AN BILLE FIONTRAÍOCHTA (COSAINT IOMAÍOCHTA AGUS TOMHALTÓIRÍ), 1989

ENTERPRISE (COMPETITION AND CONSUMER PROTECTION) BILL, 1989

EXPLANATORY MEMORANDUM

1. One of the major structural problems with the Irish economy is the prevalence of restrictive practices and anti-competitive conduct in many sectors of industry, trade and professional services. The present Bill is designed to introduce for the first time in Irish law a general prohibition on anti-competitive practices in all sectors of the economy. This, in our view, is the best way of ensuring that the economy will operate in an efficient manner, to protect traders and consumers from anti-competitive practices, provide for adequate price competition and, more generally, to prepare the Irish economy for the rigorous competition which will be opened up with the advent of the Single Market in 1992.

2. The major defect in the Restrictive Practices Acts, 1972 and 1987 is that there is no general prohibition on anti-competitive practices. Section 8 of the 1972 Act allows for the making of a particular restrictive practices order (which must be later confirmed by an Act of the Oireachtas) in particular areas of the economy. Thus while the Restrictive Practices (Groceries) Order, 1987, prohibits price-fixing in the retail groceries sector, there is no general ban on such anti-competitive behaviour. Price-fixing and price collusion are especially prevalent in the professional service sector, yet these practices are not, as such, unlawful under Irish domestic law.

3. The enforcement of the present statutory provisions has been vested in an autonomous official, who is currently known as the Director of Consumer Affairs and Fair Trade. If one has a complaint — such as that there was predatory conduct by a competitor, or that one is being unfairly excluded from a particular market — one must complain to the Director. He is empowered, if necessary, to take certain action on behalf of the complainant, including seeking injunctive relief in the High Court. But the Director is not a judicial personage. He cannot, for instance, award damages to a trader injured by the anti-competitive practices of another. In a very limited number of cases, the courts have granted an injunction to a private individual or company to restrain further breaches of the legislation. A principal objective of the present Bill is to redress this by providing that the Courts may award damages (together, if necessary, with an injunction and declaration) to a person aggrieved by the anti-competitive practices of another.

4. The provisions of the present Bill are deliberately modelled on the provisions of Articles 85 and 86 of the Treaty of Rome and (in part) on the implementing regulation, Regulation 17/1962. Articles

85 and 86 of the Treaty of Rome deliberately repudiate the approach which is to be found in our present Restrictive Practices Acts. They are framed in general terms and their objective is to render illegal all anti-competitive behaviour. The European Commission is also given effective enforcement measures, together with the power to impose fines and periodic penalty payments. But the power to award damages has been found to be the most effective method of securing the enforcement of the Community competition laws, and the absence of such a provision in our domestic law is, perhaps, the single most important defect in our legislation. By contrast, the European Court of Justice has held that damages may be awarded in favour of an aggrieved party for breaches of Article 85 and 86.

5. Another drawback with the present restrictive practices legislation is that the legality of certain practices is not judged solely by reference to their anti-competitive effect. The Third Schedule to the Restrictive Practices Act, 1972, speaks in terms of practices which "unreasonably" restrict competition or "unjustly" exclude a competitor or which "without good reason" exclude any new entrants to any trade, industry or business. This means that anti-competitive practices can be justified by reference to other criteria. For example, professional bodies can still arrange to fix professional fees and exclude price competition on the ground that this is not "unreasonable", as in their view, such horizontal price-fixing arrangements are in the public interest and are required by a professional code of practice. It would not be possible under our proposals to justify a restrictive practice according to such extraneous and subjective criteria. The only circumstances in which agreements which have anti-competitive effects might be upheld would be where they had secured an exemption from the Director of Consumer Affairs and Fair Trade (*section 1 (3)*). Any such agreement would have to be notified in advance (*sections 4* and *5*), and an exemption could only be granted by the Director where it was shown that, on balance, the pro-competitive effects of the agreement outweighed its anti-competitive effects.

6. The competition provisions of the Treaty of Rome are, of course, of increasing importance for all sectors of the Irish Economy and the intervention of the European Commission in the Irish Distillers Group take-over bid is but just one very public manifestation of this trend. However, the Treaty provisions only apply insofar as the restrictive practice in question affects inter-state trade. To put it another way, there must be an international dimension before the Commission or, indeed, private individuals, can act under Articles 85 and 86. This is a significant limitation on the reach of Articles 85 and 86 and means, in effect, that only the internationally traded sector of the Irish economy (which, in any event, tends to be the most efficient sector of the economy) is subject to the application of the Community competition rules. One object of the present Bill is to remove this limitation. If there is an inter-state trade dimension to the case, then Articles 85 and 86 will continue to apply. If not, and if the complaint relates to a purely internal matter, then the new domestic competition law will apply.

7. The result of the present Bill is that henceforth all sectors of the Irish economy will be subject to broadly the same competition provisions, irrespective of whether there is an international dimension to their trade or not. Such a proposal would itself be compatible with Community law. The European Court of Justice has ruled that the application of a national law may not prejudice the operation of Articles 85 and 86 (Walt Wilhelm *v.* Commission [1969] European Court Reports 1), but it has also determined that a national competition law may operate parallel to Articles 85 and 86 and, indeed,

require stricter standards than Community law (S.A. Lancome *v.* Etos B.V. [1980] European Court Reports 2511).

8. By way of derogation from Articles 85 and 86, Article 90 of the Treaty of Rome allows for public monopolies, save that these monopolies may not act in a manner which is anti-competitive or is otherwise inconsistent with the general principle of non-discrimination contained in the Treaty of Rome. One cannot, for example, object as such to the monopoly given to An Post but it would be entirely unlawful if An Post were to use its monopoly to discriminate against foreign firms. We propose that a similar rule should apply to the semi-State sector. In our view, the full rigours of the new competition law should apply to semi-State bodies, save that the fact that they enjoy a statutory monopoly would not be in itself open to challenge.

9. *Section 1* of the Bill corresponds to the provisions of Article 85 of the Treaty of Rome. All anti-competitive agreements, decisions and concerted practices are rendered automatically void by *section 1 (1)*, unless exempted by decision of the Director of Consumer Affairs and Fair Trade pursuant to *section 1 (3)*. *Section 1 (2)* specifically prohibits certain practices (such as horizontal price-fixing), but this is without prejudice to the generality of the prohibition contained in *section 1 (1)*. *Section 1 (3)* gives the Director of Consumer Affairs and Fair Trade powers to exempt agreements, decisions or concerted practices on what may be termed a rule of reason basis, i.e., that the anti-competitive features of the agreement or decision or concerted practice in question are outweighed by its pro-competitive features. This corresponds to powers of exemption vested in the European Commission by Article 85 (3) and Regulation 17/1962.

10. *Section 2* of the Bill corresponds to Article 86 of the Treaty of Rome. It is designed to prohibit the abuse of a monopoly or dominant position in a particular market. *Section 2 (2)* specifically prohibits certain abuses, but this is without prejudice to the generality of the prohibition contained in *section 2 (1)*. Unlike *section 1*, there is no exemption procedure in respect of conduct which comes within the scope of the prohibitions contained in *section 2* of the Bill.

11. *Section 3 (1)* vests the High Court with an entirely new and important jurisdiction. The High Court may now award damages (including punitive damages) to a person, trade association or company aggrieved by a violation of *section 1* (anti-competitive practices) or *section 2* (abuse of dominant or monopoly position). As we have seen, the courts have no such jurisdiction and this is one of the principal reasons why the Restrictive Practices Acts, 1972 and 1987, have been ineffectual to date. The jurisprudence of the European Court of Justice under Articles 85 and 86 (and, indeed, the courts in the United States under the Sherman Anti-Trust legislation) shows that the power to award damages is one of the most effective ways of ensuring compliance with competition laws.

Section 3 (2) provides that the High Court shall have jurisdiction to grant injunctions and declarations in any case arising under this Act where it is "just and convenient to do so".

12. *Section 4 (1)* provides that all future agreements, decisions or concerted practices of the kind described in *section 1 (1)* coming into existence after the entry into force of this Act and in respect of which the parties seek an exemption pursuant to *section 1 (3)* must be notified to the Director of Consumer Affairs and Fair Trade.

Section 4 (2) provides that *section 4 (1)* shall not apply to certain types of agreements, decisions or concerted practices where not more than the two parties are involved. The agreements in question must

relate to resale maintenance agreements or restrictions on the asignee or user of any copyright, patent, trade mark or industrial design, or are in the nature of joint ventures.

Section 4 broadly corresponds to Article 4 of Regulation 17/1962.

13. *Section 5* deals with existing agreements, decisions and concerted practices which the parties desire to have exempted pursuant to *section 1 (3)*. Any such agreements, decisions or concerted practices must be notified to the Director of Consumer Affairs and Fair Trade before 31 December 1991.

14. *Section 6* provides that any decisions of the Director of Consumer Affairs and Fair Trade to exempt an agreement, decision or concerted practice shall be for a specified period only. He is empowered to attach conditions and obligations to his decision; and by *section 6 (3)* is given power to revoke or amend his decision in certain circumstances. *Section 6 (4)* provides that no such amendment or revocation may be made by the Director without notice to the parties and without giving them an adequate opportunity to be heard.

15. *Section 7* provides that the Director of Consumer Affairs and Fair Trade may authorise an officer to exercise any of the powers conferred on such an authorised officer by section 15 of the Restrictive Practices Act, 1972 (as amended by section 18 of the Restrictive Practices (Amendment) Act, 1987) for the purpose of obtaining any information necessary for the exercise by the Director of his functions under this Act. These powers relate to the inspection of premises and business records.

16. *Section 8* provides for an appeal to the High Court against a decision of the Director of Consumer Affairs and Fair Trade.

17. *Section 9* provides for the repeal of the existing procedure whereby the Minister for Industry and Commerce is empowered to make a specific restrictive practices order (which must subsequently be confirmed by legislation) in relation to a specific trade or professional service. In view of the general prohibitions contained in *sections 1* and *2* of this Bill, the procedure prescribed by *section 8* is no longer necessary. However, by *section 9 (2)*, all existing orders made under section 8 of the 1972 Act or under the corresponding provisions of the Restrictive Trade Practices Act, 1953 shall continue to be in force.

18. *Section 10 (1)* provides for an exemption in favour of anything done pursuant to a statutory duty. However, by *section 10 (2)* it is provided that the Act will apply to State enterprises who for the time being are designated bodies for the purposes of the Worker Participation (State Enterprises) Act, 1977. This means that the Act will apply to virtually all commercial State-sponsored bodies.

19. *Section 12* is a commencement section and *section 13* provides for the short title.

An Teachta Máirtín Ó Cuilin,
Feabhra, 1989.

Wt. 162618/B/2. 1,325. 2/89. Cahill. (21901). G.16.