

# LAW SOCIETY SUBMISSION

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## **CONSULTATION ON PROPOSED GUIDANCE NOTES**

**Competition and Consumer Protection Commission**

**11 March 2022**

The Law Society welcomes the opportunity to comment on the following proposed CCPC guidance notes which relate to the Competition Bill 2022:

1. CCPC's Choice of Enforcement Regime for Breaches of Competition Law (the "Enforcement Notice");
2. Administrative Leniency Policy for Cartels (ALP) (the "Leniency Notice"); and
3. Interaction between the Cartel Immunity Programme (CIP) and the Administrative Leniency Policy for Cartels (ALP) (the "Immunity/Leniency Notice").

## **1. Enforcement Notice**

### **1.1 Introduction**

1.1.1 If enacted as is, the Competition Bill 2022 will permit the CCPC, for the first time, to impose administrative financial sanctions on businesses that violate EU or Irish competition law, albeit that such penalties are subject to Court confirmation. At the same time, established statutory provisions that criminalise competition law violations (sections 6, 7, 7A and 8 of the principal statute, the Competition Act 2002 (the "Principal Statute") will continue in force. Against this background, the Enforcement Regime Notice "*describes the choice(s) of enforcement options available to the CCPC when investigating suspected breaches of competition law and the criteria to be applied*" (at para. 1.4).

### **1.2 The Enforcement Notice Should Provide Greater Certainty and Reliability**

1.2.1 The Enforcement Notice Introduction states that "*the CCPC will, as far as practically possible, have regard to this Guidance Note*" (at para. 1.5). The same paragraph goes on to state that: "*Nothing in this Guidance Note is intended to limit the CCPC's discretion in carrying out its statutory function and any departure by the CCPC from the guidance.*"

1.2.2 The Enforcement Notice also states that "[*the choice of appropriate enforcement route is at the CCPC's discretion and will depend on the particular circumstances of a given case*" (at para. 2.13). The same paragraph states that the Enforcement Notice provides "*relevant stakeholders ... guidance as to when, in general, the CCPC may seek to enforce competition law through criminal proceedings or in accordance with the CCPC's administrative enforcement regime.*"

1.2.3 Further, the Enforcement Notice states that "[*the CCPC exercises its statutory discretion, on a case-by-case basis, to decide on the appropriate enforcement route for any suspected breach of competition law*" (at para. 5.2).

1.2.4 These disclaimers and other statements appear unnecessarily broad and threaten to undermine the benefits and effectiveness of the Enforcement Regime Notice. For business and business advisers, but especially for lawyers advising business clients and executives, the issues addressed in the Enforcement Notice are of critical

importance.<sup>1</sup> Among other things, a mandatory reporting obligation arises for *criminal* competition law violations under the Criminal Justice Act 2011.

1.2.5 It is also critically important for the CCPC. Lack of clarity as to whether an act is a civil rather (than a criminal) wrong may seriously impair the CCPC's ability to bring criminal prosecutions. Lack of clarity in a criminal sanction contravenes the principal of legality. The Enforcement Notice should be binding on the CCPC to the maximum extent permissible in law.

### **1.3 The Enforcement Notice Appears to Reverse Longstanding CCPC Practice on Criminal Prosecution of Cartels. If that is the Intention, the Enforcement Notice Should Make it Clear**

1.3.1 The Enforcement Notice states that the choice between criminal or civil prosecution is at the CCPC's discretion (at para. 2.13). But the CCPC has publicly stated on many occasions that it considers certain anticompetitive practices to be criminal in nature. Consistent with those statements, the CCPC has previously investigated and, via the DPP on indictment, prosecuted as criminal offences price fixing, market sharing and bid rigging, albeit not always successfully.<sup>2</sup>

1.3.2 The Irish courts have explicitly endorsed this view. In his judgment in *DPP v Duffy* [2009] IEHC 208, Central Criminal Court, McKechnie J states that cartels are "*offensive and abhorrent, not simply because they are malum prohibitum, but also because they are malum in se. They are in every sense anti-social. Cartels are conspiracies and carteliers are conspirators.*"

1.3.3 In these circumstances, it is unclear whether the CCPC has discretion (on the enforcement route) for hardcore cartel activity. If the CCPC does, however, intend possibly to prosecute hardcore cartel activity via the 2022 Bill's administrative enforcement proceedings (for instance, because a lower civil threshold of proof applies thereby effectively making the CCPC's case easier to prove), the CCPC should clearly state this and publicly inform business people and their solicitors of this important policy reversal.

1.3.4 The Enforcement Notice states that "[t]he CCPC treats all instances of cartel conduct extremely seriously" (at para. 5.8). In the same paragraph, however, the Enforcement Notice states that "[t]he exercise of the CCPC's discretion with regards to the appropriate enforcement route, in particular for cartel conduct, does not imply that the CCPC considers some types of breaches of competition law to be 'less serious' than others." How these statements can be reconciled is unclear.<sup>3</sup>

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<sup>1</sup> Liability in Irish competition law extends to company "*directors, managers or other similar officers.*"

<sup>2</sup> While now listed as "Page Not Found," the CCPC's website previously stated "[h]ardcore cartels ... are among the most serious breaches of competition law and are always pursued in the criminal courts" (see *Modern Irish Competition Law*, Wolters Kluwer, Andrews et al., referencing <http://www.tca.ie/EN/Enforcing-Competition-Law.aspx>, last access 6 May 2015).

<sup>3</sup> In contrast, the CCPC's Cartel Immunity Programme states that "[t]he most serious forms of anti-competitive behaviour are agreements between and/or concerted practices involving two or more undertakings, or decisions by associations of undertakings, aimed at coordinating competitive

- 1.3.5 It is also unclear whether the latter statement (that the CCPC effectively considers all breaches of competition law as equally serious) is consistent with Irish law. Section 6(2) of the Principal Statute deems certain competition law violations presumptively anticompetitive e.g. price fixing, limits on output or sales, and market sharing. As the CCPC states in the Immunity/Leniency Notice, the conduct in section 6(2) “*is generally referred to as ‘hard-core’ cartel conduct*” (at para. 2.5).
- 1.3.6 Similarly, in his judgment in *DPP v Duffy*, McKechnie J identified “hardcore” infringements of competition to mean “*price fixing, restricting output/limiting production, bid rigging, and market allocation.*” We note also in this regard, that a CCPC Strategy Statement for 2015 - 2018 states that “[*t]he most serious breaches of competition law are cartels.*” Likewise, the CCPC’s original Cartel Immunity Programme states that “*pursuit of cartels*” was the agency’s “*top priority.*”
- 1.4 The Enforcement Notice Should Require the CCPC to Choose its Enforcement Route At an Earlier Phase in the CCPC’s Investigation**
- 1.4.1 As currently drafted, the Enforcement Notice states that the CCPC may decide to prosecute conduct, as a criminal or civil offence, only at the end of the full formal Investigation Phase (at para. 4.10).
- 1.4.2 From experience, the CCPC’s formal Investigation Phase can take months, if not years e.g. the recent *Motor Insurance Investigation* where the Investigation Phase took almost four years. This is an unconscionably long time for an individual and/or business to be under investigation without knowing whether the investigation is criminal or civil in nature.
- 1.4.3 The Enforcement Notice states somewhat positively on this front that “[*t]he CCPC will inform parties under investigation of the envisaged enforcement route at as early an opportunity as practicable*” (at para. 5.3). But this is caveated by the wording “*bearing in mind however that the CCPC may elect to change that particular enforcement route at a later stage, depending on evidence gathered and/or criteria set out [elsewhere in the notice].*”
- 1.4.4 The Enforcement Notice also states that “[*t]he CCPC will select the appropriate enforcement mechanism once the evidence supports the CCPC’s preliminary view that a breach of competition law has occurred or is occurring*” (at para. 5.4). But this does not appear consistent with what is envisaged in para 4.10, namely that the decision to prosecute criminally will be made only on completion of the Investigation Phase.

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*behaviour on the market*” (at para. 1.2). The same paragraph states that “*such agreements seek to limit or reduce competition by agreeing to fix prices and/or other trading conditions, limit output or sales and/or share markets or customers. This conduct, generally described as “hardcore” cartel activity, is expressly prohibited by section 6(2) of the Act.*”

## **2. Leniency Notice and the Immunity/Leniency Notice**

### **2.1 How the CCPC Leniency and Immunity Programmes Interact Requires Clarification**

2.1.1 Absent greater upfront clarity from the CCPC as to when anticompetitive conduct will be prosecuted, criminally or civilly, practitioners cannot know whether to apply for immunity or leniency. This uncertainty may undermine the attractiveness of both applications.

2.1.2 This is acknowledged in the Immunity/Leniency Notice which states that “*the CCPC expects that undertakings will want to apply under both the CCPC’s immunity and its leniency programmes*” (at para. 2.13). A leniency award will give the beneficiary no protection against a criminal prosecution, should the CCPC decide - subsequent to awarding leniency - to prosecute the matter as a criminal violation. Thus, as the Immunity/Leniency Notice recognises, applicants will likely wish to apply for both immunity and leniency.

2.1.3 For the same reasons, however, given that immunity is available only to the first-in-the-door, this likely undermines the value of any leniency application other than the that first-in-the-door applicant. Whether ComReg will also operate a leniency programme is unclear and, if so, how the CCPC leniency programme will interact with same also requires clarification.

### **Conclusion**

We hope that the Commission will find these comments to be constructive.

The Law Society will be happy to engage further on any of the matters raised.

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