Submission on White Collar Crime

Competition Authority Submission to the Department of Justice and Law Reform: White Paper on Crime Discussion Document No. 3 'Organised and white Collar crime'

S-11-002
February 2011

The Competition Authority
An tÚdarás Iomaíochta

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1. INTRODUCTION

1.1 The Competition Authority (the 'Authority') welcomes the opportunity to make this submission to the Department of Justice and Law Reform on the topic of White Collar Crime. In particular, the Authority commends the work undertaken by the Department on this important issue and supports the efforts of the Department in reviewing how better to investigate and prosecute white collar crime more effectively and efficiently.

1.2 This submission is based on the experience of the Authority in detecting, investigating and prosecuting 'hard-core' competition offences under the Competition Act, 2002. It should be noted therefore that the comments in this submission will be presented from the perspective of enforcing competition law. However, it is likely that experience of the Authority in its enforcement work will have resonance in the wider law enforcement community and some of the difficulties encountered by the Authority may be familiar to other agencies.

Summary of Recommendations

1.3 The Authority believes that insufficient weight is given to the issue of general deterrence in white collar crime. This means that sentences are frequently lenient to the extent that they fail to properly deter others from offending. White collar criminals are usually seen as persons of otherwise good character and as they are unlikely to reoffend, they therefore rarely receive custodial sentences for their crimes. This undermines deterrence and adds to the perception that the State is soft on white collar crime.

1.4 There is a need to strengthen investigative powers for specialist agencies that are responsible for the investigation of white collar crime. There is also a need to make investigative powers more consistent between various enforcement agencies, possibly by the creation of generic powers such as search powers. This should also extend to obstruction in criminal investigations, where powers to overcome such obstruction need to be enhanced.

1.5 There is a need to introduce a Perjury Act and a Whistleblowers Act, both of which would be of general application. These two pieces of

legislation would help protect the integrity of investigations whilst also giving some protection to witnesses who come forward to assist State agencies when enforcing white collar crime.

1.6 The ability to compel witnesses in appropriate cases to make statements or give evidence on oath or deposition which can then be relied on in a subsequent trail is essential.

Competition offences as White Collar crime

1.7 For the purposes of this submission the term 'white collar crime' refers to criminal offences committed both by business[1] and business executives. There are of course many definitions of what constitutes white collar crime. In the narrow context of competition law, white collar crime in effect involves a property offence[2] as opposed to an offence against the person. This property offence is committed by business and business executives in the course of their commercial transactions. The parties injured by this white collar crime include competitors of the offending businesses, suppliers and purchasers of the offending companies and ultimately, consumers. It is also possible that the State, as a purchaser from members of a price-fixing cartel, can be injured by anti-competitive conduct, and that through the State, the taxpayer is also injured.

1.8 Price-fixing, bid rigging and market or customer allocation are generally understood to be the 'hard-core' breaches of competition law. These involve agreements between undertakings not to compete with each other. Instead of competing against each other on the market for customers and market share, the undertakings agree to divide up the market amongst themselves, and/or allocate customers to each other, and/or raise the price for the purchase of their products and so forth. The purpose of these cartel agreements is to reduce

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[1] In fact the Competition Act refers to 'undertakings' as being liable for a breach of that Act. Undertakings are defined at section 3 and mean '...a person being 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.' Individuals are also potentially liable in their capacity as a director, manager or other similar officer of an undertaking, including a corporate undertaking where that individual authorised or consented to the commission of an offence under sections 6 and 7 of the Act by an undertaking.

[2] See for example the comments of Greg Werden, cited by Judge Liam McKechnie in *DPP v Patrick Duffy*, [2009] IEHC 208, where Werden is quoted as stating: 'Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm...'

business risk and increase profits for the members of the cartel at the expense of their customers.

1.9 Price-fixing is the most obvious form of cartel behaviour. Price-fixing has been likened to theft. For example, Joel I. Klein, a former Assistant Attorney General in the U.S. Department of Justice Antitrust Division likened price-fixing to theft by well-dressed thieves...

> 'Let me start with the obvious: cartel behaviour (price-fixing, market allocation and bid-rigging) is bad for consumers, bad for business and bad for efficient markets generally. And let me be very clear: these cartels are the equivalent of theft by well-dressed thieves and they deserve unequivocal public condemnation.'[3]

1.10 Former member of the Authority, Terry Calvani, stated the position regarding price-fixing as follows...

> 'Price-fixing and related 'hard-core' cartel behaviour are theft and recognized to be such under Irish law. The Competition Act, 2002 addresses price-fixing in two ways: first, it is a crime on indictment and the Act vests the Competition Authority and the Director of Public Prosecutions with the power to investigate and prosecute respectively ... Second, it creates a private right of action to compensate those injured by cartel conduct. Thus the law focuses on both deterrence and compensation.'[4]

1.11 There has been recognition by the Irish judiciary in some of the cartel cases brought by the Authority that price-fixing is both a serious offence and is similar to theft. For instance, when sentencing Michael Flanagan for his role in the Heating Oil case in Galway Circuit Court, Judge Raymond Groarke stated...

1.12 Those engaged in cartels and involved in the fixing of prices are doing so only with the motivation of greed and with nothing to be gained but financial profit. That is why the legislature takes such a serious view of

[3] Klein, J.I. "The War against International Cartels: Lessons from the Battlefront", Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law and Policy, New York, October 14th 1999.

[4] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', in Katalin J. Cseres, MP Schinkel and FOW Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, (Edward Elgar Publishing Limited, Cheltenham UK 2006) at page 270.

it … I could well see circumstances where persons convicted by a jury could be subjected to terms of imprisonment.[5]

1.13 In the *DPP v Patrick Duffy*[6], Judge Liam McKechnie clearly connected price-fixing with theft. He referred to price-fixers as thieves when he commented on members of the Citroen Dealers Association thus...

> 'Realising that there could be no honour, even amongst thieves, the association provided for sanctions or penalties so as to coerce the effectiveness of its goals...'

1.14 More importantly, Judge McKechnie in the Duffy case described cartels as...

> '...offensive and abhorrent, not simply because they are *malum prohibitum*, but also because they are *malum in se*. They are in every sense anti-social. Cartels are conspiracies and carteliers are conspirators.'

1.15 Judge McKechnie's characterisation of cartels as being not merely bad because the legislature says so (malum prohibitum) but that they are bad in and of themselves (malum in se) is important. This means that there is recognition that there is something inherently wrong with this type of conduct that marks it as being obviously criminal in nature. According to this view expressed by Judge McKechnie, there can be no doubt that price-fixing involves the commission of a criminal offence.

1.16 Price-fixing along with other forms of cartel conduct was only made criminal since 1996.[7] However, it has been known for many decades that there was a problem with anti-competitive conduct in the Irish economy, long before it was made an offence to engage in price-fixing. For example, Massey and O'Hare[8] refer to Dail debates on the Restrictive Trade Practices Bill in 1952 when the then Minister for Industry and Commerce, Sean Lemass spoke of...

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[5] Irish Daily Mail, 3rd March 2006 – 'Guilty verdict in first oil price case' pp8.

[6] DPP v Patrick Duffy & Duffy Motors (Newbridge) Ltd. [2009] IEHC 208.

[7] Price-fixing was prohibited by section 4 of the Competition Act 1991, and made a criminal offence by sections 2 & 3 of the Competition (Amendment) Act 1996.

[8] P Massey & P O'Hare, *Competition Law & Policy in Ireland*, (Oak Tree Press, Cork, 1996).

> ... a growing uneasiness among the public because of the development and extension of restrictive practices in the supply and distribution of goods...[9]

1.17 According to Massey and O'Hare, the intended aim of Lemass with that legislation was '...to smash trade rings.'[10] In other words, it was known that there were trade rings, or cartels, in operation, in that era. Though they may not have been prohibited in law at that time, it is also fair to say that some at least of these cartel agreements were not open to public scrutiny. Some at least of the business interests engaged in anti-competitive conduct prior to criminalisation kept these agreements secret from their customers. This would tend to show awareness that what these businesses were engaged in wasn't for the benefit of their customers. As Lemass pointed out in that Dail debate in 1952...

1.18 We are framing this Bill on the assumption that agreements between traders who should be in competition with one another must be treated with suspicion and that such agreements are an actual or a potential source of injury to the public as consumers.[11]

[9] Ibid at page 98.

[10] Ibid.

[11] Ibid.

2. GENERAL POWERS OF INVESTIGATION

2.1 Specialist agencies have been established within the State to tackle various forms of illegal conduct. These agencies include, for example, the Office of the Director of Corporate Enforcement (ODCE), the Health and Safety Authority, The Environmental Protection Agency amongst others. These agencies in effect 'police' and enforce their respective areas of the law. In essence, the Competition Authority is the police force of competition law in Ireland.

2.2 Given that agencies such as the Authority have been established to enforce the law, it is appropriate that such agencies have the necessary powers to investigate breaches of the law. The Authority has an extensive array of investigative powers available to it under the Competition Act. These include the power to search premises (including private dwellings) on foot of a search warrant (issued by a Judge) and the power to summon and question witnesses on oath.

2.3 It is important to note that the Authority is not suggesting that specialist agencies usurp the function of the Gardai in the investigation of white collar crime. The Authority believes that the work of specialist agencies in investigating white collar crime can complement the work done by the Gardai. The Authority has a close working relationship with the Garda Bureau of Fraud Investigation ('GBFI'). There is a Detective Sergeant on secondment with the Authority to help the Authority in its criminal investigations. The GBFI have assisted the Authority in conducting searches and in various training programmes for authorised officers of the Authority, amongst other things. Though the resources of the Gardai are limited, the Authority strongly recommends that the investigation of white collar crime by specialist agencies be done with at least some assistance from the Gardai. This assistance would include assistance during searches on foot of warrants issued by the District court to search business premises and private dwellings. Working with the Gardai would help ensure a consistent and professional approach to the investigation of white collar crime.

2.4 The Authority has encountered certain limitations with the investigative powers available to it under the Act. Though these limitations arise under the Competition Act, 2002, it is possible that some at least of

these limitations arise under other legislation. In December 2007, the Authority made a submission[12] to the Department of Enterprise Trade and Employment[13] on the Review of the Competition Act, 2002. In that submission the Authority made a number of recommendations on how to improve enforcement of the Competition Act.

2.5 In essence, the Authority believes that the general powers to investigate crime provided to the Gardai should also be available to authorised officers of specialist agencies such as the Authority when those agencies are investigating breaches of the law that they police. For instance, obstruction of authorised officers in the course of a search should be an 'arrestable offence.' Also, where an authorised officer is searching a premises on foot of a search warrant in relation to a specific alleged offence but finds evidence of a completely separate and previously unknown offence, that authorised officer should be empowered to seize that evidence in much the same way as a member of the gardai or the defence forces can seize evidence under section 9 of the Criminal Law Act, 1976.

2.6 Indeed, consideration should be given to amending section 9 of the Criminal Law Act, 1976 to allow such other authorised officers duly appointed by statute, to seize and retain any material that they believe to be evidence of any criminal offence. This would assist officers of agencies that investigate white collar offences to gather evidence in much the same manner as the Gardai. This provision would not allow for fishing expeditions. What this provision would address is those situations where an investigator discovers evidence of a criminal offence not previously known of or suspected, whilst conducting a separate investigation.

2.7 Consideration should be given to the enactment of 'generic' search powers for officers from investigative agencies such as the Gardai and the Authority. A generic search warrant created by statute applicable to offences that carry a maximum tariff of say 5 years or more for conviction on indictment should be created. This would avoid the current position where each statute that creates a criminal offence also

[12] Public Consultation on the Operation and Implementation of the Competition Act 2002: The Competition Authority Submission to the Department of Enterprise Trade and Employment (December 2007) S/07/008, available at http://www.tca.ie/images/uploaded/documents/S_07_008%20Competition%20Act%202002.pdf

[13] Now known as the Department of Enterprise Trade and Innovation.

creates its own search powers (under warrant or other instrument) which can and often do, vary from other similar, though not identical, search powers. The myriad of search powers that have been created by statute leaves these powers to conduct searches open to legal challenge because of the discrepancies in wording that arises and the knock effect is that there are variations in interpretation of how various search powers should be applied. This in turn often leads to prolonged trials where the admissibility of evidence gathered during an investigation is challenged.

2.8 There is a need to amend the law to allow authorised officers of the Authority to be present at (and assist in) the questioning of suspects that have been arrested and detained for questioning. If it is clear that in order to progress an investigation it is necessary to arrest and detain a suspect for questioning, Gardai who are not familiar with the investigation, or indeed with the area of law under which the investigation is being conducted, have to be drafted in to conduct the questioning of suspects. This situation places an undue amount of pressure on members of An Garda Síochána who bear sole responsibility for the questioning of suspects in detention during the detention period. This issue was addressed in respect of officers of the Criminal Assets Bureau ("CAB") by Section 58 of the Criminal Justice Act, 2007. This provision amends Section 8 of the Criminal Assets Bureau Act, 1996 by the insertion of a provision into that Act permitting a CAB officer, accompanied by a member of An Garda Síochána who is also a CAB officer, to attend at, and participate in, the questioning of a person detained pursuant to section 4 of the Criminal Justice Act, 1984.

2.9 More generally, there is a clear need to revisit the issue of detention periods for the questioning of suspects in complex white collar crime cases. Currently, the maximum period for which a suspect can be detained for questioning is 24 hours. Where there is a mass of documentation available to the authorised officers or Gardai in a complex investigation which needs to be put to a suspect, this 24 hour maximum time period is wholly insufficient. The Authority notes the

suggestion made by the Department of Justice and Law Reform on its website[14] where it suggests the following...

2.10 'The existing law whereby a person may be detained for questioning by the Gardaí for a specified period will be amended to allow the period of detention to be broken into segments and the person released in the intervening periods. The Gardaí will be able to detain and question an individual for part of the period, release that person while the Gardaí make further inquiries into what was said and then require the individual to return to the Garda station at a later stage for the continuation of his or her detention. The extent of data and the complexity of recent investigations have shown that it is not always possible to complete questioning and check facts in one period of detention.'

2.11 The Authority supports this sensible suggestion with the additional proviso that authorised officers from the specialist investigative agencies involved in investigating the offences in question be allowed to attend and participate in the questioning of these suspects.

2.12 Under section 31 of the Competition Act, 2002, the Competition Authority can summon witnesses to attend before it so that these witnesses can answer questions on oath and provide documents where necessary. This is an invaluable tool in the Authority's investigative armoury and one that is likely to be of use to other agencies investigating white collar criminal offences. Care should be taken when using the summons power to avoid compelling the attendance of suspects who of course retain their right to silence during a criminal investigation. The summons power is of use in compelling witnesses who are otherwise reluctant to assist an investigation or who are otherwise constrained from furnishing the private records of suspects in their possession, such as bank or telephone records.

2.13 The Authority notes the suggestion by the Department of Justice and Law Reform on requiring witnesses to make a statement, and in particular the method suggested by the Department to compel witnesses to make a statement. The Department might consider, in

14 http://www.inis.gov.ie/en/JELR/Pages/Government%20approves%20text%20of%20White%20Collar%20Crime%20Bill

addition or as an alternative, a mechanism whereby a witness could be summoned by an investigative agency to attend and be examined on oath in the manner just described under section 31 of the Competition Act, 2002. Legislation could then be enacted whereby the transcript of a witness summons hearing could be presented as a statement in similar fashion to a 'normal' statement. Consideration might also be given to allowing authorised officers to apply to a District Court Judge to call a witness on depositions prior to an accused being returned for trial. This was the method used prior to the 1967 Criminal Procedure Act and remained available until 1999. These depositions are recognised as a form of statement.

3. PERJURY AND WHISTLEBLOWERS

3.1 There is a need for a perjury act in Ireland. Such an Act would clarify the law in this area and should be a law of general application. This would be of particular use and benefit if the power to summon witnesses suggested earlier is introduced for other investigative agencies. A new offence of perjury under this proposed Act would carry, at least, a maximum sentence of 5 years on indictment. This would make the offence an arrestable offence and would also help to deter persons from committing the offence.

3.2 Currently, perjury is a misdemeanour at common law which may be tried summarily in the District Court at the suit of the DPP. To sustain a conviction the prosecution must prove the authority to administer the oath, the occasion of administering it, the form of oath administered, the materiality of the matter sworn, the falsity of same and the corrupt intention of the person making the perjured statement. It is also a requirement that there be at least two separate witnesses to the act of perjury for a prosecution of perjury to succeed. Perjury cases are very difficult to prosecute successfully and as a result there have been very few such prosecutions under Irish law. Suborning perjury is also an offence at common law but is equally difficult to prosecute with any degree of success. Subornation of perjury is the procuring of another to take any oath or affirmation that is perjury or punishable as perjury.

3.3 There is a clear need for the introduction of a whistleblowers Act. Section 50 of the Competition Act, 2002 currently protects whistleblowers but does not contain sanctions for those who retaliate against whistleblowers. Explicit statutory prohibitions and penalties for reprisals against whistleblowers would enhance the willingness of those with information to come forward. Furthermore, there is a need for an act of general application so as to avoid a piecemeal approach to this very difficult problem.

4. NEED FOR CIVIL FINES

4.1 The Courts should to be able to impose civil fines in appropriate cases. Breaches of both sections 4 and 5 of the Competition Act constitute offences under sections 6 and 7 of the same Act. Whilst it is appropriate to view 'hard-core' breaches of competition law such as price-fixing as potentially criminal in nature, other breaches of competition law clearly do not bear the indicia of a criminal offence. Even so, there is a desire by legislators to leave open the possibility that the courts can impose fines for all breaches of the competition rules set out in sections 4 and 5. Given that it appears under the Constitution that the courts can only impose fines in a criminal case, this means that matters that are not necessarily criminal are in fact criminalised in order to allow the imposition of fines by the Courts.

4.2 There are possibly other matters in the law generally that are inappropriately criminalised in order to allow the possibility of the Courts to impose fines in such cases. This 'over-criminalisation' undermines arguments that serious white collar criminal offences are truly criminal, and confuses criminal breaches of the law with what should otherwise be treated as civil breaches of the law.

4.3 Arguments have been made by the Competition Authority and others[15] that there is a need to introduce civil fines in appropriate cases. Without civil fines, there are whole swathes of the Competition Act (for example section 5 – abuse of dominance) where there is no effective sanction available to the courts at all. The reason for this is that there will never be a criminal prosecution for such offences and a civil action only allows the Court to make a Declaration or order an injunction.

4.4 The reason why there will never be a criminal prosecution for some offences under the Competition Act, 2002, is as follows. Some cases require what is known as 'rule of reason analysis.' The rule of reason approach is used to decide between what are considered the pro-competitive aspects of an agreement and the anti-competitive aspects of the agreement. This means that there are instances where it is not immediately clear whether the impugned agreement or activity is

[15] See for example D. McFadden, 'Two Tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement', forthcoming in *Regulatory Crime in Ireland*, pages 193 – 215 (Blackhall Publishing, Dublin, 2010).

actually wrong. The impugned agreement or activity requires more careful scrutiny before deciding if it is pro or anti-competitive. Rule of reason analysis is a judicial tool used in competition cases. The rule of reason analysis evolved over a long period of time[16] but was considered in some detail in the *Chicago Board of Trade* case.[17] In that case Justice Brandeis stated the rule as follows...

> "The true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition…To [answer] that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature and effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."[18]

4.5 As former Competition Authority Member Terry Calvani once pointed out...

> "In other words, we are instructed to weigh the pro-competitive aspects against the anti-competitive aspects."[19]

4.6 This means that there are some breaches of competition law, other than 'hard-core' price-fixing agreements between competitors, where it is not immediately obvious to the Competition Authority and to the Courts whether the activity is sufficiently malignant to warrant Court action. If it is not immediately clear to the Competition Authority that the impugned agreement or conduct is bad, then it would be impossible for a jury to make a finding on the (complex) facts of the case that the conduct amounted to a criminal offence.

4.7 By allowing for civil fines in appropriate cases, sanctions will be available for those breaches of the law that are either not amenable to criminal prosecution or which simply do not bear the indicia of a criminal offence.

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[16] See for example *Standard Oil Co. of New Jersey v. United States*, 221 US 1 (1911) and *United States v. American Tobacco Co*., 221 US 106 (1911).
[17] *Chicago Board of Trade v U.S.*, 246 U.S. 231, 238 (1918).
[18] Ibid.
[19] Calvani, T. "Some Thoughts on the Rule of Reason", [2003] 6 E.C.L.R.

5. SENTENCING AND DETERRENCE

5.1 It is sometimes questioned whether white collar criminal offences involve the commission of real crimes. This is particularly obvious when it comes to sentencing in white collar cases. If no one is physically harmed by the offence and if there is no immediate or obviously discernible injured party, then, should these offences really attract sentences in like manner to other 'normal' criminal offences?

5.2 As already argued in this submission, hard-core breaches of competition law such as price-fixing are viewed as serious criminal offences. Unlike shop lifting or other forms of theft, the victims of this form of crime are rarely on hand to make a witness statement as an injured party in that offence. In reality, the victims of price-fixing conspiracies are usually numerous, dispersed and unaware that they are the victims of a crime. Even so, the harm caused by these crimes can be severe, not just to the large group of dispersed victims, but also to the economy and to society generally.

5.3 The Authority is of the view that hard-core breaches of competition law should attract sentences commensurate to the serious nature of the offence. Apart from punishing offenders for their wrongdoing, appropriate sentences serve as a deterrent to other would be offenders.

5.4 It has been argued that deterrence is a primary objective of enforcement of competition law. One of the problems with prosecuting white collar crime is where fines are imposed on companies and individuals without any further sanction imposed on the individual involved in the illegality. This is problematic for a numbers of reasons. For instance, it is possible that a company may pay the fines imposed on individuals (including directors of the company). In that way the company and individuals perceive the fine as being just another cost of doing business; in essence it's treated as a business risk or expense. Such fines cannot be an effective deterrent. In order to be effective as a deterrent, the sanctions for illegal conduct must be directly applicable to the individuals involved in the illegal conduct, rather than a tax that can be paid by the corporate employer without consequences for the individual.

5.5 In the *Duffy* case, Mr. Justice McKechnie recognised the important role that deterrence plays in sentencing in cartel cases. In particular, Mr. Justice McKechnie pointed to the particular importance of general deterrence as opposed to specific deterrence in these types of cases. Justice McKechnie cited O'Malley's *Sentencing Law and Practice* where O'Malley states...

> 'Deterrence may be general or specific in nature. A penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing. Specific deterrence is more concerned with the particular offender, and aims to impress upon him the punishment he will suffer if he re-offends.'[20]

5.6 Mr. Justice McKechnie agreed with O'Malley when he said…

> 'Subject to the stricture that a punishment can never exceed that available on the facts and must always be proportionate, both general and specific deterrence have an important role to play in many areas of criminal behaviour, including the examples herein given.'[21]

5.7 Mr. Justice McKechnie then developed the point with the following quotation from Greg Werden…

> 'Cartel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, but deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders.'[22]

5.8 Mr. Justice McKechnie then stated…

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[20] T O'Malley, *Sentencing Law and Practice,* (2nd Ed, Thomson Round Hall, Dublin, 2006) 2-11.

[21] DPP v Patrick Duffy (n6).

[22] Ibid para 37, citing an essay by G Werden entitled, 'Sanctioning Cartel Activity: Let the Punishment fit the Crime', delivered at a Seminar organised by the Irish Competition Authority on the 22nd November, 2008.

'In these respects I would agree. 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.'[23]

5.9 It is clear that hard-core breaches of competition law involve the commission of criminal offences. This criminal activity involves conspiracies by business to steal from their customers. Deterrence is a central element in sentencing competition conspirators. As these offenders are unlikely to reoffend, the general deterrent effect of sanctions is more important than the specific deterrent effect on the individuals who have committed the offence.

5.10 To help ensure that the general deterrence of criminal sanctions is effective there is a need to send a signal to would be offenders that this form of criminality will not go unpunished. Sanctions in the form of potentially lengthy sentences should be available to the Courts. Specialist divisions of the courts, in either the Circuit Court or in the Central Criminal Court, should be established to deal with white collar crime, just as a commercial court and competition judge have been appointed to deal with specific areas of the law. This would help ensure the consistent application of appropriate sentencing with general deterrent effect by the courts in white collar cases.

5.11 It may also be necessary to specify in legislation that creates particular offences (and sanctions), that a particular sanction for conviction on indictment is provided *inter alia* to boost general deterrence, and that general deterrence should be considered by the trial judge when sentencing for that particular offence. Though this might appear peculiar, such wording within a statute would help guide a judge when sentencing in such cases.

[23] Ibid.

6. CONCLUSION

6.1 Tackling white collar crime can be complex, time consuming and very costly in terms of the resources required. It is clear that there needs to be a more coherent approach to investigating white collar crime by creating statutory investigative tools that are of general application rather than the somewhat piecemeal approach that has been followed to date. This piecemeal approach to white collar enforcement has meant that different agencies have different powers available to them when they are investigating white collar crime. Small discrepancies between the investigative powers available under various statutes leave open greater opportunities to attack, at trial, the enforcement powers used in the case at trial.

6.2 The statutory tool kit for investigating white collar crime is not identical in every respect to the investigative tools required for investigating crimes against the person. This is most obvious in the area of detention for questioning. There the time limits currently allowed for detaining and questioning suspects constrain effective investigation of detailed and sophisticated criminal offences.

6.3 There is a need to consider the enactment of various laws of general application to assist in the coherent approach to investigating white collar crime. These laws would deal with, amongst other things, search powers, compellability of reluctant witnesses, whistleblowers protection and perjury. Each of these issues impact on the effectiveness of investigating white collar crime.

6.4 There is also a need to clearly target what are truly criminal acts, rather than breaches of statute that have been criminalised so as to allow a theoretical ability for the Courts to impose fines. The introduction of fines in civil cases would allow the courts to impose appropriate sanctions in civil cases and allow enforcers to narrow their focus on tackling actual white collar crime such as price-fixing.

6.5 Without question, the issue of appropriate sanctioning for white collar criminals is central to enforcing white collar crime. Society's confidence in the ability and willingness of State agencies to tackle white collar crime is undermined when white collar criminals are perceived as getting off lightly for the offences that they commit. The general

deterrent effect of sentences is undermined when sentences are seen to be much lighter for white collar offences such as price-fixing (or revenue or company law offences) than for other crimes such as theft, burglary and so forth. White collar offences such as price-fixing usually take time to plan and carry out. They are not 'spur of the moment' type crimes. The offenders frequently carry out their crimes over protracted periods of time, months or maybe years, meaning that they have to work at committing their crimes day after day. Yet, courts often see these offenders as being of 'previously good character' if they have no previous convictions. Furthermore, rates of recidivism are usually low. For these reasons undue weight is given specific deterrence as it is thought that the offender is unlikely to re-offend. This problem in sentencing requires urgent attention.

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