

Competition Law & White Collar Crime

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Competition Act 2002

Sections 4 & 5 contain prohibitions

Section 4: deals with agreements between undertakings (which includes cartels)

- Agreements that prevent, restrict or distort competition in trade in any goods or services within the State.
- Note distinction between “mortal sins” and lesser “venial sins”, (i.e. horizontal & vertical).

Section 5: Abuse of Dominance

Treaty on the Functioning of the European Union (TFEU)

Preamble to Competition Act 2002: An Act ... by analogy with Articles 81 and 82 of the Treaty ...

Therefore, our law derives from Community Law

Article 101 (formerly Article 81) is identical to section 4

Article 102 (formerly Article 82) is identical to section 5.

Competition Offences

Competition Act: criminal statute as it creates a number of offences

Section 6: creates offence for breach of section 4

Section 7: creates offence for breach of section 5

Note section 6(2) - offence under 6(1) - presumption that agreement between 'competing undertakings' ... to fix prices (etc.) ... has object of preventing restricting or distorting competition in trade ... unless defendant proves otherwise

This is the 'hard-core' (*per se*) offence

Note: Mortal -v- Venial Sins

Section 4: horizontal & vertical agreements

- Horizontal agreements = Cartels = Hardcore '*per se*' offences and are the mortal sins
- Vertical agreements = RPM (resale price maintenance) are the venial (lesser) sins
- Cartels are treated as criminal by Competition Authority with higher standard of proof
- RPM are 'rule of reason cases' and are treated at 'civil' standard.

Section 8: Penalties

Penalties under section 8 for offences under s.6 and s.7 breaches are in principle the same.

- A fine of € 3,000 on summary conviction
- A fine of € 4,000,000 or 10% of previous year's turnover, whichever is the greater.
- However: Individuals (directors etc.) may receive terms of imprisonment for offences under s.6(2) as per s.8(1) – Max. 5 years on indictment or 6 months for summary
- Contrast with s.8(2) – finer only and no imprisonment, for conviction either summarily or on indictment

Per se v 'Rule of Reason'

Rationale for different sentences in s.8

'Hard-core' cartel offences v Rule of Reason civil type breaches

Hard-core offences are treated as being bad with no saving graces – illegal *per se*

McKechnie J in *DPP v Patrick Duffy* on cartels:

'...offensive and abhorrent, not simply because they are *malum prohibitum*, but also because they are *malum in se*. They are in every sense anti-social. Cartels are conspiracies and carteliers are conspirators.'

Price-fixing '...the equivalent of theft by well-dressed thieves and they deserve unequivocal public condemnation...'

See Competition Authority Submission to the Department of Justice and Law Reform: White Paper on Crime Discussion Document No. 3

'Organised and white Collar crime, available at www.tca.ie

Per se v 'Rule of Reason' contd.

All other 'offences' under Competition Act require 'Rule of Reason' analysis, which is a judicial tool to determine if a wrong has been done

There are often arguments that certain vertical agreements, or actions by a dominant company are pro-consumer or pro-competition

According to former CA Member Terry Calvani:

'In other words, we are instructed to weigh the pro-competitive aspects against the anti-competitive aspects'

This type of breach of competition law does not bear the indicia of a crime

... yet the Oireachtas wanted the sanction of fines available

... it seems that fines can only be imposed in a criminal case

... therefore ... all breaches of sections 4 & 5 were criminalised

Need for Civil Fines

Only 'hard-core' price-fixing cases prosecuted as criminal cases
They are prosecuted on indictment by DPP in Central Criminal Court
Civil cases – only sanction is declaratory and/or injunctive relief
Need for 'Civil fines' to fill gap

See EU/IMF 'Programme of Financial Support for Ireland' 16 December
2010 under heading 'Structural Reforms' p 24 available at

<http://www.finance.gov.ie/documents/publications/reports/2011/euimfreview.pdf>

'Government should introduce reforms to legislation to (1) empower judges to impose fines and other sanctions in competition cases in order to generate more credible deterrence and ...'

Heating Oil Cartel

- 1st ever prosecution before a Judge and Jury of a criminal cartel in Ireland or Europe.
- Trial in Galway Circuit Court ended March 2nd 2006. Michael Flanagan t/a Flanagan Oil fined €3,500
- JP Lambe convicted on 6th March 2006 of aiding and abetting received 6 month suspended sentence and €15,000 fine,
- Total no. of individuals and undertakings convicted to date is 17 and total in fines is €122,000

Heating Oil Cartel 2

- Parties that can be prosecuted include both individuals and corporate undertakings.
- Other legislation can also come into play such as Criminal Law Act 1997 where a person can be prosecuted for aiding and abetting the commission of an offence
- Heating Oil Cartel prosecuted under repealed 1991 Act (as amended) and case prosecuted in Circuit Court.
- Future cases, such as alleged Car Cartel, will be prosecuted under 2002 Act in Central Criminal Court.
- Recently Denis Manning prosecuted and convicted for Aiding and Abetting Irish Ford Dealers association in price-fixing...received 12 months suspended sentence.

Immunity Programmes

- Core principles – first in; not the ringleader; case involvement; stay quiet and give useful case cracking evidence.
- Irish Immunity Programme and the Commission Notice on Immunity from fines both relate to cartels only.
- In Ireland it relates to offences under s.4(1)(a)-(c).