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Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by Ireland

13 June 2023

This document reproduces a written contribution from Ireland submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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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 13 June 2023.
2. Chapter 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 (“the Competition Act”) and the Competition and Consumer Protection Act 2014, with proposed amendments being brought about by the Competition (Amendment) Act 2022 (“the 2022 Act”), which was signed into law last year and which is expected to be commenced in the next few months;
3. Chapter 2 below provides a short overview of the tools of detection which the CCPC currently have at their disposal for detecting cartel behaviour; and
4. Chapter 3 below deals with new developments and tools that the CCPC are developing to aide their detection of cartels.

1. Legislative Framework

1.1. Current Legislation

5. Similar to Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), the Competition Act contains two main prohibitions:
6. 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:
 1. Directly or indirectly fixing purchase or selling prices or any other trading conditions;
 2. Limiting or controlling production, markets, technical development or investment;
 3. Sharing markets or sources of supply; or
 4. Bid-rigging (tender collusion)¹
7. Section 5 of the Competition Act prohibits the abuse by a firm of a dominant position, which abuse may consist of:
 1. Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

¹ Bid-rigging (tender collusion) has been specifically defined in and added as standalone cartel conduct into the Competition Act, by the 2022 Act, which was signed into law on 29 June 2022 and which the CCPC expects will be commenced within the coming months.

2. Limiting production, markets or technical development to the prejudice of consumers;
 3. Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 4. 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).
8. Articles 101 and 102 of the TFEU prohibit the same kind of conduct as that prohibited by sections 4 and 5 of the Competition Act, respectively, provided it can be shown that the conduct in question may have an effect on trade between Member States of the EU.
9. 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 offences (criminal breaches) of the Competition Act, such as cartel conduct, on a criminal basis 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.
10. 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:
1. An undertaking can be fined up to €5 million or 10% of its annual business turnover, whichever is greater, if convicted on indictment; and
 2. 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.

1.2. ECN+ Implementation

11. As mentioned, the 2022 Act was signed into law in June 2022 and aims to transpose into Irish Law, Directive (EU) 2019/1 of the European Parliament and of the Council, also known as the ECN+ Directive. The 2022 Act is expected to be commenced within the coming months.

12. Following commencement of the 2022 Act, the CCPC will, for the first time, have the power to find, subject to Court confirmation, that an undertaking or association of undertakings has committed an infringement of EU or Irish competition law² (including a cartel infringement) and to impose administrative sanctions including administrative financial sanctions.³ Alternatively, breaches of competition law and specifically cartels can and will continue to be prosecuted as criminal offences pursuant to the provisions of sections 6, 7, and 8 of the Competition Act and subject to the limitations set out in section 7A.⁴

13. In accordance with its obligations under the Competition Act and specifically Part 2E thereof (as inserted by the 2022 Act), the CCPC is putting in place an administrative

² Also see section 15X of the Competition Act (as inserted by the 2022 Act).

³ Similarly, also see section 15AC of the Competition Act.

⁴ The criminal fines, for conviction on indictment, has been increased to €50 million or 20% of the annual business turnover for both undertakings and individuals, whichever is greater.

leniency programme and policy for cartels, the CCPC's *Administrative Leniency Policy* ("ALP"), which will be published on the CCPC's website.⁵

14. The purpose of the ALP is to set out the policy of the CCPC in considering applications for leniency from undertakings for disclosing their participation in cartels and to outline the requirements applicant undertakings must meet for the CCPC to grant immunity from administrative financial sanctions to any first undertaking to apply and disclose its participation in a cartel and a reduction of administrative financial sanctions to undertakings (second and subsequent to apply) for disclosing their participation in such a cartel subject to meeting the required conditions (collectively "leniency").

15. Upon the commencement of the 2022 Act, the CCPC believes that the ALP will be a welcome addition to its toolkit in cartel detection. Given the new powers that the CCPC will have under the Act, for example, the power to impose administrative financial sanctions, there will be an increased incentive for members of cartels to seek immunity from these sanctions.

16. The CCPC envisions that the ALP will operate alongside its existing Cartel Immunity Programme ("CIP") which the CCPC runs in conjunction with the DPP and which provides immunity from criminal prosecution. The CCPC will therefore encourage participants in any cartel(s) to make simultaneous applications to the CCPC when coming forward to disclose conduct under both the ALP and CIP.

2. Current Tools for Cartel Detection

2.1. CIP

17. At the end of 2001, the CCPC's predecessor the Competition Authority and the DPP launched the CIP (Cartel Immunity Programme).⁶ The CIP provides a unique mechanism to help uncover cartels and provide witnesses for the criminal prosecution of cartel members. The Programme means that a member of a cartel may avoid prosecution, including fines and jail time, if they are the first member to come forward and reveal their involvement in illegal cartel activity before the CCPC has completed any investigation and referred the matter to the DPP.

18. The clear benefit of the CIP is the possibility of immunity from criminal prosecution for the first person or undertaking who comes forward and fully co-operates with an investigation.

19. The CCPC investigates alleged breaches of the Competition Act and recommends prosecution to the DPP. The DPP is then responsible for prosecuting cartel offences on indictment in the Central Criminal Court or can allow the CCPC to prosecute on a summary basis in the District Court. Under the CIP, the CCPC in a way acts as an intermediary between applicants and the DPP in seeking immunity from prosecution in return for providing evidence in a criminal trial.

20. It is important to note, that while applications for immunity under the CIP are made to the CCPC, only the DPP can grant immunity from criminal prosecution, upon recommendation by the CCPC, after considering an immunity application.

⁵ See ALP version 2, dated April 2022, to be reviewed from time to time and any amendments published on the CCPC's website accordingly.

⁶ [Cartel Immunity Programme | Competition and Consumer Protection Commission \(ccpc.ie\)](https://www.ccpcc.ie/cip)

21. The conditions for full criminal immunity under the programme are as follows:
1. The applicant is the first participant in a given cartel that makes an application in line with the requirements of the programme;
 2. The applicant must not have taken steps to coerce another party to participate (join or remain) in the illegal cartel activity;
 3. The applicant must do nothing to alert its associates in the cartel that it has applied for immunity under the CIP and must refrain from commenting publicly on the activities of the cartel in which it has been involved pending the conclusion of any prosecutions;
 4. From the time that the applicant first considered applying for immunity it must not have destroyed, hidden, made unusable or falsified any evidence relating to the offence(s);
 5. An applicant in an ongoing cartel must take effective steps, to be agreed with the CCPC, to ensure that it does not involve itself in any further illegal cartel activity following its application for immunity. However, in exceptional circumstances the CCPC may require an applicant to act in a manner that would, in the CCPC's view, be required to preserve the integrity of the CCPC's investigation;
 6. Throughout the course of the CCPC's investigation and any subsequent prosecution, the applicant must provide comprehensive, prompt and continuous co-operation; and, in particular, the applicant (including individuals who require personal immunity) has a positive duty to:
 - Reveal any and all cartel offences under the Competition Act in which the applicant may have been involved and of which it is aware;
 - Provide full, frank and truthful disclosure of all the evidence and information in the possession or control or known or available to the applicant, including all documentary, electronic and other records, wherever located, relating to the offences under investigation;
 - Preserve and not tamper with any evidence that is capable of being under the applicant's control;
 - Ensure to the best of the applicant's ability that current and former directors, officers and employees cooperate fully with the CCPC's investigation and any subsequent prosecutions;
 - From the time that the applicant first considered applying for immunity, not disclose to third parties any dealings with the CCPC (including the fact of its immunity application) without the CCPC's prior written consent, except where required to do so by law. If disclosure is required, the CCPC must be notified prior to the applicant releasing any such information. This restriction shall not, however, prevent the applicant from disclosing the existence or content of the application (i) to another competition authority or (ii) to an external lawyer for the purpose of obtaining legal advice provided the applicant ensures that such lawyer does not disclose any such information to any third party;
 - Disclose to the CCPC, unless otherwise prohibited, all applications made by the applicant for immunity in other jurisdictions;

- Co-operate fully with the CCPC, on a continuing basis, expeditiously and at no expense to the CCPC throughout the investigation and with any ensuing prosecutions; and
- Provide individuals who give clear and comprehensive statements of evidence that will be recorded by the CCPC. Such individuals must also provide complete and truthful evidence in any ensuing prosecutions.

22. The CIP has been instrumental in detecting and prosecuting cartels. For example, in 2017, the CCPC secured its first conviction for “Bid-Rigging” in the history of the State in the Central Criminal Court.

23. The investigation was opened on foot of information provided by a complainant which led to a co-ordinated CCPC search operation of a number of premises involved in the procurement of commercial flooring contracts. Further assistance was subsequently given to the investigation by an application made under the CIP.

24. The CIP, similar to the forthcoming ALP, acts not only as a detector of cartels, but also as a deterrent for cartel behaviour. Effective leniency and Immunity programmes can make collusion less attractive as they increase the risk that a co-conspirator may report the cartel to the relevant authority.

2.2. Anonymous Whistleblowing

25. The CCPC may initiate an investigation on the basis of a complaint, an immunity and/or leniency application, ex officio, or as a result of a whistle-blower account.

26. In 2021, the CCPC launched a secure and confidential online service, which runs on a third-party platform called WhistleB. The anonymous whistleblowing platform allows individuals to share information and evidence about illegal cartel behaviour, on a two-way communications basis with the CCPC, totally anonymously. The information provided as such (through WhistleB) cannot be traced back to the individual whistle-blower, unless they provide identifying details about themselves.

27. This level of anonymity is attractive to whistle-blowers. Since the information that they provide is completely untraceable, they are unlikely to face any form of persecution for reporting the conduct. Once they have provided the information through the platform, they do not have to contact the CCPC again, if they do not want to, lowering the chances even further that they may be detected as a whistle-blower.

3. New Developments

3.1. Cartels Division

28. In anticipation of the implementation of the 2022 Act, transposing the ECN+ Directive into Irish Law and introducing an administrative competition law enforcement regime, with the ALP, in addition to the existing criminal competition law enforcement regime, with the CIP, the CCPC, in September 2022, established a standalone Cartels Division, with responsibility for all horizontal restrictive practices, including cartel enforcement.

29. In an attempt to ensure a constant stream of cartel enforcement cases, the Cartels Division currently consists of two Sections, being: (i) Immunity/Leniency & Case Stream and (ii) Investigations and Enforcement, each headed up by a Deputy Director.

30. The CCPC's Digital Investigations Division and Intelligence Officer work closely with the Cartels Division, to help with development of a cartel case stream, by assisting in screening and analysis of information and data at hand.

3.2. Combating bid-rigging

31. The Hamilton Review Group into Review of Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption ("the Hamilton Review")⁷, led by a former DPP, James Hamilton, published its report in December 2020, which contained a number of recommendations focusing primarily on legislative, structural, and resourcing measures to enhance the capacity of agency and multi-agency enforcement and the prevention of corruption and white-collar crime offences.

32. In line with Recommendation 17 of the Hamilton Review, to introduce bid-rigging as a standalone cartel offence, or a form of market sharing, section 4 of the Competition Act will be amended, by section 5 of the 2022 Act, to explicitly prohibit anti-competitive agreements which are concerned with bid-rigging.⁸ The 2022 Act also introduces a new definition of "bid-rigging".⁹

33. The CCPC is actively involved in both the Economic Crime and Corruption Forum ("the Forum") and the Advisory Council against Economic Crime and Corruption ("the Advisory Council"), where Recommendation 18 of the Hamilton Review stated: "The Review Group recommends that specific legislation be introduced to enable the collection, collation and analysis of all public procurement data to detect and deter bid-rigging".¹⁰ In effect, this Recommendation relates to the introduction of a system of screening for bid-rigging in order to detect and deter bid-rigging/tender collusion, something which a number of National Competition Law Enforcement Agencies have adopted with success internationally.

3.3. Bid-Rigging Screening Tool

34. As well as the legislation described, the CCPC is developing a tool to screen procurement data for potential bid-rigging. The project seeks to promote and help implement recommendations by the Hamilton Review regarding bid-rigging.

35. As such and as mentioned, the CCPC is actively involved in both the national Forum and Advisory Council, which have been tasked in promoting the implementing the recommendations of the Hamilton Review, including to: "Introduce legislation to enable the collection, collation and analysis of all public procurement data to detect and deter bid-rigging."

36. The CCPC has liaised with the Danish Competition and Consumer Authority (DCCA) with regards to their new screening tool ("Bid Viewer") for identifying collusion and cartels in public tenders. Bid Viewer utilizes computational screening methods,

⁷ [Hamilton Review](#)

⁸ See section 4(1)(f) of the Competition Act, as inserted by section 5 of the 2022 Act.

⁹ Similarly, see section 4(11) of the Competition Act.

¹⁰ [gov.ie - Implementation plan to tackle economic crime and corruption published by Minister McEntee \(www.gov.ie\)](https://www.gov.ie/en/publications-and-statements/2020-12-01-implementation-plan-to-tackle-economic-crime-and-corruption-published-by-minister-mcentee/)

including machine learning and artificial neural networks, and is designed to uncover suspicious patterns in large public procurement datasets.¹¹

37. Much like the DCCA's view, the tool being developed by the CCPC is intended to be an additional tool which should complement traditional investigative methods, rather than replace. The CCPC envisions that the tool could be used to flag tenders which may require additional scrutiny.

38. The CCPC is very grateful to the DCCA for their ongoing assistance in developing this tool. The CCPC appreciates that while it is not compulsory for other competition authorities to assist the CCPC in this way, that it is incredibly important to have open channels of communication and co-operation between international competition authorities. With this regard, the CCPC is eager to be of assistance to other national competition authorities wherever possible. This also includes the area of immunity and/or leniency applications.

39. The CCPC understands that with changing market dynamics in modern markets, Cartel behaviour is also changing. Faced with a consistently changing technological landscape, the CCPC is of the view that it is imperative to develop new tools and methods of detection in order to keep pace with market developments. The CCPC believes that development of new tools, such as a whistleblowing platform and a screening tool similar to Bid Viewer, as well as the introduction of the ALP, while at the same time committing to and promoting the CIP, will help strengthen the CCPC's cartel detection toolkit.

4. Conclusion

40. The CCPC views detection tools such as immunity and/or leniency programmes and policies, as an important part of the battle against cartel conduct, especially hard-core cartels, which currently constitutes a criminal offence within the Irish State and will remain as such.

41. To date, the CCPC's CIP (Cartel Immunity Programme) has been a successful part of the CCPC's detection of cartels. The CCPC is optimistic that the commencement of the new Administrative regime, with the new ALP (Administrative Leniency Policy) (alongside the existing criminal competition law enforcement regime and CIP) will further increase the incentive for cartel participants to come forward.

42. The fear of fines alone, however, will not suffice in motivating cartel members to come forward. Plausible possibility of detection without leniency or immunity applications must also play a part. The CCPC is confident that efforts, such as establishing a standalone Cartel Division, with a Section dedicated to Immunity/Leniency and Case Stream, as well as additional tools, such as the anonymous whistleblowing platform, and the impending Irish version of Bid Viewer, will also play important roles in advancing detection and deterrence of cartels in Ireland, including bid-rigging.

43. The CCPC will continue to treat hard-core cartel conduct, such as price fixing, market sharing and bid-rigging as extremely serious and will continue its role in detecting, deterring and prosecuting cartels to the full letter of the law using all resources available to it, including immunity and leniency applications.

¹¹ [DCCA Bid Viewer](#)