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## Submission on the Competition Adjudication Rules and Guidelines

Competition and Consumer Protection Commission

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## About the Law Society

The Law Society of Ireland (the **Law Society**) is the educational, representative and professional body of the solicitors' profession in Ireland.

The Law Society's main statutory functions in relation to the education, admission, enrolment, and discipline of the solicitors' profession are provided by the *Solicitors Acts 1954 to 2015*. These statutory functions are exercised by the Council of the Law Society or by the various committees, task forces and working groups to which the Council may delegate certain statutory functions. A separate organisation - the Legal Services Regulatory Authority - is responsible for regulating the provision of legal services by legal practitioners.

The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

## Introduction

The Law Society welcomes the Competition and Consumer Protection Commission (the **CCPC**) Call for Input on the CCPC's Draft Rules for Competition Adjudication Oral Hearings (the **Draft Rules**) and draft Guidelines on the Conduct of Competition Adjudication Proceedings (the **Draft Guidelines**) and is pleased to submit these comments.

We focus here on the Draft Rules, given their priority, but we trust our comments may also be helpful in informing the CCPC on possible changes to the Draft Guidelines.

CCPC rules for competition adjudication oral hearings must fully respect fundamental due process rights of defendants, including the right to an oral hearing, to cross-examine witnesses, to have cases tried in public, to be held equal before the law, and to benefit from standard and fair evidentiary safeguards. The Draft Rules and Draft Guidelines concern national enforcement of EU competition law, including Article 101 of the Treaty on the Functioning of the EU (the **TFEU**) and Article 102 TFEU, and therefore involve implementation of EU law for the purposes of Article 51(1) of the Charter of Fundamental Rights of the European Union (the **Charter**). Accordingly, we have also provided comments regarding consistency of the Draft Rules with the Charter, as well as Irish constitutional law requirements.

This Submission has been prepared with the input of the Law Society's Business Law Committee.

## Summary of Recommendations

The Law Society recommends that the Draft Rules should be amended to ensure that:

1. A decision to forego an oral hearing will be taken in exceptional circumstances only and subject to due process;
2. Greater clarity is provided as to the special or exceptional circumstances when oral hearings may not be held in public;
3. Greater clarity is provided as to when remote hearings may be held;

4. Fundamental equality-before-the-law and equality-of-arms principles are respected; and
5. Evidential rules, particularly regarding admissibility of documentary evidence, are not unduly prejudicial to the defence.

## 1. Right to an oral hearing/ Right to cross-examine witnesses

### (a) Issue

According to section 15(U)(2) of the Competition Act 2002 as amended (the **2002 Act**), an adjudication officer *may* conduct an oral hearing where the adjudication officer “... *considers it necessary to resolve an issue of fact or otherwise enable the adjudication officer to make a decision.*”

Proposed Rule 3.2 states in this regard that “[w]ithout prejudice to the generality of section 15U(2) of the 2002 Act, an adjudication officer may, in their discretion, or at the request of a party, convene an oral hearing if they are satisfied that it is necessary to do so to make a decision under section 15X of the 2002 Act.”

The right to an oral hearing is protected under Article 47(2) of the Charter of Fundamental Rights of the EU, which provides for the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, as well as under the Irish Constitution (See, e.g. *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General*).<sup>1</sup>

It follows that, as a general rule, counsel for the defendant/respondent should always be permitted to address adjudication officers directly, both through written submissions and in face-to-face proceedings (i.e. oral hearings). This is particularly the case given that fundamental due process rights, including for instance the right to cross-examine witnesses, arise only if an oral hearing takes place during the adjudication process.<sup>2</sup>

Adjudicator discretion to forego an oral hearing should be exercised only where an oral hearing is highly unlikely to affect the outcome of or basis of the decision and where a detailed reasoned assessment by the Adjudicator has been provided in writing to the parties and fair opportunity to contest the proposal provided, including before the Chief Adjudication Officer.

### (b) Recommendation

The Law Society recommends that the Draft Rules should be amended to ensure that a decision by an adjudication office to forego an oral hearing will be taken only in exceptional circumstances.

Further, we recommend that the Draft Rules should be amended to ensure that a decision by an adjudication office to forego an oral hearing will be taken only where:

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<sup>1</sup> [2021] IESC 24. According to settled case-law, fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law. Further, it is well established that national enforcement of EU competition law, including Article 101 TFEU and Article 102 TFEU, constitutes an implementation of EU law for the purposes of Article 51(1) of the Charter of Fundamental Rights of the European Union (the “Charter”), and therefore that the Charter applies.

<sup>2</sup> See section 15V(9)(b) of the Act, which provides that “[a]t any oral hearing before an adjudication officer, there shall be a right to cross-examine witnesses and call evidence in defence and reply.”

- (i) an adjudication officer has determined in writing on the basis of a reasoned decision that oral hearing is highly unlikely to affect the outcome of or basis of the decision; and
- (ii) where a detailed reasoned assessment by the Adjudicator has been provided in writing to the parties and the parties have had fair opportunity to contest the proposal.

## 2. Right to a hearing in public

### (a) Issue

According to section 15(V)(10) (a), an oral hearing “...shall be held in public unless the adjudicator is satisfied that, given the existence of special circumstances ...the hearing or part of the hearing should be held otherwise than in public.”

According to Draft Rule 3.20, oral hearings will be held in public “...unless the adjudication officer is satisfied that special circumstances exist (including where commercially sensitive information is given or likely to be given in evidence) such as to justify the oral hearing of part thereof being conducted otherwise than in public.”

Fundamental EU and Irish constitutional principles require that oral hearings be held in public, absent extraordinary circumstances. Rule 3.20 should therefore set out more clearly, and preferably in an exhaustive fashion, when oral hearings may not be held in public.

More specifically, given the inherent nature of competition law cases, it is highly likely that most if not all cases under adjudication will involve some commercially sensitive information. To provide for *in camera* or private, non-public hearings in cases involving commercially sensitive information could well result, therefore, in most if not all oral hearings being held in private.

We note in this regard that adjudication officers have “... the same powers, rights and privileges as a judge of the High Court when hearing civil proceedings on the occasion of that action including with respect to: (a) the attendance and examination of witnesses on oath or otherwise (including witnesses who are outside the State); (b) compelling the production (including discovery) of records or an identified category or categories of records is a fundamental constitutional requirement” (the 2002 Act, section 15V(6)). It follows that any decision to hold an oral hearing in private or *in camera* should be taken in circumstances akin to when a High Court hearing *in camera* is justified.

In determining the “mode of hearing,” Draft Rule 3.18 states that “[s]ubstantive hearings shall be held in person unless determined otherwise by the adjudication officer.” We also note that, in the absence of any limitation or other criteria, Draft Rule 3.18 appears to provide adjudication officers wide, and arguably excessive, latitude to provide for remote hearings.

### (b) Recommendation

The Law Society recommends that Draft Rule 3.20 should set out clearly, and in an exhaustive fashion, when oral hearings may not be held in public. Further, Draft Rule 3.20 should make clear that private *in-camera* hearings will only take place in exceptional circumstances and that claims that commercially sensitive information will be involved is not a blanket reason to restrict fundamental EU and Irish constitutional requirements for public hearings. At a

minimum, any adjudication officer decision to hold a hearing remotely should be reasoned and in writing, with fair opportunity for the parties, and interested parties (including interested members of the public) to contest, including before the Chief Adjudication Officer.

Similarly, Draft Rule 3.18 should set out what criteria an adjudication officer must apply in deciding to provide for remote hearings, any adjudication officer decision to hold a hearing remotely should be reasoned and in writing, and the parties provided fair opportunity contest, including before the Chief Adjudication Officer.

### **3. Equality before the law: Fair procedural treatment: assuring that the parties have the same procedural rights**

#### *(a) Issue*

Proposed Rule 3.16 provides that an adjudication officer may decide whether a defendant has breached a “*procedural or hearing requirement*” and impose on that defendant “*one or more of the sanctions provided in section 15X(2)(b) of the 2002 Act.*”

Three categories of sanctions are provided for in section 15X(2)(b): (i) structural or behavioural remedies; (ii) administrative financial sanctions; and (iii) periodic penalty payments.

The Law Society questions whether imposition of structural or behavioural remedies and/or administrative financial sanctions as contemplated in Rule 3.16 would exceed the lawful authority of an adjudication officer under the 2002 Act. In our view, the 2002 Act rightly does not allow an adjudication officer to impose either (i) structural or behavioural remedies or (ii) administrative financial sanctions on defendants for breaches of a procedural or hearing requirement, at least in the manner contemplated in Proposed Rule 3.16.

First, imposition of behavioural or structural remedies or administrative financial sanctions of up to 10% worldwide turnover, would likely constitute manifestly disproportionate sanctions for violation of adjudication officer case management directions.

Second, under the 2002 Act, a finding of a breach of a “*procedural requirement*” can only be made after important procedural safeguards are observed, including but not limited to issuance by the CCPC of a statement of objections, opportunity to contest including fair access to the file, and completion and provision to the defence by the CCPC of a full investigation report.<sup>3</sup>

Third, the 2002 Act permits one category of sanctions only for “*hearing requirement*” violations of the type contemplated in Proposed Rule 3.16.<sup>4</sup> These are “*hearing requirement periodic penalty payments*” as defined in the 2002 Act (i.e. payments provided for in section 15AD of the 2002 Act).<sup>5</sup>

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<sup>3</sup> See for instance, section 15L(1)(a)(ii), section 15L(2), and section 15L(9)(a) of the Act.

<sup>4</sup> The Act defines a “*hearing requirement*” as “*a requirement imposed by an adjudication officer ...under section 15V or 15W*” (Section 4(a)). Section 15V, concerning “*admissibility of evidence and rules for oral hearings,*” provides that an adjudication officer may summon witnesses and otherwise has “*the same powers, rights, and privileges as a Judge of the High Court.*” Section 15W, concerning “*powers and offences,*” provides that an adjudication officer may direct parties to answer questions on oath, adduce evidence, and clarify any issue of fact.

<sup>5</sup> A periodic penalty payment imposed per day can be up to 5% of the “*average daily total worldwide turnover*” of the defendant in the last financial year. For a firm with, for example,

While procedural requirements are not defined in the 2002 Act, section 15AD explicitly distinguishes “*hearing requirements*” imposed by an adjudication officer from more serious violations of CCPC investigation powers listed in section 15AD(1)(a) such as: failure to comply with a CCPC search, failure to provide complete and correct response to a CCPC request for information; failure to attend a mandatory CCPC interview; and failure to comply with commitments and/or (structural/behavioural) remedies.<sup>6</sup>

The Law Society also questions whether Proposed Rule 3.16, which applies only to defendants, involves unfairly applying stricter procedural rules to one side only, the defendants. It is likely that this approach conflicts or is inconsistent with the independence of adjudication officers.<sup>7</sup> Adoption of procedural rules that appear stricter on defendants than on the CCPC prosecution could potentially be viewed as running contrary to that independence. That one side to a civil procedure (the plaintiff) benefits from preferable procedural rules, and the other (the defence) is subject to more onerous ones does not appear consistent with an impartial and independent procedure.

We also question whether this approach may be compatible with fundamental principles of Community law, including as set out in Article 20 and 21 of the Charter. Equality before the law and right of non-discriminatory treatment have also been recognised by the European Court of Justice as basic principles of Community law ).<sup>8</sup>

We also note that the 2002 Act explicitly contemplates the possible imposition on defendants of daily or other periodic penalties for violation of case management directions.<sup>9</sup> While the 2002 Act allows for such penalties, however, it does not require adjudication officers to adopt

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€365m worldwide turnover in the last financial year, a daily fine of up to €50,000 could be imposed.

<sup>6</sup> Section 15AD provides for periodic penalty payments in respect of two different categories of violations:

- (i) *for serious violations*: section 15AD(1)(a) violations of CCPC investigation powers such as: (a) failure to comply with a CCPC search, (b) failure to provide complete and correct response to a CCPC request for information; (c) failure to attend a mandatory CCPC interview; and (d) failure to comply with commitments and/or (structural/behavioural) remedies; and
- (ii) *for less serious violations*: section 15AD(1)(b) violations of adjudication officer “hearing requirement” case management directions.

<sup>7</sup> The Act requires adjudication officers to be independent. We note in this regard that the long title to the Act refers to “... *the appointment and empowerment of independent adjudication officers*” (emphasis added). Further, the Act stipulates that adjudication officers “*shall*” be independent in the performance of their functions (section 15P(1)(a)).

<sup>8</sup> According to settled case-law, fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law. Further, it is well established that national enforcement of EU competition law, including Article 101 TFEU and Article 102 TFEU, constitutes an implementation of EU law for the purposes of Article 51(1) of the Charter, and therefore that the Charter applies. See judgment of 13 November 1984, Case 283/83 Racke [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 EARL [1997] ECR I-1961, and judgment of 13 April 2000, Case C-292/97 Karlsson [2000] ECR 2737.

<sup>9</sup> A hearing requirement periodic penalty may be imposed by an adjudication officer following issuance of a notice stating the adjudication officer’s intention to impose a periodic penalty payment from a specific date if the defendant has not complied by then and giving the daily amount to be imposed (Section 15AD(b)). Unlike other periodic penalty payments, a hearing requirement can be imposed by an adjudication officer “on his or her own motion” (Section 15AD(4)(b)). In contrast, any other type of periodic penalty payment necessitates a CCPC investigation, including a statement of objections and other due process rights.

a generalised approach to such penalties, particularly not via a generally applicable procedural rule. It is unclear whether Draft Rule 3.16 is defensible, where the 2002 Act effectively permits adoption of rules that would apply equally and fairly to both the CCPC prosecution and the defence. We also acknowledge that it is an offence for both the defence or the CCPC prosecution to violate “hearing requirements” (section 15w(5)).<sup>10</sup>

*(b) Recommendation*

The Law Society recommends that Draft Rule 3.16 be deleted on the grounds that it may conflict with an adjudication officer’s duty of independence and may violate fundamental due process rules of EU law and the Irish Constitution.

## **4. Rules of Evidence**

*(a) Issue*

Proposed Rule 4.7 concerning admissibility of document statements as evidence of fact appear to allow, at adjudication officer discretion, relatively serious erosion of the normal rules of evidence regarding admissibility of documentary evidence.<sup>11</sup>

The Law Society notes that Draft Rule 4.7 would allow an adjudicator to admit, as evidence of fact, statements in documents without the need for corroborating witness testimony from those involved in writing the documents and that, from Draft Rule 4.8, any document containing a statement “*that relates to*” to competition law violation is potentially so admissible.<sup>12</sup>

We also recognise that Draft Rule 4.11 states that “...*in estimating the weight, if any, to be attached to evidence admitted by virtue of these Rules and/or the 2020 Act, the adjudication officer shall consider all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.*”

In directing an adjudication officer, when estimating the weight of evidence, to “*consider all the circumstances from which any inference can reasonably be drawn,*” we question if Draft Rule 4.11 provides enough of a basis to justify unfair and excessive reliance on circumstantial evidence, to the detriment of business.

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<sup>10</sup> Section 15W(5) provides that it is an offence for any “person” (including an authorised officer of the CCPC) to fail to comply with adjudication officer case directions and procedural requirements in a relatively broad array of cases. Section 15W(12)(a) permits an adjudication officer to refer to the DPP any suspected breach of a hearing requirement.

<sup>11</sup> Proposed Rule 4.7 states that “[i]f a document contains a statement by a person asserting that an act has been done, or is, or was, proposed to be done, by another person, being an act that relates to a regulatory breach (the “relevant act”) then, at the adjudication officer’s discretion, that statement shall be admissible at the oral hearing as evidence that the relevant act was done by that other person or was proposed (at the time the statement was made, or, as the case may be, at a previous time) to be done by him or her.”

<sup>12</sup> Proposed Rule 4.8 states that “[f]or the purposes of Rule 4.7 “regulatory breach” means (a) the entry into or the making or implementation of an agreement or decision, or the engaging in of a concerted practice, the subject of proceedings under the 2002 Act, or (b) the doing of the act or acts that constitute an abuse of a dominant position, the subject of proceedings under the 2002 Act.”

From the foregoing, the Law Society believes that Draft Rules 4.7, 4.8 and 4.11 are unduly prejudicial to the defence case.

*(b) Recommendation*

The Law Society recommends that Draft Rules 4.7, 4.8 and 4.11 be deleted as they are unduly prejudicial to the defence case.

**Conclusion**

The Law Society, and in particular our Business Law Committee, appreciate the opportunity to provide this submission to the CCPC on the proposed Draft Rules and Guidelines. We are available to meet with the CCPC to discuss any aspect of this Submission or to discuss this topic more generally.

For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: [PolicyTeam@LawSociety.ie](mailto:PolicyTeam@LawSociety.ie)