



The Competition Authority
An tÚdarás Iomaíochta

Ms Marian McDermott,
Office of the Director of Corporate Enforcement,
16Parnell Square,
Dublin 1.

Friday 17th October 2008

By Hand & e-mail to consultation@odce.ie

Re: Preparation of ODCE Strategy Statement 2009 - 2012

Dear Ms McDermott,

The Chairman of the Competition Authority, Mr. Bill Prasifka has asked that I respond to your request for a contribution to your planned Strategy Statement for 2009 – 2012. I would like to apologise for not writing to you sooner in this regard and hope that my comments will be of some assistance.

My comments are in fact quite brief and grow from the experience of the Competition Authority in the enforcement of the Competition Act 2002 ('the Act'). As you are aware, the Competition Authority is charged with, *inter alia* the investigation and prosecution of alleged breaches of both Irish and European competition law in the State. The Act applies to 'undertakings' as defined at section 3 of the Act. An undertaking '...means 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...' (emphasis added).

As you will appreciate, the Competition Authority as a matter of course frequently investigates the illegal behaviour of corporate undertakings engaged in various forms of anti-competitive behaviour. The Act renders individuals personally liable to prosecution and specifically envisages the prosecution of company directors. Section 8 (1) (b) (ii) provides for terms of

imprisonment of individuals for a period of up to 5 years for conviction on indictment. Those individuals include directors. Section 8(6) reads:

“Where an offence under *section 6* or *7* has been committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being ***a director***, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person, as well as the undertaking shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence...” (emphasis added).

Section 8(6) speaks of “the doing of the acts that constituted the offence... by a person, being a director... that person, as well as the undertaking shall be guilty of an offence...” As mentioned above the Act recognises that the broad concept of undertakings includes corporate undertakings. The act seeks to make directors of those corporate undertakings personally liable to prosecution for offences committed in relation to that corporate undertaking.

The wording of section 8(6) of the Act fits almost perfectly with the class of persons captured by the disqualification provision of Section 160(1) of the Companies Act 1990. As you are aware conviction on indictment under Section 160 of the Companies Act 1990 of a person for any indictable offence in relation to a company will, without the need for any further judicial intervention, result in that person’s automatic disqualification for a period of five years from the date of that conviction.¹ This is made clear at subsection (1)(b) where the convicted person is “deemed...to be subject to a disqualification order...”

Section 160 refers to “a person...convicted on indictment of ***any indictable offence*** in relation to a company” (emphasis added) as being a person that will be disqualified from holding, amongst other things, a directorship in any company. On a plain reading of the section, disqualification under section 160(1) applies in cases where an individual is convicted of any indictable offence in relation to a company, under any legislation, including the Competition Act 2002.

¹ The prosecutor may apply for a different period to the court.

In the heating oil cartel case² it was widely reported in the media that a number of company directors were amongst those prosecuted. As reported in the publication *Competition*³ the charges against one such director were worded in such a way as to specifically tie him as a director to his company and that the “doing of the acts constituting that offence having been authorised or consented to by you [named director] you are guilty of the said offence.”⁴ You should note that to date, three individuals convicted of offences arising under Competition Law⁵ have been disqualified from holding directorships for a period of five years as per Section 160 of the Companies Act 1990.

Specific Issues

In Dublin Circuit Criminal Court in January 2007, a company director specifically drew the Judge’s attention to the fact that he would be automatically disqualified from holding any directorships in the State as a consequence of his conviction which arose from his capacity as a director of a corporate undertaking. This was played up by his counsel to the point that disqualification as a company director was a severe form of punishment and should be counted as part of the sentence imposed by the court, rather than an automatic consequence of his criminal conviction that was beyond the Judge’s consideration. The Judge agreed with the accused’s counsel and, taking his automatic disqualification into consideration, imposed on the accused a comparatively small fine with no custodial sentence.

The Competition Authority is concerned that the Judiciary might consider automatic consequential disqualification as part of the sentencing process rather than note the fact that such disqualification is an automatic consequence of criminal conviction and does not form part of the sentencing process. The Competition Authority believes that the issue of director disqualification should be highlighted with the Judiciary through seminars and other educational programmes.

² This case was taken under the Competition Act 1991 as amended by the Competition (Amendment) Act 1996, both of which acts were repealed and replaced by the Competition Act 2002. However the elements of the offences for which both undertakings and individuals were prosecuted are almost identical.

³ *Competition*, Vol. 12, Ed. 10, pp232.

⁴ *Ibid.*

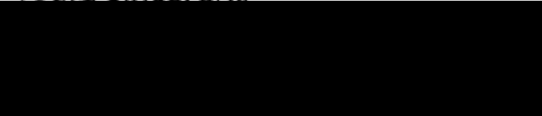
⁵ All three individuals were in fact convicted under the now repealed Competition Act 1991 and Competition (Amendment) Act 1996 which were repealed and replaced by the Competition Act 2002.

Of greater concern to the Competition Authority is the fact that company directors convicted in similar competition cases in the various Circuit Courts outside of the Dublin Circuit Court Area have not had their record of conviction transmitted to the Companies Registration Office ('the CRO'). As they have not had their conviction recorded in the CRO this means that it is possible that they are still acting as company directors despite having been disqualified as a consequence of their conviction when acting as director of a convicted corporate undertaking. The ODCE should consider methods of ensuring that the various Circuit Court offices record the fact of a company director's conviction with the CRO otherwise errant company directors may continue to act as directors despite their automatic consequential disqualification.

Finally, there is no doubt that prosecuting individuals including company directors for their part in criminal activity with (corporate) undertakings has a strong exemplary effect in the application of the Competition Rules under the Act. From the Authority's experience in this regard we would strongly urge the ODCE to pursue individuals as a priority through the criminal courts. Criminal proceedings against company director's acts as an exemplar to other directors on the type of behaviour that is unacceptable under the Companies Acts and is a deterrent to those directors tempted to break the law.

I trust that you find these brief points of use.

Yours sincerely,

A large black rectangular redaction box covering the signature of David McFadden.

David McFadden
Solicitor to the Competition Authority