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I. INTRODUCTION

Occasionally, it is a good idea to take a moment to get off the treadmill and survey one's surroundings. The invitation by Competition Policy International's *Antitrust Chronicle* to reflect on Irish competition law and practice is one of those moments. So, after twenty two years of "modern" competition law in Ireland—since the Competition Act 1991 was enacted to revolutionize Irish competition law—it is useful to take time out and share some reflections that will hopefully be useful not only to those in Ireland but, perhaps more importantly, to those beyond Ireland who are reflecting on their own regimes.

In contrast to many jurisdictions worldwide, Ireland was early out of the blocks in terms of enacting "modern" competition laws. Since then, the country has punched well above its weight in terms of its influence on competition law and practice. It has attracted talent from all over the world. However, it has also fostered home-grown talent and helped them play an important role not only in the Irish Competition Authority but also in competition agencies worldwide. So, these observations should not be seen as criticism of individuals—who have, for the very most part, played stellar roles.

Instead, these reflections are a review of a system that is worthy of study but, like any system, is also capable of improvement. The Irish regime is worth studying because it has witnessed quite radical changes—it is worth recalling that in Ireland the very act of competing has, over a few decades, mutated from being a criminal act to a societal goal. For example, until 2006, it was a criminal offense to sell grocery items at below cost but now "competition" is seen as not only a public policy aim but a citizen's right. (Query, whether there is now a "human right" to have a competitive and efficient market with the benefits which flow to citizens?)

II. OVERVIEW OF THE IRISH REGIME

Before sharing some reflections, it is useful to paint a short picture of the Irish regime and structure. It is convenient to do so in a chronological way paying attention to particular events.

Throughout the 1950s, and again in the 1970s, Ireland enacted and amended "restrictive practices" legislation in the "control of abuse" rather than "prohibition" style—thereby controlling, by way of Ministerial orders, behavior which was seen as anticompetitive or contrary to the public interest. These were the so-called "Restrictive Practices Acts." However, these controls were always retrospective and specific rather than prospective in effect and general in nature (as would be the case with modern competition law regimes such as that of the European Union or the modern Irish regime).

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In 1978, Ireland adopted a system of merger control whereby certain mergers and acquisitions had to be notified to the then Industry & Commerce Minister for approval on the basis of a combined competition and public interest test with the Restrictive Practice Commission (now the Competition Authority) being invited by the Minister to review those deals about which the Minister had a particular concern. This was the Mergers, Takeovers and Monopolies (Control) Act 1978. Ireland was therefore one of the first European countries to have a merger control regime. The vast majority of transactions were approved but it was, at times, a political-type system that downplayed "competition" as a criterion and was more interested in factors such as the impact of the proposed transaction on employment levels.

The Competition Act 1991 repealed the Restrictive Practices Acts—except for one Ministerial Order (known as the Groceries Order) which retained a "ban" on selling grocery goods below the net invoice price paid by the retailer. The 1991 Act adopted a hybrid of the EU and U.S. systems. The principal EU substantive rules (i.e., what are now Articles 101 and 102 (but not Article 106) of the Treaty on the Functioning of the European Union) were adopted in the 1991 Act.

The Act provided for the establishment of the Competition Authority but the latter's power was relatively limited. The State was unwilling (and, in part, unable) to put resources into the Competition Authority to perform a role akin to the European Commission; instead, the State largely "privatized" enforcement allowing "aggrieved persons" to institute court proceedings for damages, exemplary damages, injunctions, and/or declarations. Basically, it took the U.S. enforcement model and grafted it on to the EU substantive model. The reason why the State was unable to invest into the Competition Authority the powers to impose fines and order changes in behavior is that, under Irish constitutional law, such functions are confined to the courts.

Equally, the 1991 Act did not provide for criminalization of anticompetitive behavior and so the statute chose the civil route. So the Act went some way towards adopting a new effective competition regime but it did not go far enough.

The Competition Authority, established under the 1991 Act, called for the criminalization of competition law. This was achieved when the Irish Parliament enacted the Competition (Amendment) Act 1996. This statute provided for some criminal penalties in respect of breaches of Irish competition law.

At the turn of the century, a newly composed Competition Authority convinced the Government to enact a new more potent Act, the Competition Act 2002, to repeal the 1991 and 1996 Acts. The 2002 Act provided for enhanced enforcement powers and court-imposed sanctions of five years in jail and fines of up to EUR 4 million for hard-core competition breaches (principally, cartels). Very interestingly, the 2002 Act also provided that (a) breaches of Articles 101 and 102 of the TFEU constitute criminal offenses and civil wrongs under the Irish Act and (b) there is an explicit right of action in the Irish courts for damages, exemplary damages, injunctions, and/or declarations for breaches of EU and/or Irish competition law.

In 2006, there was public controversy about the Groceries Order because of its ban on "below cost" selling and a belief that consumers were therefore paying more than they ought to do so for certain grocery items. A new statute, the Competition (Amendment) Act 2006, was

enacted which repealed the Groceries Order and applied competition law in full to the grocery sector.

There have been criminal prosecutions instituted under the 1996 and 2002 Acts. They were mainly against what might be termed “small fry” local operators. Many—but not all—of these prosecutions were successful. The Competition Authority would have taken more cases but their files were either not prosecuted by the Director of Public Prosecutions (“DPP”) (who is the State prosecutor) or, when prosecuted, the defendants were sometimes acquitted by the courts. Interestingly, the courts were willing to award persons who were acquitted all or part of their court costs. The fact that there have been acquittals is sometimes seen as a failure, and in part it was, but it would be a poor system where only “dead cert” prosecutions were instituted.

Some civil cases were also brought by the Authority including some rather unusual and peripheral cases on somewhat theoretical issues. Some failed in the courts. It is hoped that the Competition Authority will not be deterred from taking suitable civil cases in the future but it probably needs to be more careful about its choice of cases.

The current economic and financial crisis began to hit Ireland in 2007. Like a Caribbean island hit first by a hurricane which then moves on to the continental American landmass, Ireland was first hit by an economic crisis which then engulfed most of Europe. The Troika of the International Monetary Fund, the European Central Bank, and the European Commission agreed on a “bail out” with Ireland, which included a commitment by Ireland to reform its competition law regime.

Frankly, it was an odd commitment. The Irish competition regime is not perfect but there was no sense that the causes of Ireland’s problems included a defective competition regime. Moreover, the key element of the proposed reform package was the introduction of so-called “civil fines” that would allow the courts to impose, in cases brought by the Competition Authority, a fine on those in breach of competition law with the standard of proof to find a breach being on the basis of the “civil” standard of proof (i.e., on the balance of probabilities) rather than the higher “criminal” standard (i.e., beyond reasonable doubt).

Such a reform was advocated by some in the Competition Authority so as to allow cases to be taken more easily. The proposed reform was not likely to do anything to enhance the chances of Ireland’s economic recovery and was, in any event, fatally flawed as being unconstitutional. When the unconstitutional argument was raised, some advocates said that the Constitution should be amended—which, in Ireland’s case, requires a referendum of the people—which was not realistic. Instead, the eventual Competition (Amendment) Act 2012 was a watered-down measure which introduced some relatively minor procedural innovations and a doubling of the jail sentences to ten years and an increase in maximum fines from EUR 4 million to EUR 5 million. The 2012 statute has done no harm but may well not do much good either.

Interestingly, looking at the economic crisis as a whole, the Competition Authority had a somewhat “quiet crisis”—it could (and should) have been more center stage than it was. It was somewhat side-lined in that legislation was enacted to provide that certain mergers and acquisitions in the financial services sector could be adjudicated upon by the Minister for Finance rather than the Competition Authority—and while this occurred only once (in the AIB/EBS merger), the point was established in the legislation. Interestingly, for cost-cutting

reasons, but not for any ideological reason, it was proposed in 2009 to merge the Competition Authority and the National Consumer Agency but that merger has not yet occurred.

So what are the lessons from the two decades or so of competition law and policy in Ireland? There are many lessons but it is proposed to focus in on a few.

III. HAVE A SYSTEM FOR PEER REVIEW AND FILTERING CASES

While it would be tempting, and indeed attractive, for the Competition Authority to be able to select its own cases and then impose fines, the current Irish system has much to commend it not only for Ireland but other jurisdictions as well. The Authority investigates suspected breaches (often in conjunction with the Irish police force) and then has to bring cases to the DPP for her to review. The DPP then decides whether or not to prosecute; if it is prosecuted, then the case has to go before a court. This means that there is “peer review” by the DPP and the Irish police.

It is too tempting for a competition agency that has become immersed in a case to “plough on” even when the case is weak—ultimately, such cases will often be overturned on appeal. It is tempting to speculate whether there would have been so many fines ever imposed in the U.K. construction cases had there been such a peer review system. The Irish regime may seem cumbersome but it avoids false decisions at the administrative level that are then overturned on appeal after much time and expense.

IV. USING COURTS CAN BE A REALITY CHECK ON THE PRACTICALITY OF COMPETITION THEORY

Competition agencies internationally can be somewhat zealous and overly focused on the “competition” criterion. “Competition” is just one of the colors that shines through a society’s prism. Having courts (i.e., judges and juries) can provide a reality check. There is no doubt that some of the cases instituted by the Irish Authority and brought before the courts were not cases which either the judges or the juries believed ought to have been instituted and they therefore dismissed the cases.

Courts can also provide a useful filter in terms of the level of sanctions to be imposed. There is clearly “fine or penalty inflation” among competition agencies worldwide which has meant that some enormous and unrealistic fines are being imposed—many of these are overturned on appeal by courts—but this problem is not present in Ireland where the fine is decided upon by the courts. To date, the fines imposed by Irish courts have been in keeping with fines imposed by Irish courts generally but have been much less than if they had been imposed by a competition agency. So, in a result that would appear ironic to many, the greater use of courts makes the system somewhat more robust and realistic.

V. STUDIES SHOULD BE SPECIFIC, SHARP, AND SWIFT

The Irish Competition Authority has the power to conduct studies. This is welcome because studies can be very useful in developing a competitive economy. Unfortunately, the manner in which many of these studies have been conducted has been less than satisfactory. At one point, the Authority sought to conduct studies on banking, insurance, and certain professions almost simultaneously. It was a case of academic or institutional ambition winning out over practical reality. The study about professions—and the introduction of greater

competition and efficiency in certain professions—took almost a decade. Taking a decade to produce a study does little to enhance the reputation of an institution. Instead, studies (which are a valuable exercise) should be specific, sharp, and swift.

VI. BE RESPECTFUL OF HUMAN RIGHTS AND FAIR PROCEDURES IN INVESTIGATIONS

Investigations by the Competition Authority have been largely seen as fair and reasonable. However, at a point of great zeal and enthusiasm, the Authority adopted a notice to enable it to “veto” the choice of lawyer by persons being interviewed. The Authority was concerned that the same lawyer could represent various parties under investigation and therefore the Authority’s investigation could be impaired.

The notice was challenged in the Irish High Court by the Law Society of Ireland. The High Court annulled the notice and expressed concern about it. No one would doubt the importance of investigations being given the leeway to succeed but equally nothing should be done to undermine respect for human rights and fair procedures (including the right of any citizen to choose their own lawyer).

VII. WELCOME, BUT WORRY ABOUT, CHANGING PERSONNEL

The Irish Competition Authority has been very fortunate to have attracted members and staff from overseas. While the members may have been more high profile than the staff, both have contributed a great deal. This is welcome. However, there is a need to ensure that there is some continuity and local knowledge because the Authority has suffered somewhat from frequent changes of personnel—indeed, there is a certain irony that there has been a continuous build up of expertise and experience on the part of the local bar and economic community while the Competition Authority has changed quite often. Indeed, there has been such an ebb and flow of personnel at the Authority that there have been times when it had too few staff to function effectively and it became less than effective.

VIII. DON'T CHANGE THE LAW OR CHANGE DIRECTION TOO OFTEN AND DON'T CRAVE CONTINUOUSLY AFTER NEW POWERS AND GREATER RESOURCES

One criticism which may be leveled at the Authority is that too often it has craved new powers and not used the ones which it has. This is perhaps a frequent complaint about many institutions worldwide but it is important for existing powers to be used rather than for “breaches” to be left unaddressed because there might be a better power out there somewhere which the agency might get one day.

IX. DON'T CONCENTRATE TOO MUCH ON CARTELS; BE CONCERNED TOO ABOUT ABUSE OF DOMINANCE

There is an international trend in favor of treating cartels as the “hard core” breaches. They are the “supreme evil.” They are the “murder” of competition law offenses. There is no denying that cartels are serious breaches and should be treated seriously. However, the last two decades have shown that, for the most part, the Authority has neglected monopolies and the abuse of dominance.

Unfortunately, there is little sign that this is changing. Indeed, a move by the Authority to address abuses of dominance could have a greater impact on problems in the Irish economy than

almost any other measure that the Authority could take. (Indeed, at a European level, a greater focus on abuses of dominance by State entities could unlock some of the potential of the European economy as much as any investigation of cartels.)

X. MORE ENFORCEMENT AND GREATER CLARITY WOULD ENCOURAGE MORE CIVIL LITIGATION

In line with many jurisdictions, there have not been many cases in Ireland where damages were sought, or obtained for, breaches of competition law. This is despite a relatively litigious culture in Ireland, a clear statutory basis for instituting proceedings, an experienced competition judiciary, and a legislative regime addressing explicitly the issue of competition litigation for more than two decades.

There are probably several reasons for this reluctance:

1. There is a greater likelihood of civil damages cases as “follow-on” actions rather than “original” plaintiff initiated cases. Unfortunately for this purpose, the cases initiated by the Competition Authority (largely against small defendants) would not have generated the sort of “damages” which would encourage follow-on actions. If there is successful public enforcement in larger cases then follow on actions are more likely.
2. The law is still seen by many in Ireland as relatively unclear and uncertain.
3. The Authority needs to set out clearly what would be available to plaintiffs (e.g., which aspects of their files) because that could facilitate private claims in terms of reducing some of the surrounding uncertainty. It is very likely that there will not be an outbreak or rash of private litigation any time soon but more cases are almost inevitable as the system matures.

XI. CONCLUSION

Overall, the Irish regime has worked reasonably well. It has suffered at times from the ebb and flow of personnel and a desire to change the law continuously. This impatient desire to change the law has resulted in several statutes being enacted, but perhaps without much of a gain. It is hoped that the regime will settle down now and that both enforcement and compliance will be enhanced by more dynamism and constancy from the Authority.