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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- IRELAND --

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IRELAND

OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY WITHIN OVERALL GOVERNMENT

1. Objectives of Competition Law

At the risk of stating the obvious, the over-riding goal of competition policy is, or should be, to support and encourage economic efficiency. Consistent with this goal, the following core, i.e. to be specified in competition law and to be performed by a competition agency, can be identified:

- monopoly abuses;
- cartels/horizontal market agreements;
- vertical agreements;
- mergers and acquisitions; and
- state restrictions on competition.

Further functional objectives relevant to competition policy include:

- public procurement;
- state aid;
- anti-dumping;
- sectoral regulation; and
- consumer protection policy.

It is not essential that these issues be addressed by a competition agency. It is, however, important that policy in these areas is consistent with competition policy.

The remainder of the discussion focuses on the core competition goals and functions, about which the following three points should be recognised.

1.1 *Economic Efficiency*

Economic efficiency is generally measured in terms of overall economic welfare and in some cases, more narrowly by consumer welfare. It can be argued that competition policy should emphasise consumer rather than aggregate welfare on the grounds that consumer interests may generally be less well represented within policy making processes. A second argument is that, in the absence of competitive product markets actual profits may overstate the optimal level of producer surplus on account of productive inefficiencies, due to principal-agent or X-inefficiency issues.

1.2 *Broader Policy Objectives*

Policy makers may seek to use competition policy to further other (broader) policy objectives, such as industrial policy, regional development or the “public interest”, as for example in a public interest test for mergers. There are two reasons why it is best not to use competition policy as a wider policy instrument. Firstly, broadly specified policy objectives can be ambiguous and as such are subject to “capture” or “hijack” by the politically strongest private interests, usually those of producers or workers. Thus *de jure* public interest objectives may *de facto* serve private interests. Secondly, non-competition policy mechanisms are generally superior for achieving non-competition policy objectives. To elaborate, restricting competition in an attempt to achieve a broader policy objective will have inevitable anti-competition side effects, e.g. granting protected monopoly profit to a firm or firms. There is no reason to suppose that the State will have the capacity, even if it has the will, to control the extent and distribution of such side effects. In summary, restrictions on competition may be both ineffective and socially wasteful.

1.3 *Competition versus Competitors*

Encouraging economic efficiency does not require policy to focus on industry structure, or to protect competitors, particularly small firms simply because they are small. Such an approach would penalise efficient (larger) rivals and ultimately would not further consumer welfare. Rather, in emphasising economic efficiency, competition policy should distinguish between cases of anti-competitive dominance (a welfare reducing outcome), as opposed to the case where a high market share reflects the ability of a firm to meet the needs of consumers better than competitors (i.e. a welfare enhancing outcome).

2. **Design of an Agency**

The structure and functions of a competition agency will be, or should be, determined by the relevant competition legislation. It is important to recognise the scope for powerful interest groups to influence legislation and hence the effectiveness of the agency. Fingleton (2001) documents the manner in which business interests heavily dominated the development of competition law in Ireland.¹ This did not take the form of explicitly relegating consumer interests in favour of pro-business objectives, but rather more subtly in that the rules governing public and private enforcement limited the exposure of business to the rigours of competition law.

There are a number of dimensions relevant to the design of a competition agency:

- independence;
- accountability;
- ensuring due process; and
- adequacy of Sanctions.

¹ John Fingleton “Political economy insights from competition policy in Ireland.” Fordham Corporate Law Institute, 2001.

2.1 Independence

Operational independence from the government and from private interests will enhance the credibility and effectiveness of a competition agency. To this end it is important that:

- the independent exercise of enforcement, advocacy and decision-making functions is safeguarded, preferably via statute;
- funding of the agency is transparent and does not afford the opportunity for ‘financial punishment’ by political masters;
- there is a transparent process by which senior officer holders are appointed, and terms and conditions of their tenure, particularly how they may be removed from office;
- the agency should have a mandate for ‘free and frank’ public comment, and/or recommendations, on government policies that may affect competition; and
- the agency should be able to hire dedicated specialist expertise, from within and outside of the public sector. Ideally, statute should require that senior officer holders are competition experts (as opposed to senior political or business figures).

2.2 Accountability

On a day-to-day basis the agency is accountable to its immediate customers, e.g. to provide services (such as handling and investigating complaints, assessing merger applicants etc.) in a timely and professional manner. However, the set of relationships between a competition agency and other public sector agencies is of greater significance from a ‘structure of government’ perspective.

As a public sector body, a competition agency should be, and will inevitably be, subject to a degree of control by other public agencies. It is, for example, legitimate that the agency should be accountable for the use of public resources and it is appropriate that the agency should be subject to reporting requirements to the legislature and/or the relevant Minister. It is important, however, that generally applicable control and accountability mechanisms do not undermine the agency’s operational independence.

2.3 Due Process

Due process for competition law cannot, and should not, be determined in isolation. Rather, the processes associated with the implementation and enforcement of competition law should take account of, and be consistent with, the due legal process that operates within a given jurisdiction.

In an Irish context due process involves a separation of investigation and decision-making for civil matters, i.e. the Irish Competition Authority does not impose fines or other civil sanctions. Rather, the imposition of fines, or other civil sanctions is the sole prerogative of the Courts. The investigation and prosecution of criminal matters are separate responsibilities, whereby the Authority investigates and another agency, the Director of Public Prosecutions, makes the decision whether to prosecute or not (in all indictable matters in the State).

2.4 *Adequacy of Sanctions*

Credible enforcement of competition law requires effective and adequate sanctions. Ideally, this should involve fines at the civil standard of proof for all violations and criminal sanctions for a narrower range of per se offences such as cartels. Fines for delay and non-compliance are also necessary.

In addition to the public enforcement of competition law, there should also be provision in statute to allow private enforcement, e.g. injunctive relief and compensatory or exemplary damages.