

POLICY PAPER

Competition Policy in Ireland's Recession

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Abstract: Recessions pose something of a dilemma for policymakers with respect to competition policy. Despite compelling evidence that relaxing competition policy during a recession is likely to have quite profound adverse economic consequences in terms of, for example, retarding the subsequent recovery, policymakers may nevertheless relax competition policy to try to prevent job losses and firm insolvency. In Ireland the policy response has been ambivalent. At first, between 2008-2010, competition policy carve out/exemptions were proposed, senior appointments to the Competition Authority were delayed or not made. However, in December 2010 the EU-IMF Programme of Financial Support for Ireland set a strongly pro-competition agenda. But will it last beyond the end of 2013, when the programme expires? There is reason for optimism. If the economy has recovered or is at least growing there will be less pressure for the state to accede to demands for carve outs and other such anti-competitive measures. If the EU-IMF reforms have successfully bedded down in terms of, for example, introducing greater competition in the service sector, turning back the clock may be difficult, since there will be public support for the results of the reforms. The EU-IMF inspired reforms to competition policy and their underlying rationale may be successful in persuading senior decision makers in government, both elected and non-elected, of the merits of competition. Policymakers often claim that they want evidence based policy. The reforms in the EU-IMF Programme are firmly grounded on the literature concerning the impact of relaxing competition policy as well as the Competition Authority's research into the professions. In contrast, there is little or no evidence to support the 2008-2010 interregnum.

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I INTRODUCTION

Recessions pose something of a quandary for policymakers with respect to competition policy.¹ There is an understandable concern over job loss, firm insolvency and the need for restructuring through, for example, removal of excess capacity. This might cause competition enforcement to be less vigorous in general and more accommodating with respect to particular, otherwise anti-competitive, arrangements between firms designed to mitigate the impact of the recession. However, there is a large volume of evidence that suggests such policies – as practiced in the US in the 1930s or Japan in the 1980s² – have quite profound adverse economic consequences in terms of retarding the subsequent recovery of the economy, raising prices, damaging productivity growth, while the gains to those protected from market forces can all too often be no more than transitory.³ In other words, relaxing competition policy to assist selected sectional interests imposes costs on society. This is hard to defend, particularly as there are rarely, if any, objective criteria on which these decisions are made.⁴ Thus policymakers should not slacken enforcement of competition policy in a recession. This raises the issue of which path Ireland has selected since the onset of the recession in 2008. The issue is important. If the wrong policy choice is made then the economic impact is to prolong what is already a very deep recession.

In determining which choice policymakers in Ireland have selected attention is paid to the behaviour of the institutions responsible for the legislative framework, administration, enforcement and adjudication of

¹ By competition policy we mean the administration and enforcement of competition legislation. This involves not only dealing with abusive conduct by a dominant firm, anti-competitive agreements and mergers, but also the advocacy function whereby competition agencies can investigate and recommend legislative and other changes to markets where the aforementioned enforcement tools are unlikely to yield the best outcome for consumers. The advocacy function also entails arguing against anti-competitive proposals and, where possible, suggesting alternative arrangements that are less restrictive of competition, but, at the same time, achieve the desired objective. In the case of Ireland, for example, the Competition Authority has issued a number of reports calling for regulatory reform in protected or sheltered service sectors – primarily the professions. For details see Competition Authority, *Annual Reports*, various issues. These may be accessed at: www.tca.ie

² For details on the US see Cole and Ohanian (2004) and Romer (1999); for Japan, see Porter *et al.* (2000) and Porter and Sakakibara (2004).

³ For further discussion of these points and additional references see Gorecki (2012).

⁴ It should be noted that under the Competition Act 2002 there are provisions for allowing otherwise anti-competitive agreements, mergers and abusive conduct to be allowed if, broadly speaking, the benefits outweigh the costs. Some of these issues are explored further in Gorecki (2012).

competition policy. Linking these institutions with their actions and policies with respect to competition policy is a useful way of not only identifying the key decision makers but also obtaining a better understanding of the underlying policy. There are a small number of important institutions that are responsible for competition policy. Some of these are based in Ireland, such as the Minister responsible for competition policy, the Competition Authority, the Director of Public Prosecutions (“DPP”), the Department of Finance, and, the Courts; others are at the European Union (“EU”) level, such as the European Commission (“the Commission”) and the European Courts, especially the European Court of Justice (“ECJ”); and yet others are international organisations, such as the International Monetary Fund (“IMF”). In this analysis attention is paid, in varying degrees, to all of these institutions. In each instance the decisions that an institution is responsible for are identified and then, where possible, quantified.

The period selected is 2000 to July 2012. This should be long enough to be able to detect patterns in competition policy in Ireland and, hence, be able to put into context what happened to competition policy since the onset of the recession and, perhaps, why. Was there, for example, a marked change in policy since 2008? What are the prospects for the future of competition policy in the state?

Institutions are divided into three groups: the Minister responsible for competition policy, which should be taken to include Cabinet colleagues; the Competition Authority; and, the Courts. These three sets of institutions are clearly interdependent. The Minister sets the terms of reference, the resources and the legislation (together with the Oireachtas) within which the Competition Authority administers and enforces competition law and policy, while the Courts are the final arbiter of the meaning of competition law as well as being responsible for imposing penalties and remedies. These institutions are constantly involved in competition policy, whereas the impact of the other institutions mentioned above, such as the ECJ or IMF, is more episodic and as a result there is less of a data series of events that can be readily measured. Nevertheless, where appropriate, attention will be paid to these institutions.

The paper is divided into five parts in addition to the introduction. The role, responsibilities and decisions of the Minister (Section II), the Competition Authority (Section III) and the Courts (Section IV) are each considered separately before the various strands of the analysis are brought together in the Conclusion (Section V).

II THE RESPONSIBLE MINISTER – JOBS, ENTERPRISE AND INNOVATION

The Minister responsible for competition policy which at the start of the 2000 period was the Department of Enterprise, Trade and Employment (“DETE”) was renamed the Department of Jobs, Enterprise and Innovation (“DJEI”) by the end of the period, no doubt reflecting the changed economic times. The policy stance of the Minister towards competition policy can be measured by examining:

- Legislation, which will refer not only to laws that are enacted but also legislative proposals. Furthermore, the remit will extend beyond the Competition Act 2002 and also include other legislation relating to competition policy, such as the Minister’s proposals to introduce a Code of Practice for Designated Grocery Goods Undertakings (“the Grocery Code”).
- The Competition Authority, where the influence of the Minister is captured by: funding, senior appointments, and, organisational issues.

The Minister’s decisions with respect to legislation and the Competition Authority reflect, of course, wider governmental and public policy considerations. One of these which is particularly important, the EU-IMF Programme of Financial Support for Ireland (“EU-IMF Programme”), which sets out specific policy actions that had to be taken by the state as a condition for receiving the financial support.⁵

2.1 *Creating the Legislative Framework: Proposals, Bills and Legislation*

The major competition legislation proposed and passed between 2000 and 2012 is presented in Table 1. Three quite distinct phases emerge from this narrative of legislative proposals, irrespective of whether or not they are or were implemented. Two periods – 2000-2007 and 2010 to 2013 – in which legislation that is strongly pro-competitive is passed or proposed and one period, 2008-2010, where the reverse is the case. We consider each in turn.

2.1.1 The Modernisation of Competition Legislation: 2000-2007

Competition policy in Ireland was modernised and reformed between 2000 and 2007 with the introduction of the Competition Act 2002 and the abolition of the Restrictive Practices (Groceries) Order 1987 (“the Groceries Order”) in 2006. The Competition Act 2002 saw the end of the voluntary notification

⁵ For details see EU-IMF (2010, 2011a, 2011b, 2011c, 2012a, 2012b) and the discussion below.

Table 1: *Selected Competition Legislative Developments, Proposed and Enacted, Ireland, 2000-2012*

<i>Year</i>	<i>Legislation</i>	<i>Comment</i>
2002	Competition Act (CA 2002)	Modernised competition law. Merger function transferred to the Competition Authority, with mergers decided using a competition test, rather than a public interest test. Cartel offences made arrestable (i.e. five years or more jail sentence). Rebuttable presumptions introduced. Notifications abolished so Competition Authority resources allocated to detecting breaches of competition law, such as cartels. Law based on Competition and Merger Review Group <i>Report</i> (CMRG, 2000).
2006	Competition (Amendment) Act	Repealed the Restrictive Practices (Groceries) Order, 1987, which criminalised selling below net invoice price certain groceries products and 'hello' money. The legislation also introduced certain safeguards for grocery suppliers, but these included a competition test. Law based on a review of the operation of the Order (DETE, 2005).
2007	S.I. No. 122 of 2007	Revised the criteria for notification of a media merger so as to eliminate unnecessary notifications where there was no actual media involvement. Advice from the Competition Authority (Gorecki, 2011b).
2007 to present	Announcement of consultation on Competition Act	None of the submissions received published; no draft proposals for change published for discussion. Draft Bill anticipated in late 2012.
2008	Credit Institutions (Financial Support) Act	Mergers necessary to maintain stability of banking system subject to exclusive jurisdiction of Minister for Finance who applies the substantial lessening of competition ("SLC") test, but can approve anti-competitive mergers if necessary to maintain financial stability. In 2011 Minister promoted and evaluated the AIB/EBS merger. A two page assessment was released. The merger led to SLC if EBS continued as a separate entity, but since that was not possible "on [unspecified] terms acceptable to that State" no SLC (Charles River Associates (CRA), 2011, para 8).
2008 to present	Announcement of exemption of voice-over actors, freelance journalists	Part of Partnership Agreement (Gorecki, 2009a, p. 223). Legislation was to be introduced in 2009, but none to date. Competition Authority not satisfied that the agreement involving these groups met the criteria under the CA 2002 for exemption, having earlier concluded

Table 1: *Selected Competition Legislative Developments, Proposed and Enacted, Ireland, 2000-2012 (contd.)*

<i>Year</i>	<i>Legislation</i>	<i>Comment</i>
	and session musicians from CA 2002	that the agreement between voice-over actors and advertisers breached CA 2002 (Competition Authority, 2004).
2008 to present	Announcement to exempt IMO from s 4 of CA 2002 in negotiations with the State	The Irish Medical Organisation (IMO) is the representative body for General Practitioners (GPs). The intention is to exempt the IMO so that it can conduct negotiations with the State concerning the provision of public health services (Department of the Taoiseach, 2008). Legislation yet to be enacted.
2009 to present	Announcement of Code of Practice for Designated Grocery Goods Undertakings (the Grocery Code)	Policy measure announced in response to concerns of grocery suppliers in part a response to the decline in value of sterling. No research undertaken to verify the nature of the problem, whether or not intervention is merited and whether or not the proposed code is the most appropriate instrument of intervention (Gorecki, 2009b).
2011-12	Competition (Amendment) Act	Updating fines, jail sentences contained in the CA 2002 (e.g., maximum jail sentence for a cartel offence increased from 5 to 10 years) and added new sanctions (e.g. in a damages claim no need to prove that a breach occurred if prior conviction). Introduced as part of EU-IMF Programme. The legislation commenced on 3 July 2012.
2011 to present	Legal Services to Regulation Bill	According to the Explanatory Memorandum, the Bill is designed to "... to establish independent regulation of the legal profession, to improve access and competition, make legal costs more transparent and ensure adequate procedures for addressing consumer complaints." Introduced as part of the EU-IMF Programme.
2011-12	Health (Provision of General Practitioner Services) Act	Designed to introduce greater competition in the provision of GPs services provided by GPs treating public patients through the General Medical Services scheme. Introduced as part of the EU-IMF Programme. The legislation commenced on 12 March 2012.
2011 to present	Proposed Legislation on Exemptions and Reform	"No further exemptions to the competition law framework will be granted unless they are entirely consistent with the goals of the EU/IMF Programme and the needs of the economy (EU-IMF, 2011a, p. 15)."

Table 1: *Selected Competition Legislative Developments, Proposed and Enacted, Ireland, 2000-2012 (contd.)*

<i>Year</i>	<i>Legislation</i>	<i>Comment</i>
		“Building on the Competition (Amendment) Bill, the Irish authorities will engage with European Commission services and discuss measures to further enhance the competition enforcement framework and present amendments to the Bill where appropriate (EU-IMF, 2011c, p. 10).”

Source: CMRG (2000), Competition Authority (2004), CRA (2011), Department of the Taoiseach (2008), Gorecki (2009b, 2011b), EU-IMF (2010, 2011a, 2011b, 2011c) and the websites of Department of Health and Department of Jobs, Enterprise and Innovation.

system – washing clean linen in public – and a shift towards cartel enforcement, with the maximum jail sentence for a hard core cartel offence increased from two to five years.⁶ Responsibility for mergers was assumed by the Competition Authority using a competition test. Previously the Minister had responsibility using a public interest test. The Groceries Order had criminalised undertakings that reduced, for certain grocery products, prices below net invoice costs. Enforcement action had been taken, for example, against a supermarket for reducing the price of disposable nappies (DETE, 2005, p. 172). The mandatory merger notification criteria were revised so as to remove unnecessary notifications. These pro-competitive legislative measures were based on careful analysis.⁷

2.1.2 Carve Outs, Exemptions and Changing the Goalposts: 2008-2010

The second period dates from 2008 to 2010, when competition policy received much less support from the Minister. It slipped down the priority agenda. In this short period legislation was introduced or proposed that exempted the application of certain parts (i.e., mergers, agreements) of competition legislation to certain activities such as banking, groceries, GPs and voice over actors. These proposals were usually based on little or no analysis.⁸ In the case of voice-over actors where there was evidence, it demonstrated that the proposed exemption did not pass the cost/benefit

⁶ A hard core cartel is one that fixes prices, allocates markets either by product or geographically, or limits output or sales or capacity. By their very nature such arrangements are anti-competitive.

⁷ See, for example, CMRG (2000) and DETE (2005).

⁸ In the case of groceries, for example, it was proposed to introduce a Code of Practice for Grocery Goods Undertakings. One supporter of such a Code felt that before it was introduced that “... the underlying justification for such a Code should first be articulated on the basis of a robust investigation and research in supplier/retailer relationships.” (Travers, 2011, p.5).

analysis that forms part of the Competition Act 2002 that allows otherwise anti-competitive agreements.⁹ In addition, in the one instance where these proposals were implemented – shifting responsibility for important bank mergers to the Department of Finance – alternative legislative arrangements that would have given competition policy a larger role were not selected,¹⁰ while the two-page published assessment of the 2011 Allied Irish Banks plc/EBS Building Society (“AIB/EBS”) merger raised more questions than it answered.¹¹ Up until 2008 the Competition Act 2002 was a law of general application, but the various carve outs are a move away from this state of affairs. This sets a clear precedent for other groups, such as farmers and some professions, to exploit and so undermine the effectiveness of competition policy in Ireland, particularly in view of the fact that it appears that little or no evidentiary basis is required in order for an exemption to be sought and

⁹ This is discussed further in Gorecki (2009a, pp. 222-223).

¹⁰ Under the UK competition regime, for example, the Office of Fair Trading (“OFT”) makes a finding as to whether or not a merger might lead to substantial lessening of competition, thus requiring a Phase II investigation by the Competition Commission. However, the Minister can, after the OFT has made its report, decide that the merger should be allowed on other broader public interest grounds. This occurred with respect to the takeover by Lloyds TSB plc of HBOS plc where the relevant Minister issued a 28 paragraph decision justifying his action. For details see DBERR (2008). Subsequently, a UK government commissioned report into banking, which considered both financial stability and competition, made a series of recommendations designed to create a competitive banking sector, including sufficient divestiture from Lloyds/HBOS to create a strong challenger bank. For details see Independent Commission on Banking (2011).

¹¹ This has been the only merger considered by the Minister for Finance under the legislation. The competition assessment, prepared by CRA (2011), stated that the AIB/EBS merger would lead to a substantial lessening of competition (“SLC”) in the supply of mortgages and perhaps (“unlikely but not impossible”) the supply of savings products, on the assumption that EBS would continue, absent the merger, as an independent financial institution. However, the assessment stated, “... there is no realistic prospect for EBS to remain as an independent standalone institution in the market on terms acceptable to the State. [*Redaction on grounds of commercial sensitivity*].” A number of counterfactuals were considered but did “not appear very credible or realistic.” No details were presented again on grounds of commercial confidentiality. Hence, the assessment concluded that, “... there is no realistic counterfactual against which the merger brings about a material reduction in competition.” Any discussion of the assessment is handicapped by the use of commercial confidentiality to redact significant information. What were the terms not acceptable to the state? Would they have been acceptable to the Competition Authority, given its guidance on the use of the failing firm defence for a merger that might otherwise lead to SLC and the application of this defence in the Musgrave/Superquinn merger (Competition Authority, 2011c)? The assessment says it consulted with the Competition Authority and the Central Bank of Ireland. Why were their views not reported? While the Competition Authority (2012) subsequently stated “... that there is strong evidence in support of EBS being a failing firm” (*ibid*, p. 36), this was based on the Department of Finance’s view “in relation to the relevant counterfactual” (*ibid*, p. 35). The Competition Authority, rarely, if ever, relies on the views of the merging parties of the relevant counterfactual without first conducting an investigation as it did in the Musgrave/Superquinn merger. The Central Bank of Ireland (2012) did not set out its position on the merger in its *Annual Report*.

possibly granted, nor are any criteria apparent. It thus encourages rent seeking behaviour by such groups.

2.1.3 The EU-IMF Programme of Financial Support for Ireland: 2010-2013

The third period dates from December 2010 to the end of 2013 and coincides with the EU-IMF Programme. This marked a decisive shift in the nature of proposed competition legislation. A firmly pro-competition agenda is set until at least the end of 2013, the termination date of the EU-IMF Programme. The protectionist anti-competitive impulse of the state manifest between 2008 and 2010 was stilled. Structural reform was the order of the day as set out by the EU-IMF (2010, 2011a, 2011b, 2011c, 2012a, 2012b). Legislation was introduced by the Minister, in accordance with the EU-IMF Programme, to increase penalties and remedies for infringements of competition law, which, although an improvement, fell short of civil fines. Legislation was introduced by other Ministers implementing longstanding Competition Authority recommendations for the liberalisation of the sheltered sectors of the economy – legal services and the provision of GP services to public patients.¹² Finally, instead of sanctioning the proposed carve outs and exemptions proposed between 2008 and 2010, a signal was sent by the EU-IMF Programme that these were unlikely to be approved.¹³ On the contrary, the EU-IMF Programme envisaged that competition legislation will be strengthened. The Minister's discretion has been considerably circumscribed by the IMF-EU Programme. As a result competition policy instead of slipping down the policy agenda has been given priority status – at least until the end of 2013.

2.2 *The Competition Authority: Funding, Appointments and Organisation*

The Minister plays a vital role in relation to the Competition Authority in terms of funding, senior appointments, and organisational structure. We consider each in turn by examining the record since 2000. As with legislative developments the EU-IMF Programme had a role to play, but it has been less apparent.

¹² See Competition Authority (2006, 2010b, 2010c). In the case of legal services the 2011 Programme for Government also stated that reforms would take place designed to introduce greater competition. For details see Department of the Taoiseach (2011).

¹³ "Requests for exemptions to the competition law framework will not be accepted unless they are consistent with the goals of the EU/IMF supported programme for Ireland and the needs of the economy." (EU-IMF, 2011b, p. 29). This was subsequently repeated by the EU-IMF (2012b, p. 7).

2.2.1 Resources and Funding

In terms of resources and funding of the Competition Authority, we use a monetary measure, the Grant-in-Aid, and the sanctioned staffing level, measured in persons. In both cases these are maximum amounts, it is up to the Competition Authority to spend and allocate these resources.¹⁴ Table 2 shows that the Grant-in-Aid in nominal terms grew rapidly to reach a maximum of close to €7 million in 2008, up from €1.62 million in 2002 – more than a quadrupling in funding. However, funding declined in 2009 and 2010 to reach €4.7 million in 2010, before recovering a little in 2011 to €5.1 million. Sanctioned staff doubled between 2000 and 2006 from 29 to 60 and then remained constant. However, as we shall see in Section 3.1, limits have been placed since 2009 by government on the degree to which these positions can be filled. The increase in resources for the Competition Authority reflected a report by prepared by Deloitte & Touche (2000) making the case for increased resources as part and parcel of the modernisation of competition policy with the passage of the Competition Act 2002.

While the increase in resources to the Competition Authority clearly indicated a policy preference for a stronger competition regime, how should the decline in the Grant-in-Aid in 2009 and 2010 be interpreted? At the same time that the Competition Authority's Grant-in-Aid was cut there was also a broader budgetary retrenchment by the state due to the financial crisis. The issue thus becomes to what extent the Competition Authority suffered a disproportionate budget cut. In order to measure this we express the Grant-in-Aid of the Competition Authority as a percentage of the DJEI's budget (Table 2). Here we see that the nominal increase in the Grant-in-Aid to 2007 is reflected in an increase in the Competition Authority's share of DJEI's budget which peaks in 2005 not 2007, but also that in 2009 and 2010 the Competition Authority's share remained largely unchanged from 2006/07, apart from an increase in 2011, suggesting that the Competition Authority did not experience a disproportionate decline in the Grant-in-Aid.¹⁵ Of course, it could be argued that during a recession cartels and other restrictions on competition are more likely to occur and so funding of the Competition Authority should be a priority area for government expenditure.

¹⁴ Of course, the Competition Authority can always ask for additional in-year resources. It should also be remembered that legal costs in criminal cases taken by the DPP are paid by that organisation, while the Competition Authority bears the costs of civil court cases, although the Department/Minister will assist in funding such costs if the Grant-in-Aid is exceeded.

¹⁵ Table 2 also presents comparable data for persons, with a similar conclusion. However, the data with respect to persons need to be interpreted with care towards the end of the period in view of the hiring freeze.

Table 2: *The Competition Authority Budget and Staff in Relation to Department of Jobs, Enterprise and Innovation Budget and Staff, 2000-2011*

<i>Year</i>	<i>Competition Authority Grant-in-Aid € millions</i>	<i>Competition Authority Staff Sanctioned</i>	<i>Competition Authority Budget/DJE&I Budget %</i>	<i>Competition Authority Staff/DJE&I Staff %</i>
2000	1.55	29	0.16	n.a.
2001	2.01	44	0.20	n.a.
2002	1.62	44	0.13	n.a.
2003	3.51	47	0.29	0.44
2004	4.32	47	0.36	0.75
2005	5.07	53	0.38	0.87
2006	5.8	60	0.30	0.95
2007	6.1	59	0.29	0.86
2008	6.78	59	0.30	1.03
2009	5.57	59	0.27	0.89
2010	4.7	59	0.34	n.a.
2011	5.1	59	0.61	n.a.

n.a. not available.

Source: The Competition Authority *Annual Report*, various issues.

The Department of Enterprise, Trade and Employment, *Annual Reports* 2000-2005.

The Department of Enterprise, Trade and Employment, *Annual Output Statements*, 2006-2009.

The Department of Enterprise, Trade and Innovation, *Annual Output Statement*, 2010.

The Department of Public Expenditure and Reform, *Revised Estimates for Public Services*, 2011.

Under the EU-IMF Programme the budget of the Competition Authority is being carefully examined to see if it is adequate. The "... Authorities will undertake a review of the resourcing of the Competition Authority and report on whether it is sufficient to allow adequate enforcement capacity of the new legislative framework." (EU-IMF, 2011c, p. 13). The review was to be completed by Q1 2012 with implementation by Q2 2012 (*ibid*, p. 13, p. 15). On 25 April 2012 it was announced that as a result of the review the Minister had approved ten additional staff positions for the enforcement function of the Competition Authority.¹⁶

¹⁶ The announcement was made in the Seanad during a debate at the Committee Stage of the Competition (Amendment) Bill 2011. For details see <http://debates.oireachtas.ie/seanad/2012/04/25/00007.asp>. Accessed 13 August 2012. The review that resulted in the increase in the number of positions does not appear to have been published.

2.2.2 Senior Appointments

In terms of senior appointments to the Competition Authority the Minister plays a vital role. It is the Minister's responsibility to initiate the process, through the Public Appointments Service, to select the Chairperson and members of the Competition Authority. These persons play a key leadership role in the Competition Authority; without them the organisation is likely to experience difficulty in carrying out its business, as well as retaining and attracting new staff. Under the Competition Act 2002 there is provision for five full-time Members, one of whom is also Chairperson, appointed after an open recruitment process as specified in Section 35 of the Act. In general, the Competition Authority has had a full complement of senior appointments in the period 2000-2008 (Table 3). However, things changed in 2009. Vacancies were left unfilled, while a new Chairperson was appointed on a temporary basis. This state of affairs reflected the fact that the Minister did not make senior appointments as vacancies arose. As a result the Competition Authority was in danger of not having a quorum, which would have severely curtailed its effectiveness.¹⁷ To resolve this situation emergency legislation was introduced in 2010 to permit temporary Members (six months, with a maximum of one six month extension) to be appointed by the Minister without a competition.¹⁸ In October 2011, a permanent Chairperson was appointed and three full time permanent Members were appointed shortly thereafter. The state of affairs prior to these appointments may have reflected, in part at least, the proposed merger between the Competition Authority and the National Consumer Agency ("NCA"), an issue to which we now turn.

2.2.3 Competition Authority/National Consumer Agency Merger

In terms of organisational structure the most important change was the announcement of the merger of the Competition Authority with the National Consumer Agency ("NCA") on 14 October 2008. Mergers between agencies take time to bed down and for the new structure to perform in an efficient and effective manner. The competition and consumer protection functions are often combined (e.g. Canada, Australia and the US); while in other instances they are separate (e.g. European Union). In the case of the UK, where the consumer

¹⁷ For example, without a quorum a merger which led to SLC could not be prohibited nor could the Competition Authority refer a case to the DPP for criminal prosecution.

¹⁸ The Competition (Amendment) Act 2010. One vacancy had existed since January 2009. However, since a period of notice is required the Minister would have been aware of the pending vacancy prior to the resignation date. The debates in the Seanad for 2 June 2010 provide background on the legislation. For details see: <http://debates.oireachtas.ie/seanad/2010/06/02/00006.asp>. Accessed 16 August 2012.

Table 3: *Members of the Competition Authority, Status of Appointment, 2000-2011*

Year	Chairperson	Members	
		Permanent (PA)	Temporary (TA)
2000	PA	4	n.a.
2001	PA	3	n.a.
2002	PA	4 ^a	n.a.
2003	PA	4	n.a.
2004	PA	4	n.a.
2005	PA	4	n.a.
2006	PA	4	n.a.
2007	PA	4	n.a.
2008	PA	4	n.a.
2009	PA	3	n.a.
2010	TA	1	2
2011 (Sept)	TA	0	3
2011 (Dec)	PA	3 ^b	0
2012 (July)	PA	3	0

^a Resigned 31 December 2002.

^b One of the three Members took up their appointment in January 2012, the other two in December 2011.

n.a. = not applicable.

Source: The Competition Authority *Annual Report*, various issues, website and press announcements.

and competition functions have been combined in the Office of Fair Trading, it is now proposed to separate these two functions (DBIS, 2011). The fact that the competition and consumer functions are sometimes combined and sometimes not, suggests that there is not a strong a priori case for merging the two functions. In any event, irrespective of the merits, for a merger to be successful requires careful thought as to its implementation, resourcing and structuring. It is not clear that this is the case with respect to the proposed Competition Authority/NCA merger:

- *First*, prior to the creation of the NCA in May 2007 the issue of whether the competition and consumer protection functions should be combined was considered and rejected (Consumer Strategy Group, 2005, pp. 84-87). When the Competition Authority/NCA merger was announced the NCA was in the process of relocating to Cork from Dublin and persons had been hired on that basis. The Competition Authority was and is located in Dublin.

- *Second*, no well documented case has been articulated for the merger. In making the announcement the Minister made references to “synergies and efficiencies” (DETE, 2008a, p. 2) which were subsequently repeated (DETE, 2008b, p. 3). There is no credible documented estimate of the expected synergies.¹⁹
- *Third*, when the Minister made the announcement of the merger she said that “[D]etails [of the merger] would be worked upon over the coming months ...” (DETE, 2008a, p.2). In other words, the decision to merge was taken without an analysis of how the merger was to work out in practice. Four years on, few details have been released for discussion or draft legislation published.

Thus, the DJEI’s role in relation to senior appointments and the organisation of the Competition Authority, if not to the funding, is consistent with the discussion in respect of the legislative framework for competition policy. After a period of strong support for competition policy, measures were taken or proposed between 2008 and 2010 by the Minister that lessened the ability of the Competition Authority to effectively administer and enforce competition law. However, recent positive moves by the Minister with respect to senior appointments to the Competition Authority, combined with the increase in the number of staff positions for the Competition Authority under the EU-IMF Programme should, to a considerable extent, restore the Competition Authority’s ability to enforce competition law. However, the ongoing uncertainty concerning the Competition Authority/NCA merger, for which no well argued justification has been presented, is a distraction that is unlikely to contribute positively towards the enforcement of competition policy.

2.3 *The Change in the Minister’s Direction: Why?*

There are two distinct changes in policy towards competition policy since the onset of the recession: 2008, when an attempt was made to reverse the

¹⁹ Nevertheless, an indication was subsequently provided three years later by the DJEI (2011) in terms of (unspecified) rationalisation of back-office functions and savings amounting to €170,000. However, these are not entirely credible. In the case of back-office functions Competition Authority payroll services have always been provided by the DJEI, while in the case of IT services the Competition Authority decided in the early 2000s not to use that of the DJEI, given the specialist needs of the Competition Authority. The savings of €170,000 come through the abolition of the Board and Board related fees of the NCA. However, from these savings the costs incurred of the partially completed move of the NCA to Cork in 2007 would need to be deducted. Furthermore, it is not clear if account is taken of the fact that the size of the senior staff (i.e. Chairperson and Members) of the combined NCA/CA entity may be larger than the current Competition Authority by up to two persons whose compensation would be about twice €170,000 when pension costs are taken into account.

existing pro-competitive policy agenda; and 2010, when the pro-competitive agenda was re-established at the behest of the EU-IMF Programme. We consider each in turn.

2.3.1 Turning Back the Clock: 2008

There is no Ministerial or Departmental statement which can be relied upon to explain the change in stance towards competition policy in 2008. No statement appears that suggests a change in attitude towards competition policy, which is still treated as a desirable policy.²⁰ Thus any attempt to explain the change in direction, or perhaps emphasis, is of necessity indirect and somewhat tentative. Nevertheless, one explanation concerns two different models of economic management of markets, combined with the financial crises and budgetary cutbacks.

The Competition Act 2002 embodies within it the view that market forces are, in general, the most appropriate method of organising markets. This does not mean that markets are perfect and that they always work well. Within the Competition Act 2002 there is provision that if the benefits exceed the costs then otherwise anti-competitive mergers, agreements between competitors or conduct by a firm with significant market power will be allowed. For example, an otherwise anti-competitive merger would be allowed if the anticipated efficiency gains more than offset the expected price-enhancing effects of the merger. Furthermore, there is recognition that markets might not always work well for consumers and so there are provisions for the Competition Authority to advocate changes in the way markets work or are regulated as occurred, for example, with respect to household waste collection (Competition Authority, 2005c).

In contrast, the partnership or corporatist model of managing markets sees scope for intervention in the ways markets work as a result of dialogue between the interests of organised labour and organised business, with the state acting to a considerable degree as a facilitator. Although partnership agreements started off in 1987 as an agreement about pay the range of issues covered expanded considerably. The proposal to remove voice-over actors and similar groups from certain parts of the Competition Act 2002 was a direct outcome of the partnership process (Gorecki, 2009a). In the partnership model restrictions on the working of the market are thus seen in the wider context of securing agreement on pay and related conditions. Immediate short-term needs to secure an agreement are seen as more important than the loss of

²⁰ This is confirmed, for example, by examining the DJEI's *Annual Output Statements* for 2008 to 2010. These may be accessed at: <http://www.djei.ie/corporate/finance/publications.htm>. Accessed 3 March 2012.

possible benefits of competition in particular markets. In contrast to processes under the Competition Act 2002, the partnership process is not only shrouded in secrecy, but also as the OECD (2001, p. 151) remarked consumers are "... an interest group which do not participate in the Partnership process." In the tests set out above for allowing otherwise anti-competitive mergers, agreements or exclusionary conduct by a firm, the impact on consumers is the key consideration.

While there is a clear tension between the market model inherent in the Competition Act 2002 and the partnership approach, they may not be as diametrically opposed as they might appear at first. Rather, it could be argued that the relationship is more nuanced. The default method of organising markets is that embodied in the Competition Act 2002, the partnership approach is concerned with exceptions, such as those proposals for carve outs and exemptions set out in Table 1.²¹ Seen in this light the change in direction by the Minister is easier to explain. The financial crisis and austerity budgets that followed increased the demand for intervention to moderate and abate market forces. The state, due to financial stringency found it much more difficult to suggest alternative methods of meeting the demands of the social partners, such as increased public expenditure, hence the turning point in the Minister's attitude to competition policy in 2008. Even though the strains of the recession resulted in the abandonment of the partnership model in 2009, its longstanding nature may have continued to exert an influence on policy-makers as to how to make decisions.²²

²¹ The demands for these carve outs and exemptions arose in part as a reaction to the enforcement actions and policy statements of the Competition Authority. However, before these proposals could be implemented, circumstances changed with the onset of the banking crisis and the recession combined with the EU-IMF Programme.

²² More speculatively, the change in 2008 by the Minister towards competition policy may have been influenced by the decision of the Competition Authority to take a civil court case under the Competition Act 2002 against the Beef Industry Development Society ("BIDS"). (For details, see Competition Authority (2011a, pp. 22-23).) This association of beef processors agreed to reduce capacity in order, in part at least, to avail of government modernisation grants. Under the BIDS arrangements a system of levies on output was introduced that raised the marginal cost of those firms that stayed in the market (i.e. the stayers) to pay those that left (i.e. the goers). The state encouraged the private arrangement to limit capacity. The justification was provided by a series of government sponsored reports. The most senior official of the sponsoring department – agriculture – gave evidence in the High Court as did a senior official from Enterprise Ireland both in support of BIDS. Although the Irish High Court found in 2006 that the BIDS arrangements were not anti-competitive, the ECJ in 2008 concluded that they breached competition law by object. (By object means that the agreement in and of itself is anti-competitive and thus there is no need to examine its effects on price or quantity. For further discussion see Whish (2009, pp. 113-118).) The success in the BIDS case may, ironically, have lessened support for competition policy.

2.3.2 Reaffirming the Competition Agenda: 2010

In contrast to the 2008 change in policy direction, there is no difficulty in explaining the sudden volte face in 2010 that reaffirmed the importance of the competition agenda. Ireland needed outside financial assistance due to the banking and fiscal crisis and one of the conditions of the lenders – the IMF and the EU – was a strengthening of the competition agenda as part of a broader programme of structural reform. Under the heading ‘Raising the Growth Potential’, the EU-IMF (2010, p. 10) envisaged a programme of liberalisation of the service sector and civil fines for breaches of competition law. Subsequently, as noted above, the EU-IMF became concerned that the Competition Authority did not have sufficient resources to discharge its functions appropriately. Hence, the policy agenda of these international organisations is consistent with the discussion in the opening paragraph of the paper which sees competition and markets as the driving forces for growth.

2.3.3 What's to be Done Beyond 2013?

The 2008-2010 competition policy agenda of the Minister is quite different from that agreed with the EU-IMF in late 2010. However, the EU-IMF Programme expires at the end of 2013, raising the issue of whether or not the pro-competitive reforms – liberalisation of selected professions, moratorium on carve outs and exemptions, increased resources for Competition Authority, strengthening competition law – contained in that programme will be reversed or at least severely attenuated once the state has unilateral control of the agenda. Whether that is the case will depend on a number of factors. First, if the economy has recovered or is at least growing there will be less pressure for the state to accede to demands for carve outs and other such anti-competitive measures. Second, the reforms may have successfully bedded down in terms of, for example, introducing greater competition in the service sector while the Competition Authority might be more visible in terms of high profile cartel investigations and prosecutions. To the extent that this is the case, turning back the clock may be difficult, since there will be public support for the structural reforms of the EU-IMF. Third, the EU-IMF inspired reforms to competition policy and their underlying rationale may be successful in persuading senior decision makers in government, both elected and non-elected, of the merits of competition. Fourth, policymakers often claim that they want evidence based policy. The reforms introduced during 2000-2007 were based on careful analysis, while the 2010-2013 pro-competitive agenda is firmly grounded on the literature concerning the impact of relaxing competition policy as well as Competition Authority's research into the professions. In contrast, there is little or no evidence to support the 2008-2010 interregnum. At this stage it is difficult to establish whether or not a firm

foundation for the pro-competitive agenda has been set that will last beyond 2013.

One way of reinforcing the pro-competitive agenda is for those individuals and groups that support competition policy to speak out more forcefully in its favour. Such groups might include the competition lawyers, academics, ex-policy-makers, practitioners and so on. A recent paper by Frank Barry (2009) points out the role of similar groups in relation to deregulation in the air passenger sector. There is a need to persuade elected representatives of the benefits of competitive markets, which tend to be widely dispersed, compared to the concentrated nature of the benefits of a particular carve out.

III THE COMPETITION AUTHORITY.

The Competition Authority is charged with the administration and enforcement of competition policy in Ireland. It has wide discretion in discharging these responsibilities. It has the power to start investigations on its own initiative, the power to summons witnesses to give evidence, search premises subject to obtaining a search warrant from the District Court, and refer criminal cases to the DPP for prosecution²³ and to initiate legal proceedings in civil cases and summary criminal cases. Under the mandatory notification system the Competition Authority is responsible for merger control using a competition test.²⁴ The Competition Authority also has a mandate to advise Ministers on the impact, from a competition perspective, on legislative proposals, such as the proposed Grocery Code referred to in Table 1, while Competition Authority's studies on eight professions has led to increased openness, liberalisation and competition.²⁵ The Competition Authority thus has a wide range of activities and outputs in enforcement and advocacy.

Attention is confined here to criminal cartel cases. The Competition Authority has consistently argued that cartel enforcement is its top priority. For example, its 2006-2008 *Strategy Statement*, that:

²³ Cases by way of indictment have to be referred to the DPP, while for summary prosecutions it is at the discretion of the Competition Authority. More serious cases proceed by way of indictment, reflected in higher maximum fines and jail sentences.

²⁴ In terms of the quality of its merger work the Competition Authority, in a recent survey of competition agencies, was ranked fourth amongst agencies in 60 countries. For details see Ganslandt (2012).

²⁵ For details see Competition Authority (2011a, pp. 43-46; 2012, pp. 41-43) and Section 2.1.3 above.

[C]artels are generally recognised as the most serious form of anti-competitive behaviour and the Competition Authority has identified cartel investigations as its top priority (Competition Authority, 2005b, p. 7).²⁶

Setting cartel enforcement as its top priority is consistent with the Competition Authority devoting more of its resources to cartel enforcement than any other Competition Authority function.²⁷ It is also consistent with the thrust of the modernisation of competition policy with the passage of the Competition Act 2002. To strength cartel enforcement the Cartel Immunity Programme was introduced in 2001²⁸ and members of the Garda Bureau of Fraud Investigation were seconded to work on cartel investigations. The Competition Authority (2005a, p. 3), based on the work in 2004, took the view that, “[O]ne full investigation leading to criminal enforcement proceedings” a year was the level of output to which it could aspire.

Three indicators of cartel enforcement are considered. First, the resources available to the Competition Authority to fight cartels and conduct its other activities. Second, the use of the investigate powers of the Competition Authority. Third, the timing, number and success of the Competition Authority and the DPP in bringing criminal cartel cases.

3.1 *Resources*

The Minister sets the Competition Authority’s Grant-in-Aid and sanctioned number of staff persons. A comparison to the Competition Authority’s outturn and actual number of employed staff, respectively, measures the degree to which the Competition Authority uses the resources it has been allocated. The results are presented in Table 4. On the comparison between outturn/Grant-in-Aid, this increases from 0.85 in 2000 to 1.00 in 2004 before declining to 0.83 in 2010. In terms of the ratio of actual to sanctioned staff a similar pattern emerges of an increase in the ratio to 2004 (1.00) and 2005 (1.02), before declining to 0.66 in 2011. However, the decline in both ratios was not due to the policy of the Competition Authority but rather the hiring freeze introduced by the state in 2009, combined with an “... incentivised career break and early retirement schemes” (Competition

²⁶ This was repeated in the 2009-2011 Strategy Statement (Competition Authority, 2008b, p. 7) and 2012-2014 Strategy Statement (Competition Authority, 2011b, p. 5).

²⁷ In 2011, for example, a quarter of the Competition Authority’s resources were devoted to cartel enforcement (Competition Authority, 2012, p. 61).

²⁸ As of October 2010, 13 immunity applications had been made since 2001 (Purcell, 2010); as of July 2012, the number was 20 (Ciaran Quigley, Secretary, Competition Authority in evidence before the Joint Oireachtas Committee on Jobs, Enterprise and Innovation, 24 July 2012).

Table 4: *The Competition Authority Budget and Staff 2000-2011*

Year	Euro Millions			Staff		
	Grant in Aid	Outturn	Outturn/ Grant	Sanctioned	Actual	Actual/ Sanctioned
2000	1.55	1.32	0.85	29	25	0.86
2001	2.01	1.85	0.92	44	25	0.57
2002	1.62	1.57	0.97	44	36	0.82
2003	3.51	3.33	0.95	47	39	0.83
2004	4.32	4.31	1.00	47	47	1.00
2005	5.07	4.62	0.91	53	54 ^a	1.02
2006	5.8	4.8	0.83	60	58 ^b	0.97
2007	6.1	4.8	0.79	59 ^c	53	0.90
2008	6.78	5.95	0.88	59 ^d	54	0.92
2009	5.57	5.38	0.97	59	46	0.78
2010	4.7	3.9	0.83	59	40	0.68
2011	5.1	3.6	0.71	59	39 ^e	0.66

^a Includes 2 staff members on career break.

^b Includes 3 staff members on career break.

^c Reference to number of sanctioned staff in 2007 was not found, assumed same as 2009.

^d Reference to number of sanctioned staff in 2008 was not found, assumed same as 2009.

^e Includes 1 staff member on maternity leave.

Source: The Competition Authority, *Annual Report*, various issues.

Authority, 2010a, p. 55). In terms of the volume of resources there was an increase in the number of staff from 25 persons in 2000 to reach a peak of 58 in 2006, with a subsequent decline to 39 in 2011, approximately the same level as 2003. However, as noted above in Section 2.2.1, sanction was given in April 2012 for 10 additional staff positions to be assigned to enforcement.

3.2 Use of Investigative Powers

Under the Competition Act 2002 (and previous competition legislation) the Competition Authority has two important investigative powers: to summons witnesses to give evidence under oath; and to search premises and other places where evidence may be on the foot of a search warrant secured from the District Court. The use of these powers is an indication of investigative activity, an input not an output. Nevertheless, these data are reported publicly in the Competition Authority's *Annual Report*. While potential cartelists may not read these reports, there are other channels through which they might become aware of the use of search and witness summons powers (e.g. press reports, lawyers, and trade associations). A high and rising use of these powers

is likely to deter the formation of cartels, a low and falling use of these powers is likely to encourage cartel formation, since the probability of detection is likely to fall.²⁹

The number of times that these powers have been used is presented in Table 5. While search warrants are generally used for cartel type offences, summons can also be used as well for civil cases and merger cases. Hence for a would-be cartel, the search power is likely to be a more important indicator than the use of the witness summons power. The search power was used extensively between 2002 and 2005 varying between 18 and 42 searches a year, but the number of searches fell off after 2005 with no searches conducted in 2010, one in 2011,³⁰ before showing signs of increased enforcement activity with nine searches reported in the first seven months of 2012.³¹ In terms of the use of the witness summons power, a decline also occurred but this dated from 2008, when the power was used 40 times, to 2011 when it was only used four times.

Hence, in terms of investigative activity by the Competition Authority, the evidence suggests that this dropped off in terms of searches in 2006, while for the witness summons power this decline dated from 2008. Shortage of staff would not appear to be the reason for the decline in the search power since in 2006 the Competition Authority employed 58 persons and even in 2009 the number employed was 46, virtually the same as in 2004 when 24 searches were conducted. It may, of course, be that the earlier searches led to a large number of cases that had to be processed, an issue to which we now turn.

3.3 *Taking Criminal Cartel Cases*

Investigation and prosecuting criminal cartel cases is likely to be a time consuming resource intensive activity, requiring patience and careful sifting of the evidence. Witnesses will have to be located and interviewed, premises searched, forensic IT used to interrogate computers and a theory of the case developed. Cases referred to the DPP by the Competition Authority will typically be for the more serious cartels. As a result it is likely that the Competition Authority will refer only a few cases to the DPP and/or take summary cases on its own. Indeed, as noted above, in 2005 one criminal cartel case a year was considered a reasonable benchmark for which to aim.

²⁹ A recent Office of Fair Trading report found that more enforcement activity deterred firms from breaching competition law. For details see London Economics (2011).

³⁰ The Irish Farmers Association were the subject of the search, as confirmed by the Competition Authority in a press release dated 13 May 2011, "Competition Authority Confirms IFA Search." For details see Competition Authority's website: www.tca.ie

³¹ There were unconfirmed reports of searches in the bakery market in 2012. For details see Beauchamps (2012).

Table 5: *Use of Search and Summons Power, Competition Authority, 2000-2011*

<i>Year Summons</i>	<i>Search Warrants</i>	<i>Witness</i>
2000	n.a.	n.a.
2001	2	11
2002	18	56
2003	21	69
2004	24	58
2005	42	46
2006	9	38
2007	10	18
2008	7	40
2009	3	24
2010	0	2
2011	1	4
2012 (July)	9	n.a.

n.a. = not available.

Source: The Competition Authority, *Annual Report*, various issues, press releases and evidence of Isolde Goggin before the Joint Oireachtas Committee on Jobs, Enterprise and Innovation, 24 July 2012.

The evidence is consistent with a small number of criminal cartel cases. Over the period 2000 to July 2012 the DPP instituted four prosecutions on the foot of a reference from the Competition Authority, while the Competition Authority took two cartel cases (Table 6). These prosecutions are concentrated in the period 2003-2008. The pattern is consistent with the build-up of resources in terms of staff which reached a plateau of between 54 and 58 persons between 2005-2008 (Table 4). However, there were no criminal prosecutions taken after 2008, while the two that were taken in 2008 both resulted in acquittals (Table 7). Furthermore, there is a lag between the referral of the case to the DPP and the resulting prosecution. Hence, prosecutions taken in 2008 by the DPP reflect work done by the Competition Authority earlier. Seen in this context there appears to have been a considerable decline in cartel enforcement by the Competition Authority after 2008 measured in terms of prosecutions. The decline in resources and the use of temporary senior appointments is likely to be part of the explanation. With permanent senior appointments being made in 2011, the receipt of four new cartel immunity applications in 2011 (Competition Authority, 2012, p. 19), increased enforcement activity and the recently announced additional enforcement resources, cartel prosecutions are likely to resume.

Table 6: *Criminal Proceedings, Competition Act, DPP and Competition Authority, Frequency, 2000-2011*

Year	Cartel Proceedings	
	Cases Initiated by the DPP on Foot of Reference by the Competition Authority	Cases Initiated by the Competition Authority
2000	0	Estuary Oil
2001	0	0
2002	0	0
2003	0	Drogheda Grain/IFA
2004	Heating Oil	0
2005	0	0
2006	Irish Ford Dealers Association	0
2007	Citroen Dealers Association	0
2008	Mayo Waste	Irish Rail/Hedge Cutting Contract
2009	0	0
2010	0	0
2011	0	0
2012 (July)	0	0

Note: Cases dated by when legal proceedings initiated or case first heard in Court. Cases referred to the DPP are typically cases that are brought by way of indictment; while the Competition Authority brings summary prosecutions.

Source: Competition Authority, *Annual Reports*, various issues and press releases.

It could, of course, be argued that this conclusion is based on somewhat partial considerations. There may have been a considerable number of cases referred to the DPP by the Competition Authority, but, as yet, these have not led to a prosecution. However, according to the Competition Authority's *Annual Reports*, after 2008 only one case (in 2010) was referred to the DPP. It could also equally be argued that the cartel cases investigated led to civil court proceedings rather than criminal court proceedings. However, in the period 2008 to 2011 only one civil court case was taken by the Competition Authority (2010a, pp. 20-21), which in turn related to earlier undertakings given to the Competition Authority, so that does not seem a credible explanation. It may be that there are just less cartel cases. This does not seem credible either. There are good reasons for more rather than less restrictions on competition in a recession, as evidenced by the legislative proposals made since 2008 (Table 1). At the EU level the number of cartel cases decided by the European Commission has increased steadily since 1990, with a more than trebling of

Table 7: *Criminal Proceedings, Competition Act, DPP and Competition Authority, Results, 2000-2012*

<i>Year</i>	<i>Cartel Proceedings</i>		
	<i>Case Initiated by Competition Authority</i>	<i>Conviction/Acquittal (Number)</i>	<i>Fine/Jail Sentence</i>
2000	Estuary Oil	Conviction (1)	£1,000 fine
2003	Drogheda Grain/IFA	Conviction (3)	Probation Act
2008	Irish Rail/Hedge Cutting Contract	Acquittal (3)	-
<i>Cases Initiated by the DPP on Foot of Reference by the Competition Authority</i>			
2004	Heating Oil	Convicted (18)	€1,000-€30,000/ 6 months/2 years suspended (2 persons)
2006	Ford Dealers Association	Conviction (1)	€30,000/ 12 months, suspended
2007	Citroen Dealers Association	Conviction (14)	€2,000-€80,000/3/ 9 months suspended (8 persons)
2008	Mayo Waste	Acquittal (3)	-

Note: Cases dated by when legal proceedings initiated or case first heard in Court. It may take several years for legal proceedings to be completed. In heating oil the final prosecution was not concluded until 3 May 2012. Estuary oil was an RPM case rather than a cartel case. Convicted/acquittal counts individuals and companies separately

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

decisions comparing 1990-94 with 2005-2009 (11 vs. 33), while 11 were decided in 2010-2011.³²

3.4 Oversight and Accountability

All agencies require being held to account in order to ensure that they are meeting their targets and employing resources in an efficient and effective manner. The evidence suggests that there are grounds for concern, despite the undoubted success of the Competition Authority in bringing successful cartel prosecutions, with respect to the way in which the Competition Authority addresses it top priority – vigorously pursuing criminal cartels. One way of

³² For details see European Commission (2011, Table 1.10). Cartel cases in the number quoted in the text refer to those instances where a fine was imposed. If the 2010-2011 rate of cartel infringements were to continue to 2014 then the number of cases decided would be 27.

addressing this issue is to design better accountability mechanisms. This issue was recognised in a recent Government Statement in relation to economic regulators (Department of the Taoiseach, 2009), but some of the same points also apply to the Competition Authority.³³ The Comptroller and Auditor General might be able to develop the expertise similar to the UK's National Audit Office (2005) investigation into the Office of Fair Trading enforcement approach. Clearly there is a fine line between holding the Competition Authority to account while at the same time not compromising its independence.

IV THE COURTS

The success or failure of competition policy to a considerable degree hinges on the activities of the Courts. It is the Courts that interpret the meaning of the Competition Act 2002 and decide on the penalty (e.g. a fine and/or a jail sentence) and, where appropriate, the remedy (e.g. a duty to deal). It is true, of course, that in many instances the Competition Authority will settle a case without going to Court. However, implicit in reaching a settlement is the threat of a Court case. Hence, success or failure in Court will have wider ramifications beyond the immediate case. We consider both civil and criminal competition cases. In view of the independence of the judicial we would not expect – and do not observe – any shifts in attitude towards competition policy since the onset of the recession.

4.1 *Criminal Matters*

Hard core cartels such as price fixing, market sharing and bid rigging have typically been pursued by the Competition Authority and the DPP as criminal matters. In contrast, such offences are typically treated as civil matters in most EU jurisdictions. The cases brought in the 2000s by the DPP and the Competition Authority were the first such criminal cases in Ireland. As a result there might have been a reluctance of juries to convict and Courts to impose prison sentences and large fines. However, juries have been prepared to convict,³⁴ prison sentences imposed, albeit suspended, and fines levied,

³³ The Government Statement called for more departmental expertise so that there would be better monitoring and holding to account of economic regulators by the responsible government department, while acknowledging the important role of Oireachtas Committees.

³⁴ For example, in the heating oil case. For details see Gorecki and McFadden (2006). In most instances, however, the parties plead guilty.

albeit too low.³⁵ Nevertheless, prison sentences and fines show some signs of increasing,³⁶ while in a number of cases the language of judges in sentencing has been very supportive of competition policy and condemnatory of cartels.³⁷ Despite this progress, there are concerns that in some instances the sanctions have been too lenient,³⁸ and while listing the factors by the Court that need to be considered in sentencing is appropriate, establishing a closer relationship between the harm to consumers and sanctions imposed is essential (Gorecki and Maxwell, 2012b). In sum, the Courts have been supportive of competition matters in criminal cartel cases, but to be more effective fines should reflect the economic damage that they cause, while prison sentences should be imposed rather than suspended.³⁹

4.2 *Civil Matters*

Civil matters, in contrast to criminal cartel cases which are typically taken on a 'by object' basis, can require dealing with quite complex matters such as market definition, tying and bundling, countervailing buyer power, object versus effect in an agreement between competitors, balancing the considerations set out in Section 4(5) of the Competition Act 2002, and competition-for-the-market (i.e. competitive tendering) as compared to competition in the market (i.e. side by side competition). These largely economic concepts are quite different from those employed in the criminal

³⁵ This applies, for example, to *DPP v Patrick Duffy and Duffy Motors* [2009]. IEHC. 208. The offences covered 1997 to 2002. Turnover figures are not provided in the judgment for Duffy Motors for this period, but were for 2007 and 2008. The total fine imposed on the individual and the company was €100,000. This is low using a number of benchmarks. First, the fine is only 1.1 per cent of Duffy Motors turnover in 2008. Second, the fine is only 2.6 per cent of the maximum fine that could be imposed under the legislation (i.e. the greater of €3.81 million or 10 per cent of turnover in the 12 months prior to conviction, €927,000). Third, the fine is low in relation, 1.1 per cent, to the evidence of the typical or average ability of cartels to raise prices (e.g. Connor and Bolotova (2006) and Werden (2009).) For further analysis of the sentence in this case see Gorecki and Maxwell (2012a).

³⁶ See Table 7 for details.

³⁷ Several passages are cited in the *Annual Reports* of the Competition Authority (2008a, pp. 7-9; 2010, p. 17). However, reported judgments in cartel cases are conspicuous by their absence. Of the 33 convictions of individuals and undertakings in three cases initiated by the DPP (Table 7), in only one instance – covering an individual and an undertaking – is there a reported judgment, while in another a transcript of the sentencing hearing of an individual has been made available due to the efforts of the Competition Authority. See Gorecki and Maxwell (2012a) for details.

³⁸ For a discussion of the sanctions in the Ford Dealers Association case see Curtis and McNally (2007). See also footnote 35 above.

³⁹ In *DPP v Patrick Duffy and Duffy Motors* [2009]. IEHC. 208, the judge was clearly minded to impose a custodial sentence but felt that since other members of the cartel, in similar circumstances, had not been jailed, a suspended sentence was appropriate. For a discussion of why custodial sentences should be imposed in cartel cases, see, for example, Werden (2009).

Table 8: *Civil Court Cases, Competition Issues, Selected High Court Cases, 2004-2011*

<i>Competition Issues</i>		
<i>Year</i>	<i>Case</i>	<i>Issue</i>
2004	Competition Authority v. John O'Regan <i>et al.</i> (ILCU)	Tying and market definition
2006	Hemat v Medical Council	Undertaking or an Association of Undertakings
2006	Competition Authority v Beef Industry Development Society ("BIDS")	Object v effect, balancing pros/cons of an anti-competitive agreement
2009	Nurendale Limited t/a Panda Waste Services v Dublin City Council and three other councils	Competition for the market compared with competition in the market, geographic market definition, dominance (single firm and collective)
2009	Rye Investments Ltd v Competition Authority	Countervailing buyer power
2010	Digital Messenger Ltd, t/a Swords Express v Minister of Transport and Dublin Bus	Meaning of "so as to compete".

Note: Cases dated by the High Court decision. In some cases there was an appeal to the Supreme Court and in one instance a question was referred to the ECJ.

Source: High Court judgments.

cartel cases. The High Court, which is typically the court of first instance, in a series of judgments between 2004 and 2011 has had to address these issues. In some instances the case before the High Court involved the Competition Authority, in other cases, although revolving around the Competition Act 2002; it did not involve the Competition Authority. Finally, in one case the topic at issue revolved around a competition issue but under the Road Transport Act rather than competition legislation. Each case is listed in Table 8, together with the pertinent issue(s).

A careful review of these judgments suggests that the High Court is experiencing difficulty with the complex economic and legal concepts involved in civil competition cases.⁴⁰ In some cases, it can be argued, that an incorrect

⁴⁰ For a discussion of several of these cases see Andrews and Gorecki (2010), Gorecki (2008, 2009d, 2011a), and Gorecki and Mackey (2007).

decision has been made, in others the decision is correct but the reasoning incorrect. One exception is the 2010 case involving bus licensing. Some cases have been reversed in appeal, most notably in the BIDS case which went to the ECJ, while in two cases the appeal to the Supreme Court has yet to be heard. However, appeals are costly, take time and are uncertain. A better understanding of the economic concepts underlying competition policy at the High Court might reduce the need for such appeals.⁴¹

In terms of the way forward, it could be argued that there is learning by doing as the High Court becomes more familiar with competition issues. It is not clear what alternatives are likely to improve the situation. One option would be for the Competition Authority or a new institution to be created that would be the court of first instance, but with an appeal mechanism to the Supreme Court and eventually the ECJ for appropriate cases. This is the standard approach in the EU. However, this is unlikely in Ireland due to constitutional difficulties. Alternatively, perhaps more seminars should be held to inform the competition judges⁴² and perhaps greater effort should be made to ensure that competition judges have more prior competition law experience.

V CONCLUSIONS

Competition policy is important for the future of the Irish economy. Support for the policy suggests a preference for market mechanisms, appropriately policed, as the way in which economic activity should generally be organised. Private agents decide where investment and resources should be allocated in response to consumer demand and act accordingly. However, for this to take place resources need to flow in response to market signals and not be impeded by barriers to entry and other restrictions. Hence, competition policy plays an important role in policing the market by detecting and instituting legal proceedings of breaches of competition law and, where these tools are inadequate, making recommendations to ensure that market forces can operate effectively. This was the policy of the Minister between 2000 and 2008 and agreed with the EU-IMF Programme between 2010 and 2013 as the price for financial assistance.

⁴¹ See references in previous footnote for some of the same concerns over some Supreme Court decisions.

⁴² The Competition Authority held a seminar on 'Sanctions, Fines and Settlements in Cartel Cases: Developments and Deterrence in the EU and Ireland' on 22 November 2008. One of the papers to be presented was an earlier version of Werden (2009) which was cited with approval in *DPP v Patrick Duffy and Duffy Motors* [2009]. IEHC. 208.

The alternative, pursued by the Minister between 2008 and 2010, is a relaxation of competition policy through carve outs/exemptions from competition law combined with various measures that serve to reduce the effectiveness of the Competition Authority in administering and enforcing competition policy. This contributed to the fact that cartel enforcement by the Competition Authority ground to a halt after 2008, measured in terms of prosecutions. The 2008-2010 option chosen by Ministers is hard to justify. It favours those sectoral interests that are successful in obtaining carve outs/exemptions and those that are able to take advantage of the less effective administration and enforcement of competition policy. It is not clear what criteria are used to justify such exemptions. In some instances they represent decisions arrived at in secret with no consumer representation as part of the partnership process. However, the evidence suggests that such a policy stance is likely to have quite profound adverse economic consequences in terms of retarding the subsequent recovery of the economy, raising prices, damaging productivity growth, while the gains to those protected from market forces can all too often be no more than transitory.

Thus, the policy environment for competition policy has after an unhappy start improved considerably. Current policy, based on the EU-IMF Programme, is firmly pro-competitive and will continue that way until at least the end of 2013. Better competition laws are likely to be introduced; sheltered sectors are being exposed to competition in the professions as the Competition Authority has long argued for, while the Authority's funding is set on a firmer foundation. However, more needs to be done to ensure that competition policy is enforced appropriately. In civil cases, for example, which involve complex economic issues, the reasoning of the High Court, on a number of occasions, has been hard to follow. In criminal cases, the fines need to take into account the economic damage caused to consumers, while custodial sentences are long overdue. If these difficulties can be overcome then competition policy will be able to make a positive contribution to ensuring that the recession is no longer than is necessary and the appropriate lessons will have been learnt from the experience of jurisdictions that relaxed competition policy during recessions.

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