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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Director Disqualification and Bidder Exclusion – Note by Ireland

29 November 2022

This document reproduces a written contribution from Ireland submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm

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1. Introduction

1. This submission has been prepared by the Irish Competition and Consumer Protection Commission (“the CCPC”) for consideration at the OECD Competition Committee Roundtable on 29 November 2022, with reference to the Chairman’s letter of 02 August 2022 and the questions annexed thereto.
2. Chapter 2.1 below contains a discussion of the current legislation in the Irish State, i.e., the relevant sections of the Competition Act, 2002, as amended and section 839 of the Companies Act 2014;
3. Chapter 2.2 below provides a short overview of the experience of the CCPC’s predecessor, the Competition Authority (“TCA”), of director disqualifications, pre-amendments brought about by the Competition and Consumer Protection Act 2014; and
4. Chapter 2.3 below deals with the CCPC’s experience of director disqualification, post the 2014 amendments, mentioned above, i.e., subsequent to the merger of the TCA and the former National Consumer Agency into the CCPC.

2. Director Disqualification - An Irish Perspective

2.1. Current Legislation

2.1.1. Companies Act 2014

5. Section 839(1) of the Companies Act 2014, provides for the automatic disqualification of a person convicted of certain offences, for a period of time, as a director of an Irish company in certain circumstances.
6. As such, the section provides:
 - (1) *A person is automatically disqualified if that person is convicted on indictment of (a) any offence under this Act, or any other enactment as may be prescribed, in relation to a company, or (b) any offence involving fraud or dishonesty.*
 - (2) *A person disqualified under subsection (1) is disqualified for a period of 5 years after the date of conviction or for such other (shorter or longer) period as the court, on the application of the prosecutor or the defendant and having regard to all the circumstances of the case, may order.*
 - (3) *A person disqualified under subsection (1) is deemed, for the purposes of this Act, to be subject to a disqualification order for the period of his or her disqualification.*
 - (4) *Subsection (1) is in addition to the other provisions of this Act providing that, upon conviction of a person for a particular offence, the person is deemed to be subject to a disqualification order.*

7. On 23 March 2016, Ireland's Minister for Jobs, Enterprise and Innovation at the time, Richard Bruton, adopted the Companies Act 2014 (Section 839) Regulations 2016¹, which provides that the offences under section 6 and 7 of the Competition Act 2002 (as amended) are prescribed for the purposes of section 839(1) of the Companies Act 2014. In effect, the adoption of this statutory instrument means that any person who is convicted of being party to an anti-competitive agreement, decision or concerted practice (section 6) or involved in abusing a dominant position (section 7) may be disqualified from being a director in the circumstances outlined in section 839 of the Companies Act 2014.

2.1.2. *Competition Act 2002*

8. The Competition Act 2002, as amended (“the Competition Act”) contains two main prohibitions:

1. Section 4(1) of the Competition Act prohibits and renders void “all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State”. As such, the Competition Act lists some specific types of conduct which are expressly prohibited and these include:
 - Directly or indirectly fixing purchase or selling prices or any other trading conditions;
 - Limiting or controlling production, markets, technical development or investment;
 - Sharing markets or sources of supply; or
 - Bid-rigging (tender collusion)².
2. Section 5 of the Competition Act prohibits the abuse by a firm of a dominant position, which abuse may consist of:
 - Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - Limiting production, markets or technical development to the prejudice of consumers;
 - Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 - Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts (e.g. tying).
9. Articles 101 and 102 of the [Treaty on the Functioning of the European Union](#) (“TFEU”) prohibit the same kind of conduct as that prohibited by sections 4 and 5 of the Competition Act, provided it can be shown that the conduct in question may have an effect on trade between Member States of the EU.

¹ [S.I. No. 147/2016 - Companies Act 2014 \(Section 839\) Regulations 2016. \(irishstatutebook.ie\)](#)

² Bid-rigging (tender collusion) has been specifically defined and added as standalone cartel conduct by the Competition (Amendment) Act 2022, which was signed into law on 29 June 2022 and which the CCPC expects will be commenced within the coming months.

10. Sections 6 and 7 of the Competition Act make it an offence to breach section 4 or 5 of the Competition Act or Article 101 or 102 of the TFEU. The CCPC investigates alleged breaches of the Competition Act and can either itself bring a summary prosecution in the District Court or, in more serious cases, refer a case to the Director of Public Prosecutions (“the DPP”) for prosecution on indictment.

11. Section 8 of the Competition Act sets out the penalties for those found guilty of offences under section 6 or section 7 of the Act and the criminal fines and/or prison sentences are as follows:

- An undertaking (business) can be fined up to €5 million or 10% of its annual business turnover, whichever is greater, if convicted on indictment; and
- An individual found guilty of an offence on indictment can be fined up to €5 million or 10% of his or her annual individual turnover, whichever is greater. An individual can also be imprisoned for up to 10 years.

2.2. The Competition Authority (pre-2014)

2.2.1. Heating Oil Cartel

12. 2006 was the year that saw the first criminal conviction on indictment for offences against the Competition Act. By the end of that year, with multiple successful prosecutions in the home heating oil case in the west of Ireland, 15 criminal convictions in total were secured, including the first criminal conviction by jury trial for Competition Act offences in Europe.

13. In 2007, the prosecution of various members of the heating oil cartel continued and on 23rd January 2007, in Dublin Circuit Criminal Court, Corrib Oil Company Limited and its director, Eugene Dalton Snr, were convicted and sentenced. Corrib Oil Company Limited was fined €15,000 and Eugene Dalton was fined €10,000. Eugene Dalton was disqualified automatically for a period of five years from holding a directorship of any company in Ireland under Section 160 of the Companies Act, 1990.³

14. In Dublin Circuit Criminal Court in January 2007, a company director specifically drew the Judge’s attention to the fact that he would be automatically disqualified from holding any directorships in the State as a consequence of his conviction which arose from his capacity as a director of a corporate undertaking. This was played up by his Counsel to the point that disqualification as a company director was a severe form of punishment and should be counted as part of the sentence imposed by the court, rather than an automatic consequence of his criminal conviction that was beyond the Judge’s consideration. The Judge agreed with the accused’s counsel and, taking his automatic disqualification into consideration, imposed on the accused a comparatively small fine with no custodial sentence. The Competition Authority was concerned that the Judiciary might consider automatic consequential disqualification as part of the sentencing process rather than note the fact that such disqualification is an automatic consequence of criminal conviction and does not form part of the sentencing process. The Competition Authority believed that the

³ TCA Annual Report 2007:

https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/2007_Annual_Report.pdf

issue of director disqualification should be highlighted with the Judiciary through seminars and other educational programmes.⁴

15. As such, in 2008, the Competition Authority organised a conference on the topic of sanctions for competition offences that was moderated by judges from the Supreme Court and High Court and featured comments from the Attorney General. Together with an array of international enforcement officials, they brought home a very salient point – the need for serious and consistent sanctions for competition offences.

2.2.2. Citroen Dealerships

16. Following investigations by the Competition Authority, proceedings were instituted by the DPP against a number of Citroen Dealerships, their Officers and Directors:⁵

- On 8th May 2008, before Judge Michael O’Neill in Dundalk Circuit Court, Mr. James Durrigan and James Durrigan & Sons Limited. pleaded guilty to one count each of entering into an agreement which had as its object the prevention, restriction or distortion of competition in the motor vehicle trade in Leinster by directly or indirectly fixing the selling price of Citroen vehicles. James Durrigan and Sons Limited, was fined €12,000 and Mr. James Durrigan was sentenced to three months imprisonment, suspended for two years. Sentencing Mr. Durrigan, Judge O’Neill stated that price fixing seriously affected the consumer as it distorted the market value of the product. As a consequence of his conviction under the Competition Act 1991, and pursuant to Section 160(1) of the Companies Act 1990, Mr. James Durrigan was automatically disqualified, for a period of five years from the date of his conviction, from appointment as or acting as an auditor, director or other officer of any company.
- On 28th October 2008, in Trim Circuit Court, with Judge Michael O’Neill again presiding, Ravenslodge Trading Limited, trading as Jack Doran Motors, and Mr. Jack Doran both pleaded guilty to one count each of entering into an agreement which had as its object the prevention, restriction or distortion of competition in the motor vehicle trade in Leinster by directly or indirectly fixing the selling price of Citroen vehicles. Ravenslodge Trading Limited was fined €20,000 and Mr. Jack Doran was sentenced to three months imprisonment, with the sentence suspended for five years. As a consequence of his conviction under the Competition Act 1991, and pursuant to Section 160(1) of the Companies Act 1990, Mr. Jack Doran was automatically disqualified, for a period of five years from the date of his conviction, from appointment as or acting as an auditor, director or other officer of any company.

17. In accordance with amendments introduced by the Competition (Amendment) Act 2012, an individual convicted of certain competition law offences was no longer eligible for probation. In addition, an undertaking or individual convicted of competition law offences may potentially be ordered to pay the costs incurred by the CCPC in relation to the investigation, detection and prosecution (also costs incurred by the DPP) of the offence.

⁴ TCA Submission to the Office of the Director of Corporate Enforcement - Preparation of ODCE Strategy Statement 2009 - 2012 https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/S_08_008-Submission-to-the-ODCE.pdf

⁵ TCA Annual Report 2008: https://www.ccpc.ie/consumers/wp-content/uploads/sites/2/2017/03/2008_Annual_Report.pdf

18. In accordance with a further amendment made by the 2012 Act, a court had a discretionary power to disqualify a person from acting as a company director where the person has been found to have breached section 4 or 5 of the Competition Act or Article 101 or 102 of the TFEU.

2.3. The Competition and Consumer Protection Commission (post-2014)

2.3.1. Flooring

19. The “Commercial Flooring Cartel” case in 2017 resulted in the automatic disqualification of a company director for engaging in bid-rigging (tender collusion) in the procurement of flooring contracts for major international companies, which is a form of anti-competitive agreement and an offence pursuant to section 6 of the Competition Act, where an individual, Brendan Smith, a former director of Aston Carpets, pleaded guilty to the offence before the Central Criminal Court, and was disqualified for a five-year period, in addition to his fine of €7,500.

20. The DPP appealed the sentence as being too lenient and the Supreme Court of Appeal, on 20 June 2018 increased the fine for the individual, Brendon Smith, to an amount of €45,000 and upheld the director disqualification.⁶

21. Section 855 of the Companies Act 2014 makes it an offence to contravene a disqualification order:

“855. (1) A person shall be guilty of a category 2 offence who acts, in relation to any company, in a manner or a capacity which he or she is prohibited from doing by virtue of being a person—

who is subject to a disqualification order.”

22. Section 871 of the Companies Act 2014 provides for the penalty,

“871 (2) A person guilty of an offence under this Act that is stated to be a Category 2 offence shall be liable –

on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or

on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.”

23. It is important to note that the above penalty makes it an “arrestable offence” and therefore can involve the arrest and detention of an individual pursuant to section 4 of the Criminal Justice Act 1984 for the full and proper investigation of the offence of acting as a director when disqualified. A live investigation is currently ongoing where this arrest/detention strategy has been utilised.

3. Conclusion

24. The CCPC views director disqualification as an important part of the battle against cartel conduct, especially hard-core cartels, which currently constitutes a criminal offence within the Irish State.

⁶ The Court of Appeal in DPP and Aston Carpets, and Brendan Smith: <https://www.ccpic.ie/business/former-director-fined-e45000-bid-rigging-tenders/>

25. Hard-core cartel conduct is both a serious offence⁷ and an arrestable offence⁸ and as such, where people conspire to commit a serious offence, they can be arrested and detained (max 1-week detention) and a suspect arrested for an arrestable offence, being able to be detained under Sec 4 of the Criminal Justice Act 1984, as amended. Once detained such suspect can be interviewed under caution, inferences can be invoked and samples can be taken. There is also the power to re-arrest and detain, if new evidence comes to light after the initial release from detention (for both). It also means that once an arrestable offence is being investigated, orders can be sought from the Courts to uplift bank accounts, phone records can be sought and requests for data as per Sec 41b of the Data Protection Act 2018 can be made to data holders.

26. Court sentences have however been rather lenient in the form of suspended prison sentences and relatively low fines and automatic director disqualification places another important consideration upon individuals involved (or considering getting involved) in criminal cartel conduct, the same as an automatic criminal record resulting from a conviction, with a subsequent inability to travel to certain Countries, such as the United States of America for instance.

27. Director disqualification therefore acts as a strong deterrent and as recent experience has shown, enforcement of such disqualification plays an important part in the success of the overall measures of punishment for individual cartel offenders.

28. The CCPC (and its predecessor TCA) has always shared the view expressed by a number of Judges that prison sentences are appropriate for hard-core cartel conduct, such as for instance Judge Raymond Groarke, who commented: "*Those engaged in cartels and involved in the fixing of prices are doing so only with the motivation of greed, and with nothing to be gained but financial profit. That is why the legislature takes such a serious view of it...I could well see circumstances where persons convicted by a jury could be subjected to terms of imprisonment.*"⁹

29. As such the CCPC welcomes an increase in penalties in section 8 of the Competition Act for criminal cartel convictions on indictment, by the Competition (Amendment) Act 2022, to fines not exceeding the greater of €50,000,000 or 20% of turnover in the financial year ending 12 months prior to the conviction and/or imprisonment for a term not exceeding 10 years.¹⁰

30. The CCPC will continue to treat hard-core cartel conduct as extremely serious and will continue to battle (investigate and prosecute with the assistance of the DPP) such conduct to the full letter of the law, including automatic director disqualification.

⁷ Criminal Justice Act, 2006: <https://www.irishstatutebook.ie/eli/2006/act/26/enacted/en/print#sec70>

⁸ Criminal Law Act, 1997: <https://www.irishstatutebook.ie/eli/1997/act/14/section/2/enacted/en/html#sec2>

⁹ DPP v Michael Flanagan trading as Flanagan Oil, Galway Circuit Criminal Court, 02 March 2006.

¹⁰ Footnote 2 above.