Commission for Communications Regulation | The Competition Authority An tÚdarás Iomaíochta | CER Commission for Energy Regulation An Coimisiún um Rialáil Fuinnimh | IRISH MEDICINES BOARD

# Submission to the Law Reform Commission Proposed New Programme of Law Reform 2012

## Enforcement of Competition and Regulatory Law: The Case for Reform

### Introduction

1. Regulatory objectives are set to pursue public welfare objectives, such as competitive markets, consumer empowerment and safe goods and services amongst other things.

2. Our submission is twofold: we submit (a) that an enforcement regime applicable to all regulatory bodies[1] be put in place, and (b) that effective penalties for competition and other regulatory infringements be established.

3. The recommended reforms aim to address enforcement powers and enforcement penalties, the better to deter non-compliant behavior and thus deliver the statutory objectives as set out by Oireachtas on foot of Government proposals in addition to other issues raised by a review of the law. We address each issue separately in what follows

### Enforcement Powers

4. Enforcement powers need to be a meaningful deterrent. To be effective the threat of enforcement must be real. This means that any enforcement procedure must be timely and efficient, particularly where there are high value dynamic markets and limited resources with which to regulate them.

5. Currently there is an ad-hoc legislative approach to enforcement powers, with slightly different procedures applying to, for example, search powers and summons powers (to mention but two). As a result, there is not a reliable set of precedents that can apply to enforcement powers exercised by all agencies, and courts have to apply a case-by-case approach which is neither efficient nor ultimately useful.

6. We submit that there is need for a consistent legislative approach towards enforcement powers exercised by regulatory agencies. Perhaps the most efficient way of doing this would be by a single Act which set out the enforcement powers capable of being exercised by regulatory bodies, and then in a schedule listing the bodies to which the Act is applicable (clearly bodies could be added to or deleted from such a schedule as appropriate.)

[1] In this submission, any reference to "regulatory bodies" includes the Competition Authority, although it is not in the strict sense a regulatory body – that is, it is not concerned with any particular sector of the market.

## Enforcement Penalties

7. Traditional criminal offences are not the most effective or efficient approach to ensuring regulatory compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. Most regulators will not adopt this approach and most regulated entities will not treat these offences as a realistic deterrent. Even in the realm of competition law, criminal offences are appropriate only for what are known as "hard-core" cartel offences, which are readily understood by a jury. Nevertheless, at present, all competition infringements are criminal offences, although in practice the Competition Authority will attempt to enforce non-hard-core infringements only in the civil courts.

8. However, while civil enforcement is more appropriate to regulatory offences than criminal prosecution, the problem is that the orders that a court can impose are not effective. In general, the court in such a case is limited to making a declaration or issuing an injunction. A fine would be an appropriate penalty, but the constitutional difficulties may mean that the civil courts could not impose a fine of sufficient size to be effective.

9. Penalties need to be a meaningful deterrent. For the penalties to be a realistic deterrent to the potential gains from non-compliance they need to be proportionate to the harm incurred to the market. Fines should also be proportionate to the turnover of the infringing entity. We submit that the Law Reform Commission might consider the question of non-criminal fines under two headings: (a) fines imposed by courts in civil cases, and (b) administrative fines imposed directly by regulatory bodies,

## Fines imposed by the courts in civil cases

10. Fines imposed directly by the courts in civil cases would be a very effective method of deterrence, if such fines are proportionate to the infringement in question. However, a perceived constitutional difficulty (which has never been pronounced upon definitively by the courts) prevents courts imposing large fines except in criminal cases. We submit that the Law Reform Commission examine this issue and make appropriate recommendations, including, if necessary a recommendation to amend the Constitution.

## Administrative fines

11. A number of different models of fining power have been pursued by the State in recent years. Some are essentially voluntary (e.g. on the spot fines). One can pay the fine imposed or instead go through the judicial process. Others involve application by the regulatory authority to court. It should also be noted that where national regulatory authorities are given certain powers of a quasi judicial nature, the legislature has struggled to avoid contravening the principle of *nemo iudex in causa sua*. Thus, for example, one finds provisions in the Broadcasting Act, 2009 for a Compliance Committee and provisions in Part III C of The Central Bank Act, 1942 (as amended) for an appeal to an Appeals Tribunal.

12. These legislative contortions simply emphasise the very real legal difficulties associated with anybody acting as investigator, prosecutor, judge, jury and executioner. Under the Constitution, limited powers and functions of a judicial nature can be conferred on bodies other than courts. However, this may not be done in criminal matters. Without fully empowered regulatory enforcement regimes comparable with other jurisdictions, other positive changes and improvements to the regulatory landscape may lose their value in application.

## National and EU concerns

13. Concerns on the lack of an effective civil enforcement regime have been raised both nationally and by the EU. The Memorandum of Understanding between Ireland, the EU Authorities and the International Monetary Fund, of December 2010, made the following recommendation: "To enhance competition in open markets, Government should introduce legislation to empower judges to impose fines and other sanctions in competition cases in order to generate more credible deterrence." We understand that the Attorney General advised that this was not possible due to constitutional difficulties.

14. The Fine Gael Policy Document on Public Sector Reform (February 2011): proposed to merge the Competition Authority with a number of other regulators to create a Competition and Utilities Commission and to empower that Commission to "impose administrative fines on violators of competition law, as in the UK and other EU countries".

15. In a recently published book on regulatory crime, Michael McDowell, a former Minister for Justice said "...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 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."[2]

16. More recently again, at the Competition Press Conference on 27th September 2012, Mr. McDowell said "There are, in my view, good grounds for a further departure in relation to competition law to allow the introduction of substantial administrative law remedies (including administrative fines) for persons infringing our competition law. The panoply of jury trial as the chief means of ensuring compliance with our criminal law entailing, as it does, proof beyond reasonable doubt, seems ill-suited, in the 2lst century, to the implementation of a competition regime based on European law concepts such as the ban on anti-competitive practices and agreements and the abuse of dominant position. There is, of course, a constitutional issue as to whether a fine (punitive as it obviously is)can be administered on a company or business other than as a result of the operation of the system of criminal justice using the courts established under the Constitution and requiring

[2] *Regulatory Crime in Ireland*, (Kilcommins & Kilkelly, eds.) First Law/Lonsdale 2010

compliance with the constitutional obligation of prosecution in due course of law. For my part, I think the time has come to make a serious attempt to introduce into Irish law the concept of administrative fines (which are already working in licensed regulated areas such as the banking and insurance sectors)."[3]

17. The Better Regulation Group Review of penalties in 2007 was terminated at early stages prior to any conclusion with no report but was considered valuable at the time and the same terms of reference would remain relevant today. The terms of reference were twofold: to examine the current system of penalties and fines for non-compliance with Irish regulatory decisions; and to explore and report to the Better Regulation Group on the potential for improvements in the current system of penalties and fines to promote compliance and ensure proportionate penalties for non-compliance with Irish regulatory decisions.

18. The European Commission noted in its 7th and 9th implementation reports regarding electronic communications that there was an enforcement weakness in Ireland due to constitutional issues over the inability of an National Regulatory Authority to impose fines, noting that this causes serious problems with the functioning of the single market as a whole. [4]

19. Other jurisdictions have valuable models for consideration in reviewing this area. For example in Spain as in most civil law jurisdictions administrative fines are imposed directly by the national regulatory authority for breaches of obligations under the electronic communications framework. However, common law jurisdictions also have valuable models. For example, the UK allows for the imposition of fines by administrative bodies and Australia has a model that also embraces administrative fines.

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[3] Address by Michael Mc Dowell SC to the Competition Press Conference at Radisson Hotel, Stillorgan Rd., Dublin, on: Thursday 27 September 2012.

[4] 7th Report: Commission of the European Communities, Communication From The Commission To The Council, The European Parliament, The Economic and Social Committee and The Committee Of The Regions, Seventh Report on the Implementation of the Telecommunications Regulatory Package (Brussels, 2001)
<http://ec.europa.eu/information_society/policy/ecomm/doc/library/annualreports/7threport/7report2001.pdf>
9th Report: Commission of the European Communities, Communication From The Commission To The Council, The European Parliament, The Economic and Social Committee and The Committee Of The Regions, Report on the Implementation of the EU Electronic Communications Regulatory Package (Brussels, 2003)<
http://ec.europa.eu/information_society/policy/ecomm/doc/library/annualreports/9threport/com20030715en.pdf>

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