"Filling a gap in Irish competition law enforcement: the need for a civil fines sanction"

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SUMMARY

In this paper, we, on behalf of the Competition Authority (the 'Authority'), will argue that there is a need for civil fines in cases involving non-hardcore infringements of competition law (i.e., infringements other than hardcore cartel activity). Since 1996, all infringements of Irish competition law have been criminal offences. This criminal jurisdiction has been used very effectively to convict some 32 undertakings and individuals of hardcore cartel activity. But criminal prosecution is neither appropriate nor practical for non-hardcore infringements and the Authority does not, in practice, pursue criminal prosecutions in such cases. The only other remedies available to the Authority in such cases are to seek a declaration (i.e., a court ruling that a particular arrangement or behaviour is unlawful) or an injunction (i.e., a court ruling requiring a particular arrangement or behaviour to be terminated). Current legislation does not provide for any form of civil pecuniary penalty or sanction to be imposed on the undertaking(s) involved in such non-hardcore infringements. The Authority takes the view that the absence of such sanctions is a serious weakness in the Irish competition law enforcement regime. It believes that this weakness needs to be addressed by the enactment of appropriate amending legislation to provide for the type of civil fines for competition law infringements that exist in many other jurisdictions.

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1. INTRODUCTION

1.1 What is meant by 'civil fines'?

In this paper 'civil fines' are fines imposed by the courts on completion of civil proceedings. The standard of proof is the civil standard of 'the balance of probabilities' rather than the criminal standard of 'beyond reasonable doubt'. Civil fines are to be distinguished from administrative fines. Administrative fines are sanctions imposed by a body other than a court, such as a competition authority.

The Authority favours the introduction of civil fines that may be imposed on infringing undertakings only by a court in civil enforcement proceedings brought by the Authority as plaintiff. The Authority is not seeking power to impose administrative fines itself.

1.2 Recent developments: the IMF/EU/ECB MoU

The Authority has for many years taken the view that civil fines should be one of the sanctions available to enforce competition law in Ireland.[1] While the issue has been discussed from time to time over the years, a certain momentum has developed in the recent past in favour of the incorporation of such sanctions in our competition legislation. This is primarily because of the inclusion of a commitment in the Memorandum of Understanding between the European Commission and Ireland[2] (the 'MoU') to strengthen the mechanisms available to enforce competition law in Ireland. The MoU, which was agreed in December 2010, contained a commitment to introduce legislation to empower judges to impose fines and other sanctions in competition cases. The revised MoU terms, which were agreed in April 2011[3], replaced the December 2010 commitment with one stating that *"the Government shall bring forward legislation to strengthen competition law enforcement in Ireland*

[1] See, for example, (General Proposal 3, paras. 5.20-5.25) of the Authority's Submission of December 2007 to the Department of Enterprise Trade and Employment in response to the Department's Public Consultation on the Operation and Implementation of the Competition Act 2002, accessible at: http://www.tca.ie/images/uploaded/documents/S_07_008%20Competition%20Act%202002.pdf

[2] Memorandum of Understanding, 10 December 2010 http://www.finance.gov.ie/documents/publications/reports/2011/euimfrevised.pdf. See p.24 for the competition policy commitments.

[3] First Update, 28 April 2011 http://www.finance.gov.ie/documents/publications/other/2011/draftmoumay2011.pdf. See pp.30/31 for the competition policy commitments.

*by **ensuring the availability of effective sanctions** for infringements of Irish competition law and Articles 101 and 102 of [TFEU]*". [Emphasis added.]

In light of these developments, it seemed timely for the Authority to initiate a public discussion of civil fines, the justification for them, the challenges to their adoption in Irish law and the manner in which they might be introduced. It was for this reason that the Authority organised a public seminar on civil fines on 11 April 2011.[4]

The purpose of the seminar and of this paper is to explain the Authority's views on the issue. The Authority welcomes any comments on this paper which interested parties may wish to submit, either on a confidential basis or otherwise.

1.3 Outline of paper

This paper will start with a brief review of the evolution of Irish competition law, with particular reference to the enforcement mechanisms that have been incorporated in the various Competition Acts over the years. It will then explain why the Authority believes that there is a major gap in those enforcement mechanisms which, in practice, means that undertakings can engage in certain serious infringements of competition law with impunity. We will then ask whether civil fines could fill that gap by providing effective deterrence to such infringements and will refer to the experience of other jurisdictions where civil fines are part of the competition law enforcement toolkit.

We will then review the current legal position in Ireland in relation to civil fines, with particular reference to relevant EU law principles as well as the Irish constitutional law issues that need to be considered in relation to the introduction of legislation providing for significant financial sanctions for competition law infringements. Finally, we will set out the elements of a civil fine sanction which the Authority believes would be appropriate in the Irish context.

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[4] The Seminar was held in the Dublin Writer's Museum, Parnell Square. The speakers were Gerald FitzGerald, Member of the Competition Authority and David McFadden, Legal Advisor to the Competition Authority. The presentations of the two speakers are entitled 'The Civil Fines Condition in the EU/IMF MoU: The Competition Authority's Perspective' and 'The Civil Fines Condition in the EU/IMF MoU: Constitutional Issues' respectively, and are available on the Competition Authority's website at http://www.tca.ie/EN/Promoting-Competition/Presentations--Papers/Civil-Fines-condition-in-the-EUIMF-MoU-the-Competition-Authoritys-perspective.aspx?page=1&year=0

2. LEGISLATIVE HISTORY

2.1 Early years: an absence of enforcement followed by criminalisation of all infringements

Modern Irish competition law began with the enactment of the Competition Act, 1991 (the '1991 Act'). The substantive provisions of the 1991 Act, which contained prohibitions of restrictive agreements and the abuse of dominant positions, were closely modelled on the European competition rules in the EC Treaty. Those substantive prohibitions have not changed since then and remain the bedrock of Irish competition law. With one remarkable exception, the procedures set out in the 1991 Act were also closely modelled on the EC competition law procedures then in force.

The procedural divergence from the EC model was that the 1991 Act contained no public enforcement powers or sanctions of any kind. Instead, it relied entirely on private parties who suffered loss as a result of anti-competitive conduct to institute proceedings in the courts seeking damages or the equitable remedies of declarations and injunctions. The 1991 Act gave the Authority no enforcement powers, not even the power to apply to court for a declaration or injunction.[5] The Minister who introduced the 1991 Act later acknowledged that this extraordinary lack of public enforcement powers in the 1991 Act was due to the unwillingness of the then Government, which had placed a general embargo on public sector recruitment, to allocate the resources that such powers would have necessitated. The Authority's lack of enforcement powers was, however, immediately recognised and criticised as a serious weakness in the legislation.

A Bill to remedy this weakness in the 1991 Act was eventually enacted as the Competition Act (Amendment) Act, 1996 (the '1996 Act'). This Act adopted public enforcement mechanisms which radically changed the structure of Irish competition legislation and gave the Authority a significant enforcement role. It gave the Authority power to apply to court for the civil remedies of declarations and injunctions. But more importantly, it also provided that all infringements of the prohibitions of anti-competitive conduct in the 1991 Act[6] would thenceforth constitute criminal offences. The Authority was given extensive investigative powers, as well as power to prosecute minor offences summarily. More serious offences were to be prosecuted on indictment by

[5] The Minister for Enterprise, Trade and Employment was given this power, but it was never exercised.

[6] These prohibitions covered infringements of both EC and Irish competition law.

the Director of Public Prosecutions (the 'DPP'). These prosecutorial arrangements were continued by subsequent legislation and remain in force today.

2.2 The 2002 Act: Distinguishing "hardcore" and other offences

While both the civil and criminal jurisdictions created by the 1996 Act were used on a number of occasions and with some success by the Authority and (in due course) by the DPP, it was recognised that the legislation needed to be made more effective and, in particular, that a clear distinction needed to be drawn between hardcore competition law infringements, such as price-fixing, market sharing, bid-rigging etc, on the one hand, and other infringements such as vertical restraints and the abuse of dominant market positions, on the other.

Following a major review of the legislation by a Government-appointed Competition and Mergers Review Group, a comprehensive new Act, which repealed and replaced the earlier legislation, was enacted as the Competition Act, 2002 (the '2002 Act'). The 2002 Act, which remains in force today, retained the substantive prohibitions of anti-competitive agreements and behaviour first set out in the 1991 Act, but greatly extended the functions and powers of the Authority. These included, for example, the transfer of merger review functions from the Minister for Enterprise, Trade and Employment to the Authority, as well as significantly increased investigative powers. However, for the purpose of this paper, the most important change introduced by the 2002 Act was the different treatment of hardcore cartel activity, on the one hand, and other infringements of the prohibitions in the Act, on the other.

The term hardcore cartel activity is not used in the Act itself, but it is a term commonly used to describe the most serious forms of cartel conduct. These are identified in section 6 (2) of the 2002 Act as comprising agreements or concerted practices or decisions of associations involving competing undertakings which fix prices, limit output or sales or share markets or customers. These forms of horizontal anti-competitive conduct (usually called 'cartels') are universally recognised as those which cause the most direct and serious disruption of the normal competitive process and as practices for

which no economic or other justification can be advanced. As McKechnie J. put it in *DPP v Duffy*[7]:

> *"[Cartels] can be used for all forms of anti-competitive behaviour but are particularly attracted to price-fixing, restricting output/limiting production, bid-rigging and market allocation. These are 'hard-core' infringements of competition law, and rightly so have been repeatedly described as involving odious practices… They 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."*

In recognition of the pernicious nature of these kinds of cartel activity, section 6(2) of the 2002 Act provides that such conduct shall be presumed to have the object of preventing, restricting or distorting competition unless the defendant proves otherwise. Even more significantly, it provides that custodial sentences of up to 5 years imprisonment may be imposed on individuals who are found to have committed a section 6 (2) offence. This makes such offences "arrestable offences" under the Criminal Law Act, 1997, with all the consequences that flow from their being placed in this category of serious crimes. While increasing the potential custodial sentences for these hardcore offences, the 2002 Act removed custodial penalties for all other offences.[8] This drew a clear distinction between the penalties that could be imposed for hardcore and non-hardcore competition law infringements.

[7] *DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited* [2009] IEHC 208

[8] However, the (criminal) fines that can be imposed on undertakings and/or individuals for section 6 (2) offences and for other offences are the same.

3. WHY ARE CIVIL FINES NEEDED FOR INFRINGEMENTS OF IRISH COMPETITION LAW?

3.1 Criminal convictions have been obtained for hardcore offences, but not for other offences

Since the enactment of the 2002 Act, the DPP has obtained some 32 convictions against undertakings and individuals involved in hardcore cartel activity. Fines totalling some €600,000 have been imposed and individuals have been sentenced to terms of imprisonment of up to 12 months[9].

The criminal sanctions imposed in these cases have demonstrated that Irish juries are willing to convict undertakings and individuals where there is clear evidence of hardcore cartel activity. While there may be room for debate as to whether the individual sentences imposed in these cases were adequate, the courts have adopted increasingly strong language condemning hardcore cartels and warning that, in future, convicted individuals will serve time in prison.

The risk of being prosecuted for those who engage in such practices has also increased in recent years through the success of the Cartel Immunity Programme. This Programme, which is administered by the Authority in cooperation with the Office of the DPP offers complete immunity from prosecution to the first participant in a cartel who contacts the Authority and who agrees to cooperate fully in the investigation of the cartel and in the prosecution of the other cartel participants. Many of the recent criminal investigations undertaken by the Authority have been initiated as a result of applications for immunity under the Programme

However, it is notable that since the enactment of the 2002 Act, the Authority has not instituted summary criminal prosecutions in cases involving non-hardcore infringements of the prohibitions in the Act, nor has it referred any such cases to the DPP for prosecution on indictment. (It has instead instituted civil proceedings seeking declarations or injunctions in respect of non-hardcore infringements and in some cases it has been successful in obtaining such remedies.[10] But the absence of a provision for civil fines in the legislation means that, in such cases, the courts were (and remain) unable to

[9] However, in all cases to date, the imprisonment sentence has been suspended subject to the convicted individual not offending again.

[10] In other cases, it was able to use the threat of such civil proceedings to obtain undertakings from the infringing parties to cease the infringing activity.

impose any sanction on the parties for their involvement in the illegal activity concerned.) The reasons why the Authority has never sought to have undertakings involved in non-hardcore infringements subjected to the fines provided for in the 2002 Act need to be explained.

3.2 Why no prosecutions for non-hardcore infringements?

3.2.1 What are non-hardcore infringements?

We have already noted that, in terms of consumer welfare, there can be no justification for hardcore cartel activity of the kind specifically listed in section 6(2) of the 2002 Act, namely, price-fixing, limitation of output or sales and market sharing. These activities have the object, and usually have the effect, of restricting competition between the cartel participants so that they can charge higher prices to their customers without the risk of their supra-competitive profits being eliminated through the normal competitive process.

However, the position is not so clear-cut in relation to non-hardcore conduct.

Such non-hardcore conduct falls into two broad categories. The first comprises agreements, concerted practices and decisions whose legality needs to be considered by reference to section 4 of the 2002 Act. Examples of such arrangements include joint venture agreements between competitors, agreements between suppliers and distributors, specialisation agreements, joint purchasing or selling arrangements and decisions and agreements relating to standardisation. In almost all such cases, the question as to whether the arrangement may be justifiable in terms of consumer welfare needs to be considered. This involves a review of the arrangements to see whether they satisfy the conditions for exemption set out in section 4(5) of the 2002 Act. (In summary, these conditions require the parties to the arrangements in question to show that the arrangements result in efficiencies which benefit consumers and do not restrict competition to an extent greater than is required to achieve those efficiencies.)

The second category of non-hard-core conduct is the abuse of dominant market positions. While there is no exemption for such abusive conduct once proven, the question as to whether particular conduct does, in fact, constitute an abuse of dominance is often a highly complex one that requires definition of the relevant market, assessment of the market position of the allegedly dominant undertaking and consideration of the likely effect on competition of the allegedly abusive behaviour. These types of cases usually require expert

economic evidence which can be very complex and may be open to different interpretations.[11]

In many such cases, the imposition of pecuniary penalties of any kind, whether criminal or civil, would not be warranted. These could include cases where there may have been room for bona fide argument regarding the compliance of particular arrangements with competition law, even though the arrangements are ultimately found not to comply. In such cases, the civil remedies of declaration and injunction already available to the Authority under the 2002 Act should be sufficient to ensure future compliance. (Indeed, in many such cases that come to that attention of the Authority, the issues are settled without the need for court proceedings.) However, there are cases involving non-hardcore infringements where, in the Authority's view, civil fines should be available as a means of sanctioning past infringements and deterring similar infringements in the future. It would not be possible or appropriate to attempt to draw up a comprehensive list of the types of case in which civil fines should be available as a mechanism for ensuring the effective enforcement of competition law in Ireland. Some examples will have to suffice. It is suggested that these might include: resale price maintenance; prohibitions of passive sales in vertical agreements; sharing of sensitive commercial information by competitors which falls short of hardcore cartel activity, discriminatory trade association rules restricting access to a trade or profession, as well as exclusionary and exploitative abuses by dominant undertakings (including refusals to supply, refusal of access to essential facilities, loyalty discounts and rebates, exclusivity agreements, predatory pricing, discriminatory trading terms and terms and conditions involving tying and bundling). There may well be other examples, but this list is sufficient to show that there is a range of non-hardcore anti-competitive arrangements and conduct that can seriously undermine competition and which should therefore be discouraged by the prospect of appropriate sanctions falling short of criminal conviction.

3.2.2 How the Authority deals with non-hardcore infringements

The Authority receives numerous complaints each year relating to conduct which clearly does not involve hardcore cartel activity, but which may involve

[11] The views of expert economists in these cases often diverge. For instance they may dispute what constitutes the relevant market (both product and geographic) or whether an undertaking is dominant on that market. Then, when looking at the impugned conduct, what might appear to one expert as abusive behaviour may appear to another as aggressive but fair competitive conduct.

arrangements of various kinds which restrict competition or the abuse of a dominant position. The Authority considers all such complaints and where it believes that the conduct may involve a restriction of competition or the abuse of a dominant position, then, insofar as its resources permit, it may initiate an investigation. Where it forms the view that there has been an infringement of the Act, it will consider using the civil process to obtain the remedies of declaration or injunction which are available to it under the Act. In most cases, these civil remedies – or the threat of them - are sufficient to bring the infringement to an end. However, these remedies obviously involve no sanction for the past anti-competitive behaviour of the undertakings involved and are therefore devoid of any general deterrent effect.

It is clear to the Authority and, we believe, accepted by the legal community generally that cases which fall within either of the two non-hardcore categories mentioned above are generally not cases in which criminal prosecution would be either appropriate or likely to be successful. The Authority's view is that non-hardcore infringements are rarely, if ever, susceptible to proof to the satisfaction of a jury in a criminal trial (i.e., beyond reasonable doubt) and that civil sanctions are therefore the only appropriate and practical remedy. In the words of the Director of Public Prosecutions, James Hamilton:

> *"…it may be seriously questioned whether a jury trial is necessarily the best way to deal with complicated regulatory issues which are criminal in name only. …. While it may be possible to explain to a jury why price-fixing or bid-rigging are harmful practices which should be illegal, much of competition law would be difficult for those who are neither lawyers or economists. Irish law has, however, criminalised any breach of the entire competition law code, notwithstanding that in other jurisdictions the use of criminal sanctions has generally been confined to cartel activity."*[12]

A leading Irish competition law practitioner has commented on the implications of this wholesale criminalisation of all competition law infringements in the following terms:

> *"The imposition of criminal sanctions may, paradoxically, hinder the enforcement of competition law because it sets too high a standard*

[12] Hamilton J: *"Do We Need a System of Administrative Sanctions in Ireland?"* in *Regulatory Crime in Ireland* (S. Kilcommins and U. Kilkelly, eds., First Law 2010) p.21

which must be met so that effectively only the most serious and most easily proven cases are instituted and others are left unprosecuted."[13]

This comment accurately describes the reality of the situation that has developed since infringements of Irish competition law were criminalised some 15 years ago. In that period, the Authority has never recommended that the DPP should initiate a prosecution in a case coming within either of the above non-hardcore categories.[14] This situation means that there is, in reality, little or no incentive for undertakings to comply with the prohibitions in the Act relating to non-hardcore conduct.

[13] V J G Power, *Competition Law and Practice* (Dublin: Butterworths, 2001) 70.46

[14] The Authority did, itself, initiate a summary prosecution in the District Court in a resale price maintenance case in 2000, *Competition Authority v Estuary Oil*, and this resulted in a conviction when the undertakings concerned pleaded guilty. (For further information, see Competition Authority Annual Report, 2000.) But that case would probably not reflect current Competition Authority enforcement policy.

4. HOW CAN EFFECTIVE DETERRENCE FOR NON-HARD-CORE INFRINGEMENTS BE ACHIEVED?

In a judgment delivered in a recent criminal trial for hardcore cartel activity, the presiding judge made the following comment about the importance of deterrence for such crimes:

> *"Competition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective, sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place...[15]"*

Criminal sanctions are an appropriate and effective form of deterrence for hardcore cartel activity. But, as already indicated, the Authority's view is that they are neither appropriate nor practicable in relation to non-hardcore competition law infringements. The Director of Public Prosecutions has expressed the point in the following terms:

> *"…there is an argument from principle that the statute book should not be cluttered up with criminal law provisions in areas which were not traditionally the preserve of criminal law and which do not carry the same moral stigma as convictions for core criminal offences do. Furthermore, the courts have often recognised a distinction between regulatory or public welfare offences and core criminal law in general. Courts have been more willing to accept the principle of strict or even absolute liability in relation to regulatory offences, whereas the tendency in relation to core criminal law has been to imply a requirement of mens rea, a guilty intent…".*[16]

The issue is not confined to competition law and the Authority's views are shared by others. For example, a former Attorney General and Minister for Justice, Equality and Law Reform has made the following comments:

> *"…it became increasingly clear to me that fundamental issues as to … how Ireland's laws were complied with and where responsibility for enforcement and compliance with the law in Ireland lay, were being ignored, or, perhaps more fairly, avoided because of the profound*

[15] McKechnie J in *DPP v Duffy*, April 2009.

[16] Op. cit., p.17.

difficulties in adapting traditional methods of enforcement and compliance with the demands of a complex, regulated market economy. The issue is whether Ireland can continue to rely exclusively on criminal sanctions enforced by criminal warrants to secure compliance with the huge array of regulatory laws which are an essential part of our sophisticated, compliant economy."[17]

But if criminal sanctions are neither appropriate nor practical for non-hardcore competition law infringements, what sanctions could constitute the effective deterrents which are clearly necessary in such cases?

Numerous other countries[18], as well as the European Union, have responded to this challenge by enacting legislation providing for the imposition in such cases of pecuniary penalties or civil fines. Such sanctions are imposed after a finding on the basis of the civil standard of proof (i.e., on the balance of probabilities or preponderance of evidence) that an infringement has occurred. This is accepted as the appropriate form of sanction for non-hardcore infringements for a number of good reasons. For cases involving often complex economic argument, civil procedures are clearly more suitable than a criminal trial before a jury where the prosecution must prove its case to the very demanding criminal standard of "beyond reasonable doubt".[19] The sanction is also more appropriate than those which are imposed in hardcore cartel cases since it does not involve a criminal conviction or the prospect of

[17] McDowell M: *"Non-Criminal Penalties and Criminal Sanctions in Irish Regulatory Law"* in *Regulatory Crime in Ireland* (S. Kilcommins and U. Kilkelly, eds., First Law 2010) pp. 129/130.

[18] These include virtually all EU Member States – including the UK – and also other common law jurisdictions such as Australia, Canada and New Zealand.

[19] However, it is important to note that where a significant sanction may be imposed in civil proceedings, the court is likely to be particularly demanding regarding the evidence of the alleged illegality. Thus, in *O'Keeffe v Ferris* [1997] 3IR 463, the Supreme Court found that the provisions of the Companies Acts relating to fraudulent trading, which exposed company directors to potentially large personal liability, were civil rather than criminal. But when delivering the judgment of the Supreme Court, Flaherty J made the following remarks: *"It is true that the proof of fraud will be to the civil standard but it is also so that the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved".* This approach has also been adopted by the English and Australian courts. In *Briginshaw v Briginshaw* (1938) CLR 336, a civil case, McTiernan J stated in his judgment that *"English law adopts the reasonable rule that the strictness of the proof of an issue should be governed by the nature of the issue and its consequences"*. In Australia, a number of cases considered the standard of proof to be applied in cases involving pecuniary penalties which could be imposed in respect of certain competition law infringements under the Trade Practices Act In *TPC v The Heating Centre Pty Ltd* (1985) ATPR 40-156, Beaumont J stated: *"although the civil standard of the balance of probabilities is appropriate, in reaching conclusions and drawing inferences, the Court should be mindful of the seriousness of he allegations, having regard to the penalties involved".* This finding was subsequently upheld on appeal by the Full Federal Court in *The Heating Centre Pty Ltd v TPC* (1986) 9 FCR 153.

imprisonment for individuals, consequences that should be reserved for hardcore cartel activity. Finally, civil penalties facilitate the settlement of cases on the basis of admissions or undertakings in a way that is not possible in the context of a criminal prosecution. Settlement of such cases is often the most efficient and satisfactory mechanism for resolving the issues in question and the availability of civil sanctions can greatly assist a competition authority in negotiating acceptable settlement terms. Equally, the absence of such sanctions inevitably diminishes an authority's ability to achieve such outcomes.

In many jurisdictions that operate a civil sanctions regime, the sanctions are imposed by the relevant national authority; in others they are imposed by the courts after a trial in which the national competition authority requests the relevant court to impose the sanction. The Competition Authority favours the second of these options and is not seeking the power to impose such sanctions itself.

With regard to the level of fines that would need to be imposed in order to constitute effective deterrents against non-hardcore infringements, this should be related to the gains which the infringing undertaking has made from its unlawful activity and should also take into account the probability of detection.[20] Where the infringing undertaking has made substantial gains, the fines would need to be even more substantial.[21] Most EU Member States which provide for the imposition of civil fines have adopted the general framework of the EU regime which allows the imposition of fines of up to 10% of the annual turnover of the undertakings involved in the infringement.[22] The

[20] Economists argue that the appropriate calculation of the necessary sanction for deterrence purposes is the gain made from the unlawful activity multiplied by the inverse of the probability of detection. This would, however, result in a huge multiple of the gain made and, it is argued, should be modified by the application of the proportionality principle.

[21] The Australian Law Reform Commission recommended in its Report 95:*Principled Regulation* that legislation providing for civil penalties should set out the considerations that a court may take into account in determining the amount of the penalty to be imposed, These considerations include: the deterrent effect of the penalty; the nature and extent of the contravention; any loss or damage suffered, or gain made, from the contravention; the deliberateness of the conduct and the period over which it extended and, where the defendant is a body corporate, whether the corporation exercised due diligence. See: http://www.alrc.gov.au/report-95.

[22] Some countries, such as Brazil, have opted for much higher limits.

Competition Authority would favour the adoption of a similar framework in an amended Irish Competition Act.[23]

[23] It has been suggested that a civil remedy of "unjust enrichment" or "disgorgement" would be an adequate deterrent for non-hardcore infringements. The Authority does not share this view. Apart from the complications associated with the calculation of the gains made by infringers, the prospect of the loss of those gains following successful civil proceedings initiated by the Authority would have little deterrent effect when the risk of detection is taken into account. Given that all such cases will not, in reality, be detected and pursued, the risk of losing the gains made can be discounted by a significant margin.

5. CIVIL FINES (AND OTHER CIVIL SANCTIONS) UNDER IRISH AND EU LAW

5.1 Irish law - the Constitutional Issue

Article 38.1 of the Irish Constitution provides that *"No person shall be tried on any criminal charge save in due course of law"*. Article 38.5 goes on to provide that *"…no person shall be tried on any criminal charge without a jury"*.[24]

The traditional interpretation of Article 38.1 is that it effectively prohibits the imposition of substantial fines in civil cases (i.e., civil fines). The argument is that a substantial fine is, in effect, a punishment and that acts that may expose a party to the risk of punishment should be categorised as crimes, thereby conferring on the party concerned the rights available to a person accused of a serious criminal offence.[25] Those rights include the right to have the case against them tried before a jury and to be proved 'beyond reasonable doubt' (as opposed to the 'balance of probabilities' standard that applies in civil cases). In other words, if the legislature were to enact legislation providing for the imposition by a court of substantial fines in civil proceedings, it would be argued that the legislation was incompatible with Article 38 since the fines would amount to punitive sanctions which could only be imposed following a criminal trial. We understand that the reason why the 2002 Act contains no provision for civil fines was a concern at the time of its enactment regarding the compatibility with Article 38 of such a legislative measure.

The term 'criminal charge' used in Article 38.1 is nowhere defined in the Constitution. The Supreme Court has, however, considered the meaning of the term in a number of cases, some of which we consider in this paper. The relevant case law does not specifically address the issue of civil fines of the kind which the Authority would like to see incorporated in an amended Competition Act, but our view is that the judgments provide helpful guidance as to the form of civil fine which could be provided for by the legislature without being categorised as a criminal penalty. In order to determine what

[24] Article 38.5 excludes from this requirement minor offences and cases tried by special courts and military tribunals.

[25] Contrary arguments have been put forward by various commentators, but the compatibility with the Constitution of fines imposed by the courts in civil proceedings has not yet been decided directly by the Irish courts.

form of civil fine could be introduced, it is necessary to review some of that case law.

The essential *indicia* of what constitutes a criminal offence have been enumerated by the Supreme Court, most notably in the case of *Melling v O Mathghamhna.*[26] These *indicia* were reviewed in three separate judgements handed down in that case. Lavery J. set out the following *indicia* of what constitutes a criminal offence:

> *"… the detention of the person concerned, the bringing of him in custody to a Garda station, the entry of a charge in all respects and the terms appropriate to the charge of a criminal offence, the searching of the person detained and the examination of papers and other things found upon him, the bringing of him before a district justice in custody, the admission to bail to stand his trial and the detention in custody if bail be not granted or is not forthcoming, the imposition of a pecuniary penalty with the liability to imprisonment if the penalty is not paid..."*

Kingsmill Moore and O'Dalaigh JJ agreed with Lavery J in their judgements.

On the basis of the criteria listed by Lavery J (and accepted by Kingsmill Moore and O'Dalaigh JJ) in *Melling,* it seems clear that a regime of civil fines in the form that the Authority considers necessary[27] for the effective enforcement of competition law in Ireland would not, of itself, result in a non-hardcore infringement of EU or Irish competition law being categorised as a criminal offence. This is because such a regime would be distinguishable from a criminal law regime in the following ways:

- Civil proceedings initiated in the courts by the Authority for the imposition of civil fines in cases involving non-hardcore infringements of either EU or Irish competition law would not involve the arrest and detention of suspects for questioning.

- There would be no requirement of *mens rea.* (As already indicated, such a requirement would be inappropriate for infringements where complex economic issues may need to be considered before a court

[26] [1962] I.R. 1

[27] See Section 6 below.

could determine that the arrangements or behaviour in question were illegal.)[28]

- There would be no prospect of imprisonment, even if the defendant in a case failed to pay the fine. (The legislation could provide for civil remedies for the recovery of fines such as attachment of assets, appointment of a receiver, registration of judgments against assets etc.)

Support for the view that such a regime would be compatible with the Constitution may be found in the judgment of the Supreme Court in *McLoughlin v Tuite*.[29] In that case, the plaintiff argued that the penalties imposed upon him under the Income Tax Act 1967 were punitive in nature and thus involved a criminal charge. The High Court found that the penalty was not indicative of a criminal offence and that, accordingly, the legislation imposing it was not repugnant to the Constitution. On appeal, the Supreme Court agreed, finding that the penalty had none of the procedural or other characteristics of a criminal offence, as set out in *Melling*. It did not require *mens rea*, there was no provision for arrest, search, detention or custody and no provision for imprisonment for failure to pay any penalty imposed by the court. In the words of Finlay C.J., who delivered the judgment of the Court:

> *"The only feature which could be said to be common between the provisions of s.500 and s.508 [of the Income Tax Act, 1967] and the ordinary constituents of a criminal offence is that the payment of a sum of money is provided for which is an involuntary payment and which is not related to any form of compensation or reparation necessary to the State but is rather a deterrent or sanction. The court is not satisfied that the provision for a penalty in that fashion in a code of taxation law…clearly establishes the provision of the section as creating a criminal offence."*

Similar arguments can be made in respect of a fine for infringements of competition law, the purpose of which is deterrence rather than punishment and where the justification for the penalties is the public good which the legislation is intended to promote and protect. The following comment by the Director of Public Prosecutions in relation to the issue of administrative

[28] This is in marked contrast to activities such as price-fixing, market-sharing and bid-rigging which are recognised by the community as being morally wrong.

[29] *McLoughlin v Tuite* [1989] IR 82.

monetary penalties (which we refer to in this paper as civil fines) is relevant in relation to the justification for deterrent penalties in civil legislation:

> *"While on the face of it, the imposition of administrative monetary penalties may not appear to differ from the imposition of a fine in a criminal case, in principle the idea behind such a fine is not to punish the person who has broken the regulations concerned for the wrongdoing but rather to compensate society for the injury caused to it and also to deter others from breaching the regulation".*[30]

5.2 Existing Civil Sanctions in Irish Law

It is worth noting in the present context that there already exist in Irish law civil sanctions that are either very similar in their intent and effect to civil fines or actually are a form of civil fine.

5.2.1 Exemplary damages

As mentioned earlier, section 14 of the Competition Act 2002 allows the Court to make an award of exemplary damages to a private plaintiff in a civil action where the Court decides that the conduct of the defendant has been so egregious that it merits punishment. But the Authority, as a plaintiff in proceedings under section 14, can only seek a declaration or an injunction. The irony in this is that a court action taken by a private party can result in the award of exemplary damages if the court is of the view that the anti-competitive behaviour merited punishment, while the outcome of civil proceedings taken by the Authority is completely devoid of any form of sanction or deterrent.

The High Court of England and Wales in *Devenish Nutrition Ltd and others v Sanofi-Aventis SA*[31] recently dealt with the issue of exemplary damages in competition cases. The Court explained that *'…the purpose of exemplary damages is … to punish and deter*.'[32] In defining exemplary and punitive damages, the Court cited an earlier decision of Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary* where Lord Nicholls said…

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[30] Op. cit., p.17

[31] *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2007] EWHC 2394 (Ch); [2008] 2 All ER 249.

[32] Ibid 47.

> *"Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter"*.[33]

Lewison J in *Devenish* then made clear his view on the purpose of exemplary damages in competition cases:

> *"In my judgment in antitrust cases the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anti-competitive behaviour"*.[34]

Notwithstanding the conclusion that the purpose of exemplary damages is to punish and deter, it has never been suggested that this sanction is other than a civil remedy or that its imposition should only be permitted following a finding beyond reasonable doubt by a jury in a criminal trial.

5.2.2 The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, (SI No 305 of 2003) (the "Regulations")

The above Regulations are a recent example of statutory provision for civil fines in Irish law. The Regulations were enacted to transpose into Irish law Directive 2002/20/EC on the authorisation of electronic communications networks and services (the 'Directive').

Article 10 of the Directive deals with compliance by providers of electronic communications services with the conditions and obligations attached to their authorisation. Where a provider fails to comply with the conditions and obligations, the national regulatory authority ("NRA") must notify the provider and give it an opportunity to remedy the breach. If the provider does not remedy the breach within a specified time, the NRA must take appropriate measures to ensure compliance. Article 10(3) is the provision that is relevant from the perspective of civil fines. As part of the 'appropriate measures', the Directive allows (but – importantly in the present context - does not oblige) Member States to empower their NRA to impose financial penalties. The

[33] Ibid, citing Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29 at [51], [2001] 3 All ER 193 at [51], [2002] 2 AC 122.

[34] Ibid 48.

precise wording is: *'Member States may empower the relevant authorities to impose financial penalties where appropriate*.'

The Regulations set up a procedure whereby, to enforce compliance with the conditions attached to the authorisation, the NRA must apply by way of motion to the High Court for an order compelling compliance. The Court may issue a mandatory injunction directing compliance within a particular time. It is important to note that this alone would have been sufficient for compliance with the Directive, but the Regulations go further. Notwithstanding that Member States are not obliged to empower their NRAs to impose financial penalties in the Directive, paragraph 18(7) of the Regulations provides as follows:

- An application for an order [enforcing compliance] may include an application for an order to pay the Regulator such amount by way of financial penalty as the Regulator may propose as appropriate in the light of the non-compliance;
- In deciding on such an application, the Court shall decide the amount (if any) of the financial penalty which should be payable and shall not be bound by the amount proposed by the Regulator;
- In deciding what amount (if any) should be payable, the Court shall consider the circumstances of the non-compliance, including:
    - The duration,
    - The effect on consumers, users and other operators,
    - The submissions of the Regulator on the appropriate amount, and
    - Any excuse or explanation for non-compliance.

A number of points about the Regulations are noteworthy. They give power to the High Court to impose a financial penalty in the context of a civil proceeding (a motion to the High Court). There was no obligation upon Ireland to provide for such a penalty when implementing the Directive. The financial penalty is added to the existing remedy of a mandatory injunction and no financial cap is specified. It is left to the discretion of the Court whether to impose the penalty or not in any particular case. The quantum of the fine is also left to the discretion of the Court to decide in a particular case,

but the Regulations set out criteria to which the Court must have regard in deciding the amount of the penalty, if any, that is to be imposed.

This provision is almost identical to that sought by the Authority: fines imposed at the discretion of the court in appropriate cases under domestic competition law.

5.3 Can civil fines be imposed by the Irish courts for infringements of EU competition law?

Council Regulation (EC) No 1 of 2003,[35] (the 'Regulation') - sometimes referred to as the Modernisation Regulation - introduced procedures that radically altered the administration and enforcement of EU competition law. One of its objectives was to delegate to the national competition authorities in the Member States the power to take effective action within their respective jurisdictions to challenge and sanction infringements of EU competition law. Thus, the first paragraph of Article 5 of the Regulation states:

> *"The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty*[36] *in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:*
>
> — *requiring that an infringement be brought to an end,*
>
> — *ordering interim measures,*
>
> — *accepting commitments,*
>
> — ***imposing fines, periodic penalty payments or any other penalty provided for in their national law.***" (Emphasis added)

The Irish courts are designated as competition authorities for the purpose of Article 5 the Regulation.[37] Given that a Regulation is directly applicable by virtue of Article 288 of Treaty on the Functioning of the European Union ('TFEU'), it seems clear from a plain reading of the first paragraph of Article 5

[35] Council Regulation (EC) 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1/1.

[36] Now Articles 101 and 102 of the Treaty on the Functioning of the European Union

[37] S.I. No. 195/2004 — European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004

that Irish courts already have the power to impose fines in competition cases, albeit competition cases arising under EU law rather than Irish law.

The standard of proof is not, however, specified in the Regulation. It might therefore be argued that this leaves open the question as to whether the availability of criminal fines (which are provided for under the 2002 Act) is sufficient for the purposes of Article 5. The Authority takes the view that criminal fines are not sufficient if one accepts the proposition that criminal prosecutions are inappropriate and impractical as a means of enforcing competition law against the wide range of infringements covered by the term "non-hardcore". This is because Member States must take effective measures to comply with their obligations under EU law and this obligation would not be satisfied by an enforcement regime that was, in practice, ineffective in respect of a wide range of non-hardcore competition law infringements.[38] The Authority therefore takes the view that the first paragraph of Article 5 must be interpreted as empowering the Irish courts to impose civil fines for such infringements of EU competition law. It is aware that many lawyers with expertise in EU competition law share this view.

In a recent preliminary reference case decided by the Court of Justice of the European Union[39], the Court decided that Article 5 is directly applicable by virtue of Article 288 of the TFEU. The case concerned the application of the second paragraph of Article 5 (rather than the first paragraph referred to above) and the Court was therefore not required to interpret the different elements of the first paragraph. However, Advocate General Mazak, who delivered an Opinion[40] in the case, offered a more wide-ranging review of Article 5. He pointed out that the principle of the primacy of EU law requires a national court *"not to apply national law which is contrary to EU law but to apply EU law instead. Indeed, … a national court which is called upon…to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting*

[38] This principle of effectiveness is reflected in Article 35 of the Regulation which imposes an obligation on Member States to ensure the effective enforcement of Community competition law within their territories. That Article reads *inter alia*: "*The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts."*

[39] Case C-375/09, Prezes Urzedu Ochrony Konkurencji i Konsumentow v Tele2Polska sp. z o.o., now Netia SA, judgment of 3 May 2011. (The case is usually referred to as "Tele2Polska").

[40] Delivered 7 December 2010

provision of national legislation…"[41] He pointed out that Article 5 therefore allows the designated national competition authorities (NCAs) to take the decisions set out in Article 5 without the need to wait for the transposition of that Regulation into national law. He went on to give some concrete examples of cases in Germany, Italy and Belgium in which this had happened.[42]

It therefore seems clear that Article 5 allows the Irish courts to impose civil fines for EU competition law infringements. If that is the case, then questions regarding the effective implementation of Regulation 1/2003 would not arise. However, this interpretation gives rise to a bizarre anomaly regarding the enforcement mechanisms available to the Irish courts in respect of competition law infringements in Ireland. This is that the Courts would be able to impose fines on undertakings in civil proceedings for infringements of EU competition law while they would be unable to do so in almost identical civil proceedings under Irish competition law. From a policy and enforcement perspective, this is an absurd outcome given that the facts in many competition cases heard by the Irish courts involve infringements of both EU and Irish competition law.

[41] In Ireland, this principle of primacy is reflected in Article 29.10 of the Irish Constitution which provides that *"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities…"*

[42] For example, in Italy, the Italian competition authority ordered interim measures pursuant to Article 5 even though this was not provided for under Italian law.

6. FORM OF CIVIL FINES PROPOSED BY THE COMPETITION AUTHORITY

The Authority's proposal is for a fine that a court could impose in civil proceedings brought by the Authority for non-hardcore infringements of the Act. Such civil fines would be enforceable by civil remedies rather than through the current enforcement mechanism for enforcing criminal fines. In other words, imprisonment would not be the default penalty for failure to pay a fine.

The provision should be contained in the future equivalent of section 14 of the 2002 Act. That section gives both the Authority and any aggrieved (private) person the right to sue in civil proceedings. The civil fine could be made available to the Court as a sanctioning option at the Court's discretion, in addition to the declaratory or injunctive relief that it can currently order.

However, to minimise the risk of the proposed civil fine being found to be a criminal penalty in disguise, it would have to avoid most, if not all the various *indicia* of a criminal offence as specified by the Supreme Court.[43] In the Authority's view, this could be achieved by the following steps:

- Providing for the imposition of the fine by a court following a finding of infringement in a civil trial;
- Imposing a strict liability test (i.e., not requiring any *mens rea* or intent for the finding of infringement) but possibly permitting a due diligence defence;
- Possibly, stating in the legislation that the applicable standard of proof should be the balance of probabilities, but providing that the court shall take into account a number of specified factors such as the nature of the infringement, any defence and the gravity of the matters alleged;[44]

[43] For a review of these indicia, see Section 5.1 above.

[44] This approach has been adopted in Australia: see the Evidence Act 1995 (Cth), section 140(2). See also footnote 21 above.

- Providing for fines to be calculated by reference to (but not exact quantification of) the harm caused by the infringement rather than the culpability of the undertaking;[45]

- Placing the civil fine in the civil proceedings portion of the statute;

- Not providing for individuals representing the undertaking to be arrested, searched or detained during the investigation of the alleged infringement;

- Making undertakings rather than corporate officers such as directors liable to pay such fines.[46]

- Removing the possibility of imprisonment for default in payment of fines and instead leaving non-payment of the fine to the Court to deal with by way of civil remedies.

[45] The Australian Competition and Consumer Act 2010 (Cth) provides, in section 76, for a range of civil pecuniary penalties. This includes a penalty of three times the value of the benefit gained by an infringing party which is reasonably attributable to the prohibited activity, where such benefit can be calculated. The provisions of section 17(3) of the Consumer Information Act, 1978 may be of interest in this context. While the section relates to criminal fines, it contains an unusual provision enabling the court, at its discretion, to order that all or part of the fine should be paid by way of compensation to any person who was summoned as a witness on behalf of the prosecution in the proceedings and who suffered personal injury, loss or damage resulting, wholly or partly, from the offence.

[46] An individual could, however, be fined if he/she were an undertaking for competition law purposes.

7. CONCLUSION

Competition law has an important role to play in promoting and protecting the competitiveness of the Irish economy. This has been a key issue in the discussions between the Irish Government and the IMF/EU/ECB. The revised Memorandum of Understanding published on the 4th May 2011 repeats and refines a number of important competition-related conditions that originally appeared in the Memorandum of Understanding signed in December 2010. One of these conditions reflects the Troika's concerns about the effectiveness of Irish competition law enforcement and records a commitment by the Government to *"bring forward legislation to strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union".* This commitment is an implicit acknowledgement that, as this paper argues, the sanctions currently available in Ireland for competition law infringements are inadequate. If the Troika believed that Irish law already provided for effective sanctions for infringements of Irish and EU competition law, then this commitment would have been unnecessary.

For the reasons explained in this paper, the Authority's view is that there are no *"effective sanctions"* for non-hardcore infringements of competition law in Ireland. Such infringements, which include abuses of a dominant market position and various forms of restrictive agreements, can seriously distort and impede competition by excluding competitors from markets and, in some cases, even putting them out of business. As Irish competition law stands, criminal prosecution is the only means by which any sanction can be imposed on infringing undertakings. While criminal prosecution is appropriate for hardcore cartel activity, it is rarely, if ever, appropriate or practical to seek criminal convictions in cases involving non-hardcore infringements. Such cases usually involve complex economic analysis and argument and a criminal trial, in which a jury must be convinced, beyond reasonable doubt, of the guilt of the accused, is an unsuitable forum in which to try such matters. Non-hardcore infringements can, however, have serious economic effects and, in such cases, sanctions in the form of civil fines/pecuniary penalties should be available, at the Court's discretion, to offset at least some of the gains the infringing undertakings have earned from their unlawful activities and, equally importantly, to deter them and others from engaging in further infringements.

The absence of civil fines for non-hardcore infringements of Irish competition law means that there is not at present a comprehensive regime of *"effective sanctions for infringements of Irish competition law"*. Indeed, if our interpretation of Article 5 of Regulation 1/2003 were incorrect, it would mean that there would not be a comprehensive regime of effective sanctions for infringements of EU competition law either.

The Authority's experience over the years is that this is a serious deficiency in Ireland's competition law enforcement regime and we are therefore pleased to note from the terms of the revised Memorandum of Understanding that the Government is committed to bringing forward legislation to ensure that effective sanctions will be available in future.

Finally, while the Authority is aware of the arguments that are sometimes advanced to question the compatibility of a civil fines regime with the Irish Constitution, our considered view is that there are good grounds for believing that suitably drafted legislation would be compatible with the Constitution. Even if that view were found to be incorrect, the Authority believes that the absence of any effective deterrence to a wide range of competition law infringements has such serious implications for the protection and promotion of competition in Ireland that any current constitutional impediment should be overcome by means of a referendum to adopt an appropriate amendment to the Constitution.

END