

# Cartel Regulation

The application of competition regulation  
in 48 jurisdictions worldwide

# 2013

Contributing editor: D Martin Low QC



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# Ireland

Tony Burke, Niall Collins and Anne-Marie Jenkinson

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## Legislation and jurisdiction

### 1 Relevant legislation

What is the relevant legislation and who enforces it?

The Competition Act 2002 (as amended) (the Act) sets out the statutory basis for competition law in Ireland. The Competition Authority (the Authority) is an independent statutory body responsible for applying Irish and European Union competition law in Ireland, as well as informing government, public authorities, businesses and the wider public about competition issues. The Authority investigates alleged breaches of the Act and recommends prosecution to the director of public prosecutions (the DPP). The Authority has also been assisted by two detective sergeants seconded from the Irish police force. Since 2007, in telecommunication matters, the Authority has shared enforcement responsibility with the Irish sectoral regulator (ComReg).

### 2 Proposals for change

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

In October 2011, section 10 of the Act was commenced. The section provides measures to assist juries in considering complex financial and economic evidence during trials for breaches of competition law. Section 10 provides that in a trial on indictment, the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate:

- any document admitted in evidence at the trial;
- the transcript of the opening speeches of counsel;
- any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial;
- the transcript of the whole or any part of the evidence given at the trial;
- the transcript of the closing speeches of counsel; or
- the transcript of the trial judge's charge to the jury.

On 3 July 2012, the minister for jobs, enterprise and innovation commenced the Competition (Amendment) Act 2012 (the Amendment Act). The Amendment Act is intended to strengthen the enforcement of competition law and help battle white-collar crime in Ireland. The main provisions of the Amendment Act include:

- an increase from five to 10 years of the maximum prison sentence for conviction of an offence relating to anti-competitive agreements, decisions and concerted practices;
- increases in fines that can be imposed for competition offences from €4 million to €5 million;
- a body convicted of competition offences may have to pay the costs of investigation and court proceedings for the first time;
- the courts can now disqualify a person from being a director of a company in summary criminal and in civil proceedings;

- a person convicted of certain competition offences will not be eligible for probation;
- commitments given to the Authority can be made rules of court; and
- it will be easier for private individuals affected by anti-competitive practices to prove an action for damages against a cartelist, once public enforcement proceedings have successfully been taken.

Although the Amendment Act is intended to strengthen the enforcement of Irish competition law and to more effectively tackle white-collar crime, it remains to be seen whether it will have any influence on the, heretofore, low levels of criminal sanctions imposed by the Irish courts in competition matters.

The amalgamation of the Authority with the National Consumer Agency (the Agency) is expected shortly with the unified regulators' mandate to cover both competition and consumer law matters. It also appears that the Authority will publish its revised Cartel Immunity Programme (the CIP) (which is currently being considered by the DPP). It is generally acknowledged that the CIP is working well, but that some tweaks may be required in order to provide enhanced clarity on how the CIP operates.

### 3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Irish competition law is broadly derived from, and applied by analogy with, the competition rules in the Treaty on the Functioning of the European Union (TFEU). Section 4(1) of the Act, broadly, reflects article 101 TFEU and prohibits and renders void 'all 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'. The Act lists certain types of behaviour that are expressly prohibited and includes arrangements that:

- directly or indirectly fix purchase or selling prices or other trading conditions;
- limit or control production or markets;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties; or
- attach supplementary obligations to a commercial contract that have nothing to do with the subject of the contract (eg, tying).

Under section 6 of the Act, a breach of section 4 (or of article 101 TFEU) is a criminal offence. Furthermore, such a breach gives rise to a civil right of action. In the case of hard-core cartels, breach of section 6 can result in serious penalties, including imprisonment. 'Hard-core cartel' is defined in section 6(2) of the Act as an agreement or decision made by competing undertakings or a concerted practice

the purpose of which is to directly or indirectly fix prices with respect to the provision of goods or services, limit output or sales, or share markets or customers. The legislation defines ‘competing undertakings’ as undertakings providing, or capable of providing, goods or services to the same applicable market. Accordingly, section 6(2) is designed to catch horizontal anti-competitive arrangements.

#### 4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

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

However an offence under section 4(1) of the Act or article 101(1) TFEU can be proved only if the efficiency criteria in section 4(5) or article 101(3) TFEU are not met. In this context, it is a good defence to show 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 also provides that, in the context of proceedings under 6(1), it shall be a good defence to prove that acts done were done pursuant to a determination or direction by a statutory body. However, it is difficult to imagine circumstances whereby an Irish statutory body would condone cartel activity.

#### 5 Application of the law

Does the law apply to individuals or corporations or both?

Section 4 applies to an ‘undertaking’, which is defined in the Act as an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service. In this context, ‘gain’ does not equate to profit, rather, the concept encompasses activities carried out in return for a charge or payment. In EU law, the concept of ‘undertaking’ is not defined by legislation, but through jurisprudence of the EU courts as including natural persons that engage in ‘economic activity’, regardless of its economic form or its ownership (see, for example, Case C-49/07 MOTE [2008] ECR I-4863). Accordingly there is a subtle difference between the definition of undertaking as applicable under Irish and EU law.

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 the recent case of *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’s case was 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 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. The Oireachtas (the Irish parliament) could expressly have done so but did not.

#### 6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

The Irish competition rules apply to any arrangements that prevent, restrict or distort competition in the state or in any part of the state. Accordingly, the test is effects-based.

The Authority has investigated alleged extraterritorial cartels in the past in the form of associations registered under the US Webb-Pomerene Act (1918) (Webb-Pomerene), but ultimately took no further action. Webb-Pomerene, passed when few countries had effective antitrust policies and many, in fact, condoned collusive conduct, offers protection only against US Sherman Act violations. Violations of foreign antitrust laws are still violations. The law continues to attract criticism, although the relatively recent US Supreme Court judgment in *Empagran*, which interpreted a provision of a related statute (the Foreign Trade Antitrust Improvement Act (1994)), arguably renders the law obsolete.

#### Investigation

##### 7 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 Authority, on the Authority’s own initiative or as a result of a leniency application under the CIP.

##### The gathering of evidence

Once the Authority has decided to initiate an investigation, it may begin by issuing a written request for information, issuing a witness summons or conducting an on-site inspection (dawn raid).

The Authority regularly uses the powers conferred upon it (by section 31 of the Act) to summon witnesses, to examine witnesses under oath and to require the production of any document within the control or possession of the witness. Witnesses summoned to appear before the Authority have the same rights and privileges as witnesses appearing before the High Court. They also are 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 incrimination has constitutional status. If a witness is asked a question that could incriminate him, he should inquire whether he is being compelled to answer under the Act. If he answers under compulsion the answers will not be admissible in proceedings against him.

##### Legal proceedings

Despite the fact that the Authority may take either civil or criminal action, cartel activity is typically treated as a criminal matter. Where the Authority 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 Authority may opt to send a file to the DPP, who will consider whether to prosecute on indictment (and before a jury in the high court). Alternatively, the Authority may opt for a civil action.

#### 8 Investigative powers of the authorities

What investigative powers do the authorities have?

The Authority’s investigative powers are primarily contained in section 31 and section 45 of the 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 Authority has the power to summon witnesses (see question 7). The Authority may also conduct dawn raids. These powers permit officers to enter, by force if necessary, and search business premises and vehicles. The powers also extend to the private dwellings of directors, managers and members of staff. The Authority may authorise members of the Irish police force as officers for this purpose.

In order 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 (for a limited period) 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. The obstruction of an authorised officer is a criminal offence.

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## International cooperation

### 9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Under section 46 of the Act, the Authority may, with the consent of the minister, enter into arrangements with foreign competition authorities. The Authority can also arrange to provide information and assistance to a foreign competition authority. The Authority is a member of the European Competition Network (the 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, the ECN provides a framework for consultation, exchange of information and assistance between 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.

The Authority is also a member of the International Competition Network, which provides a venue for developing best practice in competition law and policy and addressing practical competition concerns. Domestic cooperation agreements also exist with sector-specific regulators as well as with the Agency (soon to be merged with the Authority).

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### 10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

The main interplay for the Authority is with the European Commission (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 Authority 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.

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### 11 Adjudication

How is a cartel matter adjudicated?

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 Authority in the district court are heard by a judge sitting without a jury.

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### 12 Appeal process

What is the appeal process?

#### Civil

Under Irish law, most decisions of courts, and bodies exercising quasi-judicial powers, can be appealed to a higher court. Decisions of the district court can be appealed to the circuit court. The appeal hearing takes the form of a *de novo* hearing.

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 Supreme Court. The Supreme Court is the ultimate and final court of appeal.

#### 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 rehear as much of the case as is necessary. A criminal decision of the circuit court may be appealed to the Court of Criminal Appeal as may a decision of 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 Criminal Appeal on the grounds of undue leniency.

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### 13 Burden of proof

With which party is the burden of proof?

The onus of discharging the burden of proof in both criminal and civil cases is on the Authority or the DPP (depending upon who is prosecuting). In civil cases the burden of proof is the 'on the balance of probabilities', while in criminal actions the offence must be proved 'beyond reasonable doubt'. Certain presumptions are contained in the Act to aid the Authority'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 available.

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## Sanctions

### 14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

#### On summary conviction

In the case of an undertaking that is not an individual, a fine not

exceeding €3,000 may be imposed. In the case of an individual, a fine not exceeding €3,000 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.

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#### 15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Authority does not have the power to impose administrative fines or other sanctions. Fines can only be imposed by a court. Civil injunctions may be sought by the Authority. The Authority may also seek a declaratory order from a court declaring that the provisions of the Act have been breached by the undertaking.

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#### 16 Civil and administrative sanctions

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 14 and 15, the Act provides for both civil and criminal sanctions for breach of the competition rules.

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#### 17 Private damage claims and class actions

Are private damage claims or class actions possible?

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. As noted in question 2 and in the 'Update and trends' section, the Amendment Act provides that where cases have been successfully brought by the Authority, 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.

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 unite several causes in the same action.

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#### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

Since 2000, the Authority has brought some 50 prosecutions in connection with alleged cartel activity. These prosecutions have delivered 32 convictions to date, of which four were for summary offences with the remainder procured on indictment.

The vast majority of these convictions were secured since 2006, in respect of three cartels, and involving the Ford Dealers Association, the Citroen Dealers Association and in relation to the provision of home heating oil in the West of Ireland. Fines totalling approximately €550,000 have been imposed in addition to prison sentences totalling some 75 months. However, all of these prison sentences have been suspended. Mr Justice William McKechnie did opine in the case of *DPP v Hegarty* that the only effective deterrent for those involved in such criminal activity was a prison sentence,

and that 'the serving of a custodial sentence was near at hand'. It remains to be seen whether this will materialise. A prison sentence of 28 days was imposed by the Central Criminal Court in November 2009 on one member of the Citroen Dealers Association for contempt of court, resulting from his failure to pay a fine imposed for breach of section 4 of the Act.

In January 2006, the Authority received complaints alleging that competitors had agreed to divide up markets between them in the waste disposal industry across County Mayo, in breach of section 4 of the Act. Following an Authority investigation, the DPP, in December 2008, initiated proceedings against eight defendants. Seven of the defendants were charged with entering into an agreement between August 2005 and September 2005, which had as its object the prevention, restriction or distortion of competition in the provision of domestic waste collection services in County Mayo (contrary to section 4(1) and section 6 of the Act). The remaining defendant was charged with aiding and abetting the commission of the offence. The defendants were tried before a jury at the Central Criminal Court (sitting in Galway) and were acquitted on all counts.

Other cases of note include the Authority's proceedings against the Beef Industry Development Society (BIDS) and the case against the Licences Vintners Association (the LVA) and the Vintners Federation of Ireland (the VFI). The Authority commenced civil proceedings against BIDS in 2003. This well-publicised case related to an agreement between competitors to reduce capacity in the Irish beef processing industry. In January 2011, the case concluded prior to any decision being reached by the high court on the application of article 101(3), when BIDS withdrew its claim for exemption under article 101(3) and agreed to contribute to the Authority's costs in the case.

In March 2009, the Authority commenced legal proceedings against the LVA and the VFI. The Authority alleged that the 'price freeze' announced by the respective organisations in December 2008 was in breach of previous high court-sanctioned undertakings between the Authority and the organisations. Between 2003 and 2005, the Authority had agreed settlement terms with the LVA and the VFI, where the associations undertook not to recommend prices to their members in respect of alcoholic beverages. In July 2009, the high court found the VFI and LVA to be in contempt of court, holding that there was a breach of the undertaking given. Having reached this decision, the court did not need to examine the merits of the case.

More recently, on 30 May 2011, the jury in the Irish Rail 'hedgcutters' bid-rigging trial returned a not-guilty verdict against the defendants. The case, taken by the DPP, was heard by Mr Justice John Cooke in the Central Criminal Court. The central allegation was that the defendants had entered into an anti-competitive arrangement to fix prices in the context of a competitive Irish Rail tender process, contrary to section 4(1) of the Act. During the trial, the jury heard evidence that Irish Rail had launched a tender process in 2006 for the award of a contract for the provision of vegetation clearance services along parts of the then-disused Ennis, County Clare to Athenry, County Galway railway line, which was to be brought back into use as part of a 'western rail corridor'. Ten companies, including the defendants, were invited to submit a tender. However, the tender process was suspended following the receipt by Irish Rail of widely varying bids. This prompted Irish Rail to convene a meeting of the relevant bidders at Athenry railway station in early 2007 in order to review the tender specifications.

The prosecution alleged that, at the conclusion of this meeting, and after the departure of the Irish Rail official, further discussions took place between the bidders. During the course of these discussions, the defendants allegedly sought to agree to fix prices by instructing the others not to bid below a certain level and threatening violence against any of the bidders who failed to comply. The alleged discussions were said to have been concluded with a series of handshakes to signal a concluded agreement. In the days immediately following this meeting, four of the bidders withdrew their tenders and reported what had happened to Irish Rail. The tender

process was subsequently terminated. These four bidders were ultimately successful in the award of the contract.

In their defence, the defendants denied the accusations alleging that the four 'reporting' bidders had in fact concocted those accusations specifically to ensure that they would secure the contracts in question. Irish Rail's procurement policy in this instance also came under attack for breach of guidelines issued by the Authority (broadly that potential tenderers for contracts should not be allowed to know who their competitors were). The defendants were acquitted by the jury.

The recent decision of the Irish Supreme Court in *DPP v Hegarty* is considered in question 5.

The maximum fines are set out in question 14.

The longest sentence a court has imposed was in the case of *DPP v Hegarty* where a jury sentenced the defendant to two years in prison (suspended) and fined him €30,000. The largest fine imposed by a court was €80,000 imposed in the case of *DPP v James Bursey and Bursey Peppard Limited* for price fixing and the implementation of agreed prices for the sales of Citroën cars. Mr Bursey is the only person to serve a custodial sentence in Ireland for a cartel offence. He served 28 days imprisonment for failure to pay the fine imposed.

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## Sentencing

### 19 Sentencing guidelines

Do sentencing guidelines exist?

There are currently no guidelines for sentencing in cartel cases.

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### 20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Not applicable.

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### 21 Leniency and immunity programmes

Is there a leniency or immunity programme?

The Authority, in conjunction with the DPP, operates the CIP, which offers full immunity from prosecution. The programme is not a statutory regime, rather it is an administrative programme designed to assist the Authority in tackling cartel behaviour. Applications for immunity under the CIP are made to the Authority. The Authority may recommend to the DPP that an undertaking receives immunity, but only the DPP can grant immunity from prosecution.

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### 22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

Immunity is available only to the first applicant to provide the Authority 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 Authority, 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 Authority'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 Authority 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. This first contact is typically made by telephone, with the Authority's 'designated officer', between the hours of 10am and 4pm Monday to Friday (except public or bank holidays). The Authority operates a telephone number and the designated officer may be reached on +353 87 763 1378.

It remains to be seen whether the proposed removal of the prohibition on a cartel ringleader availing of immunity will materialise in the revised CIP. It should be noted that a body corporate making an application for immunity must use a corporate act to do so.

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### 23 First in

What is the importance of being 'first in' to cooperate?

The Authority 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. It should be noted that joint applications are not accepted.

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### 24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

Immunity is not 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 requirements of the CIP, a subsequent applicant who does meet the requirements may be granted immunity. Cooperation with the Authority 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.

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### 25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity? Are there deadlines for applying for leniency or immunity, or for perfecting a marker?

The first-in rule and the Authority's marker system dictate that an applicant who is considering immunity should contact the Authority as soon as is practicable. As noted in question 23, the applicant's legal adviser may contact the Authority on a no-names basis in the first instance. No deadlines exist in applying for leniency or immunity. An applicant will be allowed to initially apply for a 'marker' with the Authority'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 and will be invalid.

### Update and trends

2012 has seen the commencement of the main provisions of the Competition (Amendment) Act 2012 (the Amendment Act). These include:

- an increase from five to 10 years of the maximum prison sentence for conviction of an offence relating to anti-competitive agreements, decisions and concerted practices;
- increases in fines that can be imposed for competition offences from €4 million to €5 million;
- a body convicted of competition offences may have to pay court and investigation costs;
- the courts can now disqualify a person from being a director of a company in summary criminal and in civil proceedings;
- a person convicted of certain competition offences will not be eligible for probation;
- commitments given to the Authority can be made rules of court; and
- private individuals affected by anti-competitive practices will find it easier to prove an action for damages against a cartel, once successful public enforcement proceedings have been taken.

The Amendment Act is a distinct strengthening of the penalties that may be imposed, however, it remains to be seen how effective this will be. An increase in penalties can only have an influence if undertakings and their employees are aware of and understand the potential impact. The level of penalties that have been imposed has been increasing over time. However, to date, the longest sentence a court has imposed is two years in prison (suspended) in the case of *DPP v Hegarty*, while the largest fine imposed by a court was €80,000 in the case of *DPP v James Burse and Burse Peppard Limited*. Only one person has served a custodial sentence (28 days) for a cartel offence, which was for the failure to pay the fine imposed. These are a long way off the maximum penalties of up to 10 years' imprisonment and €5 million in fines.

In 2011 the Authority received 33 new complaints of alleged criminal cartel behaviour, one of which led to the launch of a detailed investigation. This investigation led to the Authority announcing on 30 May 2012 that Show Jumping Ireland (SJI) had agreed to amend an anti-competitive rule that prevented members from competing at unaffiliated show-jumping events with a prize fund in excess of €50/£50. Potential penalties were in place for non-observance. The Authority believed that the rule was disproportionate and likely to infringe section 4 of the Act and article 101 TFEU.

The Authority formed the opinion that the rule amounted to a decision of an association of undertakings, which was likely to restrict the participation of SJI members at unaffiliated show-jumping events and the organisation of such unaffiliated events in Ireland. SJI agreed to amend the rule in order to address the Authority's concerns. The amendment of the rule means that members of SJI may now participate in unaffiliated events with a prize fund greater than €50/£50, without being penalised for so doing, provided that the unaffiliated event concerned has signed up to health and safety standards specified by SJI; and has adequate insurance in place. The Authority clearly disapproved of an outright ban on its members participating in events organised by any competitor to SJI. However, the Authority accepted the argument that competitors in such events needed to be appropriately protected from a health and safety perspective.

Of the other complaints, 21 were closed in 2011, and 11 are still being evaluated. The Authority received 106 new complaints of anti-competitive agreements and abuses of dominance, 92 of which were closed during the year.

Finally, the Authority has proposed revisions to its Cartel Immunity Programme for the DPP to consider. It is expected that the revised programme will be published by 2013. The Authority intends to facilitate leniency applications on an EU-wide basis and further improve cartel detection and prosecution on a European-wide scale.

## 26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The Authority will not disclose information acquired by it in the course of its investigation, save 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 the context of domestic submissions and domestic discovery, statements made in support of an immunity application can be made subject to a discovery order. However, the courts can refuse to grant a discovery order where, broadly, discovery is not in the public interest. In the case of domestic submissions and foreign discovery, the rules of evidence of the foreign court will apply. A foreign applicant can seek to have a discovery order that has been granted in another EU member state enforced in Ireland, subject to judicial discretion in applying Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In the case of foreign submissions and domestic discovery in civil matters, discovery orders are unlikely to be issued by the Irish courts in connection with statements made in foreign jurisdictions (unless the same or related documents are within the possession, procurement or power of persons in Ireland). In criminal proceedings, statements made in foreign jurisdictions can be the subject of discovery orders in the Irish courts (although there is limited precedent in this connection).

## 27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

The applicant must be the first to make an application for immunity and must also fulfil the conditions set out in question 22.

## 28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

Plea bargaining is not a feature of Irish criminal law.

The Authority, 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 LVA and the VFI (referred to in question 7 above). The other method of settlement is by way of negotiated agreement directly between the Authority 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

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

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

**30 Cooperation**

What guarantee of leniency or immunity exists if a party cooperates?

First, the DPP enters into a qualified immunity agreement with the applicant. The applicant will then inform the Authority and the DPP of what evidence the applicant is in a position to provide. Once the stipulated terms of the agreement have been fulfilled by the applicant, and the applicant observes its continuing obligations under the agreement, the agreement will be binding on the DPP.

**31 Dealing with the enforcement agency**

What are the practical steps in dealing with the enforcement agency?

See question 22 above.

**32 Ongoing policy assessments and reviews**

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

Every three years, the Authority publishes a strategy statement that sets out its strategic goals and objectives for the following three years. The most recent strategy statement (covering the period 2012-2014) outlined the Authority's intention to publish a revised CIP in conjunction with the DPP. As noted in question 2, the Authority's revised CIP is currently being considered by the DPP and is expected to be published imminently.

**Defending a case****33 Representation**

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? 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 Authority or before

the Irish courts. However, during 2004, the Authority published a notice opining that where the same lawyer proposed to represent more than one person in a matter, and in circumstances where the Authority 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 Authority's notice, which was subsequently quashed by the high court on the basis 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 Authority.

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.

**34 Multiple corporate defendants**

May counsel represent multiple corporate defendants?

The same factors and considerations outlined in question 33 also apply in the case of corporate defendants.

**35 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.

**36 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.

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