

Cartel Regulation

In 45 jurisdictions worldwide

Contributing editor
A Neil Campbell



2015

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Cartel Regulation 2015

Contributing editor
A Neil Campbell
McMillan LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledeu
george.ingledeu@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

© Law Business Research Ltd 2014
No photocopying: copyright licences do not apply.
First published 2000
Fifteenth edition
ISSN 1473-3420

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2014, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global Overview	7	Germany	97
Martin M Toto, Peter J Carney, Mark Powell and Alexandra Rogers White & Case LLP		Thorsten Mäger and Alf-Henrik Bischke Hengeler Mueller	
Australia	9	Greece	104
Michael Corrigan and Ian Reynolds Clayton Utz		Anestis Papadopoulos and Liza Lovdahl Gormsen KPP Law	
Austria	17	Hong Kong	112
Astrid Ablasser-Neuherber and Florian Neumayr bvp Hügel Rechtsanwälte		Natalie Yeung and Mariko Tavernier Slaughter and May	
Belgium	23	Hungary	117
Bruno Lebrun and Laure Bersou De Gaulle Fleurance & Associés		Levente Szabó KLART Szabó Legal	
Brazil	29	India	124
Mauro Grinberg, Leonor Cordovil, Ricardo Motta and Luís Gustavo Lima Grinberg e Cordovil Advogados		Suchitra Chitale C&C Partners (Chitale & Chitale)	
Canada	35	Indonesia	129
A Neil Campbell, Casey W Halladay and Guy Pinsonnault McMillan LLP		HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Anastasia P R Daniyati Assegaf Hamzah & Partners	
China	44	Ireland	135
Susan Ning and Hazel Yin King & Wood Mallesons		Philip Andrews and Damian Collins McCann FitzGerald	
Colombia	52	Israel	142
Emilio José Archila Peñalosa Archila Abogados		Eytan Epstein, Tamar Dolev-Green and Shiran Shabtai Epstein, Knoller, Chomsky, Osnat, Gilat, Tenenboim & Co Law Offices	
Cyprus	57	Italy	150
Pantelis Christofides L Papaphilippou & Co LLC Advocates & Legal Consultants		Rino Caiazza and Francesca Costantini Caiazza Donnini Pappalardo & Associati	
Czech Republic	63	Japan	158
Tomáš Fiala Vejmelka & Wünsch, sro		Eriko Watanabe Nagashima Ohno & Tsunematsu	
Denmark	69	Korea	165
Asser Rung-Hansen DAHL Law Firm		Hoil Yoon and Sinsung (Sean) Yun Yoon & Yang	
European Union	74	Lithuania	172
Anna Lyle-Smythe and Murray Reeve Slaughter and May Hans-Jörg Niemeyer and Hannah Ehlers Hengeler Mueller		Giedrius Kolesnikovas Motieka & Audzevičius	
Finland	84	Malaysia	180
Mikael Wahlbeck, Antti Järvinen and Katja Jaakkola Hannes Snellman Attorneys Ltd		Sharon Tan Suyin Zaid Ibrahim & Co	
France	90	Mexico	187
Pauline de Lanzac and Juliette Hochart Latournerie Wolfrom & Associés		Rafael Valdés-Abascal and José Ángel Santiago-Ábrego Valdes Abascal Abogados SC	
		Netherlands	193
		Jolling K de Pree and Stefan Molin De Brauw Blackstone Westbroek NV	

Nigeria	201	Spain	260
Babatunde Irukera and Ikem Isiekwena SimmonsCooper Partners		Juan Jiménez-Laiglesia, Alfonso Ois, Jorge Masía, Joaquín Hervada and Rafael Maldonado DLA Piper Spain	
Norway	206	Sweden	266
Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA		Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling	
Poland	212	Switzerland	274
Dorothy Hansberry-Bieguńska and Małgorzata Krasnodebska-Tomkiel Hansberry Tomkiel		Marcel Meinhardt, Benoît Merkt and Astrid Waser Lenz & Staehelin	
Portugal	218	Taiwan	282
Mário Marques Mendes and Pedro Vilarinho Pires Marques Mendes & Associados		Mark Ohlson, Anthony Lo and Fran Wang Yangming Partners	
Romania	227	Turkey	288
Mihai Rădulescu and Victor Iacob Rădulescu & Muşoi		Gönenç Gürkaynak and K Korhan Yıldırım ELIG, Attorneys-at-Law	
Russia	233	Ukraine	295
Vladislav Zabrodin and Irina Akimova Capital Legal Services International, LLC		Sergiy Shklyar and Natalia Ivanytska Arzinger	
Singapore	238	United Kingdom	301
Lim Chong Kin and Scott Clements Drew & Napier LLC		Lisa Wright and Vassilena Karadakova Slaughter and May	
Slovenia	245	United States	313
Nataša Pipan Nahtigal and Tjaša Lahovnik Odvetniki Šelih & partnerji, op, doo		Martin M Toto White & Case LLP	
South Africa	252	Quick Reference Tables	322
John Oxenham Nortons Inc			

Ireland

Philip Andrews and Damian Collins

McCann FitzGerald

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Competition Acts 2002 to 2014 (the Act) form the statutory basis for competition law in Ireland.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition and Consumer Protection Commission (CCPC) is the authority with responsibility for cartel investigation. It was established on 31 October 2014 under the Competition and Consumer Protection Act 2014 (the 2014 Act). It replaces, and is an amalgamation of, the Irish Competition Authority (TCA) and the National Consumer Agency.

The CCPC is an independent statutory body responsible for applying Irish and EU competition law in Ireland, as well as informing the government, public authorities, businesses and the wider public about competition and consumer protection issues. The CCPC investigates alleged breaches of the Act, and can either itself bring a summary prosecution in the District Court or, for more serious cases, recommend prosecution on indictment to the Director of Public Prosecutions (DPP). To date, all prosecutions of cartel cases have been brought by the DPP.

The CCPC is assisted by a detective sergeant seconded from the Irish police force. It is also assisted by the police force at other times, such as during searches. Since 2007, the Irish sectoral telecommunications regulator (ComReg) has shared enforcement responsibility in telecommunications matters.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The 2014 Act, which came into operation on 31 October 2014, along with establishing the CCPC, introduced a number of enhancements to powers of officers of the CCPC and the Irish police force in cartel investigation and enforcement. The key enhancements to the cartel investigation regime are as follows:

- the extension of the period of time for which materials seized during an investigation can be retained;
- materials found during the course of an investigation over which privilege has been claimed may be seized, pending a court determination of the status of the materials; and
- the hard-core cartel offence (price fixing, output limitation, market sharing, bid rigging) is subject to the Criminal Justice Act 2011 (CJA), which contains measures by which the police can tackle white-collar crime.

The enhancements are addressed in further detail in the relevant sections below.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The national prohibition on anti-competitive agreements – set out in section 4 of the Act – adopts verbatim the wording of article 101 TFEU (omitting the element of effect on interstate trade).

Thus, section 4(1) of the Act prohibits:

agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State agreements that prevent, restrict or distort competition in the State or in any part of the State.

Further, in a manner identical to the approach in article 101(3) TFEU, arrangements falling within section 4(1) of the Act may nevertheless be permitted if those arrangements:

... contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not (a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives, and (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. Section 4(5).

Pursuant to section 4(2) of the Act, an arrangement ‘shall not be prohibited under subsection (1) if it complies with the conditions referred to in subsection (5)’.

Attempt is also made in the Irish legislation to introduce a US-style per se competition law offence in respect of breaches considered unequivocally harmful to consumers. According to the Act, agreements between ‘competing undertakings’ to directly or indirectly fix prices, limit output or sales, or share markets or customers, are presumed to have the object of preventing, restricting or distorting competition unless the defendant proves otherwise (section 6(2) of the Act).

The Act provides for different, more stringent sanctions for such ‘hard-core’ cartel offences as compared to those for non-hard core breaches of section 4 and article 101 TFEU. Thus, on conviction on indictment for a hard-core offence, fines of €5 million or 10 per cent of turnover for a business may be imposed and a similar fine or ten years’ imprisonment, or both for individuals. For non-hard core offences, there is no scope for imposition of prison sentences (whereas, in previous Irish legislation, in theory at least such offences were punishable with up to two years’ imprisonment), but the individual and company fines remain.

The purpose of this approach is to assist criminal cartel enforcement by singling out hard-core cartels and limiting the possibility for defences in respect of such cartels based around claimed business purposes, anti-competitive harms, pro-competitive benefits, or overall competitive effects.

In deference to the doctrine of equivalence, the Act purports to adopt this dichotomy in treatment of so-called ‘hard-core’ and ‘non-hard-core’ offences to both breaches of section 4 of the Act and article 101 TFEU.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

In the context of cartel-type activity, no industry-specific offences or defences exist.

It is a defence to show, pursuant to section 4(5) of the Act or article 101(1) TFEU, that the alleged anti-competitive arrangement contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

Section 6(5) of the Act provides that, in the context of proceedings for a cartel offence under section 6(1), it shall be a good defence to prove that acts were done pursuant to a determination or direction by a statutory body.

6 Application of the law

Does the law apply to individuals or corporations or both?

Irish cartel law applies to both individuals and corporations.

Section 8(6) of the Act provides that where an undertaking commits an offence under section 6 and the conduct in question was authorised or consented to by a person being a director, manager or other similar officer of the undertaking, that person as well as the undertaking shall be guilty of an offence. In practice, the Irish prosecution authorities have typically sought to prosecute both company directors and companies suspected of participation in cartel activity.

In *DPP v Hegarty*, the defendant challenged proceedings taken against him on the basis that the prosecution had not first secured a conviction against his employers. The defendant argued that he could not be convicted unless his employer had first been convicted. In July 2011, the Irish Supreme Court ruled that an individual employee can be tried for a breach of Irish competition law even if his or her employer has not been convicted of an offence.

The Court noted that an 'undertaking' for competition purposes can be a person, a body corporate or an unincorporated body. Further:

there is nothing surprising in the concept of both non-personal undertakings and their managers or officers and like persons being exposed to criminal prosecution arising out of the same abusive conduct. Such persons are separate and distinct legal personalities and therefore no question of double punishment arises.

The Supreme Court also noted that there is no reference to a 'conviction' having been obtained in the relevant section of the Act, rather to an 'offence' having been committed, and that there was no interpretative basis for importing into the section such a condition.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Irish competition rules apply to arrangements that prevent, restrict or distort competition in the state or in any part of the state. As such, conduct that takes place outside the state but gives rise to anti-competitive effects in the state will be caught by the legislation. The Irish authorities have not, to date, sought to prosecute individuals or corporations from outside the state for cartel conduct with anti-competitive effects in the state.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Initiation

Investigations can be initiated as a result of a complaint to the CCPC, on the CCPC's own initiative or as a result of a leniency application under the CIP.

The gathering of evidence

Once the CCPC has decided to initiate an investigation, it may gather evidence by issuing a written request for information, issuing a witness summons or conducting a dawn raid (see question 9 for further details). Where an investigation has been initiated as a result of a leniency application, the CCPC will look to the applicant to provide as much information and assistance as possible to further its investigation.

Legal proceedings

While the CCPC may take either civil or criminal action, cartel activity is typically treated as a criminal matter. Where the CCPC considers the matter to be criminal in nature, it may opt for summary prosecution itself in the District Court. This will be before a judge sitting without a jury. In the case of more serious infringements, the CCPC sends a file to the DPP, who will consider whether to prosecute on indictment (and before a jury in the High Court). The civil procedures open to the CCPC are injunctions and declarations from either the Circuit Court or the High Court.

There are no time frames provided for under statute in relation to the carrying out of investigations, and in practice investigations and legal proceedings can span several years.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CCPC's investigative powers are primarily contained in sections 18 and 37 of the 2014 Act. It also has the power to use informal techniques, such as voluntary interviews, and request voluntary responses to information requests, although the use of such techniques is unlikely in the case of a criminal cartel investigation.

The CCPC has the power to summon witnesses. The powers contained in the Act to summon witnesses, examine witnesses under oath and require the production of any document within the control or possession of witnesses are regularly used during investigations. Witnesses summoned to appear before the CCPC have the same rights and privileges as witnesses appearing before the High Court. They are also subject to the same penalties for failure to comply, and non-compliance may be subject to sanctions in the form of fines or imprisonment. In Ireland, the privilege against self-incrimination has constitutional status. If a witness is asked a question that could incriminate him or her, he or she should enquire whether he or she is being compelled to answer under the Act. If he or she answers under compulsion, the answers will not be admissible in proceedings against him or her.

The CCPC may also conduct dawn raids. These powers permit authorised officers to enter, by force if necessary, and search business places and vehicles. The powers also extend to the private dwellings of directors, managers and staff. The CCPC officers may be accompanied by members of the police force for this purpose.

To enter premises, the authorised officers must be in possession of a warrant issued by a judge of the District Court in the area where the investigation is to take place. When conducting a dawn raid investigation, authorised officers may seize and retain any books, documents or records relating to the business, and take any other steps necessary for preserving or preventing interference in these items. Officers may also gather information from directors and employees in relation to the carrying on of the business or gather any other information they may reasonably require, including books, documents or records. Since the introduction of the 2014 Act, items taken during the course of a dawn raid may be retained for a 'reasonable' period (or, if enforcement proceedings are commenced, until the conclusion of proceedings).

In addition, the 2014 Act introduced a new procedure for the seizure of legally privileged materials. The CCPC may remove materials found during the course of an investigation even where the party being investigated claims privilege. A determination of the High Court is required before privileged legal material may be returned to its recipient (essentially this involves a review by the court of the materials to determine whether they are covered by privilege).

As introduced by the 2014 Act, an authorised officer of the CCPC can attend and participate in the questioning of the arrested cartel suspect while accompanied by a police officer. As mentioned, upon introduction of the 2014 Act, the hard-core cartel offence became subject to the CJA. In practice this means, among other things, that:

- the police investigating the hard-core cartel offence may suspend and recommence the detention of a suspect up to two times over a maximum period of four months;
- the police may question overnight a suspect in certain circumstances, including where the police believe that there is a risk of the destruction of or interference with evidence; and
- it is an offence for 'any person' to fail to disclose to the police as soon as practicable information which he or she knows or believes might be of material assistance to the police in relation to prevention of the commission or the investigation of a hard-core cartel offence.

As a final point, it should be noted that the obstruction of an authorised officer is a criminal offence. It is also an offence pursuant to the CJA 2011 to conceal or dispose of evidence relating to a hard-core cartel offence actually or likely to be under investigation by the police.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Under section 23 of the 2014 Act, the CCPC may, with the consent of the minister, enter into arrangements with foreign competition authorities. The CCPC can also arrange to provide information and assistance to a foreign competition authority. The CCPC is a member of the European Competition Network (ECN), which aims to build an effective legal framework to police undertakings engaging in cross-border anti-competitive behaviour. With respect to enforcement of articles 101 and 102 TFEU, the ECN provides a framework for consultation, exchange of information and assistance between the European Commission (the Commission) and the national competition authorities (NCAs) as well as between individual NCAs, with the aim of consistent and uniform application of articles 101 and 102 TFEU.

The CCPC is also a member of the International Competition Network, which provides a forum for developing best practice in competition law and policy and addressing practical competition concerns.

11 Interplay between jurisdictions

Are there other jurisdictions where there is significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in the jurisdiction?

The main interplay for the CCPC is with the Commission. Cooperation among the network of competition authorities in the EU is governed principally by Regulation No. 1/2003 (the Modernisation Regulation) and the Commission Notice on cooperation within the Network of Competition Authorities.

Authorised officers from Ireland have accompanied officials from the Commission on dawn raids in relation to a number of alleged cartels operating in Ireland.

Since the Modernisation Regulation entered into force, the CCPC is also charged with the enforcement of EU competition law. Under the regime, Irish authorised officers may be accompanied by officials from other NCAs and, under article 22 of the Modernisation Regulation, one NCA may ask another NCA for assistance in collecting information on its behalf.

With regard to punishment of cartel activity, it is theoretically possible for a cartel participant to be prosecuted twice, in the first instance for breach of domestic competition law and in the second instance for breach of EU competition law. It is highly likely, however, that either the relevant NCA or the Commission (depending on the particular case) would take the punishment imposed by the other body into consideration.

Cartel proceedings

12 Adjudication

How is a cartel proceeding adjudicated or determined?

The legislation provides that an individual indicted for an offence under section 4 of the Act will be tried before a jury in the Irish Central Criminal Court (the High Court exercising its criminal jurisdiction). Proceedings on indictment can only be initiated by the DPP.

Summary proceedings initiated by the CCPC in the District Court are heard by a judge sitting without a jury.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The onus of discharging the burden of proof in both criminal and civil cases is on the CCPC or the DPP (depending upon who is prosecuting). In civil cases (for the avoidance of doubt, there is no civil administrative sanction or fine regime in Ireland) the burden of proof is 'on the balance of probabilities' (but this varies in the case of injunctions). In criminal actions, the burden of proof is 'beyond reasonable doubt'. Certain presumptions are contained in the Act to aid the CCPC's or the DPP's prosecution of cartels. There are certain documentary presumptions as well as a presumption that the object of any hard-core arrangement is to restrict competition. In such instances, the burden of proof is reversed and the onus then lies on the defendant. There is also a rebuttable presumption that any director or any person employed by the undertaking who had decision-making authority consented to the breach of the competition rules unless proof to the contrary is established.

14 Appeal process

What is the appeal process?

Criminal

In criminal trials, decisions of the District Court can be appealed to the Circuit Court. The appeal hearing will take the form of a *de novo* hearing. The only exception to this is where the appeal is in relation to the sentence only. In this situation, the Circuit Court need only re-hear as much of the case as is necessary. There is a right of appeal from jury trials to the Court of Appeal (ie, from the Circuit Court and the Central Criminal Court).

In certain circumstances, an appeal from the Central Criminal Court may be made directly to the Supreme Court. The DPP may also appeal to the Court of Appeal on grounds of undue leniency.

Civil

The civil procedures open to the CCPC are injunctions and declarations from either the Circuit Court or the High Court. A civil decision of the Circuit Court may be appealed to the High Court on a point of law. Similarly, a decision of the High Court may be appealed to the Court of Appeal (except where the right of appeal is limited expressly by law). A final appeal to the Supreme Court is possible where threshold criteria are met. It is possible in limited circumstances to appeal directly from the High Court to the Supreme Court.

Decisions of administrative bodies, such as the CCPC, may be judicially reviewed whereby a claimant will typically request an order quashing the decision of the administrative body on the basis that the decision was *ultra vires* the administrative body, or that the administrative body acted unreasonably in coming to its decision. The unreasonableness test used by the Irish courts has a particularly high threshold to overcome, as the courts tend to be reluctant to overturn decisions of expert bodies.

Appeals taken by the CCPC (or by the DPP on the advice of the CCPC) from criminal actions or civil cases may be made under the normal rules of criminal procedure.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

The CCPC may criminally prosecute cartel conduct (summary prosecution), or it may recommend prosecution to the DPP in the case of more serious cartel offences (prosecution by indictment).

On summary conviction

In the case of an undertaking that is not an individual, a fine not exceeding €5,000 may be imposed. In the case of an individual, a fine not exceeding €5,000 or a term of imprisonment not exceeding six months, or both, may be imposed.

On conviction on indictment

In the case of an undertaking that is not an individual, a fine not exceeding €5 million or 10 per cent of turnover (whichever is greater) may be imposed. In the case of an individual, a fine not exceeding €5 million or 10 per cent of the individual's turnover (whichever is greater) or a term of imprisonment not exceeding 10 years, or both, may be imposed.

In addition, daily default penalties apply for continued contravention.

To date, a total of 33 criminal convictions have been secured in respect of cartel conduct. Criminal fines in excess of €600,000 and 10 custodial sentences have been imposed. However, the Irish courts have not yet required any individual to actually serve time in prison for cartel offences; all custodial sentences have, to date, been suspended.

In the most recent decision of *DPP v Hegarty* in May 2012, the Court imposed a custodial sentence of two years, the highest to date; however, this sentence was suspended. The Court noted that the only reason this sentence was suspended was because of the length of time that had elapsed since the offence was committed (10 years), and that it would be 'somewhat invidious and certainly unfair' if Mr Hegarty were required subsequently to serve the sentence.

In the earlier case of *DPP v Manning*, the Court imposed a 12-month prison sentence, which was suspended. In sentencing Mr Manning, the trial judge noted that Mr Manning would have served a prison sentence if not for the declining state of his health.

In *DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited*, the trial judge stressed the Irish courts' increasing intolerance of cartel infringements and stated that 'Two years on, I say once more that if the first generation of carteliers have escaped prison, the second and present generation almost certainly will not.'

In 2009, Mr James Burse was sentenced to six-month and nine-month suspended sentences. A total of €80,000 fines were also imposed and Mr Burse was sentenced to and served a 28-day prison term for non-payment of these fines.

The following criminal fines have been imposed by the Irish courts in recent years:

- in 2007, a fine of €30,000 was imposed in the case of *DPP v Manning*;
- in 2009, a fine of €80,000 was imposed on Mr James Burse in the *Citroen Dealers* case;
- in 2009, a fine of €50,000 was imposed in the *Duffy Motors* case; and
- in 2012, a fine of €30,000 was imposed in the case of *DPP v Hegarty*.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The CCPC does not have the power to impose administrative fines or other sanctions. Fines can only be imposed by a court. Civil injunctions and court orders declaring that the provisions of the Act have been breached by an undertaking may be sought by the CCPC.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

In *DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited*, the trial judge summarised the approach the Irish High Court will take with respect to cartel activity and sentencing practices in Ireland:

In Irish law it has been established for many years that any sentence imposed must reflect the crime and the criminal. It must be rational in its connection to both. It must be proportionate. Therefore, factors such as the seriousness of the offence (culpability, harm, behaviour, etc), the circumstances in which it is committed and the prescribed punishment must be looked at. As of course must be any aggravating circumstance as well as any mitigating one. The latter would include, if the evidence so established, matters such as a guilty plea, cooperation, remorse, absence of previous convictions, good character, unlikely to re-offend, etc. This list must be added to by any other individual factor which is legally capable as attracting credit. Having done this exercise the appropriate sentence to fit the crimes and the offender is arrived at.

As previously mentioned, it is also noteworthy that in the case of *DPP v Manning*, in sentencing Mr Manning, the Court considered as relevant his declining state of health.

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements? If so, what is the usual time period?

No. As outlined in questions 15 and 16, the only sanctions imposed with respect to cartel infringements are the imposition of fines and custodial sentences.

However, under European public procurement legislation implemented in Ireland, contracting authorities are required to exclude from a tender process persons who have been convicted of an offence involving, inter alia, 'participation in a prescribed criminal organisation'. It is untested whether this provision would apply in the context of a person or undertaking that has been convicted of a cartel offence.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As outlined in questions 15 and 16, the Act provides for criminal sanctions only for breach of the competition rules.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The reliefs available to private litigants include injunctions, declarations and damages (including exemplary damages).

Section 14 of the Act provides, inter alia, that private actions for damages may be taken by any individual who is aggrieved as a result of any agreement, decision or concerted practice that is prohibited under the Act. The individual has a right of action against the undertaking party to the arrangement and against any director, manager or other officer of that undertaking. Where cases have been successfully brought by the CCPC, private parties suing for damages can rely on the fact that the parties have already been found by the courts to have infringed the Act and will not be required to separately prove that the infringement has occurred. This is designed to facilitate follow-on damages actions. To date, very few private actions have been taken in the Irish courts.

The legislation provides for any person who is aggrieved in consequence of an infringement to claim damages before the Irish courts. While this has not been addressed by an Irish court it appears that indirect purchasers, customers or competitors could bring follow-on actions insofar as they can establish that they have been aggrieved. Defendants may be made to pay the cost of CCPC investigations.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

There is no mechanism for a class action in Ireland. However, there remains limited scope within the rules of procedure of the Irish courts to join several causes in the same action. Order 15(9) of the Rules of the Superior Court states that: 'Where there are numerous persons having the same interest in one case or matter, one or more of such persons may sue or [...] in such cause or matter, on behalf [...] of all persons so interested.'

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The CCPC, in conjunction with the DPP, operates the Cartel Immunity Programme (CIP), which offers full immunity from prosecution to the first successful applicant. The programme is not a statutory regime, rather it is an administrative programme designed to assist the CCPC in tackling cartel behaviour. Applications for immunity under the CIP are made

to the CCPC. The CCPC may recommend to the DPP that an undertaking receives immunity, but only the DPP can grant immunity from prosecution. Under the CIP, there is no leniency available to any individual or undertaking other than full immunity for the first successful applicant.

Immunity is available only to the first applicant to provide the CCPC with evidence of cartel behaviour and the evidence provided must be sufficiently strong to merit the grant of immunity. Certain conditions must be satisfied before the CIP may be availed of. The applicant:

- must take certain steps, as agreed with the CCPC, to terminate its participation in the anti-competitive activity;
- must not alert the other members involved in the anti-competitive activity that it has applied for immunity;
- must show that it has not, nor have any of its relevant past or present employees, coerced another party to participate in the anti-competitive activity, nor must it have acted as the instigator or have played the lead role in the illegal activity; and
- must provide complete and timely cooperation throughout the course of the CCPC's investigation and any subsequent prosecution. In particular, the applicant must reveal any offences in which it may have been involved, and provide full, frank and truthful disclosure and any and all supporting evidence and information.

The applicant may initially approach the CCPC through its legal adviser on a hypothetical, no-names basis to protect its anonymity when attempting to determine if it would qualify for immunity. Accordingly, this allows an applicant to place a marker to protect its position (for a period determined by the designated officer) pending completion of the immunity application. First contact is typically made by telephone (on +353 87 763 1378) with the CCPC's designated officer between the hours of 10am and 4pm Monday to Friday (except public or bank holidays).

It appears unlikely that the proposed removal of the prohibition on a cartel ringleader availing of immunity will materialise in the revised CIP, which is expected to be published shortly. It should be noted that a body corporate making an application for immunity must use a corporate act to do so.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The CCPC will make a recommendation to the DPP to grant immunity only if the applicant is the first to come forward to confess involvement in cartel activity and to satisfy the conditions of the CIP (see question 22). Joint applications are not accepted.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Neither immunity nor leniency are available to the second applicant coming forward, and there is no formal immunity plus or amnesty plus regime. However, if the first applicant fails to meet all the requirements of the CIP, a subsequent applicant who does meet the requirements may be granted immunity. Cooperation with the CCPC may potentially be viewed as a mitigating factor by the court when imposing fines or sentencing, although this has not been addressed by the Irish courts to date.

25 Approaching the authorities

Are there deadlines for making or completing an application for immunity or leniency? Are markers available and what are the time limits and conditions applicable to them?

The first-in rule and the CCPC's marker system dictate that an applicant who is considering immunity should contact the CCPC as soon as is practicable. As noted in question 22, the applicant's legal adviser may contact the CCPC on a no-names basis in the first instance. No deadlines exist in applying for immunity. An applicant will be allowed to initially apply for a marker with the CCPC's immunity officer, which protects the applicant's place in the queue for immunity for a set period of time. During this time,

the applicant must gather the necessary information and evidence needed to complete its application for immunity.

Where a marker is granted the immunity officer will then determine the period within which the applicant has to perfect the marker by submitting its application for immunity. Where a marker is perfected within the allocated set period, the information provided will be deemed to have been submitted on the date when the marker was granted. If a marker expires before it is perfected, the immunity officer will consider any other applications for a marker or for qualified immunity. A former holder of an expired marker may re-apply, but its original place in the queue is not protected. Joint applications for immunity by two or more conspirators will not be accepted.

Subject to the requirements set out at question 26, the CCPC will recommend immunity to the DPP if the applicant is the first to come forward before the CCPC has gathered sufficient evidence to warrant a referral of a completed investigation file to the DPP.

26 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

In addition to the points set out at question 22, to benefit from the Irish leniency programme, the following conditions must also be satisfied by the applicant:

- cooperate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions; and
- in the case of a corporate undertaking, the application for immunity must be a corporate act. While applications from individual directors or employees will be considered, they 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 for the duration of the investigation and any ensuing prosecutions.

As noted in question 24, 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.

There is no scope under the CIP for leniency or immunity to be granted to subsequent cooperating parties.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

The CCPC will not disclose information acquired by it in the course of its investigation, except in accordance with the normal practice and procedures pertaining to criminal investigations and prosecutions, in particular, if disclosure is:

- required by law;
- used to administer and enforce the Act;
- necessary to prevent the commission of a criminal offence;
- made public by the applicant; or
- made in the course of an investigation or subsequent proceeding.

An applicant cannot request that its identity, or any information disclosed, remains confidential during the investigation or subsequently in any proceedings that may be initiated by the CCPC or the DPP.

28 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Plea bargaining is not a feature of Irish criminal law.

The CCPC, however, may reach a settlement with members of a cartel. In the event that legal proceedings have already been initiated, this may be done by a court-sanctioned settlement. Such was the case in the proceedings (civil proceedings in this case) involving the Licences Vintners Association and the Vintners Federation of Ireland, and in the recent *Irish*

Medical Organisation case. The other method of settlement is by way of negotiated agreement directly between the CCPC and the alleged members of the cartel. Such a settlement was reached in the case of the Irish Hospital Consultants Association. Although there was no court action involved, the settlement agreements were legally enforceable and binding. In neither case did the settlement amount to an admission of liability.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

Any person involved in cartel activity may offer to cooperate and seek immunity from the CCPC. An undertaking may choose to seek immunity on behalf of its employees (present and past), including directors and officers. Employees not having the role of either director or officer of the undertaking may approach the CCPC on their own behalf.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

See question 22.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

A review of the CIP is under way and a revised programme is expected to be adopted in 2014. The stated aim of the review is to ensure that the programme reflects best international practice, including the updated ECN Model Leniency Programme. The 2013 Annual Report of the TCA states that the Competition Authority the revised programme is due to be adopted during 2014.

Defending a case

32 Representation

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

There is no specific legislation governing the representation of individuals or undertakings appearing before the CCPC or before the Irish courts. However, during 2004, the TCA published a notice opining that where the same lawyer proposed to represent more than one person in a matter, and in circumstances where the TCA held the belief that it would adversely affect the investigative process, it could permit the lawyer to appear on behalf of one person only. The Law Society of Ireland challenged the TCA's notice, which was subsequently quashed by the High Court on the basis

Update and trends

The 2014 Act has introduced a number of significant enhancements to the cartel enforcement regime in Ireland. In particular, by bringing the hard-core cartel offence within the scope of the CJA 2011, the role of the Irish police force in cartel enforcement has been enhanced. It remains to be seen whether these powers will be utilised in cooperation with CCPC-led investigations, separately from CCPC investigations or indeed at all.

that it was both unconstitutional and contravened article 6 of the European Convention on Human Rights. The High Court held, however, that in certain limited circumstances, an individual's preferred legal representative could be denied by the TCA.

As an employee may be personally liable to criminal prosecution under the provisions of the Act, the interests of a company and of its employees may not be aligned. In such circumstances, it will typically be prudent for employees to seek alternative legal representation.

33 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The same factors and considerations outlined in question 32 also apply in the case of corporate defendants.

34 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

Yes. Corporations may pay both legal fees and any financial penalties imposed on employees.

35 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Penalties and fines are non-tax deductible under Irish law. For an amount to be tax-deductible it must be incurred wholly and exclusively for the purpose of trade, it must be revenue in nature (not capital) and the deduction must not be specifically disallowed by law. Criminal fines imposed by a court for membership of a cartel are therefore not tax-deductible under Irish law.

Private damages meeting the above criteria may be tax-deductible. There are no judgments setting out whether private damages incurred through membership of a cartel are tax-deductible. It would, nonetheless, appear difficult to argue that membership of a cartel, being a criminal activity, is an activity undertaken wholly and exclusively for the purpose of trade.

MCCANN FITZGERALD

Philip Andrews
Damian Collins

philip.andrews@mccannfitzgerald.ie
damian.collins@mccannfitzgerald.ie

Riverside One
Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 829 0000
Fax: +353 1 829 0010
www.mccannfitzgerald.ie

36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

There is no express provision requiring an Irish court to take this into account. It is likely that other jurisdictions would apply penalties proportionate to the effect on competition in their own jurisdiction. Therefore, it is unlikely that an Irish court would take such penalties into account.

The common law principle of double jeopardy in relation to the decisions of foreign courts is, however, recognised in Irish criminal proceedings. This principle may, therefore, be applied in relation to criminal sanctions for cartel activity.

37 Getting the fine down

What is the optimal way in which to get the fine down?

Availing of the CIP and observing continuing obligations under the immunity agreement is the optimal way of getting the fine down.

Getting the Deal Through

Acquisition Finance	Dispute Resolution	Licensing	Public-Private Partnerships
Advertising & Marketing	Domains and Domain Names	Life Sciences	Public Procurement
Air Transport	Dominance	Mediation	Real Estate
Anti-Corruption Regulation	e-Commerce	Merger Control	Restructuring & Insolvency
Anti-Money Laundering	Electricity Regulation	Mergers & Acquisitions	Right of Publicity
Arbitration	Enforcement of Foreign Judgments	Mining	Securities Finance
Asset Recovery	Environment	Oil Regulation	Ship Finance
Aviation Finance & Leasing	Foreign Investment Review	Outsourcing	Shipbuilding
Banking Regulation	Franchise	Patents	Shipping
Cartel Regulation	Gas Regulation	Pensions & Retirement Plans	State Aid
Climate Regulation	Government Investigations	Pharmaceutical Antitrust	Tax Controversy
Construction	Insurance & Reinsurance	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Insurance Litigation	Private Client	Telecoms and Media
Corporate Governance	Intellectual Property & Antitrust	Private Equity	Trade & Customs
Corporate Immigration	Investment Treaty Arbitration	Product Liability	Trademarks
Data Protection & Privacy	Islamic Finance & Markets	Product Recall	Transfer Pricing
Debt Capital Markets	Labour & Employment	Project Finance	Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



iPad app

Available on iTunes



Cartel Regulation
ISSN 1473-3420



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law