



Response to the Competition and Consumer Protection Commission Consultation on Strategy

The UCD Business Law and Regulation Research Group, UCD Sutherland School of Law¹

The strategy is based on concern in relation to limited resources – no agency has an unlimited budget. One key issue is the balance between enforcement and advocacy which is reflected in the questions posed.

Question 1

How should we prioritise sectors of the Irish economy that would benefit most from intervention to increase competition and promote overall economic welfare?

This question goes to advocacy which is an important dimension for compliance and enforcement. The ICN, the OECD and UNCTAD have reported on advocacy. The ICN survey noted that less than 20% on average is spent by most competition agencies on advocacy. Prioritisation should therefore be based on the importance of a matter for the country's economy, the resources that participation will require and the likelihood of success. This suggests that some preliminary research to drill down to these parameters is desirable. The Commission, as a new body, albeit one that emerges from a merger, needs to consider when considering advocacy matters how they impact on its credibility. This is not self-serving but important in enhancing its role as an advocate for policies important to the Irish economy. The way the Commission is constituted will facilitate that as the Australian experience has shown how an agency that is seen as clearly representing the consumer interest is in a better position to advocate for the benefits of competition also (Brenchley, 2003).

Advocacy in relation to legislation is important but needs to be strategic, as the consultation document suggests. The OECD points to procedures internally allowing the agency to focus on the relatively few proposals that present significant competition (and consumer) issues and allow the agency to intervene early on. This may depend on building allies in the legislature who support a strong competition and consumer policy and are willing to act.

Coordination with other regulators is important to ensure effective use of resources and to avoid duplication or confusion of roles. The toolkit for advocacy is well-rehearsed by the ICN, the OECD and UNCTAD and it is clear that the Commission has embraced all these tools in its former incarnations.

¹ The BLReg Group expresses its thanks to Suzanne Kingston, Imelda Maher and Colin Scott for their significant contribution in the preparation of this submission. The views expressed in this submission are not necessarily shared by each individual member of the Group. The Group is happy to engage in further dialogue with the Commission on the issues raised.



Question 2

How should we prioritise our enforcement activities?

While the Commission will in some circumstances be required to respond to issues that emerge and should continue to do so, the high cost of conducting market investigations (Waddams, 2014) also suggest that some preliminary research would be desirable to decide whether to investigate a particular sector and what the benefits might be of such an investigation.

Enforcement needs to be effective. For competition enforcement the Commission is unusual in the EU in that it cannot (for constitutional reasons) impose fines itself but needs to go to court. This makes enforcement more uncertain and more expensive and raises the stakes considerably in looking to enforce competition laws. We note that the Central Bank has statutory powers to apply significant administrative sanctions on those it regulates and that the UK government has taken significant steps towards implementing regulatory regimes which place more emphasis on administrative as opposed to criminal sanctions (Regulatory Enforcement and Sanctions Act 2008). It would be valuable to investigate at whole-of-government level the extent to which administrative sanctions can be deployed consistent with the constitution. It is noted that the European Commission recently suggested that measures be adopted to make competition sanctions more consistent and effective for all the Member States. EU law may thus in time resolve this shortcoming.

The costs associated with applying fines through litigation suggest that some regard should be had to the regulatory pyramid which points to an interplay between enforcement through the courts and compliance strategies (Ayres and Braithwaite, 1992; Braithwaite, 2002). Under this model, the agency seeks first to educate the public, public authorities and firms as to the value of competition, the rules set down and the consequences of non-compliance. While the emphasis is on cooperation and education it is backed up by the threat of deterrence and sanction. Firms must believe that the agency can and will act where appropriate, that it will act fairly and consistently in relation to all, and that it can look to impose sizeable sanctions where required. One of the challenges for the Irish regime in the competition sphere is that the need to go to court to obtain sanctions weakens the relationship between advocacy and enforcement as there is greater uncertainty in particular regarding criminal enforcement. To the extent that litigation is an unrealistic and costly step in some cases the pyramid is 'broken' in the sense that it lacks the credible commitment to escalating sanctions in those cases where this is deemed necessary.

The regulatory pyramid points to a relationship between enforcement and advocacy which in turn are linked to the credibility of the Commission. Cases widely viewed as beneficial to consumers should be chosen as a Commission with a credible enforcement record can hold more sway when advocating competition and consumers laws in the private or public domains. This has been borne



out by the experience of the US (Joshua, 2011). Having said that, research shows that, where institutional discretion is employed in choosing cases to pursue, it is vital that this is done in a way that maintains the faith of those regulated, and indeed the public at large, that the law is being applied and enforced in a transparent and fair way. Thus, one of the strongest criticisms of the now popular approach of targeted, risk-based enforcement is that, wrongly applied, it can lead to serious rule of law concerns. This has led certain commentators to propose a more nuanced model of regulatory enforcement, in which regulators are sensitive not only to compliance performance of firms, but also to firms' own attitudinal settings, to the different logics of regulatory strategies (in this context, for instance, the potential tension between economic efficiency- and consumer welfare-based logics), and to the regime's own performance in achieving its overall goals (e.g. Baldwin and Black, 2007).

Question 3

How should the Commission encourage compliance with competition and consumer law?

Research on compliance in the competition sphere shows that the support of senior management is important for compliance programmes to work effectively. These programmes are a long-term game in terms of embedding a 'compliance culture' in the firm. However, individual managers may still be tempted to engage in cartel activity and this can only be deterred where there are individual sanctions. In other words, compliance and deterrence are interrelated (Stephan, 2009).

Further, empirical research carried out in Australia suggests that, in the specific case of firms' attitudes to competition law, there may be many and varied motives for compliance even within a single individual firm (Nielsen and Parker 2012). Specifically, while firms have distinct economic, social and normative motives, there is no hard and fast distinction between firms holding these motives, and most firms act with all three in mind, albeit with different weightings. An effective compliance strategy by the Commission should speak to each of these different motives, and should be sufficiently nuanced to capture variations in weighting or importance attributed to each of these different motivations for compliance. A further important factor influencing compliance behaviour is of course the resources that regulatees have to become aware of relevant legal rules, and to decide how to act accordingly, which is where the Commission's advocacy work is, again, highly relevant.

Research in the tax field also shows that where action is taken against a party, that their willingness to comply in the future is in part contingent on their perception of how fairly they were treated, even if they were found to be in the wrong (Wenzel, 2002). Hence fair procedures are not just important for legitimacy of the Commission but also have a role to play in ensuring compliance.

Question 4

How should we go about empowering consumers to be in a better position to make the right choices and assert their rights?



Considerable emphasis is placed in consumer policy within the EU generally and in particular sectors, such as financial services, on empowering consumers to look after their interests by understanding their vulnerabilities in the context of particular consumer transactions. Behavioural research emphasises significant limits to consumers' capacity to process and act on information, but also offers policy measures which take advantage of such behaviour (Howells 2005). The available insights suggest taking an approach which links experimentation to research so as to learn about how consumers learn about and act on choices and develop knowledge and capacity to assert their rights through using self-help mechanisms within legislation (such as cooling off periods) and seeking advice on more complex remedies as appropriate when stakes are high.

In respect of competition matters for consumers empirical research there shows that anticipated gains are important for consumer activity but if the perception is that the process of realising those gains (i.e. the switch) will be lengthy then consumers will be deterred from even searching (Waddams-Price and Zhu, 2013; Waddams-Price, Webster and Zhu, 2013). The research also disaggregated different kinds of consumers with different patterns of behaviour exhibited for different age groups and different socio-economic groups. This suggests four things: that consumers can be empowered to switch but regard needs to be had to empirical research in the field and this research shows that there may be different answers for different kinds of consumers. It also suggests that it is not sufficient to rely on consumer conduct alone to promote competition.

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