

From Cooperation to Criminality

William Prasifka, Chairperson, The Competition Authority

At 15th Irish Competition Law Autumn Update 2009

1 October 2009

Competition, as a paradigm, completely fails to characterise the market economy within which we live our lives, the market economy that creates wealth within society. What, after all, is competition? It is a zero sum game, with winners and losers. Simply and properly understood, the market economy is a system of voluntary transactions. Voluntary transactions – otherwise easily characterised as cooperation.

Competition policy presumes that the competitive process allows capital and other inputs to move to their highest value uses, thus ensuring that allocative and dynamic efficiency follow. Cooperation between firms in some instances may assist in this regard.

However, there is a line beyond which, if it is crossed, cooperation becomes anti-competitive. It is legal for a company to set a high price – since market forces erode anticompetitive effects. However it is illegal for two or more companies to cooperate and agree to set a high price; this has detrimental and harmful effects on consumer welfare.

Today I will explain where that line lies. I will emphasis this within the context of trade associations, which have as their aim cooperation in the development of their sector. However it has been our experience that often it is within these associations, or on the boundaries of them, that the line between cooperation and anticompetitive criminal activity can be crossed.

For this reason, pursuant to its statutory function under section 30(1)(d) of the Competition Act¹, the Competition Authority will be publishing a Notice on Trade Associations. The Competition Authority has extensive experience in dealing with trade associations. We hope that this notice will assist trade associations and those who deal with them to understand what types of cooperation are illegal under competition law. We are finding that in difficult economic times, competition policy

¹ Section 30(1)(d) of the Competition Act 2002 states it is a function of the Competition Authority “to publish notices containing practical guidance as to how the provisions of this Act may be complied with”

is presented with both challenges and opportunities which make it even more imperative that we speak out and issue guidance.

The Outer Boundaries of Cooperation

Trade Associations can play a productive and pro-competitive role in the development of a sector. Forms of cooperation and collaboration are as numerous as there are businesses and commercial objectives. No one would argue that cooperation on developing Health and Safety standards should be abolished; the same can be said for industry environmental policies. It is outside the scope of the Competition Authority's forthcoming notice on trade association conduct to fully explore the outer limits of permissible cooperation. Such a task is in fact impossible.

However, some forms of cooperation are unequivocally anticompetitive and competition law recognises them as such. Certain practices such as price fixing, market sharing and bid rigging are regarded as hardcore criminal behaviour – I will further discuss this in a while.

Between the line of unequivocal pro-competitive cooperation and criminal anti-competitive cooperation is an ambiguous grey area. Difficult cases arise where there is substantial economic integration and the effects on competition are ambiguous. In fairness to trade associations, these are types of conduct that generally take place directly between firms rather than through trade associations. Collaborations on production, marketing, buying and research & development all provide opportunities to enhance economic efficiency – and restrict competition. Where such collaborations take place, it is only reasonable for serious questions to be raised. Are efficiencies achieved? If so, at what cost? Is competition unnecessarily restricted?

The unambiguous trend in the development of competition law in the modern era is the growing influence and acceptance of economics analysis. The Commission's notice on enforcement priorities relating to Article 82 is but the latest example. Of course, the debate on the boundaries of economic analysis is not and will never be over – particularly as it relates to problems that arise from unilateral conduct, vertical restraints, and economic integration.

For some, the arrival of economic analysis in competition law is taken as an excuse to consider all activity, no matter how pernicious, to be capable of justification. This is simply not the case, and must be resisted.

In the recent *Leegin* decision, for example, the US Supreme Court removed vertical minimum resale price maintenance (RPM) from the category of agreements which

are *per se* illegal, finding instead that all the circumstances of such an agreement should be weighed to determine whether it constitutes a restraint of trade.² It may be noted that the Commission adopts a much stricter approach to RPM, for the purposes of EC competition law, than that espoused by the majority of the Court in *Leegin*.³

Regardless of whether one agrees with the approach in *Leegin* to the issue of vertical restraints, the judgment provides absolutely **no** support for the suggestion that horizontal agreements, especially with respect to pricing or other key competitive factors, should be subject to anything other than the strictest scrutiny. The Court in *Leegin*, noting “*the appreciated differences in economic effect between vertical and horizontal agreements*”, was at pains to stress that the finding did **not** extend to horizontal price fixing, which “*is, and ought to be, per se illegal*”. Indeed, the *Leegin* decision in fact reaffirms that such agreements are “*manifestly anticompetitive*” and *per se* illegal.

Just as economics helps us to identify and analyse (if not necessarily solve) the difficult cases, it also helps us to identify, analyse and solve the easy cases. We can now state that certain types of conduct are bad, are *malum in se*, and can be condemned without any redeeming social value.

We hope that the Notice on Trade Associations will provide effective guidance on these issues.

Anti-competitive Cooperation - a Growing Consensus of Support for Criminalisation

Agreements that are without doubt anti-competitive and criminal are those that raise price (above competitive levels), reduce output – without any efficiency enhancing potential. Typically these are naked agreements/concerted practices to restrict competition – without any element of economic integration, such as:

- Price-fixing
- Bid-rigging
- Market allocation schemes

² *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (Case No. 06-480) Judgment of 28 June 2007, hereafter “*Leegin*”.

³ See Commission Notice *Guidelines on Vertical Restraints* (2000/C 291/01) at paragraphs 47 and 225-228.

Economic analysis identifies such behaviour as not only damaging to social welfare, but as coercive transfers – the very antithesis to voluntary transactions that form the underlying premise of a market economic working to the benefit of society.

Such coercive transactions must be deterred. The goal of any enforcement regime must be to stop such activity from occurring in the first place. Accordingly, large fines are appropriate, as are criminal sanctions of incarceration and disqualification from directorships.

Competition law has now reached a maturity in how it deals with naked collusion. There is a growing consensus, in Ireland and internationally, that criminal conviction and imprisonment is the most appropriate sanction for hardcore horizontal restrictions of competition through fixing price, sharing markets or customers, or limiting output – the “*explosive growth*” in anti-cartel enforcement has been described as “*one of the most significant developments in antitrust (or competition) law over the last decade.*”⁴ The United States has for over a century prosecuted participants in hardcore cartel arrangements criminally. In Ireland, cartel offences have been criminal since 1996. Many European jurisdictions are following suit. In *DPP v Duffy*, McKechnie J, in the Central Criminal Court stated that the reasons for criminalizing cartel behaviour are “*clear cut. It is to secure the effectiveness of and to provide support for the enforcement of these pro-competitive provisions.*”⁵

Section 6(1) of the Act makes it a criminal offence for an undertaking to enter into or implement an agreement, make or implement a decision or engage in a concerted practice contrary to section 4(1) of the Act or Article 81(1). There is a rebuttable presumption under section 6(2) of the Act that any agreement, concerted practice or decision that has the purpose of directly or indirectly fixing prices, limiting output or sales or sharing markets or customers has the object of restricting competition contrary to section 4(1) and/or Article 81(1). Section 8 of the Act provides that a sentence of up to **five years imprisonment** or a **fine of the greater of 10% of turnover or €4 million**, or both, may be imposed on any individual found guilty on indictment of this offence.

As section 6(1) is an indictable offence relating to a company, any person convicted under the provision in the Circuit Court or higher is **automatically disqualified** for

⁴ ABA Section of Antitrust Law, *Antitrust Law Developments* 6th ed. (2007) ABA Book Publishing, Chicago, at p.733, fn. 1.

⁵ *DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited* (23rd March 2009), paragraph 20.

five years from acting as a company officer, such as a director, secretary, auditor or liquidator.⁶

Under section 7 of the Criminal Law Act 1997, an individual found guilty of aiding and abetting the commission of an offence prohibited by section 6(1) of the Competition Act is guilty in the same manner as if he himself had committed the actual competition offence.

There have been over thirty successful criminal prosecutions for hardcore anticompetitive behaviour to date. Criminal prosecution is, ultimately, a matter that lies at the discretion of the Director of Public Prosecutions (DPP). Criminal sanctions are appropriate in hardcore cartel cases, involving, for example, secret agreements between competitors to fix prices or divide up particular markets between them. The *Galway Heating Oil* case, discussed below, saw the first successful criminal cartel trial to take place before a judge and jury in Europe. In *DPP v Manning*, McKechnie J in the Central Criminal Court identified a variety of “*very powerful reasons*” to impose custodial sentences in such cases, including the need to ensure effective deterrence, the inadequacy of fines in securing compliance with the law, and encouraging cooperation with cartel investigations.⁷

The Director of Public Prosecutions and the Competition Authority operate a Cartel Immunity Programme which may provide immunity from criminal prosecution under the Act for self-reporting of unlawful cartels by participants. Further information about the programme is available on the Competition Authority’s website at www.tca.ie.

Competition Authority to Publish Notice on Trade Associations

As noted, trade associations can play a productive and pro-competitive role in the development of a sector of the market. However, in our experience, they can be involved in restricting competition, either in a primary role in coordinating collusion or in a secondary role by providing an opportunity for their members to collude.

DPP v Flanagan and Ors,⁸ for example, led to the successful prosecution, on foot of an investigation by the Competition Authority, of a range of companies and company

⁶ Companies Act 1990, section 160(1). See McFadden, D. *How directors can be disqualified following competition cases* Competition Press, Vol. 14(8) pp. 158-161 for a discussion of the operation of this provision in competition cases.

⁷ Reproduced in the Competition Authority’s *Annual Report 2007*, available online at <http://www.tca.ie/NewsPublications/AnnualReports/AnnualReports.aspx>, at p.8-9.

⁸ See Gorecki, P. and McFadden, D. *Criminal Cartels in Ireland: the Heating Oil Case* [2006] ECLR 631, and the Competition Authority’s website at <http://www.tca.ie/templates/index.aspx?pageid=856>, for further details of these prosecutions.

directors for participating in a cartel that fixed the price of heating oil in Galway city and county (The *Galway Heating Oil* case). Coordination had been arranged by means of a trade association, the Connaught Oil Promotion Federation (COPF), which was formed to facilitate cartel meetings. Although the ostensible purposes of the COPF was to discuss industry concerns such as health and safety, insurance costs and the competitive threat posed by natural gas, price fixing also took place at COPF meetings, which were held at least monthly.⁹

Criminal convictions have also been secured relating to price fixing activities by the Irish Ford Dealers Association and the Citroën Dealers Association. In *DPP v Denis Manning*, the Central Criminal Court at the sentencing Mr. Manning, the paid secretary of the Irish Ford Dealers Association, stated in relation to the cartel activities: "*What emerged was a shocking display of practices, all criminal since 1996 and all designed to corrupt the market and in the process to squeeze the consumer of cars.*" Mr. Manning was sentenced to 1 year in prison, suspended for five years and fined of €30,000.¹⁰

The need for trade association rules in Ireland is not merely academic. The recent experience of the Dept. of Health in reducing the burden on the State in relation to its payments to Pharmacists bears this out. As the Government sought methods of reducing the costs to the exchequer, it found that the payments being made to pharmacists for certain services were too high. In response to the reduction in fees, the pharmacists threatened to collectively withdraw from providing these services. However, such coordinated behaviour by competing firms is not permitted under competition law. Of course, some pharmacists did withdraw their services in an ad-hoc fashion. However, it would have been an offence under competition law to withdraw collectively.

If pharmacists and the Irish Pharmacy Union had an exemption from competition law, they would have been within their right to insist on negotiating a higher fee with the Minister. This collective action could have taken place through a trade association. Therefore, if they did not get what they wanted, the pharmacists could have freely agreed among themselves (coordinated by their trade association) for each and every pharmacy to withdraw services from the State. This would have been a much bigger problem for the HSE than the limited withdrawal which actually took place. It would have also resulted in higher prices and a heavier burden on the taxpayer.

⁹ See Competition Authority *Annual Report 2008* at p. 5 for further details.

¹⁰ *Director of Public Prosecutions v Denis Manning* (Unreported, High Court, 9th February 2009).

This shows that competition law imposes rules on groups or associations of undertakings, including trade associations, which aid policymakers in obtaining a better deal for taxpayers.

Conclusion

While cooperation can be pro-competitive, and despite some forms of cooperation requiring economic analysis to assess their competitive effects, there is a clear line where cooperation becomes extremely harmful and subject to criminal sanctions. Trade associations need to be aware of where this line is. The Competition Authority's guidance to trade associations, soon to be published, will help in this regard.

Competition rules are there to protect consumers and economic growth. Appropriately, competition law restricts the ability of producers to cooperate. Cooperation in the form of cartels is the very antithesis of competition and only benefits the group of producers that partake in this illegal activity. During difficult times, it is even more tempting for producers to form cartels and keep prices up to maintain profitability. Thus during difficult times there will be more calls from producer groups and trade associations seeking an exemption from competition law.

The pharmacy example above shows that competition law is of benefit to the Government in implementing its policies in difficult times.

Certain professions such as session musicians, voice-over actors and the Irish Medical Organisation have received assurances that under a revised Competition Act they will not be subject to the full rigours of Competition Law. Carve-outs such as these may be the thin end of the wedge in relation to competition law.

The Competition Authority is concerned that this move will lead to similar calls for exemption from other sectors and a continued erosion of competition law in Ireland as there are no clear lines of demarcation between who will be exempt from the provisions of the Act and who won't.

Rolling back on strong competition policy will hamper growth and endanger our prosperity. It is important to bear this mind when producer interests plead for carve-outs from Competition Law.