1. INTRODUCTION

There are many parts of the Competition Act which need amending at the present time. There are difficulties with the following:

1. Mergers
2. Employment contracts
3. De-minimis provision
4. Appeal availability
5. Backlog of decisions
6. Enforcement
7. Numbers of members
8. Decision making time

It is reasonable to ask why such a long list of changes should be needed to an Act which was only enacted in July 1991. I think it is worthwhile to reflect on where this Act came from and also to step back and think about what our competition policy should be if we were starting with a clean slate.

2. BACKGROUND TO IRISH LEGISLATION

The first legislation which could be termed competition legislation was enacted in Ireland in 1953. There was a significant change in 1972 and further changes in 1987. Each change reduced the exclusions from the Act and sought to make the Act more effective. However all of this legislation is of the type which is called in the international competition world "control of abuse" as compared with the alternative which is known as a "prohibition" system.

3. CONTROL OF ABUSE VERSUS PROHIBITION SYSTEM

When we enacted our legislation originally, many countries, particularly those in Northern Europe, had or were adopting "control of abuse" systems. Gradually some of these have changed to the prohibition type.
Control of abuse means, essentially, you establish a body, in Ireland the Fair Trade Commission (FTC), to examine possible abuses and to make recommendations for action by the Minister. In Ireland this approach involved the Fair Trade Commission in conducting public enquiries, reviews or studies into trade sectors and then making recommendations to the Minister that he/she make an Order prohibiting the perceived abuses. Countries which had "control of abuse" systems in 1990 included Denmark, Norway, Sweden, and partly the United Kingdom as well as Ireland. When the Fair Trade Commission was abolished in 1991, there were 11 Orders in existence. In addition, there were published fair trade rules for many sectors. Some of the Orders, notably the Grocery and Motor Fuels Orders, had been amended several times.

The prohibition system, on the other hand, prohibits anti-competitive practices outright but usually permits for some exemption from the prohibitions. Countries with prohibition systems include the United States, Germany, Japan, France, Spain, Greece and Portugal as well as most importantly, the EU.

An important part of the background to the Act was, of course, that Ireland joined the EEC in 1973 and EEC competition law applied in Ireland from that time onwards where trade between member states was affected. In addition, members of the Fair Trade Commission participated in the workings of the Advisory Body on Restrictive Practices and Dominant Positions which examined and made recommendations on all EEC cases before the EEC Commission made its decision. The members of the Commission, therefore, became familiar in dealing with EC law issues. Another important factor is that Peter Sutherland was appointed EC Commissioner for Competition in 1986 and this gave competition law issues a higher profile in Ireland than they had previously.

4. POLITICAL BACKGROUND TO FTC STUDY

In 1987, Mr. John Bruton T.D. who had initiated the review of the 1972 Act while Minister, was the opposition spokesman when the changes were brought before the Dáil. In the meantime, Mr. Bruton had become converted to the idea that Ireland should adopt the EEC model of competition and he proposed amendments in the Dáil to that effect. It should be remembered that there was a minority Fianna Fail Government at the time. The Minister, Mr. Albert Reynolds T.D., on the advice of the Department was not willing to accept the amendments without a detailed study. The Dáil, after some discussion, enacted the proposals for the 1987 Act on the basis that the Fair Trade Commission would study and examine, in effect, whether the prohibition system should be introduced into Ireland. The Commission commenced the study shortly after but the study was constantly interrupted by other work, not least the Irish Distillers take-over references, the holding of a public enquiry into motor fuels and the completion of the report into the legal profession.
However, in 1989 while the minority Fianna Fail Government continued in office, the Progressive Democrats published an "Enterprise (Competition and Consumer Protection)" Bill. This Bill sought to provide for the enactment of the EU Competition provisions into Irish legislation.

The Bill was opposed by the then Minister, Mr. Ray Burke T.D. partly on the grounds that the report from the Fair Trade Commission had not been received and that it would be premature to take such a step. The Bill was defeated in the Dáil when the Labour Party, interestingly enough, voted with Fianna Fail because, from memory, of something in the Bill in relation to State companies.

However, in June 1989 there was a surprise General election and the Progressive Democrats in their manifesto stated that, if in Government, they would enact the EC system into domestic Irish Law. The Progressive Democrats emerged from the election as partners in Government and the Programme for Government included a commitment to introduce the legislation.

This obviously moved the Study up the priority list of the Fair Trade Commission and the Study was completed and sent to the Minister, Mr. Desmond O'Malley T.D., in December 1989. The report was signed by the writer and also by the present Chairman of the Authority, Mr. Paddy Lyons, who was the other member of the Commission at the time. Almost all of the work and research in the preparation of the report was done by myself with Mr. Lyons considering mainly the recommendations. Of the 62 recommendations, 56 were agreed by both of us with differing views on only six others. However, unknown to me, it is obvious now that the Minister had, as of course he was perfectly entitled to do, another group of people also working on a new Act.

5. ENACTMENT OF COMPETITION ACT

When the Minister's proposals emerged at the "heads" of bill stage, any resemblance to the Fair Trade Commission proposals was almost only a coincidence. Protests by me at the time to the Department were not listened to and eventually the "heads" were sent to the Attorney General's office for the drafting of the legislation.

The Attorney General's office must have received the proposals about July 1990 but the draft Bill was not sent back to the Department until late March or early April of the following year. In the meantime, the Minister was under pressure to produce the legislation which had been promised and there were a number of questions in the Dáil. In addition, as part of the on-going negotiations in respect of a legislation programme it seems to have been agreed that parliamentary time would be available for the Bill during the period April 1990 to July 1990. When the draft Bill was received from the AG's office, it was published in April 1990. At the same time, the FTC report, which had been withheld, was also published without comment.
When the Bill reached the Dáil, the three opposition parties whose spokespersons were Peter Barry, Mervyn Taylor and Pat Rabbitte were in receipt of representations, as was the Minister, from bodies such as the Confederation of Irish Industry, the Law Society and others. There was a major concern that the Bill would abolish the Groceries Order and much of the trade representations were focused on this issue. The Minister undertook not to revoke the Order pending a report by the Fair Trade Commission which was then examining the Grocery trade. The opposition proposed many amendments in the Dáil but very few were accepted by the Minister on behalf of the Government. Amid very vocal protests, the Bill was forced through the Dáil by a guillotine motion. So we had the Competition Act, 1991.

6. THE FTC PROPOSALS COMPARED WITH IDENTIFIED WEAKNESSES OF ACT

I believe it would be useful to examine how things might have been if the Fair Trade Commission proposals had been adopted. It is useful to go back to the points where we saw difficulties with the Act earlier.

1. Mergers
   Excluded

2. Employment contracts
   Excluded

3. De-minimis provision
   Included

4. Appeal availability
   Included

5. Backlog of decisions
   EC Block exemptions and notices automatically adopted

6. Enforcement
   Included

7. Decision making time
   As expeditiously as possible

8. Number of members
   Five full time

It is interesting that the wording of sections 4 and 5 would have, for all practical purposes, been the same.

1. Mergers would not have been caught by Sections 4 and 5 of the Act.
2. Employment agreements would have been excluded from the scope of the Act.
3. There would have been a "de minimis" provision.
4. All decisions of the Authority could have been appealed to the Court.
5. The EC block exemptions and EC Notices would have been automatically applied to all domestic agreements so that more than half of all agreements which were notified up to 30 September 1992 would not have needed to be notified.
6. There would be a Director of Competition who would be responsible for enforcement of the Act and who would also have provided the Secretarial service to the Authority. The Director of Competition might or might not also be responsible for Consumer Affairs. The key task in relation to a prohibition system is enforcement. The person or persons responsible for enforcement are forced to define what will be prosecuted and what will not. They bring the Act to life and by their actions make it effective or ineffective.
7. The FTC recommendations required the Authority to deal with notifications as expeditiously as possible. The idea of deadlines was discussed and it is obvious now that deadlines are needed.
8. The Authority would have had five full time members.

7. OTHER FTC PROPOSALS

The danger in looking at the present Act and considering what needs to be done is that our vision is limited by the present Act. We need to stand back and consider what ideas should be incorporated in our competition legislation. The FTC study, in addition to the points referred to above, included the following:

1. Prosecutions would be before the Authority
2. Fair Trade
3. Sectoral Study on initiative of Authority
4. Competition View of legislation
5. Creation of pro-competition climate

**Prosecution cases before the Authority**

The Authority would be considering prosecution cases brought by the Director and deciding to impose or not. Fines of up to 10 per cent of the turnover of companies could have been levied. Remember that all decisions of the authority could have been appealed to the Courts including the imposition of fines.
Fair Trade

Probably, however, the biggest single difference was that the FTC report envisaged that the authority would continue to play a role in what I consider to be very important area of fair trade. The FTC never intended nor imagined that our fair trade legislation would be revoked.

As someone who believes strongly in competition, I do not see any conflict in having fair trade provisions. It is important to ensure that they are not anti-competitive. In fact, they can be pro-competitive because they can ensure the survival of many small business at the incubation stage and allow them to survive and grow to provide competition in time for the larger businesses. Among the examples of fair trade issues are requirements that customers have to pay their accounts on time, in certain circumstances bans on below cost selling, not permitting refusals to supply, and requiring that all supplies must be in accordance with published price lists.

Sectoral Studies

It is quite extraordinary that after almost forty years of undertaking studies and reviews of trade sectors that this possibility no longer exists. It is by examining the competition elements in a trade sector that one can come to conclusions about what needs to be done. It is also in my view extraordinary that the Competition Authority are not able to undertake such studies on their own initiative, without having to wait for a Ministerial request to do so.

Effects on Competition of Legislation

It has been shown in other countries, and it is the same here, that the greatest interference with competition comes from government. I remember, particularly, that the Swedish competition Ombudsman had developed the function of commenting on proposed legislation from the point of view of its effect on competition and the market. I think the same should happen here. We need to ensure that competition issues are brought out into the open. As the Body with the expertise and the responsibility, I think it is important that the Authority should speak out.

Competition Climate

It was further envisaged that the Authority and the Director would seek to create a pro-competition climate through information, statements and speeches. There is nothing in the present legislation that prevents the members of the Authority from doing so. Equally, however, there is nothing to encourage them to do so.
8. BUSINESS PERSPECTIVE

I wish now to look at competition policy from a business perspective. In general, for most Irish businesses their problem is an excess of competition and not lack of it. We have, I understand, the second highest level of imports(exports) to GDP of any country in the EU. We have a very open economy. EC Competition law has applied to imports since 1973. We have had the single market since 1 January 1993. For internationally traded goods then there is plenty of competition. If a domestic manufacturer's prices are too high then a substitute can almost always be imported. Further evidence of the effect of competition can be seen in the inflation figures which are achieved without price control. We have the lowest inflation rate at present in Europe in spite of increases in public expenditure very much in excess of inflation. This is being achieved through competition.

9. NON-INTERNATIONALLY TRADED SECTORS

It is with the goods and services which cannot be readily traded internationally that we have to concern ourselves. Perhaps the most important area is in relation to the State monopolies for gas, passenger transport, phones and post where competition can play an important role.

At present the Competition Authority, even if it wished, can do nothing about the lack of competition in these sectors. The monopolies are conferred by statute and must be removed by statute. For changes to be made there is a need for an acceptance of the benefits of competition at every level of our national activity. At present a business's services of electricity, postage and telephones are all from State monopolies.

Let me be clear here. I am not advocating privatisation of these bodies. Privatising a monopoly will not make it more competitive. Instead I am advocating that the monopolies, insofar as possible, should be ended and that competition should bring down the costs to business and so increase national competitiveness.

Apart from the State monopolies, there are many other services of a professional nature and other types of domestic business where competition is needed.

If the benefits of competition are to be realised for business then competition has to be applied to all costs and overheads of business. Individual businesses are suffering from the disadvantages of competition which affects the price at which they can sell without the benefits of reduced costs on overheads arising from competition.
10. FOCUSING OUR EFFORTS

We need to focus on the areas where there is competition deficit rather than address many areas where change is satisfactory. If we can imagine a notified agreement as a tree and the ideal of a competitive market as a wood then we are certainly losing sight of the wood for the trees. The agreements we should be concerned with are not those which have been notified but the many restrictive agreements which have not been notified.

In my opinion, the best way to determine our priorities is to compare prices in Ireland with a number of other EU countries and perhaps with some countries outside the EU. Such a comparison and the follow up determination of the reasons for the differences will show the areas which need investigation.

11. SUMMARY FROM A BUSINESS PERSPECTIVE

Looking at the situation from a business point of view then we see a Competition Act with a great many deficiencies which can be remedied if the will is there to do so. We see the Competition Authority under-resourced, bogged down in dealing with issues they should have not be concerned with, having to take too long to make a decision, and a complete lack of enforcement of the Act. In brief a highly unsatisfactory situation. There is a danger that the regulation of competition will fall into disrepute.

The whole thrust of what is happening is wrongly focused and needs a major change so that what needs to be done can be addressed.

12. OVERALL SUMMARY

In reviewing the Act, it appears that it would be useful to look back at the FTC report of 1989. If its recommendations had been adopted many of the problems with which we are now faced would not be here.

We should immediately remedy the generally perceived deficiencies in the Act which I gave at the outset.

We should in addition look to the issues which the FTC report addressed, particularly in relation to the role of the Competition Authority. We need to widen the scope of the Authority so that they will see their responsibility for ensuring that we have in Ireland an effective market economy.

I believe we also need fair trade legislation which should not be in conflict with competition legislation.
We need to focus on the problems from a business viewpoint and do what has to be done. We need to focus on attainable goals and achieve them within a two year time frame.

It is important for our national competitiveness that we have appropriate regulatory arrangements to ensure that competition is free and fair in Ireland so that we can attain the benefits which should be available to us of a fully functioning market economy.
DISCUSSION

John Markham: Chairman, I wish to add my congratulations to you for the opportunity afforded to discuss this rather complex matter and to make a number of brief points as follows:

1. One aspect of the CIE Re-organisation Act which is not generally known is the requirement of the Holding Company to monitor internal competition between its Subsidiary Companies.

2. Mr Cagney’s reference to “universal service obligation” and “cherry picking” is very relevant to the transport sector. Richard Branson does not offer services between Knock and Farranfore; the bus operator Pierce Kavanagh does not offer these services each weekday between Ballina and Dublin. Cherry picking is a normal activity for small bus operators.

3. Some would doubt as to whether transport is an ideal market good. The examples of the US airline and UK urban bus transport suggest that deregulation can lead to oligopoly.

4. Transportation has the added complexity that the provision of infrastructure and provision of transport services are confused.

   In relation to the provision of transport services two aspects are particularly noteworthy:

   • regulations exist in both rail and road modes; however in the case of rail transport they cannot be avoided whereas in the road mode they are often ignored; and

   • pricing on the road mode has several complexities, a lack of hypothecation, huge externalities (these are generally omitted from price mechanisms) and a vast range of modes (pedestrian, cycle, car, bus, etc.).

5. Mr Cagney also rightly argued that criteria should be laid down for State aids in advance and such aid should be transparent and the criteria strictly adhered to.

   Such aids can be payments for the provision of services rather than subsidies as such and this should be recognised at the national level. The EU have set down a legislative framework for such arrangements.

Reply by John Fingleton: There is little doubt about the enormous need for competition policy in Ireland. Examples like the Dublin-London air route illustrate that competition policy can have enormous benefits that, in advance, will be
underestimated by those closely involved in the market. The fact that these are also the better-informed parties makes the benefits of competition policy difficult to evaluate *ex ante*. Attention has been focused on the services sector, but competition policy is desirable in all sectors.

The Authority, with improved investigative and enforcement powers, will come to determine those markets to which competition policy will apply. A complaints procedure would be useful in drawing the Authority's attention to cases of likely abuse. No markets should be specifically excluded, but comfort letters could be used to reduce any excessive burden on the Authority.

Tom McCarthy's point about the need for regulation is well taken. Actual or potential competition cannot be undertaken in all cases, and competition policy should address cases where the Competition Act and the work of the Authority can have no effect. Of particular concern are state monopolies and regulated markets (e.g. taxis and public houses).

It is not clear what benefits fair trade bring to the consumer that cannot be achieved by competition policy, and tempting to suspect that fair trade may inhibit competition either by constraining it within certain parameters or by setting specific rules that would be susceptible to creative compliance by firms. Thus there is a danger that fair trade could be used as a means of "upstream" regulatory capture (i.e. capture at the stage of framing rules).

In conclusion, I would reiterate the need for systematic competition policy in all sectors. This means a broader interpretation of competition policy than the 1991 Act and a more intense application of the policy than is possible with current resources.