

**LAW REFORM COMMISSION
ISSUES PAPER ON REGULATORY ENFORCEMENT AND CORPORATE
OFFENCES**

**RESPONSE OF THE COMPETITION AND CONSUMER PROTECTION
COMMISSION (CCPC)**

19 September 2017

APPENDIX

PROPOSAL FOR A DIRECTIVE TO EMPOWER THE COMPETITION AUTHORITIES OF THE MEMBER STATES TO BE MORE EFFECTIVE ENFORCERS AND TO ENSURE THE PROPER FUNCTIONING OF THE INTERNAL MARKET (COM(2017) 142 FINAL)

PUBLIC CONSULTATION BY THE DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION

Submission of the Competition and Consumer Protection Commission ("CCPC")

1. Introduction

- 1.1.** We refer to the public consultation launched by the Department of Jobs, Enterprise and Innovation on 3 May 2017. The consultation invited views from interested parties on a proposal from the EU Commission, dated 22 March 2017, for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the "Proposed Directive").¹ The CCPC very much welcomes the opportunity to provide its views on the Proposed Directive in this response to the Department's public consultation.
- 1.2.** The CCPC is very strongly supportive of the Proposed Directive. In the CCPC's view, the adoption of the Directive in its current format would greatly enhance the ability of national competition authorities throughout the EU (including the CCPC) to enforce EU competition law effectively. The Proposed Directive provides for minimum guarantees and standards to empower national competition authorities to be more effective enforcers of EU competition law. By ensuring that national competition authorities can act more effectively, the proposal aims to contribute to the objective of a genuine EU Single Market, promoting the overall goals of competitive markets that deliver jobs and growth.
- 1.3.** The CCPC's submissions in relation to the Proposed Directive are set out below.

2. CCPC's role in enforcing Irish and EU competition law

- 2.1.** The CCPC is an independent statutory body with a dual mandate to enforce competition law and consumer protection law in Ireland. The CCPC was established on 31 October 2014 following the amalgamation of the Competition Authority and the National Consumer Agency. Our mission is to make markets work better for consumers and businesses. Our enforcement powers enable us to identify, detect, investigate and where appropriate take enforcement action to address breaches of the law. The CCPC also has regulatory functions in the areas of credit intermediaries, grocery goods and alternative dispute resolution. As well as our enforcement responsibilities, we have a responsibility to promote competition and consumer welfare.
- 2.2.** Competition benefits everyone: businesses, consumers and the economy as a whole. It encourages businesses to compete for customers. Buyers of goods and services, from individual consumers to businesses, benefit by paying less and having more choice and better quality. Competition results in open, dynamic markets, featuring increased productivity, innovation and better value.

¹ A copy of the Proposed Directive is available at: http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf

- 2.3.** Irish and EU competition law forbid two broad types of behaviour: (i) anti-competitive agreements between two or more independent firms (including cartel-type agreements between competitors to fix prices, share markets, restrict output, or share commercially sensitive information);² and (ii) “abusive” practices by a firm which holds a dominant market position e.g. predatory pricing or refusal to supply.³
- 2.4.** Anti-competitive behaviour can cause very significant harm to competition and consumers. By way of example, the CCPC notes that one of the most common forms of anti-competitive cartel involves bid-rigging and, in particular, a practice known as cover pricing. Cover pricing is achieved by cartellists coming together to agree who will win a tender, with the agreed winner then telling the other cartel members what prices they should submit in order to ensure that the agreed winner’s bid wins. The rate of the overcharge related to detected price-fixing cartels worldwide is estimated to be 20%-30%.⁴ This means that the potential impact of bid-rigging in public procurement in Ireland, if even only 5% of procurement processes were subject to bid-rigging, would be extra costs for Irish taxpayers in the region of €100 million per year.
- 2.5.** The CCPC – and its predecessor, the Competition Authority – have a strong track record in successfully pursuing anti-competitive behaviour across all markets. For example, to date 18 individuals and 17 companies have been convicted of price fixing⁵.
- 2.6.** However, the CCPC is very strongly of the view that the current competition law enforcement regime in Ireland is not fit for purpose as it does not provide for an appropriate range of effective and dissuasive sanctions for breaches of EU and Irish competition law. In particular, the absence in Ireland of civil or administrative fines for breaches of competition law very significantly undermines the CCPC’s ability to combat anti-competitive conduct. The current regime in Ireland – in which fines can only be imposed following a criminal conviction in court – is particularly unsuited to the detection and deterrence of certain types of anti-competitive behaviour, such as abuse of dominance or anti-competitive vertical agreements. The lack of any kind of civil or administrative financial penalties means that there is little deterrent effect in such cases: industry knows that it may as well try to engage in such conduct, because even if the CCPC intervenes to stop it, they are not at a loss.
- 2.7.** The absence of civil or administrative fines in Ireland for breaches of competition law puts Ireland at odds with the vast majority of other EU Member States. Most EU Member States operate primarily administrative competition enforcement regimes.⁶ In a document published in 2014 (see paragraph 4.2 below), the European Commission noted the situation in Ireland and pointed out that, whatever the mix of sanctions available in a Member State, it is generally recognised that there can be no effective public enforcement of competition

² See section 4 of the Competition Act 2002 and Article 101 of the Treaty on the Functioning of the European Union.

³ See section 5 of the Competition Act 2002 and Article 102 of the Treaty on the Functioning of the European Union.

⁴ J. M. Connor (2014): “Price-Fixing Overcharges”, 3rd Edition. J.M. Connor, Y. Bolotova (2006): “Cartel Overcharges: Survey and meta-analysis”, *International Journal of Industrial Organization*, 24, pp 1109-1137.

J.M. Connor, R.H. Lande (2006): “The Size of Cartel Overcharges: Implications for US and EU Fining Policies”, *The Antitrust Bulletin*, 51, pp 983-1022. F. Smuda (2012): “Cartel Overcharges and the Deterrent Effect of EU Competition Law”, *Centre for European Economic Research*, Discussion Paper No. 12-050.

⁵ Most recently, an individual and a company were convicted by the Central Criminal Court and sentenced in May 2017 in respect of their involvement in a bid-rigging agreement.

⁶ The CCPC understands that fines for breaches of competition law are imposed by the criminal courts or by the national administrative competition authorities applying quasi-criminal procedures in Ireland, Denmark, Estonia and Slovenia. Fines for competition law breaches are imposed by the civil courts in Austria, Finland and Sweden, while the remaining 21 Member States operate administrative competition enforcement regimes.

law without deterrent civil or administrative sanctions. The European Commission's Impact Assessment accompanying the Proposed Directive echoes this, observing that, for the period 2004-2013, *"in many of those Member States in which fines are primarily criminal, EU competition law is under-enforced or, even if enforced, sanctions are seldom imposed"*.⁷

- 2.8.** The CCPC believes that the proposed Directive, if adopted in its current format, would provide for a very welcome broadening of the CCPC's enforcement tools.

3. Sanctions currently available in Ireland for breaches of competition law

- 3.1.** The CCPC's primary role in relation to EU and Irish competition law is as an investigator. At the conclusion of a particular investigation, the CCPC may form the view that an infringement of EU or Irish competition law has occurred and may decide to initiate either civil or criminal proceedings in the courts.

- 3.2.** Where the CCPC considers the matter to be criminal in nature, it may itself initiate a summary prosecution in the District Court. The District Court may impose fines of up to €3,000 on the business or individual concerned and/or a prison sentence of up to 6 months on an individual. In the case of more serious breaches, the CCPC sends a file to the Director of Public Prosecutions who will decide whether to bring a prosecution on indictment in the Central Criminal Court. On conviction, the Central Criminal Court may impose fines of up to €5 million or 10% of annual turnover on a business or individual. In addition, in the case of "hardcore" breaches of competition law (i.e. cartel offences involving, for examples, horizontal price fixing, market sharing or bid-rigging), the Central Criminal Court can impose a term of imprisonment of up to 10 years on an individual.

- 3.3.** By contrast, where the CCPC considers that civil proceedings are warranted, it can institute such proceedings either in the Circuit Court or in the High Court. The only civil remedies available to the CCPC under current Irish legislation are to seek a declaration of illegality (i.e. a court ruling that a particular arrangement or behaviour is unlawful) and/or injunction (i.e. a court ruling requiring a particular arrangement or behaviour to be terminated) before the Irish courts. It should be noted that the civil remedies available for breaches of competition law do **not** include any form of financial sanction.

4. Background to the proposed Directive

- 4.1.** Prior to 2004, the European Commission was responsible for enforcing EU competition law. Council Regulation (EC) 1/2003⁸, which came into force on 1 May 2004, provided for the decentralisation of the enforcement of EU competition law. It empowered Member States' national competition authorities and national courts – as well as the European Commission – to apply all aspects of the EU competition rules. This means that since 2004 the enforcement of EU competition law has been a shared responsibility of the European Commission and national competition authorities.

⁷ Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. A copy of the Impact Assessment is available at: http://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf

⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now, Articles 101 and 102 of the Treaty on the Functioning of the European Union].

- 4.2. In 2013/2014, the European Commission conducted an assessment of the functioning of Council Regulation (EC) No 1/2003. Based on the results of its assessment, the European Commission published a Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003 which found that there is scope for national competition authorities of the EU Member States to be more effective enforcers of EU competition law.⁹ In an accompanying Staff Working Document, the European Commission made a number of specific references to the situation in Ireland and noted:

“Whatever the mix of sanctions available in a Member State, it is generally recognized that there can be no effective public enforcement in the antitrust field without deterrent civil/administrative sanctions on undertakings. This is confirmed by experience in Ireland where currently a purely criminal system of antitrust sanctions is in force and the competition authority does not have the ability to seek the imposition of civil/administrative fines for the breach of either the EU or national competition rules.”¹⁰

- 4.3. The European Commission also pointed out in its Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003 that the procedures for the application of the EU competition rules by national competition authorities are largely governed by national law. This means that national competition authorities apply the EU competition rules on the basis of different national procedural rules. The European Commission expressed concerns regarding the divergent enforcement powers of national competition authorities and the risk that this creates of ineffective or inconsistent enforcement of EU competition law in different Member States. It noted that not all national competition authorities have a complete and effective set of national law powers at their disposal for investigating suspected breaches of EU competition law and imposing sanctions which are effective, proportionate and dissuasive. It also pointed out that differences in procedural rules in different Member States lead to legal costs and uncertainty for businesses operating cross-border.
- 4.4. In 2015, the European Commission launched a public consultation to gather views on whether the enforcement capacities of national competition authorities (such as the CCPC) need to be strengthened to ensure that they can enforce EU competition law more effectively within their jurisdictions. The CCPC submitted a response to that consultation on 23 February 2016.¹¹ One of the key points made in the response was the CCPC’s view that civil fines should be one of the sanctions available to enforce competition law in Ireland. As we have noted above, currently the only circumstance in which fines can be imposed for competition law infringements under Irish law is following a conviction in a criminal trial.
- 4.5. On 22 March 2017, following on from the public consultation referred to above, the European Commission published the Proposed Directive which aims to empower the

⁹ The European Commission’s Communication is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0453&from=EN>. The European Commission also published two accompanying Staff Working Documents: (i) “Ten Years of Antitrust Enforcement under Regulation 1/2003”, SWD(2014) 230/2; and (ii) “Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues”, SWD(2014) 231/2.

¹⁰ Commission Staff Working Document: “Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues”, SWD(2014) 231/2, paragraph 66.

¹¹ A copy of the CCPC’s response is available at: <https://www.ccpc.ie/business/european-commissions-consultation-empowering-national-competition-authorities-effective-enforcers-ccpcs-response/>

competition authorities of the Member States to be more effective enforcers of EU competition law.

5. CCPC's views on the Proposed Directive

5.1. The CCPC is very strongly supportive of the aims and content of the Proposed Directive. We consider that the measures and guarantees provided for in the Proposed Directive would greatly enhance the efficiency and effectiveness of competition law enforcement in Ireland, with corresponding benefits to Irish consumers, businesses, the economy and the State.

5.2. In particular, the CCPC's views on the Proposed Directive are as follows:

Sanctions for Breaches of Competition Law

- (i) The CCPC strongly supports the provisions contained in **Chapter V** of the Proposed Directive relating to "Fines and Periodic Penalty Payments". The CCPC considers that the most important provision of the Proposed Directive from an Irish perspective is Article 12, which requires Member States to ensure that pecuniary fines for breaches of EU competition law may be imposed either by national competition authorities themselves in administrative proceedings or by the courts in non-criminal (i.e. civil) proceedings.
- (ii) Currently, in Ireland, the only financial penalty that can be imposed for breach of EU or Irish competition law is a fine following a criminal conviction in the Irish courts. Unlike the European Commission and a large majority of national competition authorities in other EU Member States, the CCPC does not itself have the power to make binding decisions finding a breach of competition law or to impose any sanctions (including financial sanctions) for breaches of competition law.¹² Nor do the courts currently have the power in non-criminal (i.e. civil) proceedings in Ireland to impose financial sanctions for breaches of competition law.
- (iii) This means that under the current enforcement regime in Ireland, neither the CCPC nor the courts have power to impose administrative or civil fines on an undertaking for a breach of EU or Irish competition law. This puts the Irish competition enforcement regime at odds with the regimes in the vast majority of other EU Member States.
- (iv) The CCPC takes the view that criminal sanctions are appropriate for hardcore cartel activity, such as price fixing, market sharing or bid-rigging. In such cases, the accused is entitled to a full jury trial and the prosecution's case must be proved to the very high evidential standard of "beyond reasonable doubt". This means that such prosecutions will, in practice, only be initiated for the most egregious competition law infringements, typically hardcore cartels.
- (v) However, the CCPC considers that criminal sanctions are neither appropriate nor practicable in relation to non-hardcore competition law infringements (e.g. cases

¹² These comments are limited to the application of sections 4 and 5 of the Competition Act 2002, as amended, and Articles 101 and 102 of the Treaty on the Functioning of the European Union and do not refer to the CCPC's powers under the merger review provisions of the 2002 Act.

involving restrictive agreements or an abuse of dominance). 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 criminal law standard (i.e. beyond reasonable doubt) given the often complex economic and legal issues that arise in such cases.

- (vi) The CCPC believes that the enactment of legislation to provide for the imposition of administrative or civil fines for breaches of competition law will fill a significant gap in the existing competition law enforcement regime in Ireland and is of critical importance for the effective enforcement of competition law in Ireland. The CCPC believes that civil or administrative fines are vital in order to combat non-hardcore competition law infringements in Ireland (e.g. cases involving restrictive agreements or an abuse of dominance). The CCPC is of the view that, depending on the particular circumstances, civil or administrative fines might also be an appropriate sanction for horizontal cartel activity.
- (vii) The CCPC would be strongly in favour of introducing an administrative enforcement regime in Ireland whereby the CCPC would itself have the power to make infringement decisions and to impose fines and/or remedies for breaches of competition law. The CCPC considers that an administrative enforcement regime would be a complement to, not a substitute for, the existing criminal enforcement regime. We note that an increasing range of EU and Irish legislation provides – or proposes to provide – for the imposition of administrative financial sanctions by regulatory bodies themselves (e.g. the Central Bank of Ireland¹³, the Commission for Energy Regulation¹⁴ and the Data Protection Commissioner¹⁵). In all of these cases, the decision of the relevant regulatory body is subject to judicial oversight.
- (viii) The CCPC has significant expertise and experience in the enforcement of EU and Irish competition law and it would be an effective use of the CCPC's expertise and resources to have one body (i.e. the CCPC) in control of the process from start to finish. The CCPC considers that the advantages of an administrative enforcement regime would include the following:
 - It would be likely to result in consistent and predictable decisions as well as faster decision-making than an alternative court-based model.
 - It would enable parties under investigation to engage with a single body and would facilitate communications between those parties and CCPC staff throughout the entire process.

¹³ The Central Bank of Ireland operates an administrative sanctions procedure in accordance with Part IIIC of the Central Bank Act 1942 whereby, following an inquiry, the Central Bank may make a finding that a regulated entity has contravened the relevant legislation and impose sanctions, including financial penalties.

¹⁴ Under sections 61 to 63 of the Electricity Regulation Act 1999, as inserted by section 5 of the Energy Act 2016, the Commission for Electricity Regulation has the power to decide to impose fines. Such decision must subsequently be confirmed by the High Court.

¹⁵ The General Scheme of the Data Protection Bill 2017, which seeks to give effect in Ireland to the EU General Data Protection Regulation, provides that an administrative fine may be imposed by a Data Protection Commissioner and subsequently confirmed by the Circuit Court - see Heads 77 and 80 of the General Scheme of the Data Protection Bill published by the Tánaiste on 12 May 2017.

- Effective, dissuasive and proportionate administrative sanctions would create incentives for parties to seek leniency (i.e. reduction in fines) under available leniency programmes and to provide full cooperation with the CCPC in its ongoing investigation of the alleged competition law infringements. Under the current regime in Ireland, there is no system of leniency. Firms involved in non-hardcore cartel behaviour have no incentive to bring issues to the CCPC's attention in the expectation of receiving more lenient treatment. This is in contrast to the experience of the European Commission and of national competition authorities in other EU Member States where many important cases come to their attention by means of leniency programmes.
 - An administrative enforcement regime would facilitate settlements¹⁶ and commitment agreements.¹⁷
 - The speed and efficiency of the administrative procedure and the associated powers of the CCPC would be likely to have a greater deterrent effect than a lengthy, less predictable, court-based system, thereby promoting a better compliance culture.
- (ix) The introduction of an administrative enforcement regime would likely have resource implications depending on the specific nature of the model chosen. However, we consider that any resource implications would be outweighed by the significant benefits to Irish consumers and businesses of having an administrative enforcement regime in place. An administrative enforcement regime – accompanied by an attractive leniency system – would be more effective, efficient and predictable than the current system, have a greater deterrent effect and increase the incentives for businesses to cooperate with investigations conducted by the CCPC.

Independence and Resources of National Competition Authorities

- (x) The CCPC strongly supports the provisions contained in **Chapter III** of the Proposed Directive relating to “Independence and Resources”. The CCPC considers that it is very important – particularly arising from experiences in certain Member States other than Ireland – to ensure that the Directive contains express provisions guaranteeing that national competition authorities can act independently when enforcing EU competition law and work in a fully impartial manner, without taking instructions from public or private entities.

¹⁶ Formal settlement decision powers such as those adopted by the European Commission's Directorate General for Competition (see Commission Notice 2008/C 167/01, OJ 2.7.2008) facilitate the settlement of cartel cases where the parties involved admit liability and are willing to accept the imposition of fines (with a 10% reduction to reward their willingness to agree settlement terms). This system has a number of advantages, including the freeing up of European Commission resources to deal with other cases.

¹⁷ Commitment decision powers enable a competition authority to agree measures with an undertaking which remedy suspected anti-competitive conduct without having to proceed to a formal prohibition decision (which, in Ireland's case, can currently only be taken by a court). This facilitates the elimination of anti-competitive conduct in appropriate cases and reduces the resource burden on the national competition authority, thereby releasing these resources to other work streams within the national competition authority.

Investigative and Decision-Making Powers of National Competition Authorities

- (xi) The CCPC strongly supports the provisions contained in **Chapter IV** of the Proposed Directive providing for enhanced investigative and enforcement powers for national competition authorities. The CCPC considers that it is vital for the effective enforcement of competition law in Ireland that the CCPC has the investigative and decision-making tools necessary to carry out its statutory functions.

Leniency Programmes relating to Cartels

- (xii) Finally, the CCPC welcomes the provisions contained in **Chapter VI** of the Proposed Directive which are aimed at harmonising the leniency programmes operated by national competition authorities across the EU.

Competition and Consumer Protection Commission
16 June 2017