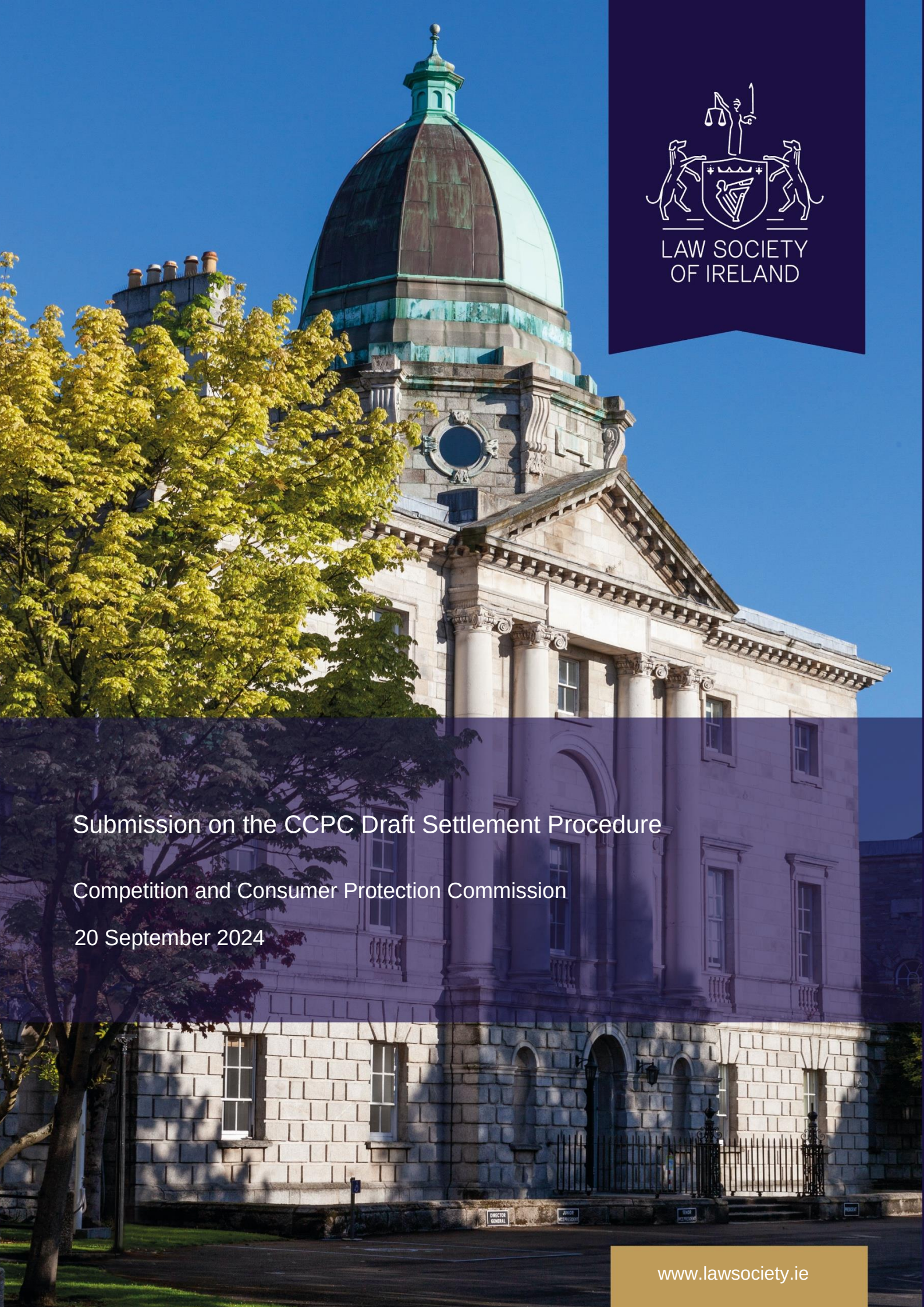

LAW SOCIETY OF IRELAND

Submission on the CCPC Draft Settlement Procedure

Competition and Consumer Protection Commission

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www.lawsociety.ie

Submission on the CCPC Draft Settlement Procedure

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 delegates those 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 delivers high-quality legal education and training and also places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion.

Introduction

The Law Society welcomes this opportunity to participate in the Public Consultation on the CCPC's Draft Settlement Procedure, *Procedure for settlement of investigations into suspected infringements of relevant competition law* (the **Draft Settlement Procedure**), and we commend the Competition and Consumer Protection Commission (the **CCPC**) for proposing to adopt a formal and written Settlement Procedure, and for conducting this public consultation. We note that similar procedures are already successfully operated in other jurisdictions and by the European Commission.

1. Settlement Procedures

Settlements can provide benefits to the CCPC, cooperating parties, the courts, victims, and the public at large by persuading alleged competition law violators – through the promise of transparent, proportional, expedited, certain, and final dispositions – to cooperate early and accept responsibility for their alleged conduct. Settlements can be a win-win situation for all parties involved.

At the same time, effective enforcement of EU and Irish competition rules by the CCPC must be compatible with full regard to the parties' rights of defence, which constitutes a fundamental principle of Irish and EU law to be respected in all circumstances, particularly in antitrust proceedings which may give rise to penalties.

2. Liability in Follow-on Actions

(i) *Transparency*

Parties contemplating settlement want to know what benefits they will gain by settling with the regulator, what risks they run by entering into settlement discussions and how likely they are to actually reach an acceptable settlement. The more transparent the CCPC is in implementing its settlement system, the more likely the CCPC is to induce parties to settle.

For parties to forego key defence rights (including the right to a hearing) by entering into a settlement, they have to be convinced that doing so is in their best interest. The benefits of settling must outweigh the benefits of litigating the case to its legal and procedural end, or a

settlement will not be achieved. Indeed, waiving or forgoing the right to a hearing is a major legal concession that some lawyers will see little or no merit in or at least, in principle, constitute a material disincentive when advising clients on the merits of settling.

Under the Competition Act 2002 as amended (the **2002 Act**), to be approved by an adjudication officer a settlement must contain express acknowledgement by the settling party "…*that it is committing or has committed an infringement of relevant competition law*."[1]

In this regard, the Draft Settlement Procedure states "[*a*] *Settlement Agreement… establishes the existence of an infringement, setting out all the relevant parameters thereof, including the liability of the undertaking*" (at para. 1.13).

Given the potential for follow-on actions, on foot of a settlement, by parties harmed by the anti-competitive conduct admitted to in the settlement (including, for instance, customers of cartel participants who may have been over-charged), a question arises as to when parties may consider a settlement is in their best interest. Fears of follow-on damages actions can provide disincentive to settlement, so transparency as to the prospect of such follow-on actions is important to encouraging settlements.

(ii) *"Trucks Settlement Decision"*

Following a 2016 European Commission settlement with various truck manufacturers (the **Trucks Settlement Decision**[2]), over a thousand follow-on damages claims have been brought in various EU member states in connection with the Trucks Settlement Decision, including in Ireland.

In such follow-on actions, an important 2020 judgment of the UK Court of Appeal held that parties that settle European Commission (the **Commission**) antitrust investigations could not deny facts they had admitted in settling with the Commission – facts that were subsequently recorded in the Settlement Decision.

Defence lawyers will doubtless need to advise parties considering settlement with the CCPC on potential liabilities in follow-on actions. Clear indication, however, of the CCPC's views on the potential use and reliability of admissions made in Settlement Submissions in any such follow-on actions would be important and valuable in the Draft Settlement Procedures. Lawyers advising on the merits of settlement will want and need to know these consequences before advising someone to undertake this process. While this is primarily for legal counsel to advise on, the CCPC's views on this would greatly improve transparency and therefore likely take-up.

3. Scope of Settlement Procedure

(i) *Remedies*

According to section 15M(1) of the 2002 Act, a CCPC settlement may involve "imposition of an administrative financial sanction *or structural or behavioural remedy*" (emphasis added).

The Draft Settlement Procedure does not, however, discuss or deal with the latter situation, namely when a settlement involving a structural or behavioural remedy, without an administrative financial sanction, may be available to parties.

[1] Competition Act 2002, as amended, section 15X(8)
[2] AB Volvo (PUBL) v Ryder Ltd [2020] EWCA Civ 1475. Infringement decision adopted by the European Commission on 19 July 2016 in Case AT.39824 – Trucks.

Rather, the Draft Settlement Procedure appears to suggest that settlement that includes consent to the imposition of structural and/or behavioural remedies may only occur "…*in addition to an administrative financial sanction*" (at para. 3.22). Further, the Draft Settlement Procedure states "[*f*]*or the avoidance of doubt, the CCPC does not consider remedies as providing a way to offset a higher level of administrative financial sanction*" (at para. 3.25).

In law, given section 15M(1)'s express and clear language, it does not seem open to the CCPC to refuse to engage in settlement negotiations if a structural or behavioural remedy, and no financial sanction, is proposed by the parties.

What type of reduced structural or behavioural remedy may be available to parties, and when this may be considered by the CCPC, in return for settlement is something that the Draft Settlement Procedure could also consider in more detail. To advise properly on the merits of settlement, clear advance understanding of potential structural or behavioural remedies likely to be part of the settlement will be essential.

(ii) *Voluntary Nature of Settlement*

According to *Walsh on Criminal Procedure*,[3] the principle "*most relevant to plea-bargaining*" is "… *the fundamental principle that the accused's plea must be voluntary*" (para. 244 19-128, Page 4).

Further, Walsh states:

> "[*i*]*nevitably, the accused will be heavily dependent on the advice of his counsel on what is the most appropriate course for him to take in the matter of a plea. Counsel will have to assess the strength of the prosecution case and consider the sentence likely to be imposed on conviction after a contested trial, compared with what might be imposed on a plea of guilty. He must also consider the scope for a plea bargain with the prosecution and what advantage, if any, that might bring for the accused. Weighing up all of these matters, counsel must advise the accused on what he considers to be the best course of action for the accused in the circumstances, while emphasising that ultimately it is the accused himself who must take the decision*."

We note that the Draft Settlement Procedure states clearly on this front that "[*t*]*he Settlement Procedure is entirely discretionary and voluntary*" (at para. 1.6). Further, the Draft Settlement Procedure states that "… *there is no obligation on an undertaking to enter into any Settlement Discussions where these are offered by the CCPC, nor to enter into any Settlement Agreement arrived at following these Settlement Discussions*" (at para. 2.3).

In cases where Settlement Discussions are commenced before issuance of a Statement of Objections (**SO**), the Summary Statement of Facts or draft SO must set out clearly the full case against the defendant. This must be done in a comprehensive manner sufficient for the defendant to assess properly with their lawyers the strength of the case against them.

We note that the Draft Settlement Procedure states on this front that "[*t*]*he Summary Statement of Facts will not provide a fully detailed analysis as would be the case in an SO*." While a fully detailed analysis as would be the case in an SO is not required in the Summary Statement of Facts, the Summary Statement of Facts must inform the parties of " … *the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the*

[3] 2nd ed., 2016.

attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections."[4]

This is critically important to ensure any settlement arrangement is sufficiently voluntary and informed. That the Draft Settlement Procedure contemplates (at para. 3.12) provision by the CCPC of copies of non-confidential versions of the key pieces of evidence relied on by the CCPC in the Summary Statement of Facts is welcome in this regard.

(iii) *File access requests*

We note that requests for access to file requests "…*may influence the CCPC's ongoing assessment of the procedural efficiencies and resource savings that can be achieved from Settlement*" (at para. 3.12). File access requests necessary for effective rights of defence to be exercised should not, however, result in any adverse implications for parties.

4. Rights of Defence and Due Process Rights

EU and Irish constitutional due process rights require that parties accused of violations of EU and/or Irish competition law "…*are afforded the opportunity to effectively make known their views on the truth and relevance of the facts, objections and circumstances.*"[5] It is important that the Draft Settlement Procedure fully reflects this by affirming that the Draft Settlement Procedure will allow fair opportunity to challenge factual and other material findings of the CCPC.

According to the "Principles of Settlement" in the Draft Settlement Procedure, "[*t*]*he Settlement Procedure is not a forum for debate. The CCPC will not accept attempts by undertakings to use the Settlement Procedure as a forum to debate the merits of the CCPC's investigation, its preliminary views, or the evidence and analysis on which any preliminary views are based*" (at para. 1.10).

Similarly, the CCPC "*will immediately withdraw from Settlement Discussions*" if parties attempt to "*plea-bargain or negotiate.*" As noted below, this wording potentially bestows overly broad powers on the CCPC as the language is not couched in a discretionary manner.

Further, the Draft Settlement Procedure states that parties negotiating a settlement with the CCPC may make only "limited representations" on the CCPC's Summary of Statement of Facts. In this regard, the Draft Settlement Procedure states the CCPC expects that "… *any representations by an undertaking on the Summary Statement of Facts should be limited to (i) confirming the facts and issues addressed in the Summary Statement of Facts; and/or, (ii) point out material factual inaccuracies in the Summary Statement of Facts*" (at para. 3.14).

The Draft Settlement Procedure states that a "core purpose" in issuing the Summary Statement of Facts is *inter alia* "…*to allow the CCPC and the undertaking to come to a common understanding on the facts surrounding [an] alleged infringement*" (at para. 3.15). To ensure any such common understanding fully reflects the defendant's understanding of the facts, the CCPC should be open to fair contest and challenge on the facts.

Reasoned challenges of the Summary Statement of Facts should not be construed as "*attempting to abuse the Settlement Procedure*" allowing the CCPC unilaterally to withdraw from settlement discussions (at para. 3.16). Further, if fair challenge of the Summary

[4] EC Notice on Conduct of Settlement Procedures, OJC167/1 of 2 July 2008, at para. 16.
[5] EC Notice on Conduct of Settlement Procedures, OJC167/1 of 2 July 2008, at para. 4.

Statement of Facts is not allowed this makes surrendering the right to a hearing an even more difficult call from a defence counsel perspective.

5. Settlement vs Plea Bargaining

(i) *Prohibition on plea bargaining and/or negotiation*

As noted above, the Draft Settlement Procedure states that "…*the CCPC will not accept 'plea-bargaining' or negotiation whereby an undertaking seeks to agree to admit its liability and responsibility for an infringement of relevant competition law of lesser gravity, duration, or scope in exchange for the CCPC closing its investigation and imposing a lesser administrative sanction. Where undertakings attempt such bargaining or negotiation, in the ordinary course, the CCPC will immediately withdraw from Settlement Discussions*" (at para. 1.11).

How plea-bargaining or negotiating in this manner differs from legitimate "Settlement Discussions" (referred to in the Draft Settlement Procedure as "*the process of engagement between the CCPC and an undertaking regarding the potential conclusion of a Settlement Agreement*") is not entirely clear, however.

The Settlement Procedure could well be considered plea bargaining to the extent it involves negotiating between a public prosecutor (the CCPC) and defendant on a guilty plea in return for reduced sanction.[6] The distinction between settlement discussions and plea bargaining, to the extent one exists, is not clear here and appears somewhat arbitrary. As there is such a fine distinction between a settlement and plea bargaining, an undertaking may not realise that it has crossed the line and mat find that the CCPC has withdrawn.

Given the severe and consequential implications of engaging in "plea bargaining," allowing the CCPC to terminate discussions immediately, as well as the peremptory nature of the CCPC's withdrawal power as currently expressed, the Draft Settlement Procedure should provide a clearer and more transparent definition of what is considered impermissible plea bargaining. We suggest that if the CCPC wishes to withdraw, the undertaking should be given advance notice to allow it to remedy the position and avoid the withdrawal.

(ii) *Cartel enforcement*

We note that the type of violations a settlement may cover is a key issue commonly addressed during settlement discussions, according to a report of the International Competition Network.[7] This includes "[*w*]*hat is the scope of the alleged cartel conduct covered by the settlement, including the nature of the anticompetitive conduct (e.g. bid rigging, price fixing and/or market allocation), the products or services covered by the conspiratorial agreement, and the duration and geographic scope of the conspiracy*."[8]

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[6] According to Walsh on Criminal Procedure 2nd Ed., "[*p*]*lea-bargaining is the name given to the negotiation between the State and the accused in which the accused tries to secure a lighter sentence in return for a plea of guilty*." Similarly, Charleton and McDermott state that "[*a*] *'plea bargain' is a practice whereby the accused foregoes his right to plead not guilty and demand a full trial and instead uses a right to bargain for a benefit. This benefit is usually related to the charge or the sentence. In other words, plea bargaining means the accused's plea of guilty has been bargained for and some consideration has been received for it. A plea bargain is a derogation from the concept that a judge can only decide a sentence after a hearing in an open court*" (The Bar Review 2000, 5(9), 476 - 481 Constitutional Implications of Plea Bargaining Peter Charleton SC, Paul Anthony McDermott BL).

[7] International Competition Network, Cartel Working Group, Subgroup 1 – General Legal Framework, Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008.

[8] *Ibid*, at page 18.

We understand that it remains the policy of the CCPC to prosecute hard-core cartel activity as crimes. Nevertheless, consistent with the CCPC's *Guidance Note on the CCPC's Choice of Enforcement Regime for Breaches of Competition Law*, the CCPC may opt to prosecute certain cartels via the administrative enforcement route (at para. 5.9).

6. Hybrid Settlements

Settlement is available only in cases the CCPC chooses to pursue via administrative enforcement. Depending on the CCPC's choice of enforcement regime in a particular case, the settlement procedure may thus be open to cartel participants, participants in other multilateral violations, and unilateral anticompetitive conduct.

The Draft Settlement Procedure does not consider in detail how settlements in multi-party investigations may work, particularly so-called "hybrid settlements."[9] Absent greater transparency on the CCPC's proposed approach in such situations, defendants will likely have limited incentive to settle.

We note that the Draft Settlement Procedures states that "[*i*]*n the case of multi-party investigations, the CCPC is more likely to consider withdrawal from the Settlement Procedure where it is clear that Settlement may not be agreed with all other undertakings also involved in that same suspected infringement such that any efficiencies gained from Settlement are likely to be minimal. The CCPC will take a case-by-case assessment in this respect*" (at para. 4.3).

It is unfortunate that this may mean higher risk of the CCPC withdrawing unilaterally from settlement negotiations in multi-party negotiations. This seems to render the path to settlement in such cases less certain and more challenging, potentially making settlements in cartel or other multi-party investigation cases less likely.

We note that, provided due process standards are respected throughout, hybrid competition law settlements are permissible in EU law.[10] Similarly, we understand that such arrangements may be permissible in Irish criminal law proceedings.[11]

7. Discretionary and Voluntary Withdrawal

The Draft Settlement Procedure is somewhat unclear as to when a party to settlement discussions may withdraw.

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[9] Where one or more party under investigation for alleged cartel offences does not settle while others do.

[10] In *HSBC* C-883/19, the ECJ reiterated its previous position, outlined in *Pometon* and followed by the GC in *Scania*, that the Commission must ensure that, in concluding the settlement procedure, the presumption of innocence of non-settling parties is preserved. To ensure this is achieved, the court must analyse the settlement decision and its reasoning "as a whole and in the light of the particular circumstances in which that decision has been adopted." In particular, the ECJ makes clear that "any explicit reference, in certain parts of that decision, to the absence of guilt of the other participants to the alleged cartel would be devoid of sense if other parts of that decision were likely to be understood as a premature expression of their guilt."

[11] Thus, according to Walsh on Criminal Procedure, 2nd Ed. "[*i*]*f two accused persons are charged in the one indictment and one pleads guilty and the other not guilty, the sentencing of the former will usually be adjourned until the conclusion of the trial of the latter. While the judge retains a discretion to proceed immediately to the sentencing of the accused who pleads guilty, it is expected that he will adjourn sentence until such time as both accused persons can be sentenced together. This has the advantage of the judge being in possession of much fuller information about the circumstances in which the crime was committed and the respective contributions of each accused.*"

At one point, the Draft Settlement Procedure states that, a party "…*may withdraw from the process at any time before a referral is made for an order on consent and the undertaking has confirmed to the Adjudication Officer its consent to the Settlement Agreement*" (at para. 1.6, emphasis added).

This seems to us to be the correct approach and in line with the "*entirely discretionary and voluntary*" nature of the CCPC's Settlement Procedure (at para. 1.6). This approach allows a defendant to withdraw at any time up until the very end of the process, when referred to the High Court for an order on consent. In terms of the CCPC's Settlement Route step plan at page 25 of the Draft Settlement Procedure, this appears to equate to step 13. This approach also appears to reflect the legislative intent as set out in section 15(L)(5)(d), which provides that a settlement may be agreed by the CCPC, "*at any time prior to a decision being made by an adjudication officer under section 15X*."

Elsewhere, however, the Draft Settlement Procedure states that, "[*a*]*n undertaking may withdraw from the Settlement Procedure at any time prior to the undertaking confirming to the Adjudication Officer that it acknowledges the infringement of relevant competition law and consent to the imposition of specific administrative sanctions*" (at para. 4.4, emphasis added). This would appear to allow withdrawal only up to the point of submission of a Settlement Submission, i.e. step 9 in the CCPC's Settlement Route step plan.

Clarification on this is important and needs emphasis. If parties may withdraw up until referral to the High Court stage, which we submit is the correct approach, then Settlement Submissions of parties that withdraw could potentially be used against those parties by the CCPC in the ensuing administrative sanction procedure.

8. Confidentiality and Disclosure

(i) *Withdrawal from settlement discussions*

Can Settlement Submissions, in which a party under investigation admits a competition law violation, be used in administrative proceedings against that party if it subsequently withdraws from settlement discussions?

The Draft Settlement Procedure states that "[*t*]*he CCPC reserves the right to use any material disclosed as part of the Settlement Procedures to the extent permitted by law*" (at para. 5.1). In the event of withdrawal from settlement discussions, any material disclosed to the CCPC to that point "… *will fall to be treated as withdrawn settlement submission for the purposes of the legislative restrictions on disclosure*" (at para. 5.2). But no explanation is provided in the Draft Settlement Procedure as to what this means in practice.

Rather, the Draft Settlement Procedure simply states "[*i*]*n this regard, to the extent that any submissions during Settlement Discussions are made in writing, this should be done under separate cover*" (at para. 5.2). To encourage settlement, greater transparency on these fundamental points is important.

(ii) *Access to settlement submissions*

Will access to Settlement Submissions, whether withdrawn or not, be granted to other addressees of a Statement of Objections in the same case who have not requested settlement (e.g., other alleged cartel members)? More specifically, will statements made by the settling party or its counsel in the course of settlement discussions be generally admissible at any trial or hearing or may otherwise be used if settlement discussions break down?

According to the Draft Settlement Procedure "… *access to a Settlement Submission (including withdrawn Settlement Submissions) is granted to a Party solely for the purposes of defending itself in proceedings before the CCPC under Part 2D or 2E of the 2002 Act or in any subsequent proceeding under Part 2H of the 2002 Act*" (at para. 5.3).

Why "Party" is capitalised here in the way a defined term typically is in CCPC documents is unclear. No definition of the term is provided in the Draft Settlement Procedure, even if it is used three times in para. 5.3 and capitalised each time. Given how critically important the term is here in determining what other parties may have access to Settlement Submissions, we strongly recommend that an appropriate definition of that word should be provided.

We assume the term as used is meant to limit strictly who may have access to sensitive Settlement Submissions to other defendants in the case and would exclude, for example, complainants and other parties. For transparency reasons and to ensure maximum confidence in the CCPC's Draft Settlement Procedure, it would be important for this to be clarified.

It is also important for the CCPC Draft Settlement Procedure to clarify the circumstances in which parties to any follow-on damages action might gain access to Settlement Statements via civil discovery means or otherwise.

(iii) *Types of access*

As regards the type of access such "Parties" may have, we note that the Draft Settlement Procedure states that "… *such access is granted only at the premises of the CCPC and on a single occasion*." This appears to mirror the approach in para. 35 of the EU's Settlement Procedures Notice, which provides that:

> "*Access to settlement submissions is only granted to those addressees of a statement of objections who have not requested settlement, provided that they commit — together with the legal counsels getting access on their behalf — not to make any copy by mechanical or electronic means of any information in the settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related proceedings*."

We note, however, that para. 5.3 does not purport to restrict parties with access making copies of Settlement Submissions (whether by mechanical or electronic means). Does this mean that the copying of a Settlement Submission via camera phone or other means will be permitted?

This would appear to be the case given that access will only be provided if "[*t*]*he Party is deemed to have given an undertaking that any such information to which it has been given access will only be used in proceedings that are directly related to those in which access has been granted, and will not be retained, stored or otherwise kept following the end of the said proceedings or any subsequent proceeding under Part 2H of the 2002 Act*."

9. Clarifications

According to the Draft Settlement Procedure, "*any correspondence in writing must be made under separate cover, on headed-paper of the undertaking, in a document that only discusses Settlement*" (at para. 3.3(d)).

What is meant by "under separate cover" in this context? Why is there a requirement that correspondence be on "headed-paper of the undertaking" and not, therefore, from the

undertaking's legal representatives? For greater transparency and certainty, these matters should be clarified by the CCPC.

Conclusion

The Law Society appreciates the opportunity to comment on the Draft Settlement Procedure.

We are also available to meet in order to respond to any queries on the content of this submission, to discuss the topic or to assist on any changes the CCPC might make to its Draft Settlement Procedure going forward.

We would, in due course, greatly value a workshop with the CCPC for our solicitors working in this area to go through worked examples with the CCPC so that legal advisors can explain and recommend the benefits of engaging in the Draft Settlement Procedure to clients in appropriate cases.

More generally, the Law Society, in particular through its Business Law Committee, remains available to assist the CCPC in the future.

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

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