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SANCTIONS IN ANTITRUST CASES

Contribution by Ireland

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SANCTIONS IN ANTITRUST CASES

-- Ireland (Competition and Consumer Protection Commission) --

1. Introduction

1. The Competition and Consumer Protection Commission (“CCPC”) was established on 31 October 2014 pursuant to the Competition and Consumer Protection Act 2014. It was established following the amalgamation of the Competition Authority and the National Consumer Agency. The CCPC has a broad mandate, with statutory responsibility for the enforcement of competition and consumer protection law. The CCPC has set itself the mission to make markets work better for consumers and businesses. The vision of the CCPC is for open and competitive markets where consumers are protected and empowered and businesses actively compete.

2. Unlike the European Commission and many national competition authorities in other EU Member States, the CCPC does not have any power to adopt prohibition decisions or to make orders, to grant remedies (procedural or structural) including interim relief, or to impose penalties in respect of breaches of Irish or EU competition law. (The principal area in which the CCPC has competition-related decision-making powers is under the merger review provisions of Irish competition legislation.) Instead, the Irish courts have sole competence to adopt prohibition decisions, make orders, grant remedies (procedural or structural) including interim relief and impose penalties in respect of breaches of Irish and EU competition law.

3. It should also be noted that, in Ireland, insofar as public enforcement of competition law is concerned, breaches of competition law can be pursued either through civil or criminal proceedings in the Irish courts. One of the CCPC’s principal statutory functions is to investigate breaches of competition law. At the conclusion of its investigation, the CCPC may form the view that a competition law infringement has occurred and may decide to initiate either civil or criminal proceedings in the courts against the undertaking(s) and directors/managers involved. Where the CCPC considers that civil proceedings are warranted, it can institute such proceedings against the undertaking(s) and/or individual(s) concerned either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself initiate a summary prosecution in the District Court. In the case of more serious breaches of competition law, the CCPC sends a file to the Director of Public Prosecutions (“DPP”) who will decide whether to bring a prosecution on indictment in the Central Criminal Court. (In such cases, the penalties that can be imposed are much more severe than those that the District Court can impose.) As a matter of CCPC policy, hardcore cartel activity is typically pursued through criminal proceedings, whereas other breaches of competition law are typically pursued through civil actions.

2. Criminal sanctions for breaches of competition law

4. In Ireland, the only financial penalty that can be imposed on an undertaking for breach of EU or Irish competition law is a fine following a criminal conviction in the Irish courts. In such cases, the prosecution’s case must be proved to the very high evidential standard of “beyond reasonable doubt” and,

in the case of a prosecution on indictment, the accused is entitled to a full jury trial¹. This means that such prosecutions will, in practice, only be initiated for the most egregious competition law infringements, typically hardcore cartels. The DPP ultimately decides whether or not to proceed with a prosecution on indictment and the Irish courts have sole competence to decide on the most appropriate remedy to be imposed on such an undertaking taking into account all the circumstances of the specific case.

5. On conviction on indictment, the court may impose criminal fines and prison sentences as follows: (i) on an undertaking, fines of up to €5 million or 10% of its annual turnover in the financial year ending in the 12 months prior to the conviction, whichever is greater; and (ii) on an individual, fines of up to €5 million or 10% of his or her annual individual turnover in the financial year prior to the conviction, whichever is greater, and/or a term of imprisonment not exceeding 10 years.

6. In addition, under Irish company law, individuals convicted on indictment for a competition offence are deemed automatically disqualified from being appointed or acting as a director or other officer, auditor, receiver, liquidator or examiner or being in any way concerned in the management of a company for a period of 5 years after the date of conviction (or for such other period as the court may order)².

7. Where an undertaking or individual has been convicted for infringements of either EU or Irish competition law following a criminal trial, the trial judge will determine the appropriate level of the fine and for an individual the amount of the fine and/or the term of imprisonment. In doing so, he will have regard to the maximum fine and maximum term of imprisonment permitted under the relevant legislation (the Competition Act 2002, as amended (the “2002 Act”)) as well as other generally relevant factors such as the nature of the offence, including its duration, the role played by the undertaking or individual, whether others were involved in the commission of the offence, any aggravating or mitigating circumstances, etc.

8. There are no formal sentencing guidelines in Ireland governing the imposition of fines by the Irish courts for breaches of competition law (or, indeed, in any criminal case) which means that the trial judge has a large degree of discretion in determining the level of fines to be imposed. However, in a judgment delivered on 23 March 2009 in *DPP v Patrick Duffy & Duffy Motors (Newbridge) Limited*, Mr Justice McKechnie in the Irish Central Criminal Court gave some general guidance on sentencing in cartel cases. In that case, Duffy Motors (Newbridge) Limited was found guilty of entering into and implementing an agreement to fix the selling price of Citroen motor vehicles throughout the province of Leinster and Mr Duffy, as a director of Duffy Motors (Newbridge) Limited, was found guilty of consenting to and authorising the illegal conduct by the company. Mr Justice McKechnie imposed on Mr Duffy two concurrent 6 month and 9 month terms of imprisonment, which were suspended for five years, and a fine of €50,000. A fine of €50,000 was imposed on Duffy Motors (Newbridge) Limited.

9. The Irish courts have imposed a criminal fine for breach of competition law in only one case since 2010. The case in question involved a heating oil cartel in the west of Ireland. In May 2012, a jury in Galway Circuit Criminal Court found one of the cartel participants, Mr Pat Hegarty, guilty of price-fixing. Mr Hegarty was fined €30,000 and received a two-year suspended prison sentence. This was the 18th conviction secured in the heating oil cartel case. The other 17 participants had been convicted in 2006 and 2007.

¹ Although the Competition Act 2002, as amended, provides for summary prosecutions in the District Court by the CCPC – which do not involve juries – experience shows that District Court judges are likely to decline jurisdiction in such cases. When that happens, the case is referred to the Central Criminal Court where the prosecution proceeds before a judge and jury.

² Pursuant to section 839 of the Companies Act 2014 in conjunction with the Companies Act 2014 (Section 839) Regulations 2016 (S.I. No. 147 of 2016).

10. Any fine imposed is subject to appeal, either by the prosecution or the defence, and may be varied by the relevant appeal court. However, as Irish law stands, the Irish courts will not take account of the practice of the European Commission or other national competition authorities in the calculation of criminal fines in competition cases.

11. The CCPC considers that criminal sanctions, particularly those directed at the individual, have a strong deterrent effect and, as such, are appropriate and effective sanctions for the enforcement of hardcore cartel activity, such as price fixing, market sharing or bid rigging. The possibility of being convicted of a criminal offence carries a significant reputational risk for both the undertaking and the individual. For the individual, it also carries a real risk as regards future prospects in terms of employment, for example.

12. However, the CCPC considers that criminal sanctions are neither appropriate nor practicable in relation to non-hardcore competition law infringements (e.g. cases involving restrictive agreements or an abuse of dominance). Notwithstanding the fact that non-hardcore competition law infringements are subject to criminal sanctions under Irish competition law, the CCPC has not to date initiated summary criminal prosecutions in cases involving non-hardcore infringements of competition law³, nor has it referred any such cases to the DPP for prosecution on indictment. The CCPC's view is that non-hardcore infringements rarely, if ever, exhibit the key characteristics of criminal behaviour and are generally not susceptible to proof to the satisfaction of a jury in a criminal trial (i.e. beyond reasonable doubt) given the often complex economic and legal issues that arise in such cases.

3. Civil enforcement proceedings

13. The CCPC considers that civil enforcement procedures are more appropriate for non-hardcore infringements. Civil sanctions would also be more appropriate than those imposed in hardcore cartel cases since they do not involve a criminal conviction or the prospect of imprisonment for individuals.

14. The CCPC may bring civil proceedings before the Irish courts in respect of any breach of EU or Irish competition law. However, no financial sanction can be imposed in such cases even where the court finds that an infringement has occurred. This is because neither the CCPC nor the courts have power to impose civil or administrative fines on an undertaking for a breach of EU or Irish competition law.

15. In the case of civil proceedings taken by the CCPC before the Irish courts, the only sanctions under current legislation (section 14A of the 2002 Act) are for the court to make a declaration of illegality and/or to grant an injunction⁴. In addition, where the court has found that an undertaking has abused a

³ The CCPC's predecessor, the Competition Authority, initiated summary criminal proceedings in the District Court in three cases. In 2000, the Competition Authority brought summary criminal proceedings against Estuary Fuel Limited for engaging in resale price maintenance contrary to section 4 of the 2002 Act and, in 2003, the Competition Authority brought summary criminal proceedings against six farmers and members of the Irish Farmers Association for participating in a blockade and a meeting with the aim of preventing importation of a shipment of UK grain contrary to section 4 of the 2002 Act. Please note that the Competition Authority also brought summary criminal proceedings in 2006 against Oliver Dixon (Hedgecutting & Plant Hire) Limited, a director of Oliver Dixon (Hedgecutting & Plant Hire) Limited and a sole trader for engaging in bid rigging contrary to section 4 of the 2002 Act, however, the District Court judge refused jurisdiction and sent the case forward for trial at the Central Criminal Court.

⁴ Section 14B of the 2002 Act provides a mechanism whereby undertakings under investigation by the CCPC may avoid the institution of civil proceedings by entering into a voluntary agreement with the CCPC to provide commitments regarding their future behaviour. If the CCPC is willing to enter into such an agreement, it will then apply to the High Court to have the agreement made an order of court. A breach of the agreement constitutes contempt of court. The CCPC may also accept contractual commitments without any involvement of the courts. However, the absence of financial penalties for a civil breach of Irish or EU

dominant position (contrary to section 5 of the 2002 Act or Article 102 TFEU), the court may make an order requiring the undertaking to discontinue the abuse or requiring the undertaking to adopt measures for the purpose of its ceasing to be in a dominant position or securing an adjustment of that position⁵. As indicated above, Irish law does not provide for the imposition of civil financial sanctions for competition law infringements. (With regard to the available remedies, the only realistic remedy will often be a declaration, because the CCPC will have become aware of, or gathered sufficient evidence of, an infringement only after the event and the courts will normally refuse to grant an injunction where the anti-competitive behaviour has ended. Indeed, the courts may even refuse to issue a declaration in such cases where, because of the absence of civil financial sanctions, a declaration will have little, if any, practical effect.)

16. While hardcore competition law infringements are the most egregious form of competition law infringement and, in the CCPC's view, therefore warrant criminal prosecution, there are non-hardcore infringements which can create serious impediments to the proper functioning of competitive markets thereby causing serious detriment to consumer welfare. Over the years, the Competition Authority and the CCPC have used their existing powers to challenge such behaviour and, in many cases, have caused the undertakings involved to cease the behaviour in question and to provide commitments regarding their future behaviour. However, because of the absence of civil financial sanctions, they have been unable to impose or to seek the imposition of effective sanctions for the infringing behaviour. (The cases in question have involved serious competition law infringements such as collective boycotts by competitors; the sharing of commercially sensitive information between competitors; restrictive agreements and concerted practices such as resale price maintenance and exclusionary conduct by dominant undertakings designed to force existing competitors out of the market or prevent new competitors from entering the market.)

17. Because Irish competition law makes no provision for civil financial sanctions, non-hardcore infringements are, in practice, not subject to any sanctions under Irish law. This makes it very difficult for the CCPC to effectively enforce EU and Irish competition law in respect of infringements other than hardcore cartels, with all the adverse consequences that that implies for the victims of such infringements and for competition in the affected markets.

18. Apart from their obvious deterrent effect, civil financial sanctions have other advantages in relation to the effective enforcement of competition law. These include the following:

- The risk of civil financial sanctions being imposed is likely to be an incentive for an undertaking suspected of infringing competition law to cooperate with the CCPC, thereby facilitating faster resolution of investigations.
- Civil financial sanctions for infringements of competition law should promote a competition compliance culture among the business community.
- Settlement of cases is often the most efficient and satisfactory mechanism for resolving the issues in question. The availability of civil financial sanctions facilitate the settlement of cases on the basis of admissions or commitments in a way that is not possible in the context of a criminal prosecution. Equally, the absence of such sanctions diminishes an agency's ability to achieve such outcomes.

competition law significantly reduces the incentives for undertakings to provide commitments to the CCPC in this way and therefore makes it difficult for the CCPC to operate this mechanism.

⁵ Pursuant to section 14A(4) of the 2002 Act.

19. For the above reasons, the CCPC considers that financial sanctions are essential for the effective enforcement of competition law in Ireland.

4. Immunity / leniency

20. The DPP and the CCPC operate a cartel immunity programme (“CIP”) that provides full immunity from criminal prosecution to the first applicant that successfully complies with the requirements of the CIP⁶. The CIP provides a mechanism to help uncover cartels and provide witnesses for the criminal prosecution of other cartel participants. The CIP does not provide for leniency for other cartel participants. Applications for immunity under the CIP are made to the CCPC. The CCPC may recommend to the DPP that an undertaking receives immunity, but only the DPP can grant immunity from prosecution.

21. Under the CIP operated by the CCPC and the DPP, an undertaking may choose to seek immunity on behalf of its employees (present and past), including directors and officers. If an undertaking qualifies for immunity, all current and/or former directors, officers, partners and employees who admit their involvement in the anti-competitive activity and who comply with the conditions of the CIP will also qualify for immunity.

22. The fact that neither the CCPC nor the Irish courts have power to impose financial sanctions in civil cases – even following a finding of infringement – has a number of consequences, including the following. First, it makes it impossible for the CCPC to operate a leniency system such as exists in other EU Member States where the national competition authorities determine the level of sanctions to be imposed on infringing undertakings and the terms on which leniency may be available. This can create difficulties for undertakings that wish to negotiate EU-wide settlements. It also means that the CCPC cannot engage with other national competition authorities in relation to sanctions or leniency conditions. Second, it means that businesses which are the victims of anti-competitive conduct have difficulty in obtaining a fully effective remedy by filing a complaint with the CCPC and are faced, instead, with the often daunting alternative of initiating a private damages action in the Irish courts.

⁶ The CIP is available at the following link: <http://ccpc.ie/sites/default/files/documents/2015-01-20%20Revised%20CIP%20Final.pdf>