The Cartels and Leniency Review

Third Edition

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EDITOR'S 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 enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen 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 due to 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 of these chapters 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 chapters on 34 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines 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 third edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those 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.

Christine A Varney
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New York
January 2015

Chapter 16

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 European Union, 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 basis 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; as such, the Irish Competition and Consumer Protection Commission (CCPC)[2] may investigate alleged cartels and recommend immunity, but the institution of serious prosecutions and the granting of immunity is the responsibility the Director of Public Prosecutions (DPP), while the imposition of sanctions is a function reserved to the courts, so the CCPC may not grant immunity or impose fines in the same way as many non-Irish competition authorities do. The CCPC, like the Authority, has been influenced not only by EU developments but also developments in North America, because some CCPC members have been drawn either from the US or Canada. 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

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

2 On the CCPC, see www.ccpc.ie. The CCPC came into existence on 31 October 2014 following the merger of the National Consumer Agency (www.nca.ie) and the Competition Authority (www.tca.ie). References to the CCPC include references to the Authority (and vice versa).

Irish regime is the same as any other, or that practice and procedures elsewhere are easily transplanted to Ireland.[3]

i Statutory framework

The key statutory framework in Ireland on cartels is contained in the Competition Acts 2002–2014,[4] which are statutes enacted by the Irish parliament (the Oireachtas). These statutes provide for possible civil and criminal liability being imposed not only on economic operators in the market (i.e., undertakings), but also others such as directors and managers of undertakings. The framework in Ireland on immunity is not contained in legislation, but is instead embodied in a notice published by the CCPC, namely, the CCPC's Cartel Immunity Programme (CIP),[5] and a great deal depends on the evolving and dynamic practice in the area, as the CIP is not entirely prescriptive.

ii Institutional structure

The institutional framework involves: the Oireachtas; the Minister for Jobs, Enterprise and Innovation (the Minister); the CCPC; the DPP; the European Commission (when EU law is involved); as well as 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. It does so on the basis of its own suspicions, information from other agencies (whether inside Ireland or outside) or on the basis of immunity applications under the CIP. The CCPC conducts its investigations using its own staff and some detectives seconded to it from the Irish police force (the Gardaí). Under Article 34 of the Constitution, the imposition of criminal sanctions is reserved to the courts (being a judicial function), so the CCPC (unlike, for example, the European Commission or the United Kingdom's Competition and Markets Authority (CMA)) does not have the power to impose fines. 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 the immunity. However, investigations are conducted by the CCPC and the Gardaí (rather than the DPP), so the immunity programme does involve cooperation between the DPP, the CCPC and the Gardaí.

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

4 For the legislation, see www.ccpc.ie and www.tca.ie.

5 On the CIP regime generally, see http://tca.ie/EN/Enforcing-Competition-Law/Cartel-Immunity-Programme.aspx. For the text of the CIP, see http://tca.ie/images/uploaded/documents/Cartel%20Immunity%20Programme.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 states in the CIP that the CCPC 'has identified the pursuit of cartels as a top priority'.[6] Some judges in the Irish courts have also indicated their intention to incarcerate those who breach competition law. For example, McKechnie J in the High Court (he is now in the Supreme Court) stated:

> *Competition crimes are particularly pernicious.[7] Coupled with that, and the low likelihood of recidivism amongst perpetuators, 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. […] In my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases.*[8]

During 2013, the Authority (now the CCPC) received 34 new complaints alleging cartel behaviour (it had received only 13 such complaints in 2012).

iv Guidance

The CCPC has given formal guidance by virtue of its CIP as well as various public statements. The CIP was published by the CCPC's predecessor, the Authority, 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 publicly about her policies, but there have been some comments over time,[9] and there is a sense that prosecutions of white-collar crime are becoming more commonplace and cartel enforcement is particularly strong (with over 30 convictions to date and a number of other prosecutions that were not successful). If one is 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.

Grey areas and controversies

Despite some initial resistance in some quarters to the idea of criminalising cartels, the principle is now well established in Irish law and practice. In 1996, the Oireachtas criminalised some breaches of competition law[10] and bolstered the criminal regime in 2002.[11] The courts have accepted criminalisation and have been willing to impose penalties.

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6 CIP, 20 December 2001, preface.

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

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

9 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.

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

11 Competition Act 2002 (the 2002 Act), which has been amended on several occasions.

There have been two particular controversies in this context worth noting. First, the CCPC has 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).[12] This idea has not progressed and has been somewhat discredited, as the possibility of enacting a regime providing for civil fines was not taken up by the Oireachtas (e.g., when enacting the Competition (Amendment) Act 2012 (the 2012 Act)[13] or the Competition and Consumer Protection Act 2014 (the 2014 Act)[14]) and there is a belief that it would be unconstitutional. 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 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]

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 would be the European Commission, the UK's CMA and the US's Fair Trade Commission. The CCPC is 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 is 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 46 of the 2002 Act provides explicitly for cooperation with foreign competition bodies. Section 46(1) defines, for the purposes of the section, the term 'foreign competition body' as meaning:

12 For example, www.tca.ie/EN/Promoting-Competition/Presentations--Papers/The-need-for-civil-fines.aspx?page=4&year=0.

13 For the text of the 2012 Act, see www.tca.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*, p. 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.

14 For the text of the 2014 Act, see www.tca.ie.

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*, p. 89 and Mackey, 'One Lawyer, Many Clients: Legal Representation of Parties with Conflicting Interests' (2012), *International In-House Counsel Journal*, Vol. 6, No. 21, 1. The case is reported at: [2006] 2 IR 262, [2005] IEHC 455.

> *[…] 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 46(2) of the 2002 Act but 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 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 46(3) of the 2002 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 will comply with terms specified in that requirement.

Conversely, under Section 46(4) 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 (b) above; 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 46(2).

ii Extradition

There has been no reported case to date concerning a foreign state seeking extradition from Ireland for cartel offences. 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. The decision on whether to allow extradition of persons in Ireland to foreign states is reserved to the courts.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The Irish courts have not yet had to opine on the geographical and jurisdictional reach of Irish competition law, but the legislation gives some guidance. In essence, it provides 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 (i.e., the Republic of Ireland) or any part of Ireland irrespective of where in the world the conduct occurred.[16] 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.

ii Parent–subsidiary liability issues

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

iii Breach of EU Law

Curiously, a breach of EU law is punishable under Ireland's 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 Act in the circumstances specified in that statute. It is unlikely that Ireland would be interested in prosecuting 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[17] or fined[18]) for breaches of EU competition law when such breaches constitute breaches of the 2002 Act.

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 immunity.

i Current immunity regime

The current regime is embodied in the 2001 CIP. It is a notice rather than legislation, but it would often be difficult for the CCPC or the DPP to resile from it where parties relied on it, in good faith, although the CIP makes it explicitly clear that nothing in the CIP affects the DPP's discretion.

16 See Sections 4 to 7 of the Competition Act 2002.

17 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.

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

The CIP outlines the policy and procedures involved in applying for immunity from prosecution for criminal offences[19] under the 2002 Act. The CIP relates to cartel offences; while the DPP is free to give immunity for other offences, the CIP relates to cartels only. The rationale for the CIP is expressed as being that participants in a cartel are secretive, and therefore are notoriously difficult to detect and prosecute successfully. The CIP encourages early self-reporting by offenders.

The CIP is open to non-undertakings: under the CIP, any person or undertaking implicated in an activity that violates the 2002 Act may offer to cooperate and request immunity. An undertaking may choose to initiate an application on behalf of its employees (current and former), including its directors and officers. Employees who are neither directors nor officers of the corporate undertaking may approach the CCPC on their own behalf.

Applications for immunity are made to the CCPC, but only the DPP may grant immunity. The application should be made expeditiously. The applicant should be the first to come forward, and before the CCPC has gathered sufficient evidence to warrant a referral of a completed investigation file[20] to the DPP.

The applicant must comply with certain requirements:

a it must take effective steps, agreed with the CCPC, to terminate its participation in the illegal activity;

b it must do nothing to alert its former associates that it has applied for immunity;

c the applicant, including all its relevant past and present employees, must not have coerced another party to participate in the illegal activity, and must not have acted as the instigator or have played the lead role; and

d throughout the course of the CCPC's investigation and any subsequent prosecution, the applicant must provide complete and timely cooperation.

In particular, the applicant must:

a reveal any and all offences under the 2002 Act in which it may have been involved;

b provide full, frank and truthful disclosure of all the evidence known or available to it or under its control, including all records, wherever located, relating to the offences under investigation with no misrepresentation of any material facts; and

c cooperate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions.

In the case of a corporate undertaking, the application must be a corporate act. Applications from directors or employees will not be regarded as having been made on behalf of the undertaking in the absence of a corporate act. Corporate undertakings must take all lawful measures to promote the continuing cooperation of their directors, officers and employees.

19 It does not provide any immunity against civil actions.

20 A completed investigation file is a high standard, so it is often possible to seek immunity even though an investigation is under way provided the file is not capable of being completed.

If the first applicant to request immunity fails to meet these requirements, a subsequent applicant that does meet these requirements can be considered for immunity.

The first stage involves initial contact with the CCPC's designated officer who receives all applications. Contact must be in person or by telephone, and there are time periods during which the officer may be contacted. The applicant should present an outline of the facts of the case and will often initially present the case through its lawyers in hypothetical terms so as to protect anonymity. Applications for immunity are queued and dealt with in the order of receipt. An applicant will be allowed to place a marker for a period to be determined by the officer to retain its place in the queue for immunity until the applicant is in a position to complete its application. Joint applications are not accepted and are invalid.

The second stage involves the granting of a qualified guarantee of immunity. If the applicant proceeds, a description (which can be oral) of the illegal activity must be given to the CCPC. If the CCPC believes that the case falls within this programme, the CCPC will then refer the matter to the DPP seeking a written qualified agreement to grant immunity from the DPP.

The third step involves full disclosure by the applicant and beneficiaries of the qualified immunity. After receiving a written qualified agreement to grant immunity, both the DPP and the CCPC must be informed with sufficient detail and certainty what evidence can be provided by the applicant. In practice, the provision of the information is to the CCPC and not the DPP. Full disclosure is required, and will be conducted on the understanding that neither the CCPC nor the DPP will use the information against the applicant, unless there is a failure to comply.

The applicant must make full disclosure after the applicant has been reminded of its legal privilege against self-incrimination. This will ensure that, should there be a subsequent failure by the applicant to comply with the terms of the immunity agreement, the CCPC in continuing its investigations can then use information given by the applicant under full disclosure.

The fourth step is the conclusion of an immunity agreement. Once the terms of the qualified guarantee have been satisfied, the DPP executes an immunity agreement that will include all continuing obligations.

Failure to comply with any of the CIP's requirements may result in the DPP revoking the agreement. The CCPC could possibly then continue its investigation but start investigating the applicant that has failed to meet its obligations.

A failure to comply with requirements under the agreement could include failure to fully promote the complete and timely cooperation of its employees, failure to disclose all offences, and failure to provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

Information becoming available pursuant to the CIP will not be disclosed other than in accordance with the normal practices and procedures pertaining to criminal investigations and prosecutions. In particular, information may be disclosed when:

a the applicant disclosed it publicly;
b the law requires it;
c the administration and enforcement of the 2002 Act requires it;
d the prevention of a criminal offence makes disclosure necessary; or
e the disclosure is made during an investigation or subsequent proceedings.

ii Planned amendment to the CIP

The CCPC and the DPP are discussing possible amendments to the CIP. The CCPC issued a consultation paper in 2010, and it is expected that the new programme will be adopted shortly.

V PENALTIES

The penalties for breaching Irish competition law are severe. In general, individuals may be jailed for up to 10 years with fines being 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 and/or declarations. These penalties are real in that the courts have seen convictions (e.g., 18 in the *Oil* cartel), but people have not served prison 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 business and private property (e.g., homes). It 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 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 Gardaí. 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 conducted following complaints to the CCPC by third parties.

The CCPC may visit at any time during normal working hours, which may or may not be first thing in the morning, and visits can last an entire day or longer. The CCPC usually 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 group reads through files, diaries and other documents, another group photocopies documents, while a third group 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 copying 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 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). Whether the

CCPC is simultaneously raiding premises of subsidiaries of the business or homes of employees should also be established.

Specialist competition lawyers should be contacted, and they should travel immediately to the organisation's offices. All relevant management personnel, head office and PR team 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 this is privileged. If its 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 team of lawyers – the CCPC has said that it respects in-house privilege.

A second copy of 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. The 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. If they try to copy other files (or seize a computer or laptop), objections should be raised formally 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 as to 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 then they should only answer if the CCPC compels an answer. Before answering, it should be stated the question is being answering under compulsion. Answers must be truthful and accurate because it is an offence to mislead the CCPC; therefore, if an employee does not know the answer to the question, then it is best that they say so. Legal advice should ideally be sought before answering questions but, particularly, questions that could be incriminating. If an employee is cautioned (e.g., by the Gardaí 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 not to 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.

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

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' (whether or not 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. 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, which facilitates private enforcement and assists public enforcement, and the 2014 Act, which merged the Competition Authority and the National Consumer Agency as well as making certain other changes, have been the main recent developments. The 2012 Act increased the maximum fine of €4 million to €5 million for indictable offences, and it 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 where a person is convicted of an offence under the 2002 Act, the court must order the person to pay to the relevant competent CCPC (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 CCPC 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 various documents be given to the jury. The 2014 Act combined the National Consumer Agency and the Competition Authority; altered the thresholds for compulsory merger notifications; changed the rules on media mergers; and made a number of other procedural changes.

As mentioned above, the CCPC and the DPP are in discussions over possible amendments to the CIP. The CCPC issued a consultation paper in 2010.[21] It is expected that the new programme will be adopted shortly.

21 www.tca.ie/images/uploaded/documents/Cartel%20Immunity%20Programme%20Consultation%20Paper.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.

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 and described by these publications as 'one of the market's most accomplished practitioners and is 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'; 'gives clients practical, common-sense advice'; an 'acknowledged guru' with an 'encyclopaedic knowledge'; a 'gifted lawyer'; 'a potent force' and has a 'great record in competition work'. He is said to do 'an incredible job' with 'high levels of commitment to a case'.

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 ever 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 or bodies.

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