

Submission to the Competition and Consumer Protection
Commission on the Strategy Statement Consultation

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13 February 2015

Introduction

It is important that the newly created Competition and Consumer Protection Commission (CCPC) gets its first Strategy Statement right. It is important because this Strategy Statement is likely to exercise a long lasting influence over the agency. It will be the point of departure for future strategies.

Given the importance of getting it right, it therefore to be welcomed that the CCPC is seeking feedback and comment on its Strategy Statement, with the publication, in January 2015, of *Consultation on Strategy* (Consultation Paper). The Strategy Statement, it is anticipated, will be finalized by the end of April.

In announcing the consultation the CCPC stated that its Strategy Statement

... will set out what we plan to achieve over the first three years of our existence and how we intend to achieve these objectives. This consultation provides an opportunity for all stakeholders to shape the direction of the new organisation.¹

Hence the Strategy Statement will set the concrete steps that the CCPC will take into order to achieve its objectives.

The purpose of the Consultation Paper exercise 'is to ask our stakeholders how the Commission should choose areas to focus on in order to deploy our resources in areas and on issues where we can have the greatest impact' (p.5). The Consultation Paper describes three activity areas:

- advocating for more competition in markets;
- delivering on our law enforcement mandate, including ensuring compliance; and,
- empowering consumers.

In each case a similar consultation question is asked concerning priority setting in the particular activity area.

In our response we will, however, comment on other aspects of the Consultation Paper, including the CCPC's proposed mission statement and values.

¹ <http://www.ccpc.ie/news/2015-01-26-public-consultation-competition-and-consumer-protection-commissions-strategy>

Mission Statement: Why Business?

The Consultation Paper sets out the ‘mission’ or objective of the CCPC is ‘to make markets work better for consumers and businesses’ (p. 2). The CCPC has a number of tools/roles that it can use/play to meet this objective, including: ‘enforcing competition and consumer law’; ‘informing and advocating on competition and consumer issues’; ‘helping consumers make informed decisions’; and, ‘having a positive influence on markets and to make Ireland a better place to do business and to be a consumer’ (p.6).

It would be helpful if some context could be given to the role of the CCPC ‘to make markets work well for businesses’ and ‘to make Ireland a better place to do business.’ The functions of the CCPC, as set out in section 10 of the Competition and Consumer Protection Act 2014, stress almost exclusively the function of promoting and protection the interests and welfare of consumers, not business. To the extent that there is a conflict between promoting the interests of consumers and promoting the interests of business then, given the unorganized fragmented nature of consumers, the consumer interest could easily suffer.

Values: Transparency and Accountability

The Consultation Paper (p. 4) sets out the CCPC’s five high level values – effectiveness, efficiency, impartiality, excellence, and respect. There is no reference to the new agency operating in an open and transparent way. Such openness and transparency is essential if the CCPC is to be held to account by elected representatives and taxpayers that fund the agency and expect value for money.

The CCPC might consider adopting the practice of other agencies to increase transparency. The UK Competition and Markets Authority, for example, releases the minutes of its board meetings.² The Council of the Pharmaceutical Society of Ireland has a public board meeting session and a private board meeting session.³ In the former guidelines, for example, are discussed, in the latter fitness to practice matters. The parallel with the CCPC is obvious: matters of enforcement would be in a private session, while (say) merger guidelines could be discussed in the public session.

In terms of providing information on its operations, the CCPC could consider publishing, on an annual basis, the breakdown of the allocation of resources across its 12 divisions, which vary from ‘Consumer

² The CMAs December 2014 Board Minutes may be found here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397404/CMA_Board_public_minutes_December_2014.pdf

³ I am a member of the Council of the Pharmaceutical Society of Ireland.

Enforcement’ to ‘Advocacy and Market Intelligence.’⁴ Such information would be useful for elected representatives in, for example, assessing where the CCPC allocates its resources and whether this matches the CCPC’s declared priorities. The Competition Authority recently ceased publishing such data in its Annual Report.⁵ It would be troubling from a transparency and accountability perspective if this policy is continued by the CCPC.

CCPC’s Views on Priorities: the Gaps

The merger of the Competition Authority and the National Consumer Agency has been in the works since 2008. Briefings were given by representatives of agencies from other jurisdictions where the consumer and competition functions were conducted within the same agency. Numerous meetings have been held in advance of the merger of the two bodies to form the CCPC. These meetings no doubt touched on the issue of priority setting. It seems to me that it would have very helpful – indeed vital - to the consultation process for the CCPC to share those thoughts with the CCPC’s stakeholders for comment. In some cases it may not be clear to the CCPC what rule should be applied or what should take priority. Putting up these questions for discussion could lead to real engagement with stakeholders.

Priority Setting: the Macro-Level

The CCPC requests views on how priorities can be set *within* the three activity areas, but does not ask for guidance on the allocation of resources – priority setting – *across* or *between* the three activity areas. This is a vitally important question of priorities. The CCPC could have made the consultation exercise more meaningful by providing data to inform the debate. More specifically, as noted above, the CCPC has already decided on a 12 division structure. It would have been very helpful if a description of the function of each division together with the number of staff had been included in the Consultation Paper. Stakeholders could then have – albeit in a rough and ready way – mapped the allocation of resources into the three activity areas and commented on the implied priorities.

Although the Consultation Paper does not discuss setting priorities across advocacy, enforcement and empowerment, the fact that the Consultation Paper lists them in that order could be interpreted to mean that the first priority of the CPCC is advocacy over enforcement. This would certainly be a reversal

⁴ <http://www.ccpc.ie/who-we-are>

⁵ Prior to its 2012 Annual Report the Competition Authority published ‘Organisational Structure of the Competition Authority,’ which contained such information.

of the priorities of the Competition Authority, both in its rhetoric and in the allocation of resources. Much advocacy would lose its edge without a solid record of enforcement.

Priority Setting: the Micro-Level

Turning now to the questions raised in the Consultation Paper.

First, the issue of prioritisation has already been extensively addressed by the Competition Authority in its *Project Selection and Prioritisation Principles* paper of July 2011, which summarized these principles under five headings:

- significance of the issue or effect of the conduct in question;
- impact of the Competition Authority's action;
- wider economic significance of the markets involved;
- strategic significance; and,
- risks, resources and costs.

These can be applied to the topics raised in the Consultation Paper.

Second, in terms of enforcement no priorities are suggested by the Consultation Paper (pp.12-14), although reference is made to cartels being a 'serious white collar crime' (p.11). In contrast, the Competition Authority in its *Strategy Statement 2012-2014* stated

Cartels are the most serious form of anticompetitive behaviour. So stopping cartels remains the Authority's top enforcement priority (p.5).

There seems little reason to change or revise this latter view, unless of course some of the consumer protection legislation listed in the Consultation Paper (pp. 11-12) is much more detrimental to consumers than cartels.

A related question concerns how to ensure compliance with competition and consumer law. Apart from guidance notes, compliance can be ensured through a robust and successful record of prosecutions, particularly for hard core cartels. The Consultation Paper recognizes the complementary nature of the relationship between enforcement and compliance. However, a major deficiency in competition law

enforcement in Ireland has been the lack of cartel prosecutions. Both of the cartel cases initiated in the Courts in 2008 were unsuccessful raising issues over case selection.⁶

Conclusion

The Consultation Paper on the CCPC's first Strategy Statement seeks to engage stakeholders over a relatively narrow, albeit very important, set of issues relating to priority setting. However, given the importance of this Strategy Statement to the CCPC's future, this submission has gone beyond the narrow confines of the questions posed in the Consultation Paper to address issue relating to the mission and values of the CCPC.

⁶ These issues are discussed further in Terry Calvani and Kaethe M Carl, "The Competition Act 2002, ten years later: lessons from the Irish experience of prosecuting cartels as criminal offences." *Journal of Antitrust Enforcement*, 2013, Vol 1, No. 2, pp. 296-324.