

# Competition Policy in Good Times and Bad

## DEW KENMARE CONFERENCE Declan Purcell<sup>1</sup> and Malachy Fox<sup>2</sup>

18<sup>th</sup> October 2009

### **I. Introduction**

Recession can be hostile to competition. Some commentators have argued that firms should get together and agree on a price in order to alleviate the pressure they are under during these times.

*“Common sense would determine that competing companies, which are struggling, get together, expand and settle on a workable price for consumers”.*<sup>3</sup>

Such measures may increase the profitability of firms, but they do serious damage to consumers.

Ireland is in the midst of a serious economic crisis, arguably the greatest since the foundation of the State. There are many hard choices that policy makers will have to contend with. Some, such as the banking crisis will require large outlays of resources, regardless of the specific policy pursued. However, in many other cases, by simply allowing competition to thrive, the Government can exact huge benefits to the consumer and the State. This paper will argue that effective competition is an ally to policymakers in restoring the economy to sustainable growth.

Section II gives an outline of the evidence that Competition is beneficial, Section III looks at the dangers of protectionist policies, Section IV details the problems that arise from creating National Champions, Section V outlines where Ireland has lost its international competitiveness. Section VI shows how removing anti-competitive regulations has been of benefit to both consumers and the wider economy. Section VII argues that any exemptions to Competition Law may be the thin end of the wedge and pose an obstacle to economic recovery and finally, Section VIII describes some of the difficulties and challenges facing both competition advocates and policy makers in bringing about change. Section IX concludes.

### **II. Why Competition, why it works and why it's important**

The starting point is the assumption that *“Competition in markets is generally a good thing”*. That assumption underlies the economies of most modern and developing countries today.

Competitive markets have, time after time, been shown to be the best way of ensuring that the range and quantity of goods and services we want and need are produced at the lowest possible cost to society. A system of well functioning markets – both in upstream and downstream markets - is an

---

<sup>1</sup> Member, Irish Competition Authority, since 1998, and Director, Advocacy Division.

<sup>2</sup> Case Officer-Economist, Advocacy Division, Competition Authority

<sup>3</sup> Irish Independent, April 20<sup>th</sup> 2009; M. Dineen

effective mechanism for ensuring that resources are allocated and put to the best possible use.

Competition also encourages firms to innovate and to reorganise their business activities in order to continuously improve their cost structure and reap productivity gains. Over time, competition leads to the introduction of improved products and processes, weeding out inefficient firms and reallocating productive resources from retreating or failing firms to new entrants or more efficient competitors. Provided it is underpinned by appropriate mechanisms to promote adaptability of workers and enterprises, this continuous structural adaptation process is beneficial for long-term prosperity.

Increased competition brings both short and long term gains in output through an improvement in the combined productivity of labour and capital. Given the enhanced pressure on businesses to perform, short term gains arise from better allocations of existing resources. Long term benefits from domestic product market reform may arise from both greater efforts to innovate and optimise production, and from the more rapid spread of new technologies. These gains obviously benefit both consumers and businesses.

There is a growing body of empirical evidence supporting the relationship between competition and productivity growth. For example, country level analyses of competition and productivity in the UK<sup>4</sup>, Germany<sup>5</sup> and Korea<sup>6</sup> have all found that productivity is higher in those sectors of the economy where competition is stronger. The McKinsey Institute has carried out many country level studies on productivity and concludes that:

“Increasing productivity is by far the most important ingredient in economic development. It solves almost all other economic problems. From the vast amount of economic experience in countries all over the world for the past 50 years, we have learned without doubt that the most important condition necessary for rapid productivity growth is fair and intense competition in all the sectors of an economy.”<sup>7</sup>

Many OECD studies have also shown a link between increased competition and better economic performance through higher productivity. Reforms promoting competitive pressures in Australia, for example, triggered an economic recovery in the early 1990s. This led to the longest economic expansion there since the 1960s.<sup>8</sup>

OECD research also suggests that aligning the different European national economic policies with those of the least competition-restraining countries would result in a 2 – 5% growth in GDP *per capita* in the OECD area as a

---

<sup>4</sup> *Restructuring and productivity growth in UK manufacturing*; R Disney; The Economic Journal; Volume 113 Issue 489, Pages 666 – 694; July 2003

<sup>5</sup> [Product market competition, corporate governance and firm performance: an empirical analysis for Germany](#); Januszewski, Silke I. & Köke, F. Jens & Winter, Joachim K., 1999., [ZEW Discussion Papers](#) 99-63, ZEW - Zentrum für Europäische Wirtschaftsforschung / Center for European Economic Research.

<sup>6</sup> [Entry, Exit, and Aggregate Productivity Growth: Micro Evidence on Korean Manufacturing](#), Chin-Hee Hahn, 2000. [OECD Economics Department Working Papers](#) 272, OECD Economics Department.

<sup>7</sup> *Opening Remarks; Global Forum on Competition*; Angel Gurría, OECD Secretary General; 21 February 2008.

<sup>8</sup> *Relationship between Competition Policy and Economic Performance*; DAF/COMP(2007)2, p15; OECD 7<sup>th</sup> February 2007

whole. Product market reforms that stimulate competition account for the largest part of the overall gains in GDP per capita in all OECD countries.<sup>9</sup>

Studies on productivity have also found a direct relationship between firms' exposure to competition and the implementation of efficient technologies. Firms operating in markets sheltered from strong competitive processes have less incentive to invest in new technologies and hence improve efficiency. This lack of technology spread leads to reduced productivity – a particularly important point when you consider that technology spread can account for more than half of total factor productivity.<sup>10</sup>

Again, OECD research shows us that enhanced product market competition can also contribute to growth by increasing employment.

“Regulatory policies that increase ... the role of competitive forces can raise output per capita by encouraging investment, improving productivity and increasing employment ... systematic reforms to promote market competition create resilient, adaptable economies that grow faster and create more jobs.”<sup>11</sup>

Estimates from recent OECD research suggest that, for the typical OECD country, product market liberalisation over the past ten years has cut the aggregate unemployment rate by about 1 percentage point.<sup>12</sup>

To summarise all this, reduced competition not only leads to higher prices and lower output in the short-term, it also reduces innovation. This lack of innovation has serious long-term consequences for the health of an economy. It is, in fact a double blow – higher prices today and less choice tomorrow.

### **III. The current economic context – some lessons from history**

Deteriorating economic circumstances have had, and will continue to have, an impact on the context in which both competition policy and enforcement operate. While changing economic circumstances impact on different markets in different degrees, undoubtedly, in some markets private operators will find it difficult to maintain profitability.

One temptation in these circumstances is for businesses to form cartels. Another is that firms will plead with Governments to introduce special measures to cushion them from the negative effects of slower economic growth, including exemption from the scope of competition law. Of course, these are rational responses to falling demand and hence over capacity. But the renewed interest in the role of competition policies in recessions has highlighted the flaws in responding favourably to calls for special protection.

In fact, it is in times of economic crisis that competition policy becomes even more important. The evidence from the US Great Depression of the 1930s and Japan's more recent deep recession during the 1990s is that well-intentioned relaxations of competition policy - or to put it another way, protectionist policies – actually prolonged those recessions.

---

<sup>9</sup> *The Benefits of Liberalising Product Markets and Reducing Barriers to International Trade and Investment in the OECD*. Economics Department Working Paper No. 463; p7

<sup>10</sup> *Perspectives on Irish Productivity; Chapter 10*; David Boyle & John Evans; March 2007; [Forfás](#)

<sup>11</sup> *Relationship between competition Policy and Economic Performance*; OECD DAF/COMP(2007)2

<sup>12</sup> “*Product Market Regulation in OECD Countries: 1998 to 2003*”, OECD Economics Department Working Paper, No. 419, 2005 (P. Conway, G Nicoletti and V. Janod).

As EU Competition Commissioner Neelie Kroes, has said recently;

*"History shows us that our economies do best when competition policy is enforced without fear or favour; in good times and bad."*<sup>13</sup>

In 1933 the US Government enacted the National Industrial Recovery Act (NIRA). This Act created the National Recovery Administration (NRA). The NRA enforced agreements that limited price competition and restricted production and investment. It is widely accepted that these policies prolonged the recession.

*"the more important effect of the NIRA was to diminish the responsiveness of price changes to the deviation of output from trend...it prevented the economy's self-correction mechanism from working."*<sup>14</sup>

In an extensive investigation into the Great Depression, Cole and Ohanian (2004) found that

*"New Deal cartelization policies are a key factor behind the weak recovery, accounting for about 60% of the difference between actual output and trend output"*.

They estimate that these policies lengthened the Great Depression by seven years.<sup>15</sup>

However, it was soon realised that the policies being pursued under the NIRA were counter-productive to restoring the health of the US economy. In 1938, the Roosevelt administration appointed Thurman Arnold as Head of the Antitrust Division at the Department of Justice. On his appointment he stated that

*"....if through the application of Antitrust laws...we can restore price competition, we will have gone a long way towards solving one of the major problems of the recession."*<sup>16</sup>

The empirical evidence of policies pursued by Japan during its so-called "lost decade" of the nineties points to a similar conclusion.

*"The sectors in which competition was restricted prove to be those where Japan was not internationally successful. In the internationally successful sectors, internal competition in Japan was invariably fierce."*<sup>17</sup>

A consequence of these ad-hoc protectionist measures is that *"unless the serious impediments and distortions that developed in the 1990's are not addressed then the period of Japanese stagnation will be unnecessarily protracted."*<sup>18</sup>

---

<sup>13</sup> Address at Chatham House, London "Competition Policy after the Credit Crunch", 26 June 2009

<sup>14</sup> Christina Romer, "Why Did Prices Rise During the 1930s?" *Journal of Economic History*, 59(1), 167-199, p. 197

<sup>15</sup> *Competition Policy in Recession and Financial Crisis*, Competition Commission Background Paper; 2009

<sup>16</sup> As quoted by Carl Shapiro, Anti Trust Division, DOJ; *Competition Policy in Distressed Industries*; 13 May 2009

<sup>17</sup> *Competition in Japan*; Michael E. Porter Mariko Sakakibara; *Journal of Economic Perspectives*, Volume: 18, Issue: 1, Pps: 27 - 50

<sup>18</sup> *Can Japan Compete?*, Porter and Sakakibara, 2000

#### **IV. The debate about National Champions**

The benefits of competition demonstrate the danger in arguments that promote the creation of "national champions". Of course companies should be encouraged to grow to a sufficient scale to compete globally. But this growth must be organic, and has to occur within a competitive environment and in full compliance with the competition rules.

Using State subsidies, or carve-outs from competition law, to artificially create firms that compete internationally redistributes taxpayers' money to private operators at a loss to the economy as a whole.

There is also evidence that vigorous domestic competition promotes success in international markets. This is intuitive; a firm that cannot compete in a national market is not going to be in a position to compete internationally.

At its essence, adopting a "National Champions" policy can become an argument for domestic protection as an implicit subsidy for monopoly profit on domestic consumers. For various reasons<sup>19</sup>, there should be considerable scepticism as to whether restricting competition for national champion reasons would be in the public interest.

Competition Authorities routinely approve mergers that result in high shares of domestic production on the basis that consumers are well protected by competition from imports. But if domestic sales are predominantly produced at home, the argument that domestic scale matters for international competitiveness breaks down.

Those in favour of national ownership argue that in certain cases a country should be able to block a merger that involves a foreign takeover of an indigenous firm. This argument is often linked to who makes the decision, in other words whether it is an independent agency or a Minister. A policy of national ownership of this kind is likely to conflict with EU or WTO membership rules, so that question may be irrelevant. Even where these rules do not apply or are not enforced, we should question the merits and costs of a merger policy that could block certain mergers on ownership grounds where competition is not lessened.

Several arguments in terms of market failures have been proposed<sup>20</sup> but we should not overlook the possibility that superior policy tools exist to achieve the same objectives<sup>21</sup>. Strong competition policy across all sectors of the economy is one of these tools.<sup>22</sup>

Economic evidence suggests that limiting ownership would, on balance, be extremely costly. There are many good examples, not least of them the City of London, of how a policy of neutrality as to ownership can be successful for the host country. A report on Irish enterprise policy pointed out that sectors

---

<sup>19</sup> Unlike most State aid that is funded by taxation, legislative protection is less transparent, and more difficult to calculate the cost to the economy. Moreover, the benefits may be illusory: monopolies tend to be inefficient, so that there is no guarantee that granting a monopoly (any more than State aid) will result in better long term performance.

<sup>20</sup> One argument put forward by proponents of a national ownership policy is that foreign owners would not be sensitive to domestic needs, or would not take time to develop personal relationships with customers. But evidence that non-commercial factors dictate business decisions could be more indicative of existing restrictions on competition than the need to restrict competition further. A second and related argument put forward is that "good" jobs are preserved in the host country. The fear is that, post merger, the company is "truncated" with key functions like advertising, product development and R&D now conducted in another country.

<sup>21</sup> Governments have many instruments to make a country more attractive for good jobs.

<sup>22</sup> Ironically, almost all businesses are willing to accept all of these arguments when applied to the markets in which they purchase inputs.

with foreign capital and ownership contributed more to the high growth rates of the past decade than several important indigenous sectors that recorded little or no growth over the period.<sup>23</sup>

There may be a small number of sectors with very particular national or strategic characteristics where domestic ownership matters more. Examples might be cultural organisations or military suppliers. Even here, a proportional approach that identifies the special objective, and selects the most effective and least costly instrument, may not require restricting competition policy.

Although protectionist measures are always damaging to economies, their impact is always greater in small open economies. Larger countries may be in a position to absorb the impact of shoring up domestic markets for political reasons. However, small countries cannot afford such measures. A cursory glance at Irish history with protectionist measures should be enough to highlight the dangers of such policies. However, over the past fifty years, Ireland has opened up its economy and that has led to significant growth.

In 1958 the Department of Finance published '*The First Programme for Economic Expansion*'. The recommendations of this report centred on a move away from protectionist policies based on an ideology of self sufficiency to policies aimed at opening up the Irish economy to international trade. During the course of the next decades, as these policies were implemented and the effect of international competition began to have an impact, Irish economic growth increased. Between 1949 and 1961, the average annual GNP growth rate was 1.9%.<sup>24</sup> This contrasts with an average annual GNP growth of 4.1% between 1961 and 1978<sup>25</sup>.

## **V. Ireland's recent loss of competitiveness**

Even though much prosperity has arisen from opening up the economy, Ireland has lost its competitive edge over recent years, although this was masked by a speculative property bubble which fuelled a construction boom. That façade has now crumbled, and the underlying deterioration in competitiveness has come to the surface.

Ireland has become an expensive economy in which to operate. Between January 2000 and September 2008, we saw a 32% loss in Ireland's international price competitiveness, reflecting a combination of higher price inflation in Ireland (approximately one third of the loss) and an appreciation of the euro against the currencies of many of our trading partners.<sup>26</sup>

According to the European Central Bank, this loss has been 28%, over double the loss of competitiveness of the Euro area as a whole (13%), measured by Harmonised Competitiveness Indicators (HCI's) for the period Q1 1999 to Q2 2008 inclusive.<sup>27</sup>

The average rate of wage inflation in Ireland between 2004 and 2008 Q2 was 50% above the EU-15 average.<sup>28</sup> In addition, the non-traded services sectors account for a large proportion of this lack of competitiveness. The annual

---

<sup>23</sup> *Ahead of the Curve – Ireland's Place in the Global Economy*. Enterprise Strategy Group 2004.

<sup>24</sup> Table 2; *Economic Growth in Ireland* p8; Mean Annual Percentage Change in real GNP; Kennedy, K.A. and Dowling, B.R. (1975), Gill & McMillan, Dublin

<sup>25</sup> *Autumn Quarterly Bulletin*; pp92; Central Bank (2004), Between 1961 and 1972 GNP growth rate was 4.25%. From 1973-1978 the GNP growth rate was 3.67.

<sup>26</sup> *Annual Competitiveness Report 2008*; National Competitiveness Council.

<sup>27</sup> *Globalisation and the Competitiveness of the Euro Area*; ECB; September 2008.

<sup>28</sup> *Annual Competitiveness Report 2008*; National Competitiveness Council.

average for services inflation in Ireland between 1999 and 2007 was 4.9% which is more than double the Eurozone average of 2.3%. Over the past ten years, inflation in the price of Irish services has exceeded that of other European countries by almost 25 percent, and Ireland is now second only to Denmark in terms of cost.<sup>29</sup>

The 'Cost of Doing Business' in Ireland is too high and this is having a detrimental effect on our ability to grow. Irish industrial electricity costs are the second highest in the EU-25. Irish prices increased by 70% between January 2000 and January 2007, which was more than twice the average rate of increase across the EU-15 (32.8%). The average price for a Kilowatt/Hour in the EU -15 in 2008 was approximately 9 cent but in Ireland was 13 cent.<sup>30</sup>

Our waste charges also reflect the fact that Ireland is a high cost economy; Dublin and Cork retain the most expensive landfill costs of 14 cities benchmarked in a recent NCC report. Dublin's cost is over twice that of Belfast at over €180 per ton and nearly 300% more expensive than London, where the cost is just over €60 per ton.<sup>31</sup>

These figures demonstrate the challenges we in Ireland face in regaining our competitive position in order to restart economic growth. Effective competition, and indeed effective advocacy of competition, will be central to this task.

It is good to see that the Irish Government, even in the face of national adversity, has seen the wisdom of an active competition policy in economic recovery, and has renewed its commitment to a policy of open markets and an open and impartial competition policy. But in no way will this commitment on its own be enough – competition gains have to be continually fought for, and policy-makers have to be continually reminded of the benefits of competitive markets. Indeed, even though Ireland prides itself as being an open economy, founded on free trade, there is still an ambivalence to the benefits that competition can bring. And a certain incidence of "that's ok for you, but not in my back yard".

## **VI. Anticompetitive Regulation in a Competitive Market Economy**

Ireland – like many other countries – still has an enormous legacy of regulation that restricts or prevents competition. And the pressure continues almost daily to add to this regulatory mountain. Across a whole range of markets from energy to communications, from transport to retail, the State has for decades directly limited how many suppliers could be in a market and how suppliers in a market could behave. And during the years while this regulatory mountain accumulated, there was no effective competition or merger law to check the private accumulation of market power or its subsequent abuse.

This type of regulation rarely if ever brings net benefits for the economy. It prevents new entrants and, in the process, reduces the incentives for existing firms to be efficient.

---

<sup>29</sup> Catching the Wave ; Forfas; 2008

<sup>30</sup> Forfas; Annual Competitiveness Report; Volume 1;2008

<sup>31</sup> Forfas; Annual Competitiveness Report; Volume 1;2008

New entrants to markets create new jobs. Where new entrants are more efficient and innovative, as they often are, the jobs they create are more stable, and increase the productivity of the economy in the long term. Yet regulation that restricts competition limits this type of valuable and innovative job creation.

Regulation that prevents or limits competition confers private benefits on existing suppliers who, protected from new entrants, set higher prices, become less efficient, less innovative and less consumer focused.

Such regulation also promotes a culture of rent-seeking whereby firms, instead of focusing on trying to win market share, seek instead to protect market share by lobbying for restrictions on competition.

In Ireland, the aviation industry is a remarkable example of the kind of turnaround that competition can produce. Aer Lingus has shifted its attention away from seeking to win political influence to keep its monopoly to a focus on efficiency and the customer with new routes and lower fares – almost totally because of the competitive threat posed by a successful low-cost airline (Ryanair). Consumers have been the clear winners from all this.

As stated above, Ireland has some of the highest energy costs in the EU. However, it must be noted that the energy market is becoming increasingly competitive. At the supply level there has been approval for a net increase in generation capacity over the next three years of 1,085 MW.<sup>32</sup> Included in this figure is the closure of older inefficient plants. Coupled with the decrease in demand resulting from the recession, competition can be expected to become stronger for the foreseeable future.

Indeed, it is already the case that lower international input prices (mainly natural gas) have led to substantial reductions in prices for industrial customers and to a lesser extent for domestic household customers. There are now five suppliers to Small and Medium Enterprises for electricity and three for domestic households. Over 90,000 businesses and over 250,000 domestic customers have switched supplier. The increased competition throughout the electricity supply chain supply has led to cost savings from more efficient generation being passed on to final consumers. Vigorous competition among supply companies has led many companies to expand their product offerings to include energy saving advice and more flexible pricing options that are more in line with their customers' needs. Since the start of this year electricity prices have dropped by 11.1% over all consumer categories with many larger customers negotiating discounts substantially larger than this figure.<sup>33</sup>

#### Restrictions Act like a Hidden Tax...

The costs imposed by restrictions on competition are usually hidden. In effect, this anticompetitive regulation gives some companies the implicit right to “tax” consumers and fellow businesses via a monopoly margin. Not only are protected firms not required to justify this, they don’t even need to declare it.

Restrictions on competition do not appear on your desks as bureaucratic forms, compliance statements, legal requirements, due dates or regulatory fees. Rather they are subtly concealed as extra 10-50% margins on an array of inputs.

Even in areas like refuse, energy costs or local authority charges where the price rises are more visible, business cannot always see if restrictions on competition are part of the cause. And even if they do, business

---

<sup>32</sup> New Generation ESB Aghada 430 MW – 2009, BGE Whitegate 430 MW – 2010, Eirgrid Interconnector 500 MW – 2013, Endesa Great Island/ Tarbert 750MW – 2012; Exits ESB Poolbeg 219 MW – 2009, ESB Tarbert/Great Island Endesa 806 MW – 2012; Source - CER

<sup>33</sup> CER Presentation, Energy Ireland, Energy Prices Seminar, 7<sup>th</sup> October 2009

representative organisations can have difficulty in pointing this out if those benefiting from the higher prices are also members.

On top of this, restrictions that raise final prices to consumers also affect businesses. Talented individuals are less likely to work hard, and may be even less likely to choose a country as a place to live, if they must suffer from high prices and unresponsive firms in a host of markets. In this way, competition in areas like food, retail or health insurance also matters critically for business.

Tackling regulation that restricts competition requires political, not financial, capital. It requires a model of decision-making that can look broadly at the interests of the economy rather than at particular interests within it. Business leaders always have great opportunities to draw the attention of policymakers to both the indirect and direct costs of poorly executed and unnecessary anticompetitive regulation.

Greater competition cannot solve all our problems, and it is not what is needed to solve every problem. But we are a very long way in most countries from having too much competition. Competition in telecoms was hugely resisted in Ireland 10 years ago: now we realise that what seemed like radical policy at that time probably did not go far enough. It is time to learn from these lessons.

## ***VII. The Competition Act and Exemptions***

We have had regular examples in Ireland of cases where the Competition Authority has either already enforced the law, or else it threatens to do so. This will often prompt representatives of the economic sector involved to lobby Government either to have itself exempted from the Competition Laws, or else to have special laws enacted to protect itself from competition law. This means that wherever enforcement actions are pursued, it is important that the Competition Authority is also very active on the advocacy front.

A particularly good example of this arose some years ago in Ireland in the pharmacy sector. In 1996, the Government introduced a regulation preventing new pharmacies from opening within a certain distance from existing pharmacies. The Competition Authority adopted a strong advocacy stance against this regulation for several years. In January 2002, the Government eventually removed the restriction.

Clearly angered pharmacists threatened a group boycott of the Health Department (the main buyer of their services). In a public statement, the Authority pointed out that such a boycott would contravene competition law and that it would act decisively if one transpired. In the event, no boycott was mounted and the pharmacists confined their collective activities to political lobbying. The restrictions have not been re-introduced.

However, the Irish Government is currently reviewing the Competition Act, and already there are proposals to create some minor exemptions to it, due to successful enforcement action by the Competition Authority. The exemptions proposed are for self-employed voice-over actors in broadcasting, session musicians and freelance journalists<sup>34</sup>. Although it may be argued that the

---

<sup>34</sup> During the course of Social Partnership talks in 2008, the Government committed itself to introducing legislation amending Section 4 of the Companies Act 2002 to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements, when engaging in collective bargaining, would be excluded from the Section 4 prohibition. The commitment will take into account that there would be negligible negative impacts on the economy or on the level of competition and will have regard to the specific attributes and nature

economic impact of the higher prices that will result from exemptions in these markets is negligible, it will certainly raise costs in those industries. It also sets a precedent that others will pursue.

Since then, the Government, having decided to reduce the fees paid to pharmacies for dispensing drugs under the community drugs schemes, was subjected to sustained pressure by the IPU in an effort to force the Minister for Health to reconsider the new prices. The Minister refused, relying on competition law which, as she pointed out frequently and vigorously, prohibited pharmacies from collectively negotiating their fees. Competition law thus helped protect the State and the taxpayer from what might otherwise have been a legalised cartel type group action by pharmacists. The pharmacists ultimately ended their protest without achieving what they had sought.

If the pharmacists had received an exemption from competition law, they would have been legally entitled to freely agree among themselves to withdraw the services of every pharmacy in the State from the community drugs schemes to try to force the Minister not to lower fees. A collective withdrawal of services by every pharmacy in the State would have been a much bigger problem for the HSE to cope with than the individual withdrawal of a third of all pharmacies, which is what actually occurred.

As well as protecting the exchequer, competition law protects consumers from collective action by players in various industries in order to force another party to negotiate with them. For example, in 2005, the Competition Authority accepted settlement terms offered by the Irish Dental Association (IDA) in proceedings taken in the High Court following allegations that the IDA and its members engaged in a collective boycott of a private dental insurance scheme being introduced in Ireland by the VHI with a firm called DeCare. Enormous benefits have accrued to consumers through the introduction of this dental insurance scheme in Ireland; this would not have happened if the Authority had not been able to take action and bring the boycott to an end.<sup>35</sup>

Another group to whom it has been stated that an exemption to the Competition Act will be granted is the Irish Medical Organisation. The stated reason is...

"the intention, in the public interest to attain the objective of protecting public health, to pursue appropriate amendments to Section 4 of the Competition Act 2002 to enable the IMO to represent its members in negotiations with the HSE and the Department of Health and Children in respect of the services provided to the public health service."<sup>36</sup>

If GPs are granted an exemption from competition law in this way, they will be legally entitled to use anti-competitive means when engaging with the State on fees for the treatment of medical card holders, the administration of flu vaccines, etc.<sup>37</sup>

---

of the work involved, subject to consistency with EU competition rules. It is proposed that three specific categories of worker, namely voice-over actors, freelance journalists and session musicians will be covered by the exclusion.

<sup>35</sup> See the full details of this settlement on the Competition Authority's website at <https://www.tca.ie/templates/index.aspx?pageid=1262&locale=0>

<sup>36</sup> Mary Coughlan, Minister for Enterprise, Trade and Employment; Written Answers, Dáil Éireann - Volume 666 - 11 November, 2008

<sup>37</sup> The IMO recently "*called on the Government to honour its commitment to amend competition law in order to allow negotiations on fees for administration of the swine flu vaccine*". Irish Medical News, 28<sup>th</sup> September 2009, "IMO calls for competition law to be expedited".

The Irish Medical Organisation (the "IMO") has exerted continuous pressure on the Government to grant it an exemption from the Competition Act. This pressure came to a head in late 2008. The IMO argued that it was prevented from "negotiating" with the Government on the issue of GP fees for supplying services under the medical card scheme for the over 70s by the Competition Act 2002. In fact, a perfectly workable model known as the "Messenger Model" was availed of to deal with the situation of setting fees payable to GPs. This obviated the need to exempt GPs from competition law, while still affording the State and the taxpayer the protection afforded by the Competition Act 2002.

Thus an amendment to competition law is actually not necessary at all. Although the Competition Act 2002 prohibits self-employed persons such as GPs from agreeing with each other on the minimum fees the State must pay them (i.e. price-fixing), this does not preclude the State from unilaterally setting a fee that it is willing to pay for such services. There are perfectly workable mechanisms available that allow the State to consult with representative bodies and/or their members on the fee structures for various schemes that the State is willing and able to pay.

The Competition Authority has very recently published guidance on how health professionals providing services to the State can engage collectively with the State on matters of fees while maintaining compliance with competition law.<sup>38</sup>

### **VIII. Political Economy Challenges**

During times of economic distress, particular sectors will plead with Governments to protect them from falling demand and excess capacity. It is inevitable that some firms within an industry will find it difficult to survive, never mind grow, in a recession. By appealing to the potential loss of jobs as a reason for protection or subsidies, industry representatives can make a powerful rationale for aid. Nobody likes to see jobs lost. By holding up examples of actual employment and firms in distress, public opinion can be steered towards legitimising the protection. Indeed an appeal to justice and fairness can be made by comparing the aid given to the financial sector with Governments' approach to other sectors.

In these circumstances the task of competition advocacy is more difficult. Trying to articulate that saving particular jobs in particular firms in the short-run will cost the economy more in terms of higher prices, less overall employment and reduced growth in the medium term is not an argument that is particularly emotively palatable.

And there lies the problem for policymakers, many of whom may need the support of the constituents under stress. Competition Authorities, through educating the public on the benefits of competition and of the futility of short-term protectionism, help policymakers in their responsibilities towards consumer welfare.

Policy makers need to determine if an industry or firm in distress is in the position it is due to an external shock or is it due to an inevitable decline in demand for its goods. The former may benefit from some intervention without distorting the rest of the economy. However, aid given to the latter only serves to transfer resources away from productive uses and harms all sectors of the economy, including those receiving the aid. After all, you cannot turn

---

<sup>38</sup> [http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected\\_item=255](http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=255)

back the tide and eventually those directly involved in such an industry will have to exit. Policy makers' efforts should be focused on re-training those involved and giving them the tools and opportunities to prosper elsewhere.

Vested interests sitting on monopoly rents are generally well-resourced, well-informed, well-connected, articulate, and have members who would suffer large injury from competition. Competition authorities are typically under-resourced – and the Irish Authority is no exception. But there is no reason why a small Authority cannot make a big difference if it “works smarter, not harder”, properly develops its communication and influencing skills, and engages in careful targeting and planning.

There are three particular challenges in this area.

1. The first and very general challenge is the inherent fear of change, especially among the general public. This natural conservative force, already a formidable opponent, is almost always whipped up by the scare-mongering of vested interests. Popular arguments are that prices will rise, quality will fall, retail outlets will close down, foreign multinationals will take over, jobs will be lost, and so on. Ironically, many of these arguments run counter to the reality that the removal of restrictions on entry will generally *increase* the number of suppliers, *reduce* prices, *enhance* quality and *expand* output. Countering fear of change is a formidable challenge.

- One element of our strategy is to boil our argument down to its essence and to find a clear and simple way of communicating it. This often takes time, and involves experimenting with different styles and manners of presentation.
- A second element is to pick cases where the restrictions on competition are most obviously excessive and disproportionate. This has been the case in Ireland with restrictions on entry in the taxi sector, where people had to wait long periods to find a taxi, even at off-peak times, and often could not find them at peak times. Since liberalisation in November 2000, the number of taxis in Dublin has increased from 2,800 to over 10,000.
- Third, we try to develop good examples, including ones where fears proved unfounded. The liberalisation of air travel in Ireland in the mid-1980s is a great example –
  - in showing the gains to **both** consumers and share holders (showing that increased competition is not a zero sum game),
  - because the gains to consumers have been great
  - because Ryanair has successfully expanded abroad
  - because competitors have become more efficient,
  - because of knock-on competitive effects in complementary markets like travel agents and airports.

A nice example of the ancillary benefits that can arise is the enhancement of Internet usage: many people's first on-line purchase has been an airline ticket!

2. A second important challenge is to adopt a longer-term perspective, and not to be discouraged by setbacks. Advocacy “wins” take time, often involving a continuing process of “two steps forward, one back”. One of the reasons that some see advocacy as less important is that it delivers over a longer period. This can also make it more difficult to get political support.

3. The third political economy challenge is how to deal with stranded costs. Increasing competition results in winners and losers. The gains of the winners outweigh the costs to the losers, but compensation of the losers is not naturally part of the process. A good example of these stranded costs is the outstanding market value of licences where the Government has restricted entry. In Ireland, for example, the outstanding stock of taxi licences when the market was deregulated had an artificial value of several hundred million euro - due entirely to the restriction on entry. Stranded costs of this kind also exist in the retail sector (pharmacy, pubs). There are good incentive reasons why losers should not be fully compensated. However, the political reality is that refusing to compensate stranded costs can make change more difficult to implement.

Partial compensation may be the best answer, but it should be proportionate to the losses, tied to the introduction of competition, and for small businesses, based on genuine hardship.

## ***IX. Concluding Comment***

Ireland is one of the most open economies in the world. Since the mid-1960's, it has experienced a large reduction in trade barriers. This has exposed much of the traded sector to competition. But the exposure to international competition was offset to a certain extent by a combination of grant aids and low corporate taxes. The sheltered non-traded sectors of the economy have been even further insulated, even where they supply crucial inputs to exporting firms.

There is a clear lesson in this: opening an economy to trade does not automatically bring vigorous competition. Put another way, an active domestic competition policy is essential for an economy that wishes to be internationally competitive.

The immediate danger to Ireland's economic recovery from granting exemptions from competition law to various business and professional groups is the threat of group or collective action against the State. Group or collective action includes, for instance, collective boycotts and/or withdrawal from the provision of various services to the State in order to maintain current prices.

There are also serious dangers to the wider goal of economic competitiveness and dangers to consumers by granting exemptions from the Competition Act in that the economy will not be as responsive as it needs to be to ensure that economic recovery comes sooner rather than later.

Ensuring that all facets of the economy are as competitive as possible is imperative if Ireland is to embark on a path of sustainable growth. Applying the full rigours of Competition Law to all sectors is essential in doing this.

Finally, as a closing quote on the subject of protectionism, it would be difficult to do better than this, from the EU Competition Commissioner Neelie Kroes -

"Protectionism...is like a pregnancy: you think it's about nine months but there are decades of consequences."