THE CARTELS AND LENIENCY REVIEW

NINTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 29 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource to the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as consider the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition

authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 29 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the ninth edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2021

Chapter 14

IRELAND

Vincent Power[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The Irish regime relating to cartels and leniency (or, as the latter is known in Ireland, immunity) is the result of an interesting mixture of law, policy and practice, with each of these three dimensions influenced by the EU, Irish, common law and US legal regimes.

The underlying Irish legal regime is a common law one, owing its origins to English law. The EU regime, which has applied in Ireland since 1973, is the inspiration for the Irish substantive – but not procedural – rules on cartels. The Irish Constitution of 1937 provides that the imposition of criminal sanctions (e.g., fines) is reserved to the courts. This means that Ireland's Competition and Consumer Protection Commission (CCPC)[2] (the successor to the Irish Competition Authority (the Authority))[3] may investigate alleged cartels and recommend immunity, but the institution of serious prosecutions and the granting of immunity is the responsibility of the Director of Public Prosecutions (DPP),[4] while the imposition of sanctions is a function reserved to the courts. Consequently, in contrast to many competition agencies internationally, the CCPC may not grant immunity or impose fines in its own right. There is a possibility that the CCPC may acquire additional powers under the EU's ECN+ regime (which is due to be implemented into Irish law), but it is not yet clear how it will work out in practice. Over the past two decades, the Authority (now the CCPC) and the Irish courts have been influenced not only by EU developments but also developments in North America, because some Authority and CCPC members have been drawn from the United States and Canada, as well as having a staff that is international in origin. Despite – or perhaps because of – these diverse influences, the Irish regime has carved out its own unique identity, and anyone outside Ireland would make a grave error in assuming that the Irish regime is the same as any other abroad, or that practice and procedures elsewhere are easily transplanted to Ireland.[5]

1 Vincent Power is a partner at A&L Goodbody.

2 See www.ccpc.ie.

3 The Authority existed from 1 October 1991 to 31 October 2014, when it was replaced by the CCPC.

4 See www.dpp.ie. The DPP is Ireland's independent criminal prosecutor of serious crimes.

5 On Irish competition law, see Power, *Competition Law and Practice* (Tottel) and McCarthy and Power, *Irish Competition Law: Competition Act 2002* (Tottel).

i Statutory framework

The key statutory framework in Ireland on cartels is contained in the Competition Acts 2002–2017,[6] which are statutes enacted by the Irish parliament (Oireachtas). These statutes provide for possible civil and criminal liability being imposed not only on economic operators in the market (known as 'undertakings') but also on others, such as directors and managers of undertakings. The immunity framework in Ireland is not contained in legislation but is instead embodied in a notice published by the CCPC, namely the CCPC's Cartel Immunity Programme (CIP),[7] and a great deal depends on the evolving and dynamic practice in the area, as the CIP is not entirely prescriptive or exhaustive.

ii Institutional structure

The institutional framework relating to competition law and cartels in Ireland involves:

a the Oireachtas;
b the Minister for Business, Enterprise and Innovation (formerly the Minister for Jobs, Enterprise and Innovation) (Minister);
c the CCPC;
d the DPP;
e the European Commission; and
f the Irish and EU courts.

First, the Oireachtas enacts the legislation on competition (including cartels) and the legislation relating to the prosecution of offences generally. Second, the Minister proposes legislation to the Oireachtas and keeps a watching brief on policy issues but does not become involved in individual cases. Third, the CCPC is an independent statutory body that investigates potential cartels. It does so on the basis of its own suspicions, information received from other agencies (whether inside Ireland or outside), complaints, tip-offs, by monitoring the media, or on the basis of immunity applications under the CIP. It conducts its investigations using its own staff and detectives seconded from the police force (Garda Siochána). Under Article 34 of the Irish Constitution, the imposition of criminal sanctions is reserved to the courts (being a judicial function), so the CCPC (unlike, say, the European Commission or the United Kingdom's Competition and Markets Authority (CMA)) does not have the power to impose fines. It is expected that the CCPC may be given the power to impose fines under the EU's ECN+ regime on its implementation into Irish law, but it is far from clear whether the conferral of this power is 'necessitated' by reason of Ireland's membership of the EU so there could be doubt about the constitutionality of conferring fining powers on the CCPC by virtue of the ECN+ regime. Fourth, the DPP decides independently (and with relatively little public scrutiny) whether to prosecute suspected serious breaches of law in the courts. It is therefore the DPP, rather than the CCPC, that decides whether to grant immunity or

6 For the legislation, see www.ccpc.ie and www.oireachtas.ie.

7 On the CIP regime generally, see www.ccpc.ie/enforcement-mergers/cartel-immunity-programme. For the text of the CIP, www.ccpc.ie/sites/default/files/documents/2015-01-20%20Revised%20CIP%20Final.pdf. For FAQs on the CIP, see www.ccpc.ie/sites/default/files/documents/Cartel%20Immunity%20Programme%20FAQ%202015.pdf.

to bring prosecutions. However, investigations are conducted by the CCPC and the Garda Siochána (rather than the DPP), so the immunity programme does involve cooperation between the DPP, the CCPC and the Garda Siochána.

iii Key policies

As a matter of policy, the CCPC treats the detection and punishment of cartels as the most important of a small number of priorities; the CCPC (and previously the Authority) has often stated that the pursuit of cartels is a top priority for it.[8] Some judges in the Irish courts have also indicated their intention to incarcerate those individuals who breach competition law.

For example, McKechnie J in the High Court (who has since been elevated to the Supreme Court) stated that:

> *[c]ompetition crimes are particularly pernicious.*[9] *Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective, sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place […] [i]n my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases.*[10]

The CCPC receives a significant number of complaints or tip-offs alleging cartels, some of which lead to investigations.

iv Guidance

The DPP and CCPC have given formal guidance by virtue of the CIP as well as various public statements over time. The CIP was published by the CCPC, but was compiled in conjunction with the DPP because, as mentioned, prosecutions are at the discretion of the DPP rather than the CCPC. The DPP does not often speak in public about policies, but there have been some comments over time,[11] and there is a sense that the prosecution of white-collar crime is becoming more commonplace and cartel enforcement is particularly strong (with over 30 competition-related convictions to date, and a number of other prosecutions that were not successful). In trying to discern the DPP's policy, it is often useful to take note of the CCPC's comments, because the latter is in a position to speak more freely than the DPP. The CCPC could usefully remind regularly both businesses and consumers of the existence of the CIP because the level of awareness of the programme has declined over time.

8 Curiously, the 2001 CIP stated this in its preface, but the 2015 CIP does not.

9 Ed., the learned judge was speaking in the specific context of cartels.

10 *DPP v. Duffy and Duffy Motors (Newbridge) Ltd*, [2009] IEHC 208.

11 For example, the previous DPP spoke on *The Week in Politics*, RTÉ Television on 16 May 2010 on prioritising white-collar crime; see also Lally, 'DPP Moots Changes to White-collar Trials', *The Irish Times*, 17 May 2010, p. 4.

v Grey areas and controversies

Despite some initial resistance in some quarters (e.g., some politicians) to the idea of criminalising cartels, the principle is now well established in Irish law and practice. The Oireachtas criminalised some breaches of competition law in 1996,[12] and bolstered the criminal regime particularly in 2002.[13] The courts have accepted criminalisation and have been willing to impose increasingly stiff penalties.

There have been two particular controversies in this context that are worth noting. First, both the Authority and CCPC have expressed a desire to have 'civil fines' imposed by the courts, which would mean that cartels could be penalised by a court on the lower civil standard of proof (on the balance of probabilities) rather than the higher criminal standard of proof (beyond reasonable doubt). This idea has apparently been abandoned and somewhat discredited (at least for now) as the possibility of enacting a regime providing for civil fines was not taken up when the Competition (Amendment) Act 2012 (the 2012 Act)[14] was enacted (or, indeed, as part of the wider Competition and Consumer Protection Act 2014 (the 2014 Act)), and there is a belief that it would currently be unconstitutional except if it were necessary as part of Ireland's obligations under European Union law (e.g., perhaps under the ECN+ regime). The second controversy has centred on the ability of more than one witness in cartel investigations to be represented by the same lawyer. An attempt by the then Authority (now the CCPC) to control legal representation by adopting a notice on the subject but the notice was annulled by the Irish High Court in *Law Society v. Competition Authority*.[15] The Irish Supreme Court has since held in *DPP v. Gormley*[16] that persons being questioned are entitled to legal representation throughout their questioning, so restrictions on persons being questioned having legal advice would be seen as unconstitutional, and, moreover, under the Competition Acts, the CCPC would not have power to veto a witness's choice of lawyer.

II COOPERATION WITH OTHER JURISDICTIONS

Ireland has a very open economy with a great deal of foreign direct investment, which means that cooperation with other jurisdictions is necessary. The CCPC cooperates, as the need arises, with other competition agencies abroad. The most relevant agencies would be the European Commission, the CMA, the US Department of Justice and the US Federal Trade Commission. The CCPC would be willing to cooperate with international agencies wherever it is necessary and lawful to do so. It is likely to cooperate both inwards and outwards, but it

12 Competition (Amendment) Act 1996 (now repealed).

13 Competition Act 2002 (2002 Act) (as amended).

14 For the text of the 2012 Act, see www.ccpc.ie. On the 2012 Act, see Power, 'Ireland's Competition (Amendment) Act 2012: A By-Product of the Troika Deal but Legislation with Long-Term Consequences' (2012) *Commercial Law Practitioner* 180, and Power, 'Irish innovations to facilitate competition litigation: Ireland's Competition (Amendment) Act 2012' (2012) 5(4) *Global Competition Law Review*, pp. 168–174.

15 On the case and the issue, see Power, 'Right to a Lawyer in Competition Investigations: Law Society of Ireland v. Competition Authority' (2006) *European Competition Journal* 89, Power, 'A National and International Perspective on Representing Businesses and Trade Associations in Competition Law Cases', 2018 4(1) *Competition Law & Policy Debate* 65 and Mackey, 'One Lawyer, Many Clients: Legal Representation of Parties with Conflicting Interests', (2012) 6 *International In-House Counsel Journal* No. 21, 1. The case is reported at [2006] 2 IR 262, [2005] IEHC 455.

16 [2014] IESC 17.

will be mindful of the need to comply with Irish (and, where relevant, EU) law and will not want to prejudice any trial before the Irish courts. Despite this general background, relatively little is publicly known about the CCPC's approach to these matters.

i Statutory basis for cooperation

Section 23 of the 2014 Act provides explicitly for cooperation with foreign competition bodies. Section 23(4) defines, for the purposes of the Section, the term 'foreign competition or consumer body' as meaning:

> *a person in whom there are vested functions under the law of another state with respect to the enforcement or the administration of provisions of that state's law concerning . . . competition between undertakings (whether in a particular sector of that state's economy or throughout that economy generally).*

The CCPC may, pursuant to Section 23(1) of the 2014 Act and with the consent of the Minister, enter into arrangements with a foreign competition body whereby each party to the arrangements may:

a furnish to the other party information in its possession if the information is required by that other party for the purpose of the performance by it of any of its functions; and

b provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

The CCPC may not, because of Section 23(2) of the 2014 Act, furnish any information to a foreign competition body pursuant to such arrangements unless it obtains an undertaking in writing by that foreign competition body that it will comply with terms specified in that requirement.

Conversely, under Section 23(3) of the Competition Act 2002 (the 2002 Act), the CCPC may give an undertaking to a foreign competition body that it will comply with terms specified in a request made of the CCPC by the body to give such an undertaking where:

a those terms correspond to the provisions of any law in force in the state in which the body is established, being provisions that concern the disclosure by the body of the information referred to below; and

b compliance with the requirement is a condition imposed by the body for furnishing information in its possession to the CCPC pursuant to the arrangements referred to in Section 23.

ii Extradition

There has been no reported case to date concerning a foreign state seeking an extradition from Ireland for cartel offences (or vice versa). In principle, extradition should be possible given that cartel activity has been a criminal offence in Ireland since 3 July 1996, when the Competition (Amendment) Act 1996 entered into force, but each case will turn on its own circumstances. The decision on whether to allow the extradition of persons in Ireland to foreign states is reserved to the courts and not the CCPC.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

To date, the Irish courts have not had to opine on the geographical and jurisdictional reach of Irish competition law to any material degree, but the legislation gives some guidance. In essence, it appears to provide that an individual and a corporation may be exposed to liability under Irish competition law notwithstanding the fact that they have no physical presence in Ireland or that the conduct was committed outside Ireland where the conduct had an effect inside Ireland (i.e., the Republic of Ireland).

i Geographical reach

Irish competition law applies to any behaviour or conduct that affects trade in Ireland[17] or any part of Ireland irrespective of where in the world the conduct occurred.[18] This means that a cartel formed and operated from outside Ireland may still be prosecuted and punished inside Ireland provided there was some effect on trade in Ireland. As such, it is legally possible for a person not based in Ireland to be prosecuted and convicted of breaching Irish competition law but, in practice, all cases to date have involved persons in Ireland. Indeed, the CCPC has not, publicly at least, shown a willingness to pursue cartels that have been investigated and punished by other agencies.

ii Parent-subsidiary liability issues

The Irish courts have not yet had to consider the parent-subsidiary liability issue that has been considered at an EU level. It is likely that the courts will be influenced by the relevant EU jurisprudence in so far as it is applicable.

iii Breach of EU law

Curiously, a breach of some provisions of EU law is, in certain circumstances, punishable under the 2002 Act. This is because Sections 4 to 7 of the 2002 Act render a breach of Articles 101 and 102 of the EU's Treaty on the Functioning of the European Union, as well as a breach of the 2002 Act in the circumstances specified in that statute. It is unlikely that Ireland would be interested in prosecuting for breaches of EU law that had no Irish connection, but the possibility is significant because it means that not only undertakings could be liable but also non-undertakings (such as directors of undertakings) may be held liable and punished (even imprisoned[19] or fined[20]) for breaches of EU competition law when such breaches constitute breaches of the 2002 Act.

17 The Republic of Ireland.

18 See Sections 4 to 7 of the 2002 Act.

19 Under the 2002 Act (as amended by the 2012 Act), the maximum term of imprisonment for a breach of the 2002 Act is 10 years.

20 Under the 2002 Act (as amended by the 2012 Act), the maximum fine for a breach of the 2002 Act is €5 million.

IV LENIENCY PROGRAMMES

Ireland operates a 'first-in receives qualified immunity' regime. The decision on whether to prosecute for a criminal breach in the area of serious cartels rests with the DPP rather than the CCPC, but it is the CCPC that interacts with the applicant and makes the non-binding recommendation to the DPP on whether to grant the immunity.

To qualify for leniency, the applicant:

a must not have taken steps to coerce another party to participate in the cartel;

b 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;

c from the time that it first considered applying for immunity, must not have destroyed, hidden, made unusable or falsified any evidence relating to the offence or offences;

d must, in an ongoing cartel, 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. Interestingly, 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; and

e must, throughout the course of the CCPC's investigation and any subsequent prosecution, provide comprehensive, prompt and continuous cooperation.

The applicant (including individuals who require personal immunity) has a positive duty to:

a reveal any and all cartel offences under the 2002 Act in which the applicant may have been involved and of which it is aware;

b provide full, frank and truthful disclosure of all the evidence and information that is in its possession or control, or that is known or available to the applicant, including all documentary, electronic and other records, wherever located, relating to the offences under investigation;

c preserve and not tamper with any evidence that is capable of being under the applicant's control;

d 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;

e generally, 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 to another competition authority or to an external lawyer for the purpose of obtaining legal advice, provided that the applicant ensures that the lawyer does not disclose any such information to any third party;

f disclose to the CCPC, unless otherwise prohibited, all applications made by the applicant for immunity in other jurisdictions;

g cooperate 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

b assist the CCPC by producing to it individual persons who would give clear and comprehensive statements of evidence that will then be recorded by the CCPC.

If the first applicant to request immunity fails to meet the requirements of the CIP or conditional immunity is later revoked, another applicant may be considered for immunity under this programme. This is a reason for those potential applicants who are too late to receive qualified immunity to nonetheless put down a marker.

In the case of an applicant that is an undertaking, whatever its legal form, the applicant must be able to show that it has made a formal decision to apply for immunity. A person making an application on behalf of a corporate undertaking must satisfy the CCPC that he or she is duly authorised to act on behalf of that corporate undertaking. If an undertaking qualifies for immunity, all current and former directors, officers, partners and employees who admit their involvement in the anticompetitive activity and who comply with the conditions of this programme will also qualify for immunity. Applications may be made on behalf of an individual who is not an undertaking. Such an application will not be regarded as having been made on behalf of an undertaking.

The immunity process commences with obtaining a marker by calling the CCPC's cartel immunity phone line. The applicant or its legal adviser must present an outline of the facts of the case, including the markets and the kind of practices involved. Such an enquiry may be made without disclosing the applicant's identity. This will enable the CCPC to determine whether a marker can be granted in this case. The marker protects the applicant's place in the queue for immunity for a short but reasonable period of time – the exact length depends on the circumstances of the case. This is intended to allow the applicant time to gather the necessary information and evidence needed to complete its application for immunity. The second step is to perfect the marker. To perfect the marker, the applicant must provide the CCPC with its name and address, as well as information concerning:

a an outline of the process that led to the immunity application, including the form of formal decision to make the application;
b the parties to the alleged cartel;
c in the case of a corporate applicant, the individual or individuals that require immunity;
d the affected product or products;
e the affected territory or territories;
f the duration of the alleged cartel;
g the nature of the alleged cartel conduct (including a description of the applicant's role);
h information on any past or possible future immunity or leniency applications in other jurisdictions in relation to the alleged cartel; and
i an outline of the nature of the evidence at the applicant's disposal.

The applicant may provide all the above information orally. If a marker expires before it is perfected, or the application is otherwise refused by the CCPC or by the DPP, the CCPC will consider any other applications for immunity in the queue and any subsequent applications. Nothing prevents the holder of an expired marker from reapplying, but in those circumstances, its original place in the queue will not be protected. Joint applications for immunity by two or more independent undertakings will not be considered. This does not preclude applications by a single economic entity on behalf of its constituent companies.

The third step is the granting of conditional immunity by the DPP, the fourth step is full disclosure by the applicant and the final step is that full immunity is granted when the conditions are fully satisfied.

V PENALTIES

The penalties for breaching Irish competition law are severe. In general, individuals may be jailed for up to 10 years or fined up to €5 million, or both, while undertakings may be fined up to 10 per cent of their worldwide turnover. These criminal penalties are supplemented by potential civil actions for damages, exemplary damages (though the power of the Irish courts to grant exemplary damages has been limited somewhat – as will be explained below), injunctions or declarations. These penalties are real in that the courts have seen convictions (e.g., 18 in the *Oil* cartel), but no people have served jail sentences for cartel activities as such (jail sentences to date have either been suspended or served for non-payment of fines).

VI 'DAY ONE' RESPONSE

The CCPC has extensive search, seizure and investigative powers. It may search both business and private property (e.g., homes). It typically conducts several raids each year, and these are typically on the offices of businesses or trade associations; however, it may only exercise those powers after receiving court consent, and must operate within the confines of the law.

The raids are conducted by several 'authorised officers' from the CCPC, who are often accompanied (at least, for a short period of time) by members of the Garda Siochána. The CCPC conducts dawn raids to gather evidence about alleged breaches of competition law. Dawn raids are usually the result of *ex officio* investigations by the CCPC or investigations following complaints to the CCPC by third parties.

The CCPC may visit at any time during normal working hours, which could be first thing in the morning, and visits can last an entire day or longer. The CCPC arrives unannounced and may enter premises by force if necessary. Its representatives must present a copy of the District Court warrant that authorises the CCPC to conduct the dawn raid. Typically, the investigators divide into groups: one reads through files, diaries and other documents; another photocopies documents; and a third examines computers and makes copies of computer files. The CCPC may also seize original documents to take them away, and may seize computers and laptops, as well as copy entire hard drives. After reviewing the information on site, the CCPC may interview persons in the building about matters under investigation or may interview them later. The CCPC will provide an inventory of the documents that have been copied and the original documents it has seized. This inventory does not have to be signed, but a copy should be taken.

One person in the organisation should take charge of the situation, and this person should act as coordinator. The warrant presented by the CCPC should be checked. Does it correctly name the business? Does it relate to the correct address? Proof of identity should be obtained from each investigator, and a copy taken of each. The CCPC should be asked to wait for the coordinator to arrive (although it is not obliged to do so). It should also be established whether the CCPC is simultaneously raiding premises of subsidiaries of the business or homes of employees.

Specialist competition lawyers should be contacted, and they should travel immediately to the organisation's offices. All relevant management personnel, the head office, and PR teams or consultants should be alerted.

Members of the management team should accompany every CCPC official at all times and note as much as possible of what they say and do.

The CCPC may photocopy all relevant documents or choose to seize the originals, but it should not read or copy correspondence with lawyers as that is 'privileged'. If the CCPC's representatives try to read or copy such documents, a formal objection should be lodged and the documents put to one side for lawyers to discuss with the CCPC after the dawn raid. If this does not happen, it would be wise to ask that all such documents be sealed for later determination by the CCPC with the company's team of lawyers – the CCPC has stated that it respects in-house privilege.

A second set of the documents being copied by the CCPC should be made by the undertaking being raided. A copy should also be made of each original document that the CCPC proposes to remove. These copies made should be read, along with the originals taken by the CCPC. This is particularly important for anyone who may be asked questions by the CCPC.

The CCPC may decide to copy computer files. Its representatives may only copy files relating to the business named in the search warrant. This was an issue in the *Irish Cement* litigation where the actions of the CCPC in attempting to seize documents beyond the scope of the warrant were criticised by the High Court[21] and the Supreme Court[22] because the CCPC exceeded its powers. If the CCPC tries to copy other files (or seize a computer or laptop), objections should be formally raised and the copy (or computer or laptop) requested to be put to one side for lawyers to discuss with the CCPC after the dawn raid whether it may be copied or taken. If not, it should be requested that it be sealed until the company's lawyers have been able to verify the relevance of the contents with the CCPC. A copy should be made of whatever computer records are copied or taken.

If the CCPC questions employees, the latter should only answer if the CCPC compels an answer. Before answering, it should be stated that the question is being answered under compulsion. Answers must be truthful and accurate, as it is an offence to mislead the CCPC. If an employee does not know the answer to a question, then it is best that he or she says so. Legal advice should ideally be sought before answering any questions but particularly before answering questions that could be incriminating. If an employee is cautioned (e.g., by the Garda Siochána or the CCPC), he or she should normally invoke the right to silence.

Detailed contemporaneous notes should be kept, and a recorder made available for any interview. Press releases or public comment should not be made unless the matter becomes public knowledge, and even then public comment is unnecessary, but staff should certainly be advised that confidentiality is imperative and they should not discuss the dawn raid with any third party.

Cooperation with the CCPC is paramount; while the investigation may seem unreasonable, the CCPC has wide powers of search and investigation.

After the dawn raid, employees should be gathered for a full debrief, and any step identified that may be required to correct any error during the dawn raid.

21 [2016] IEHC 162.

22 [2017] IESC 34.

Dawn raids in Ireland may also be carried out by the European Commission; for further details, see the European Union chapter.

VII PRIVATE ENFORCEMENT

Private enforcement of competition law has been encouraged by Ireland since 1 October 1991, when the Competition Act 1991 entered into force and 'aggrieved persons' (irrespective of whether they were undertakings) were given the statutory right to institute court proceedings to recover remedies. An explicit private right of action exists in the Competition Acts to deal with both Irish and EU competition law. Aggrieved persons may seek damages, exemplary damages, injunctions and declarations; however, the ability to obtain exemplary damages may be somewhat limited in Ireland because such damages are rare, as well as because of the manner in which the EU's Damages Directive was implemented by virtue of the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017.[23] A form of collective action is possible, but not class actions in the US sense of the term. The Competition Acts do not prescribe how damages would be calculated; and there is doubt about the legality of funding actions in certain circumstances. The *Trucks* litigation is currently before the Irish courts, and it will be interesting to see how the issues involved are addressed.

VIII CURRENT DEVELOPMENTS

The 2012 Act was designed to facilitate private enforcement and assist public enforcement. It increased the maximum fine of €4 million to €5 million for indictable offences, and increased the maximum prison sentence for indictable cartel offences from five to 10 years. It also disapplied the application of the Probation of Offenders Act 1907 to certain competition law offences. In certain circumstances, the legislation provided that where a person is convicted of an offence under the 2002 Act, the court must order the person to pay to the relevant competent authority (i.e., either the CCPC or Commission for Communications Regulation) a sum equal to the costs and expenses, measured by the court, incurred by that competent authority in relation to the investigation, detection and prosecution of the offence, unless the court is satisfied that there are special and substantial reasons for not so doing.

Section 10 of the 2002 Act did not enter into force until 3 October 2011. It provides that in jury trials, the trial judge may order that copies of any of the following documents be given to the jury:

a any document admitted in evidence at the trial;
b a transcript of the opening speeches of counsel;
c any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial;
d a transcript of the whole or any part of the evidence given at the trial;
e a transcript of the closing speeches of counsel; and
f a transcript of the trial judge's charge to the jury.

23 SI No. 43 of 2017.

The CCPC investigated a cartel in regard to carpets for commercial customers, and while there was a conviction and a fine imposed, it was regarded as being too low by the state prosecutor, so the penalty was appealed. The appeal[24] resulted in the initial fine of €7,500 being increased, on appeal, to €45,000. While this level of fine would still have been disappointing to the CCPC, it will not (and should not) deter further investigations by the CCPC and there could well be higher penalties in due course.

The CCPC has adopted its 'Protocol for dealing with claims of privacy rights in connection with unannounced searches conducted on foot of a search warrant under section 36 or section 37 of the Competition and Consumer Protection Act 2014'[25] to deal with privacy claims that could arise in, for example, dawn raids pertaining to cartels.

24 *DPP v. Aston Carpets and Flooring Ltd* [2019] 4 CMLR 4, [2018] 6 WLUK 701 (CA (Irl)).

25 www.ccpc.ie/business/wp-content/uploads/sites/3/2018/06/Privacy-Protocol.pdf.

Appendix 1

ABOUT THE AUTHORS

VINCENT POWER

A&L Goodbody

Vincent Power is a partner at A&L Goodbody and head of the firm's EU, competition and procurement group. He has been described as 'outstanding, hugely experienced and arguably the top competition lawyer in Ireland'.

Dr Power has been involved in most of the leading competition, merger control, EU, cartel and state aid cases in Ireland for over 20 years. He has a BCL from University College Cork, a BL from King's Inns Dublin, and an LLM and a PhD from the University of Cambridge. He is an Irish solicitor.

In 2017, he won the ILO Client Choice Award for the category of EU Competition and Antitrust, which is awarded by the International Law Office in recognition of a partner from the entire 28 Member State European Union who excels across the full spectrum of client service. He received the 'Irish Commercial Lawyer of the Year' award at the Inaugural Irish Law Awards in 2012. He has been recommended by all the international legal guides: 'one of the market's most accomplished practitioners and celebrated for his breadth of knowledge and excellent advice. He is able to link his technical advice to the commercial realities'; 'an authority on competition law, equally adept at state aid and merger control'; 'applauded for his analytical ability and strong understanding of commercial imperatives'; an 'acknowledged guru' with an 'encyclopaedic knowledge'; 'a potent force'; and 'has a great record in competition work'. He is said to do 'an incredible job' with 'high levels of commitment'.

Dr Power is the author or editor of seven books, including *Competition Law and Practice*, *Irish Competition Law* and the award-winning *EU Shipping Law*. He was the first law graduate to be awarded the Distinguished Alumnus award from University College Cork. He is adjunct professor of law at University College Cork and visiting professor of EU law at Dalhousie University in Canada. He has chaired, been a member of and advised four governmental commissions and bodies. He was appointed a Senior Counsel by the Irish government in 2020.

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