthen the enforcement of competition law in Ireland. While this will be difficult to attain given the limited resources available to the Competition Authority, positive steps can be achieved. The resources available can be used to tackle areas genuinely affecting the economy and private enforcement can be encouraged and supported in order to relieve some of the burden on the State.

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⁹ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04)