THE CARTELS AND LENIENCY REVIEW

SEVENTH 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 28 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. In part because of US leadership, 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.

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 28 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 seventh 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 2019

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Chapter 14

IRELAND

Vincent Power[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The vibrant 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 (*Bunreacht na hÉireann*) 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. During the past two decades, the Authority (now the CCPC) and the Irish courts have been influenced by development not only by in the European Union but also in North America, because some Authority and CCPC members have been drawn from the United States and Canada, as well having a staff that is international in origin and experience. 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]

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 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

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

2 On the CCPC, see www.ccpc.ie.

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

4 On the DPP, 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).

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

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, so it is prudent to bear in mind that there can be differences between cases.

ii Institutional structure

The institutional framework relating to competition law in Ireland involves:

a the *Oireachtas*;
b the Minister for Business, Enterprise and Innovation (formerly the Minister for Jobs, Enterprise and Innovation) (the 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 in this area. Third, the CCPC is an independent statutory body that investigates potential cartels (and competition generally, concentrations and consumer protection issues). It does so on the basis of its own suspicions, information received from other agencies (whether inside Ireland or outside), complaints, tip-offs, 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 Síochána*). 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 UK's Competition and Markets Authority (CMA)) does not have the power to impose fines (this may change under the EU's proposal to enhance the position of national agencies but it is not yet clear whether it will do so). 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 to bring prosecutions. However, investigations are conducted by the CCPC and the *Garda Síochána* (rather than the DPP), so the immunity programme does involve cooperation between the DPP, the CCPC and the *Garda Síochána*.

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

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, Mr Justice McKechnie 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]

iv Guidance

The CCPC receives a significant number of complaints or tip-offs alleging cartels, some of which lead to investigations. 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 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 convictions to date (including a conviction for bid rigging) 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.

v Grey areas and controversies

Despite some initial resistance 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 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

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.

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

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

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 or in legislation since), and there is a belief that it would currently be unconstitutional. There may also be doubts about 'civil fines' for criminal activity in the context of human rights law. The possibility of some new penalties being imposed is being discussed as part of the EU's ECN+ proposals but it is not yet clear how this will unfold.

The second controversy has centred on the ability of witnesses and suspects 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 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.

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 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 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).*

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, 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.

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 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 in point (b), 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 1996 Act 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.

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, 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.

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

17 That is, the Republic of Ireland.

18 See Sections 4 to 7 of the 2002 Act.

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.

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 also 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 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. There may well be interesting issues relating to possible double jeopardy that would have to be considered.

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 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 the applicant 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.

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.

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

a reveal any and all cartel offences under the 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. However, this restriction shall not 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

h 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. It may therefore be useful to table an immunity application even if there is already an immunity applicant because an earlier applicant may lose its position in the queue.

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 the corporate undertaking in question. 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 can 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 market and the kind of practice 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 period of time. 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 that are 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 and fined up to €5 million, 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, 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). There are certain limited circumstances in which exemplary damages would not be available but it is best to assume that they may be available.

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 conducts several raids each year, and these are typically at the offices of businesses or trade associations; however, it may only exercise those powers after receiving court consent (unless the party being visited voluntarily accepts the visit, although this may be open to some doubt) 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 Síochána*. 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 public relations 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. A copy should also be made of each original document that the CCPC proposes to remove. These copies 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. If they try 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, they 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 Síochána* or the CCPC), he or she should normally invoke the right to silence.

Detailed contemporaneous notes should be kept and a tape recorder made available for any interview. Press releases or public comment should not be made unless the matter becomes public knowledge, but staff should certainly be advised that confidentiality is imperative and that 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 steps identified that may be required to correct any errors during the dawn raid.

The Irish Supreme Court has held that the CCPC had acted unlawfully in seizing documents outside the scope of their powers in one dawn raid so it is expected that some of the procedures deployed by the CCPC will change. Unfortunately for the CCPC, the legislation is not entirely clear and it is often difficult to undertake a detailed, precise investigation on a particular issue in the context of a large business with a complex IT system. This case, relating to Irish Cement, is considered below, in Section VIII.

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 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, injunctions and declarations. Ireland has implemented the EU's Damages Directive.[21] 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; the funding of private litigation is not very well developed in Ireland, and there will be some doubt about the legality of funding actions in certain circumstances.

VIII CURRENT DEVELOPMENTS

The 2012 Act was one development that has facilitated private enforcement and assisted public enforcement. The 2012 Act 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 competition law offences. In certain circumstances, the statute provided that

21 Directive 2014/104/EU.

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 the 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.

The 2014 Act merged the Authority with the National Consumer Agency to form the CCPC, which has meant that both the competition and consumer protection dimensions need to be considered.

The powers of the CCPC to conduct dawn raids and seize documents was the subject of litigation before the High Court and Supreme Court in the *Irish Cement* litigation. The Supreme Court held that the CCPC must respect the privacy rights of those being inspected in dawn raids and the CCPC is therefore not entitled to inspect, review or use materials that are unrelated to the specific investigation and outside the scope of the warrant. The judgment was a setback for the way that the CCPC used to conduct dawn raids but it is working to address the issues raised by the Supreme Court. No one should believe that dawn raids will cease to occur – indeed, they have occurred since the judgment.

In 2018, a fine imposed in 2017 on an individual by the Central Criminal Court (i.e., the High Court exercising criminal jurisdiction) for a bid rigging cartel was increased by the Court of Appeal. (The appeal against the fine of €10,000 imposed on the company failed because the appellate court believed it was appropriate and within the discretion available to the sentencing judge). The appellate court believed the fine of €7,500 imposed on the individual was not just lenient but unduly lenient. The court said that:

> *[he] was the person with overall responsibility for the events that occurred in that he effectively orchestrated them and indirectly stood to benefit from them. [He] was in reality the person who orchestrated, authorised and conducted the criminal behaviour in question [therefore] . . . a fine of €7,500 was unduly lenient. The fine should more closely have reflected the actual financial gain accruing from the activity in question, which was in the region of €31,000. The court is also of the view that, save in exceptional circumstances, a fine should be for a sum greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent. The court will therefore impose a fine of €45,000 on the second respondent and will hear submissions as to a reasonable period in which to pay that fine. In respect of the suspended [three-month] prison sentence imposed on [him] the court is satisfied that this was reasonable and proportionate, and indeed appropriate, and therefore will not interfere with it. Any activity undertaken to impede a prosecution for offences committed is itself a serious crime and will invariably attract a sentence of imprisonment'.*

Appendix 1

ABOUT THE AUTHORS

VINCENT POWER

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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 in 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. In 2018, he won the same award for Ireland. 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 *EC 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 government commissions and bodies.

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