Law Reform Commission *Issues Paper on Regulatory Enforcement and Corporate Offences*

Response of the Competition and Consumer Protection Commission (CCPC)

19 September 2017

CCPC

Coimisiún um Iomaíocht agus Cosaint Tomhaltóirí | Competition and Consumer Protection Commission

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Executive Summary

A. The Competition and Consumer Protection Commission ("CCPC") is an independent statutory body with a broad mandate which includes the enforcement of competition law and consumer protection law in Ireland. It was established on 31 October 2014 under the Competition and Consumer Protection Act 2014 following the amalgamation of the Competition Authority and the National Consumer Agency.

B. The CCPC welcomes the publication on 27 January 2016 of the Law Reform Commission's *Issues Paper on Regulatory Enforcement and Corporate Offences* (the "Issues Paper"). Successful enforcement of the law by the State's financial and economic regulators is dependent on bodies such as the CCPC having the necessary investigative and enforcement tools to perform their functions. The legal framework must be coherent and fit for purpose.

C. In this submission, the CCPC makes some observations on the adequacy of the existing regulatory enforcement regime in Ireland and suggests a number of improvements that could be made. It should be noted that this submission focuses primarily on the CCPC's competition enforcement functions but also contains some more limited references to our consumer protection functions.

D. In this Executive Summary, we provide an overview of the key reforms that the CCPC considers are necessary to enhance the efficiency and effectiveness of competition law enforcement in Ireland. In the CCPC's view, there are a number of key reforms – most significantly, the introduction of an administrative fining regime for breaches of competition law and the standardisation of the investigative and enforcement powers of regulators – which would greatly enhance the efficiency and effectiveness of regulatory enforcement in Ireland.

Enhanced financial sanctions for breaches of competition law

E. The CCPC is strongly of the view that the current competition law enforcement regime in Ireland is not capable of achieving its objectives as it does not provide for an appropriate range of effective and dissuasive sanctions for breaches of EU and Irish competition law. In particular, the absence in Ireland of civil or administrative fines for breaches of competition law very significantly undermines the CCPC's ability to combat anti-competitive conduct.

F. The current competition enforcement regime in Ireland – in which fines can be imposed only following a criminal conviction in court – is particularly unsuited to the detection and deterrence of certain types of anti-competitive behaviour, such as abuse of dominance, anti-competitive vertical agreements or certain types of horizontal information-sharing,

where enforcement relies heavily on economic analysis. The lack of any kind of civil or administrative financial penalties means that there is little deterrent effect in such cases.

G. The absence of civil or administrative fines in Ireland for breaches of competition law puts Ireland at odds with the vast majority of other EU Member States. A large majority of EU Member States operate administrative competition enforcement regimes, whereby the sanctions are imposed by the competition authority itself, subject to a right of appeal to the courts. The CCPC believes that it is essential for the effective enforcement of competition law in Ireland that the law be amended to provide for civil or administrative fines for breaches of competition law. It should be noted that, in this submission, the CCPC uses the phrase "civil financial sanctions" to refer collectively to both civil fines (i.e. fines imposed by the courts in civil proceedings) and administrative fines (i.e. fines imposed directly by regulators themselves). This echoes the approach adopted by the Law Reform Commission in the Issues Paper.

H. On balance, the CCPC would be strongly in favour of introducing an **administrative enforcement regime** in Ireland for competition law, whereby the CCPC would itself have the power to make infringement decisions and to impose fines and/or remedies for breaches of competition law. The CCPC considers that an administrative enforcement regime would be a complement to, not a substitute for, the existing criminal enforcement regime. The CCPC believes that the introduction of an administrative enforcement regime which is more effective and efficient than a court-based system, would have a greater deterrent effect and would increase the incentives for undertakings to cooperate with investigations conducted by the CCPC. In addition, effective, dissuasive and proportionate administrative sanctions would create incentives for parties to seek leniency (i.e. reduction in fines) under available leniency programmes and to provide full co-operation with the CCPC in its ongoing investigation of the alleged competition law infringements. The introduction of an administrative enforcement regime for competition law breaches would ultimately result in significant benefits for Irish consumers and businesses.

I. With regard to the constitutional law issues raised by legislation providing for civil financial sanctions, the CCPC agrees with the Law Reform Commission's analysis in the Issues Paper and with its conclusion that "*proportionate civil financial sanctions that are imposed subject to appropriate procedural safeguards and standards of fairness may be constitutionally permissible*". The CCPC believes that such legislation could be drafted in a manner that would comply with the requirements of Irish constitutional law. The CCPC notes that an increasing range of EU and Irish legislation provides – or proposes to provide – for the imposition of administrative financial sanctions by regulatory bodies themselves (e.g. the Central Bank of Ireland, the Commission for Energy Regulation and the Data Protection Commissioner), subject to appropriate judicial oversight.

Standardising regulatory powers

J. The CCPC considers that, at present, there is a lack of coherence across the statutory powers conferred on Ireland's various regulatory and enforcement agencies. Legislation

conferring powers on regulators often appears to be drafted on an uncoordinated basis with little attempt being made to standardise powers.

K. The CCPC would very much welcome a more holistic and coherent approach to the drafting of regulatory legislation. In particular, the CCPC believes there is a need for much greater convergence in the areas of (i) investigative powers, and (ii) enforcement mechanisms. The CCPC considers that this could be achieved by appointing a central coordinator (for example, the Office of the Attorney General) to review existing regulatory powers and, in consultation with the relevant regulators and their Government Departments, make proposals for standardising such powers. The CCPC is strongly of the view that standardising the statutory investigative and enforcement powers of different regulators would greatly improve the efficiency and effectiveness of financial and economic regulation in Ireland, by providing greater legal certainty both for enforcement agencies and for business, and by enhancing the precedential value of court judgments. This does not mean that all regulators should have an identical set of powers, but rather that – where regulators have been given similar powers (e.g. inspection or search powers) – the legislation granting such powers should follow a standard template.

No other significant changes required

L. To date, the CCPC has not experienced significant issues with respect to many of the other matters raised in the Issues Paper. The CCPC considers that the existing framework broadly works well in practice with respect to the following matters:

- Co-operation between the CCPC and other sectoral regulators in relation to areas of shared competence (see our response to Chapter 5 of the Issues Paper);
- mechanisms for appealing decisions of the CCPC (see our response to Chapter 6 of the Issues Paper);
- the attribution of criminal liability to corporate entities and to corporate officers (see our response to Chapters 7 and 8 of the Issues Paper, respectively);
- the due diligence defence to certain consumer protection offences (see our response to Chapter 9 of the Issues Paper); and
- the venue for prosecution of indictable competition law offences (see our response to Chapter 12 of the Issues Paper).

M. For the reasons set out later in this submission, the CCPC does not consider that there would be any justification for introducing a due diligence defence for competition law offences (see our response to Chapter 9 of the Issues Paper) or for the increased use of deferred prosecution agreements in relation to competition law offences (see our response to Chapter 4 of the Issues Paper).

Introduction

(i) The CCPC is an independent statutory body with a broad mandate which includes the enforcement of competition law and consumer protection law in Ireland. It was established on 31 October 2014 under the Competition and Consumer Protection Act 2014 following the amalgamation of the Competition Authority and the National Consumer Agency. The CCPC's mission is to make markets work better for consumers and businesses. Its vision is for open and competitive markets where consumers are protected and empowered and businesses actively compete.

(ii) As well as its enforcement responsibilities, the CCPC is responsible for promoting competition and for promoting and protecting the interests and welfare of consumers. It does this in a variety of ways, including: conducting research; undertaking studies; publishing papers; and making submissions which inform and influence Government policy relating to consumer and competition issues. The CCPC publishes guidance documents to inform and assist interested parties in understanding the scope and content of competition and consumer protection laws. It also operates a consumer helpline and website which help consumers be aware of and understand their rights in relation to goods and services, including personal finance products and services. The CCPC also has specific responsibilities in relation to the safety of consumer products, alternative dispute resolution and the regulation of grocery sector business relationships.

(iii) The CCPC welcomes the publication on 27 January 2016 of the Law Reform Commission's *Issues Paper on Regulatory Enforcement and Corporate Offences* (the "Issues Paper"). Successful enforcement of the law by the State's financial and economic regulators is dependent on bodies such as the CCPC having the necessary investigative and enforcement tools to perform their functions. The legal framework must be coherent and capable of achieving its objectives. The Issues Paper provides an excellent overview of the regulatory enforcement framework that exists in Ireland and poses a wide range of questions concerning (i) the adequacy of the main supervisory and enforcement powers of the State's main financial and economic regulators, and (ii) whether there are gaps in the criminal law insofar as addressing serious wrongdoing by corporate bodies is concerned.

(iv) In this submission, the CCPC makes some observations on the adequacy of the existing regulatory enforcement regime in Ireland (in particular, as regards the enforcement of competition and consumer protection law) and suggests a number of improvements that could be made. In the CCPC's view, there are a number of key reforms – most significantly, the introduction of an administrative enforcement regime (including administrative fines) for breaches of competition law and standardisation of the investigative and enforcement powers of regulators – which would greatly enhance the efficiency and effectiveness of regulatory enforcement in Ireland.

ISSUE 1: Standardising Regulatory Powers

1.1. The first chapter of the Issues Paper considers the types of powers that financial and economic regulators in Ireland have to bring about compliance with regulated standards or to sanction wrongdoing. It goes on to consider whether a standard set of supervisory and enforcement powers should be created for some or all regulators.

1.2. The CCPC is strongly of the view that more standardised statutory regulatory powers across Ireland's various regulatory and enforcement agencies would greatly improve the efficiency and effectiveness of financial and economic regulation in Ireland. This does not mean that each agency should be given identical investigative powers, identical decision-making powers or identical sanctioning powers. This would not be appropriate given the different context in which each agency operates. Rather, the CCPC is of the view that – where regulators have been given similar powers (e.g. inspection or search powers) – the legislation granting such powers should follow a standard template.

1.3. From the CCPC's own experience, the use of very different types of powers may be necessary in different cases depending on the nature of the conduct being regulated. The CCPC has a broad statutory remit which includes consumer protection, competition, safety of consumer products and regulation of grocery sector business relationships. Given the diversity of its remit, the CCPC has found that different approaches are often appropriate depending on the nature of the conduct and the type of wrongdoer involved. This echoes the Enforcement Pyramid referred to in paragraph 1.02 of the Issues Paper.

1.4. However, the CCPC believes that there is a need for much greater convergence in the areas of (i) investigative powers (e.g. search and seizure powers, information-gathering powers and other investigative powers) and (ii) enforcement mechanisms (e.g. the imposition of financial sanctions by regulators or by the courts in civil proceedings). At present, there is a lack of coherence in the statutory powers of regulatory and enforcement agencies with no uniform template being used. Legislation conferring powers on such agencies often appears to be drafted on an uncoordinated basis with little attempt being made to standardise powers. This is starkly illustrated in the Law Reform Commission's 2015 *Report on Search Warrants and Bench Warrants* which notes that, as of 2015, there were over 300 separate legislative provisions in Ireland conferring powers to issue search warrants and that "*while the majority of these statutory provisions share common features, notably that the application for a search warrant is usually made on oath to a judge of the District Court, they also contain differences relevant to their own statutory context*".[1]

1.5. In the CCPC's experience, the approach to drafting regulatory legislation in Ireland tends to be piecemeal and compartmentalised. Legislation is typically drafted on a standalone

[1] Law Reform Commission, *Report on Search Warrants and Bench Warrants* (December 2015), paragraph 2.17.

basis for a particular sector or regulatory body (e.g. for the purposes of implementing an EU Directive). The approach adopted for one regulatory body in one piece of legislation will sometimes be extended in future legislation to another regulatory body; in other instances, it will not be extended – often without it being clear whether this is as a result of an oversight or a deliberate policy decision.[2] When new legislation is proposed, the affected regulatory body will typically not be familiar with – or have a comprehensive understanding of – legislative changes previously introduced for other regulatory bodies. This means that the affected regulatory body is not always in a position to make the case that an approach introduced in previous legislation should be included in its proposed legislation.

1.6. The CCPC would very much welcome a more holistic and coherent approach to the drafting of regulatory legislation in which issues relating to the investigative and decision-making powers of different regulatory and enforcement agencies were dealt with in a more centralised and cross-functional manner based on input from all agencies concerned and their parent Government Departments. The CCPC's view is that the most efficient and effective way of achieving this would be to appoint a central coordinator (for example, the Office of the Attorney General) which would act as a central repository of best practice as regards regulatory powers. This central coordinator could collate and review the existing regulatory powers of the different agencies and, in consultation with the relevant agencies and Government Departments, make proposals for standardising such powers. In the CCPC's view, such an approach would improve the coherence and effectiveness of regulatory legislation in Ireland.

1.7. The CCPC considers that there are efficiencies to be gained from standardising the statutory investigative and enforcement powers of different regulators. Such standardisation would provide greater legal certainty both for enforcement agencies and for businesses. It would also enhance the precedential value of court judgments which interpret the statutory provisions conferring powers on regulators. The current ad hoc, non-standardised approach means that court judgments relating to the powers of one agency cannot necessarily be relied upon by others, thus increasing the risks of costly litigation being brought by agencies or by businesses for the purpose of clarifying the scope of each separate agency's powers, which is costly and time-consuming for all parties involved.

[2] By way of example, footnote 3 to paragraph 1.05 of the Issues Paper notes that both the CCPC and the Commission for Communications Regulation are responsible for enforcing provisions of the Competition Act 2002 but have different powers for doing so pursuant to separate pieces of legislation.

ISSUE 2: Civil Financial Sanctions

2.1. The second chapter of the Issues Paper considers whether the regulation under Irish law of a number of areas of economic activity would be more effective if the relevant legislation permitted the imposition of civil financial sanctions where breaches of the legislation occur. It goes on to review in some detail the legal issues that would need to be considered if such sanctions were introduced.

2.2. The CCPC welcomes the Law Reform Commission's consideration of the legal issues relating to civil financial sanctions in the Issues Paper and agrees with its legal analysis and with its general approach to this issue.

2.3. The main purpose of this part of our submission is to explain why the CCPC believes that the enactment of legislation to provide for the imposition of civil financial sanctions in suitable cases is of critical importance for the effective enforcement of competition law in Ireland. As set out in paragraph 2.38 below, the CCPC's strong preference is for an administrative enforcement regime whereby the CCPC would itself have the power to make infringement decisions and to impose fines and/or remedies for breaches of competition law.

Background: Competition law enforcement under Irish law

Current competition law enforcement regime in Ireland

2.4. Unlike the European Commission and many national competition authorities of other EU Member States, the CCPC does not have power to adopt prohibition decisions or to make orders providing for remedies (procedural or structural) including interim relief, or to impose sanctions in respect of breaches of Irish or EU competition law.[3] Instead, Irish competition legislation reserves such powers to the courts.[4] In particular, in Ireland the power to impose financial sanctions for breaches of competition law is reserved exclusively to the criminal courts.

2.5. One of the CCPC's principal statutory functions is to investigate breaches of EU and Irish competition law. At the conclusion of an investigation, the CCPC may form the view that

[3] These comments are limited to the application of sections 4 and 5 of the Competition Act 2002 and Articles 101 and 102 of the Treaty on the Functioning of the European Union and do not refer to the CCPC's powers under the merger review provisions of the Competition Act 2002.

[4] The only area in which the CCPC has decision-making powers is under the merger review provisions set out in Part 3 of the Competition Act 2002. Under those provisions, the CCPC may prohibit a merger or approve it either unconditionally or subject to conditions. It may also agree to accept commitments proposed by the parties to the merger to address competition concerns raised by the transaction. It is worth noting, in the present context, that the CCPC and its predecessor, the Competition Authority, have long experience of exercising these decision-making powers in hundreds of merger cases, a significant number of which required the analysis of complex legal and economic issues.

an infringement of either section 4 or section 5 of the Competition Act 2002 (and/or Article 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU")) has occurred and may decide to initiate either civil or criminal proceedings in the courts against the undertaking(s) and directors/managers involved. Where the CCPC considers that civil proceedings are warranted, it can institute such proceedings either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself initiate a summary prosecution in the District Court. In the case of more serious breaches, the CCPC sends a file to the Director of Public Prosecutions (DPP) who will decide whether to bring a prosecution on indictment in the Central Criminal Court.

2.6. If the CCPC decides to bring a summary criminal prosecution for breach of competition law, the District Court may impose fines of up to €3,000 on the business or individual concerned and/or a prison sentence of up to 6 months on an individual. On conviction on indictment for competition law offences, the Central Criminal Court may impose fines of up to €5 million or 10% of annual turnover on a business or individual. In addition, in the case of "hardcore" breaches of competition law (i.e. cartel offences involving, for example, horizontal price fixing, market sharing or bid-rigging), the Central Criminal Court can impose a term of imprisonment of up to 10 years on an individual.[5] In addition, under Irish company law, individuals convicted on indictment for a competition law offence are deemed automatically disqualified from being appointed or acting as a director or other officer, auditor, receiver, liquidator or examiner or being in any way concerned in the management of a company for a period of 5 years after the date of conviction (or for such other period as the court may order).[6]

2.7. By contrast, the only civil remedies available to the CCPC under current Irish legislation (section 14A of the Competition Act 2002) are to seek a declaration of illegality (i.e. a court ruling that a particular arrangement or behaviour is unlawful) and/or injunction (i.e. a court ruling requiring a particular arrangement or behaviour to be terminated) before the Irish courts. Irish law does not provide for the imposition of civil financial sanctions for competition law infringements.

2.8. The CCPC takes the view that criminal sanctions are an appropriate and effective form of deterrence for hardcore cartel activity, such as price fixing, market sharing or bid-rigging. The CCPC considers that hardcore cartel activity – which typically involves a deliberate attempt being made by the cartel participants to conceal their actions – is the type of anti-competitive activity which is most amenable to prosecution on indictment. The possibility of being convicted of a criminal offence carries a significant reputational risk for both the undertaking and the individual. When competition infringements are pursued through criminal proceedings, the accused is entitled to a full jury trial[7] and the prosecution's case

[5] See section 8 of the Competition Act 2002, as amended.

[6] Pursuant to section 839 of the Companies Act 2014 in conjunction with the Companies Act 2014 (Section 839) Regulations 2016 (S.I. No. 147 of 2016).

[7] Although the Competition Act 2002 provides for summary prosecutions in the District Court by the CCPC – which do not involve juries – experience shows that District Court judges are likely to decline jurisdiction

must be proved to the very high criminal evidential standard of "beyond reasonable doubt". This means that, as a matter of CCPC policy, such prosecutions will, in practice, only be sought for the most egregious competition law infringements, typically hardcore cartels.[8] The DPP ultimately decides whether or not to proceed with a prosecution on indictment.

2.9. However, the CCPC considers that criminal sanctions are neither appropriate nor practicable in relation to non-hardcore competition law infringements (e.g. cases involving restrictive agreements, abuse of dominance or certain types of horizontal information-sharing where enforcement relies heavily on economic analysis). Notwithstanding the fact that non-hardcore competition law infringements are subject to criminal sanctions under Irish competition law, the CCPC has not to date initiated summary criminal prosecutions in cases involving non-hardcore infringements of competition law[9], nor has it referred any such cases to the DPP for prosecution on indictment. The CCPC's view is that non-hardcore infringements rarely, if ever, exhibit the key characteristics of criminal behaviour and are generally not susceptible to proof to the criminal law standard (i.e. beyond reasonable doubt) given the often complex economic and legal issues that arise in such cases.[10]

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in such cases. When that happens, the case is referred to the Central Criminal Court where the prosecution proceeds before a judge and jury.

[8] Since the enactment of the Competition Act 2002 to date, there have been 35 convictions on indictment for breaches of competition law. A combined total of €646,500 has been imposed by the courts by way of fines in these cases i.e. an average fine of €18,471 per conviction. As explained later in our submission, since 1 July 2002, the Central Criminal Court has had exclusive jurisdiction to hear prosecutions on indictment in respect of competition law offences. Prior to that date, all indictable competition law offences were prosecuted in the Circuit Criminal Court. Notwithstanding the change of jurisdiction for the prosecution of competition law offences and the increase in the maximum level of fines that may be imposed on conviction on indictment for competition law offences, combined total fines of €77,500 have been imposed in the four convictions secured to date in the Central Criminal Court for breaches of competition law i.e. an average fine of €19,375 per conviction. This level of fines seems to support the European Commission's observation (referred to in paragraph 2.12 below) that "*[…] for the period 2004-2013 in many of those Member States in which fines are primarily criminal, EU competition law is under-enforced […]*".

[9] The CCPC's predecessor, the Competition Authority, initiated summary criminal proceedings in the District Court in three cases. In 2000, the Competition Authority brought summary criminal proceedings against Estuary Fuel Limited for engaging in resale price maintenance contrary to section 4 of the Competition Act 2002 and, in 2003, the Competition Authority brought summary criminal proceedings against six farmers and members of the Irish Farmers Association for participating in a blockade and a meeting with the aim of preventing importation of a shipment of UK grain contrary to section 4 of the Competition Act 2002. The Competition Authority also brought summary criminal proceedings in 2006 against Oliver Dixon (Hedgecutting & Plant Hire) Limited, a director of Oliver Dixon (Hedgecutting & Plant Hire) Limited and a sole trader for engaging in bid rigging contrary to section 4 of the Competition Act 2002. However, the District Court judge refused jurisdiction and sent the case forward for trial in the Central Criminal Court. All of the defendants were ultimately acquitted on all charges following a trial in the Central Criminal Court.

[10] Support for the CCPC's view is set out in the European Commission Staff Working Document: "Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market", SWD(2017) 114 final (22 March 2017) ("Impact Assessment"). The Impact Assessment indicates that the experience of EU Member States with (quasi)

The enforcement gap in Ireland for breaches of competition law

2.10. For these reasons, the CCPC considers that civil or administrative enforcement procedures are more appropriate for non-hardcore competition law infringements than criminal prosecution. However, as noted above, the civil enforcement mechanisms available to the CCPC under current legislation (section 14A of the Competition Act 2002) are limited to seeking a declaration of illegality and/or an injunction before the Irish courts.[11] As indicated above, Irish law does not provide for the imposition of civil financial sanctions (i.e. fines either imposed by the courts in civil proceedings taken by the CCPC or imposed by the CCPC itself in its own administrative proceedings) for competition law infringements.

2.11. Because Irish competition law makes no provision for civil financial sanctions, non-hardcore infringements are, in practice, not subject to any sanctions under Irish law. This constitutes a very significant gap in the Irish competition enforcement regime. The absence of civil financial sanctions makes it very difficult for the CCPC to effectively enforce competition law in respect of infringements other than hardcore cartels, with all the adverse consequences that that implies for the victims of such infringements and for competition in the affected markets.

2.12. The absence of civil financial sanctions in Ireland for breaches of competition law puts Ireland at odds with the vast majority of other EU Member States. Most EU Member States operate primarily administrative competition enforcement regimes.[12] In its recent 10-year review of the operation of Regulation 1/2003[13] carried out in 2014, the European Commission noted the situation in Ireland and pointed out that, whatever the mix of sanctions available in a Member State, it is generally recognised that there can be no effective public enforcement of competition law without deterrent civil or administrative

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criminal regimes has been that, "*it is much more difficult to bring cases against infringements which are not hard-core cartels. Finding competition infringements, such as whether a company abused its dominant position, involves more complex economic facts, theories and analysis and is more resource intensive. In (quasi) criminal systems during the period 2004-2013, fines for breach of Article 102 have only been imposed once in Denmark and never in Estonia, Germany and Ireland*." A copy of the Impact Assessment is available at: http://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf.

[11] The procedure provided for in section 14B of the Competition Act 2002, which is a form of negotiated compliance agreement – discussed in Chapter 3 of the Issues Paper – is not, in the CCPC's view, an enforcement mechanism. In the CCPC's view, an enforcement mechanism must involve a procedure which is capable of being exercised by the CCPC or the courts without the consent of the alleged infringing party.

[12] The CCPC understands that fines for breaches of competition law are imposed by the criminal courts or by the national administrative competition authorities applying quasi-criminal procedures in Ireland, Denmark, Estonia and Slovenia. Fines for competition law breaches are imposed by the civil courts in Austria, Finland and Sweden, while the remaining 21 Member States operate administrative competition enforcement regimes.

[13] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 of the Treaty on the Functioning of the European Union] ("Regulation 1/2003").

sanctions.[14] A document published by the European Commission on 22 March 2017 echoes this, observing that, for the period 2004-2013, "*in many of those Member States in which fines are primarily criminal, EU competition law is under-enforced or, even if enforced, sanctions are seldom imposed*".[15]

2.13. It is worth noting that non-hardcore infringements of competition law can create serious impediments to the proper functioning of competitive markets thereby causing serious detriment to consumer welfare. Over the years, the Competition Authority and the CCPC have used their existing powers to challenge such behaviour and, in many cases, have caused the undertakings involved to cease the behaviour in question and to provide commitments regarding their future behaviour. However, because of the absence of civil financial sanctions, they have been unable to impose or to seek the imposition of effective sanctions for the infringing behaviour. (The cases in question have involved serious competition law infringements such as: collective boycotts by competitors; the sharing of commercially sensitive information between competitors; and restrictive agreements and concerted practices such as resale price maintenance and exclusionary conduct by dominant undertakings designed to force existing competitors out of the market or prevent new competitors from entering the market.)

2.14. Apart from their obvious deterrent effect, civil financial sanctions (preferably under an enforcement regime which allows a competition authority to impose fines itself in administrative proceedings) have other advantages in relation to the effective enforcement of competition law. These include the following:

- The risk of civil sanctions being imposed is likely to be an incentive for an undertaking suspected of infringing competition law to cooperate with the CCPC, thereby facilitating faster resolution of investigations.
- Civil financial sanctions for infringements of competition law should promote a competition compliance culture among the business community.
- Effective, dissuasive and proportionate civil financial sanctions create incentives for undertakings to seek leniency (i.e. reduction in fines) where leniency programmes exist. Leniency programmes provide for immunity or reduced sanctions in exchange for information and continuing co-operation by the leniency applicant with the investigating authority. In contrast to programmes such as the cartel immunity programme administered by the CCPC (in conjunction with the DPP), which provides only for immunity from criminal prosecution for the cartel participant who first applies, leniency programmes offer much greater flexibility

[14] Commission Staff Working Document: "Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues", SWD(2014) 231/2 (9 July 2014), paragraph 66.

[15] Page 22 of the Impact Assessment. In particular, the Impact Assessment indicates that, during the period 2004-2013, Ireland and Estonia reported only 1 and 3 decisions respectively under both Articles 101 and 102 TFEU. The Impact Assessment observes that, "*there is virtually no enforcement of the EU competition rules in these countries*".

by incentivising subsequent applicants to seek reduced sanctions.[16] Under the current regime in Ireland, there is no system of leniency. Firms involved in non-hardcore cartel behaviour have no incentive to bring issues to the CCPC's attention in the expectation of receiving more lenient treatment.

- Settlement of such cases is often the most efficient and satisfactory mechanism for resolving the issues in question. Civil financial sanctions facilitate the settlement of cases on the basis of admissions and/or commitments in a much more flexible way than is possible in a criminal prosecution.

2.15. For the above reasons, the CCPC considers that civil financial sanctions (preferably imposed by the CCPC itself in its own administrative proceedings) are essential for the effective enforcement of competition law in Ireland.

Past proposals to fill the enforcement gap for breaches of competition law

2.16. In 2011, the Competition Authority published a paper in which it explained why it took the view that civil fines should be one of the sanctions available to enforce competition law in Ireland.[17] There are specific, time related, aspects of the paper which are no longer relevant, but the CCPC shares and adopts the views expressed on behalf of the Competition Authority in the paper regarding the need for civil financial sanctions for the effective enforcement of competition law in Ireland. It should be noted that the 2011 paper expressed a preference for a "civil fines" regime in which fines would be imposed by the courts on completion of civil proceedings, whereas the CCPC's strong preference (as set out in paragraph 2.38 below) is now for an administrative enforcement regime whereby the CCPC would itself have the power to make infringement decisions and to impose fines and/or remedies for breaches of competition law. The CCPC considers that an administrative enforcement regime would be a complement to, not a substitute for, the existing criminal enforcement regime.

The EU dimension

2.17. In the context of the CCPC's enforcement of EU competition law, there is an important EU dimension that the CCPC believes needs to be taken in account when considering the

[16] The European Commission's Impact Assessment notes (at page 23), "*Since cartels are illegal, they are generally highly secretive and evidence of their existence is not easy to find. Cooperation by cartel members with competition authorities is therefore often crucial to uncover and punish these highly detrimental practices. Leniency programmes encourage companies to come clean about cartels in return for having no fines imposed (immunity) or a reduction in fines. They are therefore a key tool for the detection of cartels*".

[17] "Filling a gap in Irish competition law enforcement: the need for a civil fines sanction", Gerald FitzGerald, Member Competition Authority and Director of the Cartels and Mergers Divisions and David McFadden, Legal Adviser, Competition Authority, available at: http://ccpc.ie/sites/default/files/2011-06-09%20Filling%20a%20gap%20in%20Irish%20competition%20law%20enforcement%20-%20the%20need%20for%20a%20civil%20fines%20sanction_0.pdf. The paper used the term "civil fines", but the CCPC accepts that the terminology used by the Law Reform Commission in its Issues Paper (i.e. "civil financial sanctions") is more appropriate for present purposes.

question as to whether civil financial sanctions should be available as an enforcement mechanism.

2.18. The Irish courts, as designated competition authorities under Regulation 1/2003[18], may arguably already have power to impose civil fines under Article 5 of Regulation 1/2003 for infringements of Articles 101 and 102 of the TFEU given that Regulation 1/2003 is directly applicable by virtue of Article 288 TFEU. However, this issue has not been ruled upon by the courts and the interpretation of Article 5 in this context is therefore uncertain. This uncertainty is compounded by the fact that it has also been argued that, notwithstanding the absence of Irish legislation providing for civil financial sanctions for infringements of EU competition law, Ireland is nonetheless in compliance with its obligations under Article 5 of Regulation 1/2003 because, under the Competition Act 2002, all infringements of EU and Irish competition law are criminal offences punishable by the imposition of fines following the conviction of the accused in a criminal trial. However, the CCPC does not share this view because, for the reasons already explained, only hardcore competition law infringements are, in practice, the subject of criminal prosecution. All other infringements are therefore, in practice, sanction-free under Irish law. It is hard to see how this can constitute effective compliance with Ireland's obligations under Article 5 of Regulation 1/2003.

2.19. If the view that Regulation 1/2003 provides a legal basis for the application of civil financial sanctions for infringements of EU competition law is correct, that gives rise to an anomalous situation in which such sanctions could be applied for infringements of EU competition law, but not for infringements of Irish competition law. Given that infringements of Irish competition law often also involve infringements of EU competition law, this could result in significantly different enforcement outcomes between cases where, on the one hand, both EU and Irish competition law are infringed and cases where, on the other hand, only Irish competition law is infringed. This is clearly a most undesirable situation since it would result in significantly different treatment of parties depending solely on whether or not their behaviour infringed EU competition law in addition to Irish competition law.

2.20. This uncertainty regarding Ireland's compliance with its obligations under Article 5 of Regulation 1/2003 and the anomalous treatment of infringing parties would be resolved if legislation were enacted to provide a clear legal basis for civil financial sanctions under Irish law.

2.21. These anomalies resulting from Ireland's approach to the implementation of its obligations under Article 5 of Regulation 1/2003 have been further highlighted by the European Commission's 10-year review of the operation of Regulation 1/2003 across all

[18] See Article 35 of Regulation 1/2003 and see also the European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004 (S.I. No. 195/2004), as amended.

Member States.[19] In a Staff Working Document published in 2014 as part of this review, the European Commission made a number of specific references to the situation in Ireland and noted:

> "*Whatever the mix of sanctions available in a Member State, it is generally recognized that there can be no effective public enforcement in the antitrust field without deterrent civil/administrative sanctions on undertakings. This is confirmed by experience in Ireland where currently a purely criminal system of antitrust sanctions is in force and the competition authority does not have the ability to seek the imposition of civil/administrative fines for the breach of either the EU or national competition rules*."[20]

2.22. In 2015/2016, the European Commission carried out a public consultation to gather views on whether the enforcement capacities of national competition authorities need to be strengthened in order to ensure that they can enforce EU competition law more effectively within their jurisdictions.[21] The CCPC submitted a response to that consultation on 23 February 2016, a copy of which is available on the CCPC's website.[22] One of the key points made in the CCPC's response was that civil financial sanctions should be one of the sanctions available to enforce competition law in Ireland. The CCPC's Chairperson, Isolde Goggin, took part as a panellist in a public hearing in the European Parliament in Brussels on 19 April 2016 on the topic of "*Empowering national competition authorities to be more effective enforcers of the EU competition rules*". A copy of the remarks delivered by Ms Goggin on behalf of the CCPC is available on the CCPC's website.[23]

2.23. Following completion of its public consultation and an extensive data gathering exercise, the European Commission decided that legislative measures should be adopted at EU level to address a range of deficiencies in the powers of national competition authorities. This resulted in the European Commission's publication, on 22 March 2017, of a "Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market"[24] (referred to as the proposed "ECN+ Directive"). The proposed ECN+ Directive provides for minimum guarantees and standards to empower

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[19] Communication from the Commission to the European Parliament and the Council: "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", COM(2014) 453; Commission Staff Working Document: "Ten Years of Antitrust Enforcement under Regulation 1/2003", SWD(2014) 230/2; and Commission Staff Working Document: "Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues", SWD(2014) 231/2.

[20] Commission Staff Working Document: "Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues", SWD(2014) 231/2, paragraph 66.

[21] See: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

[22] See: https://www.ccpc.ie/business/european-commissions-consultation-empowering-national-competition-authorities-effective-enforcers-ccpcs-response/.

[23] https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/2016-Apr-19-Empowering-national-competition-authorities-to-be-more-effective-enforcers-of-EU-competition-rules.pdf

[24] See: http://ec.europa.eu/competition/antitrust/nca.html.

national competition authorities to enforce EU competition law more effectively. Among the measures contained in the proposed ECN+ Directive is a proposal that national competition authorities should have adequate tools to impose proportionate and deterrent sanctions for breaches of EU competition rules. In this regard, Article 12(1) of the proposed ECN+ Directive states:

> "*Without prejudice to national laws of the Member States which provide for the imposition of sanctions in criminal judicial proceedings, Member States shall ensure that national administrative competition authorities may either impose by decision in administrative proceedings, or request in non-criminal judicial proceedings the imposition of effective, proportionate and deterrent pecuniary fines on undertakings and associations of undertakings when, either intentionally or negligently, they infringe Articles 101 or 102 TFEU*."

2.24. On 3 May 2017, the Department of Jobs, Enterprise and Innovation (now the Department of Business, Enterprise and Innovation) launched a public consultation which sought views from interested parties on the proposed ECN+ Directive. On 16 June 2017, the CCPC made a written submission to the Department in response to that consultation. A copy of that submission is set out in the attached Appendix.

The Law Reform Commission's analysis of legal issues relating to civil financial sanctions

2.25. The CCPC agrees with the analysis of the legal issues relating to civil financial sanctions set out in Chapter 2 of the Issues Paper. In particular, the CCPC notes that the Law Reform Commission's analysis of the issues of Irish constitutional law that need to be considered in that context is essentially the same as that set out in the Competition Authority's 2011 paper.[25]

2.26. The CCPC also notes and agrees with the Law Reform Commission's comments in relation to Article 6 of the European Convention on Human Rights and in particular its conclusion (at paragraph 2.11 of the Issues Paper) that:

> *"The central issue is whether the procedural and substantive provisions assured by Article 6 are provided by the court or tribunal. A body such as a regulator that imposes civil financial sanctions is unlikely to breach Article 6 provided it can assure the required fairness and procedural safeguards."*

2.27. It is well established in the case law of the European Court of Human Rights that regimes such as those of the European Commission and of national agencies – in which an administrative body can itself impose a financial sanction for breach of competition law – comply with the requirements of the European Convention on Human Rights if the

[25] See footnote 17 above.

decision of the administrative body is subject to appropriate judicial review by a court with full jurisdiction to review the administrative decision.[26]

Procedures by which civil financial sanctions can be imposed: administrative systems or civil court-based systems

2.28. Generally, EU Member States enforce Articles 101 and 102 TFEU according to civil (as opposed to criminal) procedures. These civil law procedures may be either (i) administrative systems, in which the findings of infringements and the fines imposed are decided by the competition authority, or (ii) court-based systems, in which the finding of an infringement can be made either by the competition authority or by a civil court, but the fines are imposed by civil courts only. In its recent 10-year review of the operation of Regulation 1/2003, the European Commission noted that, in the "large majority of jurisdictions"[27], fines for infringements of competition law are imposed by the national competition authority itself.

2.29. In the past, the Competition Authority and the CCPC have taken the position when arguing for the introduction of civil financial sanctions under Irish law that the agency itself was not seeking the power to impose such sanctions and was happy that this power should be left to the courts. However, the discussion of this issue has evolved, with an increasing range of EU and Irish legislation now providing for the imposition of such sanctions by national competition agencies and other regulatory bodies. In its recent consultation on the powers of national competition authorities, the European Commission sought views on the advantages and disadvantages of administrative and court-based systems.

2.30. In the CCPC's response to the European Commission's consultation (referred to in paragraph 2.242 above), we set out our views on the advantages and disadvantages of administrative and civil court-based systems for the imposition of financial sanctions for breaches of competition law. An overview of the CCPC's views is set out in the following sections.

Administrative systems

2.31. Administrative systems (in which the findings of infringement and the fines imposed are decided by the competition authority) have a number of advantages when compared with the alternative model whereby one body conducts the investigation and another (possibly a court) makes findings and, where appropriate, imposes sanctions and/or remedies. These ***advantages*** of administrative systems include the following:

[26] See, for example, *Menarini Diagnostics S.R.L. vs. Italy*, ECtHR Complaint No. 43509/08; see also Case C-386/10 P *Chalkor* v *Commission*, Judgment of the Court of Justice of the EU, 8 December 2011.
[27] Commission Staff Working Document: "Ten Years of Antitrust Enforcement under Regulation 1/2003", SWD(2014) 230/2, paragraph 216.

- It is an effective use of the competition authority's expertise and resources to have one body in control of the process from start to finish.
- It is likely to result in consistent and predictable decisions as well as faster decision-making than alternative models.
- It enables undertakings to engage with a single agency and facilitates communications between undertakings and agency staff throughout the process.
- It facilitates settlements[28] and commitment agreements.[29]
- The speed and efficiency of the administrative procedure and the associated powers of the competition authority are likely to have a greater deterrent effect than a lengthy, less predictable, court-based system, thereby promoting a better compliance culture.
- Effective, dissuasive and proportionate administrative sanctions create incentives for undertakings to seek leniency under available leniency programmes and to provide full co-operation with the competition authority in its ongoing investigation of the alleged competition law infringements.

2.32. The following are some ***disadvantages*** of administrative systems:

- Administrative systems have been criticised because they involve the same agency undertaking the investigation of an alleged infringement and making the decision as to whether there has been an infringement (and imposing the penalty where it decides that there has been an infringement). However, in the CCPC's view, such concerns can be addressed if internal procedures are put in place to ensure that decisions to make findings of infringements and to impose sanctions respect the rights of the defence, are evidence-based, fully reasoned and objective, and are subject to appropriate judicial oversight.
- Because of the issue referred to in the last bullet point, appeals against the decisions of an administrative agency may be more frequent than would arise in a system involving a separate decision-making body (whether a separate administrative tribunal or a court). Such appeals can delay implementation of the decision and of any remedy or fine imposed.

2.33. It is important to note in this context that, in order to comply with the requirements of the Irish Constitution and of the European Convention on Human Rights, such administrative decisions must be subject to review by the courts. The standard of review to be applied by the courts is an important matter which should, ideally, be defined in the relevant legislation. At a minimum, it must allow for judicial review by a court with full jurisdiction to review the agency's decision.

[28] See footnote 38 below.
[29] See footnote 39 below.

Pure court-based systems

2.34. A pure court-based system is one where a regulator conducts the investigation but then must institute civil proceedings against the alleged infringer to seek both a finding of infringement and the imposition of a civil financial sanction as determined by the court.[30] While the Issues Paper did not seek views on a pure court-based system, the CCPC believes that it should set out its views on the advantages and disadvantages of such a system in the context of competition law enforcement, particularly since this is the model for the civil enforcement of competition law adopted by the Competition Act 2002.

Advantages:

- In a court-based system, the separation of the investigative role, which is undertaken by the investigating agency, and the decision-making role, which is undertaken by the court, avoids any risk of perceived "prosecutor bias" that may arise in the administrative model unless appropriate measures are adopted to minimise that risk. This may increase confidence in the impartiality and objectivity of the decision-making process.
- The established procedures for the conduct of legal proceedings before the courts provide strong protections for parties against deficiencies in the investigation, whether of a substantive or procedural kind.

Disadvantages:

- A court-based system is potentially more cumbersome than the administrative model, since it requires the investigating agency to convince a court that an infringement has occurred instead of making the decision itself and leaving it open to the parties concerned to appeal to the courts.
- Unless there are specialised courts for hearing competition law matters, the court may not have the same level of competition law expertise as the competition authority.
- In Ireland, the courts do not operate formal sentencing or fining guidelines, which makes it difficult for agencies, the parties involved and their advisers to predict the level of financial sanction which a court would be likely to impose in any given situation. In an administrative system, the agency will normally publish and follow such guidelines.
- Given the absence of sentencing guidelines (in criminal cases) and fining guidelines (in civil cases) and the fact that there is no provision for judicial plea-bargaining in Irish law, a court-based system does not allow for the flexibility which the administrative system provides in relation to leniency programmes, settlements

[30] As already mentioned, in its recent consultation on the enforcement powers of national competition authorities, the European Commission sought views on the advantages and disadvantages of administrative systems, on the one hand, and such court-based systems, on the other.

and commitments. From a competition law enforcement perspective, this is a disadvantage of a court-based system.

Systems where sanctions are recommended by a regulator and confirmed by a court

2.35. This alternative involves a system in which financial sanctions are recommended by a regulator but ultimately imposed by a court[31] or confirmed by a court[32] – in contrast to the administrative model, in which sanctions are imposed directly by a regulator.[33] When referring to the above model, the Issues Paper states that *"the distinction between the two approaches[34] may not be particularly significant as the courts have a clear role to play in all such procedures that currently exist under Irish law."* [35] The Issues Paper goes on to review briefly the role of the courts in these two models and concludes that *"the determinations of regulators, even when deciding to impose sanctions, can be presumed to respect the limits of Article 37.1"*.[36]

2.36. In relation to the purely legal issues, the CCPC agrees with this analysis.[37] However, there can be significant practical differences between the two approaches given that, in the model where the recommended sanction is ultimately imposed by a court (as is the case, for example, under section 46 of the Communications Regulation Act 2002), the regulator

[31] For example, under section 46(5) of the Communications Regulation Act 2002, ComReg may apply to the High Court for an order directing the respondent to pay to ComReg a financial penalty of such amount as is proposed by ComReg. Under section 46(6), the High Court may order the respondent to pay to ComReg a financial penalty which can be more or less than the amount proposed by ComReg. Under Regulation 19(8) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334/2011), ComReg may make an application to the High Court for an order requiring a communications operator to pay to ComReg a financial penalty of an amount proposed by ComReg. The High Court shall decide on the amount, if any, of the financial penalty and shall not be bound by the amount proposed by ComReg.

[32] See, for example, sections 61 to 63 of the Electricity Regulation Act 1999, as inserted by section 5 of the Energy Act 2016 and section 76 of the Medical Practitioners Act 2007. See also, Head 80 of the General Scheme of the Data Protection Bill published by the Tánaiste on 12 May 2017 – available at: http://www.justice.ie/en/JELR/General_Scheme_of_Data_Protection_Bill_(May_2017).pdf/Files/General_Scheme_of_Data_Protection_Bill_(May_2017).pdf.

[33] For example, the financial sanctions imposed under Part IIIC of the Central Bank Act 1942.

[34] i.e. those in which financial sanctions are (i) recommended by a regulator but ultimately imposed by or confirmed by a court, or (ii) imposed directly by a regulator.

[35] See paragraph 2.17 of the Issues Paper.

[36] This view is reinforced by the conclusions of Hedigan J in *Purcell v Central Bank of Ireland, Ireland and the Attorney General* [2016] IEHC 514. See, in particular, paragraphs 8.6 to 8.11.

[37] The CCPC also notes the judgment of Kelly J in *The Medical Council v M.A.G.A.* [2016] IEHC 779, which post-dates the Issues Paper. The judgment clarifies the role of the High Court when determining whether to confirm a decision by the Medical Council to impose a sanction on a medical practitioner pursuant to section 76(3) of the Medical Practitioners Act 2007. Kelly J finds (at paragraph 30) that, "*the jurisdiction which is conferred under s.76(3) is not an unfettered one and it does not constitute the High Court as an appeal tribunal on the merits in respect of an application of this sort. Rather, the obligation of the court is to deal with the issues of the type identified, such as adherence to correct procedural norms, adherence to the requirements of natural and constitutional justice and the making of a decision by the Medical Council which is a reasonable one*".

does not determine the financial sanction. In practice, this means, for example, that a number of important enforcement mechanisms that can be availed of by a competition authority in the administrative model (where the competition authority imposes the sanctions) are not available. These mechanisms, which are regularly used by the European Commission and many national competition authorities in other EU Member States, include: the adoption and publication of fining guidelines; settlements involving the payment of a discounted civil/administrative financial sanction; and leniency programmes under which the competition authority sets out the terms and conditions which encourage firms to disclose incriminating information to the authority in exchange for immunity from or reduced financial sanctions.

2.37. Reference is made in paragraph 2.17 of the Issues Paper to the procedure under section 54 and 55 of the Broadcasting Act 2009, which is described as a hybrid of two of the models discussed above (i.e. where (i) the financial sanctions are imposed directly by a regulator, and (ii) the sanctions are recommended by a regulator but ultimately imposed by a court or confirmed by a court). The key characteristic of this hybrid model is that the broadcaster can choose to submit to the regulator's procedure and accept whatever sanction is proposed. This is not a model that the CCPC favours because its preference is for an administrative enforcement regime of the type described in the following paragraph.

2.38. On balance, the CCPC would be strongly in favour of introducing an administrative enforcement regime in Ireland whereby the CCPC would itself have the power to make infringement decisions and to impose fines and/or remedies for breaches of competition law. The CCPC considers that the advantages of an administrative enforcement regime would include the following:

- It would be likely to result in consistent and predictable decisions as well as faster decision-making than an alternative court-based model.

- It would enable parties under investigation to engage with a single body and would facilitate communications between those parties and CCPC staff throughout the entire process.

- Effective, dissuasive and proportionate administrative sanctions would create incentives for parties to seek leniency (i.e. reduction in fines) under available leniency programmes and to provide full co-operation with the CCPC in its ongoing investigation of the alleged competition law infringements. Under the current regime in Ireland, there is no system of leniency. Firms involved in non-hardcore cartel behaviour have no incentive to bring issues to the CCPC's attention in the expectation of receiving more lenient treatment. This is in contrast to the experience of the European Commission and of national competition authorities in other EU Member States where many important cases come to their attention by means of leniency programmes.

- An administrative enforcement regime would facilitate settlements[38] and commitment agreements.[39]

- The speed and efficiency of the administrative procedure and the associated powers of the CCPC would be likely to have a greater deterrent effect than a lengthy, less predictable, court-based system, thereby promoting a better compliance culture.

2.39. The CCPC considers that an administrative enforcement regime would be a complement to, not a substitute for, the existing criminal enforcement regime. We note that an increasing range of EU and Irish legislation provides – or proposes to provide – for the imposition of administrative financial sanctions by regulatory bodies themselves (e.g. the Central Bank of Ireland[40], the Commission for Energy Regulation[41] and the Data Protection Commissioner[42]). In all of these cases, the decision of the relevant regulatory body is subject to judicial oversight.

Conclusions

2.40. The CCPC summarises its conclusions in relation to the issues raised in Chapter 2 of the Issues Paper as follows:

- The Competition Act 2002 does not provide for any form of financial sanction other than the penalties that may result from criminal prosecution. This means that there is, in reality, little or no deterrent for competition law infringements that fall outside the hardcore category. This is a very serious gap in the

[38] Formal settlement decision powers such as those adopted by the European Commission's Directorate General for Competition (see Commission Notice 2008/C 167/01, OJ 2.7.2008) facilitate the settlement of cartel cases where the parties involved admit liability and are willing to accept the imposition of fines (with a 10% reduction to reward their willingness to agree settlement terms). This system has a number of advantages, including the freeing up of European Commission resources to deal with other cases.

[39] Commitment decision powers enable a competition authority to agree measures with an undertaking which remedy suspected anti-competitive conduct without having to proceed to a formal prohibition decision (which, in Ireland's case, can currently only be taken by a court). This facilitates the elimination of anti-competitive conduct in appropriate cases and reduces the resource burden on the national competition authority, thereby releasing these resources to other work streams within the national competition authority.

[40] The Central Bank of Ireland operates an administrative sanctions procedure in accordance with Part IIIC of the Central Bank Act 1942 whereby, following an inquiry, the Central Bank may make a finding that a regulated entity has contravened the relevant legislation and impose sanctions, including financial penalties.

[41] Under sections 61 to 63 of the Electricity Regulation Act 1999 (as inserted by section 5 of the Energy Act 2016), the Commission for Electricity Regulation has the power to decide to impose fines. Such decision must subsequently be confirmed by the High Court.

[42] The General Scheme of the Data Protection Bill 2017, which seeks to give effect in Ireland to the EU General Data Protection Regulation, provides that an administrative fine may be imposed by a Data Protection Commissioner and subsequently confirmed by the Circuit Court - see Heads 77 and 80 of the General Scheme of the Data Protection Bill published by the Tánaiste on 12 May 2017.

mechanisms available to the CCPC for the enforcement of EU and Irish competition law in Ireland.

- Numerous other countries, as well as the European Union, have addressed this issue by enacting legislation providing for the imposition in such cases of civil financial sanctions. 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. In the case of the European Commission and of a large majority of EU Member States, the sanctions are imposed by the competition authority itself, subject to a right of appeal to the courts. The competition authorities in these EU Member States (many of which are of a comparable size to Ireland and some of which are smaller) are able to impose effective and dissuasive sanctions for breaches of competition law, while complying with the requirements of natural justice. The CCPC believes that it is essential for the effective enforcement of competition law in Ireland that the law be amended to provide for civil financial sanctions for breaches of competition law.

- With regard to the constitutional law issues raised by legislation providing for civil financial sanctions, the CCPC agrees with the Law Reform Commission's analysis in the Issues Paper and with its conclusion that "*proportionate civil financial sanctions that are imposed subject to appropriate procedural safeguards and standards of fairness may be constitutionally permissible*".[43] The CCPC believes that such legislation could be drafted in a manner that would comply with the requirements of Irish constitutional law. As noted in paragraph 2.39 above, an increasing range of EU and Irish legislation provides – or proposes to provide – for the imposition of administrative financial sanctions by regulatory bodies themselves (e.g. the Central Bank of Ireland, the Commission for Energy Regulation and the Data Protection Commissioner), subject to appropriate judicial oversight.

- With regard to the preferred decision-making models, the CCPC favours the administrative model over the alternative models discussed above.

CCPC's Responses to the Questions in Chapter 2 of the Issues Paper

2(a)(i) What do you think are the strengths and weaknesses of civil financial sanctions?

2.41. Civil financial sanctions act as a deterrent to unlawful behaviour that does not involve criminal activity. (Where criminal activity is involved, the appropriate deterrent is the risk of criminal conviction and the consequential penalties that may be imposed.) Civil financial sanctions require infringing parties to pay often substantial sums and to suffer the

[43] Once again, this view is reinforced by the conclusions of Hedigan J in *Purcell v Central Bank of Ireland, Ireland and the Attorney General* [2016] IEHC 514.

reputational damage resulting from the imposition of such sanctions. In the absence of such sanctions, there is little external incentive for firms or individuals to comply with the law.

2.42. While fixing civil financial sanctions at the optimal level of deterrence is not straightforward and while some repeat infringers may treat them as a cost of doing business, it seems clear that for many businesses they have a significant deterrent effect. Where the administrative model (or possibly the modified administrative model where the sanction is subject to court approval) operates, such sanctions also create a context which enables enforcement agencies to use other enforcement measures (such as leniency programmes, settlements and binding commitments) to achieve acceptable outcomes. In the absence of civil financial sanctions, it is very difficult for enforcement agencies to use such measures and there is consequent under-enforcement of competition law.

2(a)(ii) Do they help to ensure regulatory compliance?

2.43. All businesses need to manage risks with a view to minimising both the likelihood of occurrence and the impact where the risk materialises. The existence of civil financial sanctions creates a risk of exposure to such sanctions that businesses need to manage. The best way for them to do this is to adopt measures, such as corporate compliance and training programmes, designed to ensure that they comply with the relevant law. In the absence of civil financial sanctions for infringing behaviour, the incentive to adopt effective compliance measures is significantly reduced.

2(a)(iii) Should existing civil financial sanctions under Irish law be modified in any particular way to better serve the purpose of regulation in financial services or any other sector?

2.44. Since Irish law currently makes no provision for the imposition of civil financial sanctions for infringement of either competition law or consumer protection law, the CCPC has no experience of the operation of a civil financial sanctions regime under Irish law.[44] However, through its participation in the European Competition Network and in the European Commission's Advisory Committee on Restrictive Practices and Dominant Positions, it has considerable knowledge of how such regimes operate in other EU Member States and, in particular, of the measures taken to ensure that the procedures leading to the imposition of civil financial sanctions comply with the relevant principles of EU law and of the European Convention on Human Rights.

2.45. Among other things, these principles require civil financial sanctions to be proportionate to the gravity of the harm caused by the infringing behaviour and also require the

[44] Section 85 of the Consumer Protection Act 2007 allows an authorised officer of the CCPC to issue a fixed payment notice (i.e. an on the spot fine of €300) in respect of contraventions of price display legislation. However, the CCPC does not regard this fixed payment notice mechanism as being analogous to the type of civil financial sanction discussed in Chapter 2 of the Issues Paper.

procedures leading to their imposition to respect the rights of the defence. Any Irish regime providing for the imposition of civil financial sanctions (i.e. either fines imposed by the courts in civil proceedings or administrative fines imposed directly by agencies themselves) should respect the same principles and should take account of the practices that have been developed, in particular by the European Commission, in light of those principles. One example of this is the European Commission's Guidelines on the method of setting fines for competition law infringements.[45] In addition, the regime should provide for reductions in fines to be granted to leniency applicants who do not qualify for full immunity and guidelines which set out the conditions for the grant of such reductions should be published.[46] It is not suggested that any Irish legislation providing for civil financial sanctions should incorporate such guidelines, but the CCPC believes that – if legislation were to be adopted providing for an administrative fining regime (i.e. in which fines are imposed by the relevant enforcement agency) – it might be helpful if the legislation made provision for the adoption of such guidelines by the agency.

2(b)(i) Do you think that legislation that does not already provide for civil financial sanctions should be amended to include them?

2.46. For the reasons explained above, the CCPC strongly believes that Irish competition legislation should make provision for the imposition of civil financial sanctions on infringing parties.

2(b)(ii) Are there any areas of regulation that do not currently have civil financial sanctions where they would be appropriate?

2.47. See our response to the previous question.

2(b)(iii) Are there circumstances in the regulation of financial services in which civil financial sanctions would not be appropriate?

2.48. The CCPC has no comment to make in response to this question.

2(c) Do you have any other observations on the appropriateness of civil financial sanctions or the purposes for which they might be used?

2.49. No.

[45] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C210/2, 1.09.2006, p.2-5.

[46] For example, please see the European Commission's Notice on Immunity from fines and reduction of fines in cartel cases, OJ C298, 8.12.2006, p.17-22.

ISSUE 3: Negotiated Compliance Agreements

3.1. As noted in our response above to Chapter 2 of the Issues Paper, the Competition Act 2002 provides for a system of both criminal and civil enforcement of competition law. As noted in paragraph 2.7 above, the only civil remedies available to the CCPC under current Irish legislation (section 14A of the Competition Act 2002) are to seek a declaration of illegality (i.e. a court ruling that a particular arrangement or behaviour is unlawful) and/or injunction (i.e. a court ruling requiring a particular arrangement or behaviour to be terminated). Irish law does not provide for the imposition of civil financial sanctions for competition law infringements.

3.2. As noted in paragraphs 3.03 and 3.04 of the Issues Paper, section 14B of the Competition Act 2002[47] provides a mechanism whereby undertakings under investigation by the CCPC may avoid the institution of proceedings under section 14A of the Competition Act 2002 by entering into an agreement with the CCPC to provide commitments regarding their future behaviour in relation to the matter to which the investigation related. The CCPC may apply to the High Court to have such agreement made an order of court.[48]

3.3. The CCPC has entered into an agreement under section 14B of the Competition Act 2002 in only one case.[49] In several other cases, the CCPC has adopted a non-statutory approach by accepting contractual commitments from parties under investigation outside of the section 14B process – these contractual commitments have been accepted by the CCPC either as an alternative to enforcement action (i.e. without any involvement of the courts) or as a means of settling existing court actions. As regards its consumer protection functions, it is worth noting that under section 73 of the Consumer Protection Act 2007 the CCPC can seek and obtain a written undertaking from a trader. Such undertakings are typically sought by the CCPC in lieu of initiating civil or criminal proceedings against the trader. They can include, for example, commitments to comply with the requirements of consumer protection law or to refrain from engaging in particular conduct, an undertaking to publish a corrective statement, or an undertaking to compensate a consumer.

3.4. In the CCPC's view, both statutory settlement agreements (such as those provided for under section 14B of the Competition Act 2002 and section 73 of the Consumer Protection Act 2007) and non-statutory contractual commitments constitute an important and

[47] As inserted by section 5 of the Competition (Amendment) Act 2012.

[48] Section 14B(2) states: "*The High Court may, upon the application of the competent authority, make an order in the terms of an agreement to which this section applies if it is satisfied that – (a) the undertaking that is a party to that agreement consents to the making of the order, (b) that undertaking obtained legal advice before so consenting, (c) the agreement is clear and unambiguous and capable of being complied with, (d) that undertaking is aware that failure to comply with any order so made would constitute contempt of court, and (e) the competent authority has complied with subsection (3)*."

[49] On 18 December 2012, the Competition Authority applied to the High Court under section 14B for an order in the terms of an agreement dated 14 November 2012 entered into between the Authority and Brazil Body Sportswear (BBS), the distributor of the FitFlop brand of footwear on the island of Ireland.

effective part of a regulatory or enforcement agency's toolkit. This is particularly so in cases where the agency's primary objective is to resolve the underlying non-compliance and bring about a change in behaviour. However, the CCPC would emphasise that it is difficult for an agency to obtain acceptable commitments unless the alternatives facing the parties under investigation include an efficient decision-making regime with the risk of substantial fines and other remedies being imposed by the decision-maker. The CCPC believes that the absence of civil financial sanctions for breach of Irish or EU competition law (as discussed in our response above to Chapter 2 of the Issues Paper) significantly reduces the incentives for parties to provide commitments to the CCPC (either using a statutory or non-statutory approach) and therefore makes it difficult in practice for the CCPC to operate this mechanism.

ISSUE 4: Deferred Prosecution Agreements

A. Competition law

4.1. As explained in our response above to Chapter 2 of the Issues Paper, the CCPC investigates suspected breaches of Irish and EU competition law. At the conclusion of an investigation, the CCPC may form the view that an infringement of either section 4 or section 5 of the Competition Act 2002 (and/or Article 101 or 102 of the TFEU) has occurred and may decide to initiate either civil or criminal proceedings in the courts against the undertaking(s) and directors/managers involved. Where the CCPC considers that civil proceedings are warranted, it can institute such proceedings either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself initiate a summary prosecution in the District Court. In the case of more serious breaches (typically hardcore cartel activity), the CCPC may send a file to the Director of Public Prosecutions (DPP) who will decide whether to bring a prosecution on indictment in the Central Criminal Court.

4.2. The sanctions available in criminal prosecutions for breach of competition law include fines and/or custodial sentences. The only civil remedies available to the CCPC under current Irish legislation (section 14A of the Competition Act 2002) are to seek a declaration of illegality and/or an injunction. Irish law does not provide for the imposition of civil financial sanctions for competition law infringements.

4.3. As far as the CCPC is aware, deferred Prosecution Agreements ("DPAs") of the type used in the USA and UK do not exist in Irish law. However, as noted in the Issues Paper,[50] the DPP and the CCPC jointly operate a cartel immunity programme ("CIP") which can be viewed as a type of DPA in that it provides full immunity from criminal prosecution to the first applicant that successfully complies with the requirements of the CIP. The CIP does not, however, provide for leniency for other cartel participants. An undertaking which has applied for immunity under the CIP may also choose to seek immunity on behalf of its employees (present and past), including directors and officers.

4.4. The CCPC considers that the CIP provides a useful mechanism to help uncover cartels and provide witnesses for the criminal prosecution of other cartel participants. However, in relation to DPAs more generally, the CCPC considers that their use in the Irish competition law sphere (if they were to be introduced) should be limited for a number of reasons.

4.5. First, DPAs do not have strong deterrent effects. Their main function is as a means of detecting criminal activity or gathering more information in an ongoing investigation (as observed above in relation to the CIP). DPAs can be a useful complement to a regulator's enforcement toolkit but, in the CCPC's view, there is a risk that, if DPAs were to be

[50] Paragraph 4.05 of the Issues Paper.

regularly used as an alternative to criminal prosecution, parties may start to view DPAs as a "cost of business" rather than a reason to avoid criminal activity in the first place.

4.6. Second, the CCPC considers that it is important that justice is seen to be done, particularly with regard to the most serious breaches of competition law. Overuse or inappropriate use of DPAs could undermine the credibility of a regulator and the administration of justice more generally if DPAs are viewed by society in general as a means for a party to "buy" its way out of a criminal prosecution.

4.7. Finally, it is our understanding that DPAs are only effective if the party being investigated and the regulator can reach agreement as to the regulator's interpretation of the case. If the party being investigated fundamentally disagrees with the regulator's view of the facts of the case or interpretation of the relevant law, it may be willing to contest the case before the Irish courts rather than agreeing to be bound by commitments in a DPA.

4.8. In terms of the role of the regulator, the CCPC would be in favour of the regulator having a degree of involvement in the negotiation of the DPA at the end of an investigation due to its familiarity with the investigation and expertise in the sector more generally. This would be the CCPC's preference even if another agency would ultimately be responsible for initiating criminal proceedings, as in the case of the CIP.

B. Consumer protection law

4.9. The majority of consumer protection offences can be tried either summarily in the District Court or on indictment in the Circuit Criminal Court. To date, all criminal enforcement actions for breaches of consumer protection law taken by the CCPC and its predecessors[51] have been taken on a summary basis in the District Court.

4.10. Since the entry into force of the Consumer Protection Act 2007, the enforcement of consumer protection law has been characterised by the availability of a range of proportionate measures to address breaches of the law. This means that the CCPC may employ measures other than prosecution to help achieve compliance with consumer protection law. For example, the CCPC may seek to obtain written undertakings from a trader that such trader will comply with the requirements of the Consumer Protection Act 2007. In such an instance, the CCPC may opt not to proceed with a prosecution if the trader provides an undertaking that s/he will cease the infringement and undertake not to do so in the future. The CCPC is also empowered to apply to the Circuit Court or the High Court for a prohibition order (i.e. effectively an injunction) against a trader but the CCPC may decide to withdraw its court application if the trader provides an acceptable undertaking to the CCPC. Prosecutions may also be avoided where the CCPC decides to issue a fixed payment notice (i.e. an on the spot fine) in respect of a contravention by a

[51] The Office of the Director of Consumer Affairs was incorporated into the National Consumer Agency in May 2007. The National Consumer Agency subsequently amalgamated with the Competition Authority to form the CCPC on 31 October 2014.

trader of particular consumer protection laws, for example, price display legislation. Failure to pay a fixed payment notice will result in criminal prosecution.

4.11. The CCPC considers that the use of DPAs (if they were to be introduced) in relation to cases involving consumer protection offences should be limited for the reasons identified in paragraphs 4.5 to 4.7 above. Breaches of consumer protection legislation are, typically, low value but may be widely spread in terms of impact. Decisions taken by traders will be taken on the basis of a cost-benefit calculation and therefore if DPAs (if they were to be introduced) were to be seen by traders as a means to "buy" a way out of a criminal prosecution, the incentives for traders to comply with the law in the first place would be reduced.

ISSUE 5: Coordination of Regulators

5.1. The CCPC is strongly supportive of co-operation between regulators to improve their efficiency and effectiveness. In the context in which the CCPC operates, such co-operation takes place (i) on the basis of co-operation agreements entered into between the CCPC (and its predecessors i.e. the Competition Authority and the National Consumer Agency) and other sectoral regulators, and (ii) pursuant to the "lead agency"-type provisions in Part 4A of the Competition Act 2002 (as inserted by the Communications Regulation (Amendment) Act 2007) which set out a mechanism whereby the CCPC and the Commission for Communications Regulation ("ComReg") must coordinate their approach as regards the application of competition law in the field of electronic communications networks and services.

5.2. In the CCPC's experience, these important statutory-based co-operation mechanisms are supplemented in practice by other more informal mechanisms which enable regulators to share experiences, know-how and expertise and identify potential solutions to the common challenges that they face.

Co-operation Agreements

5.3. Section 19 of the Competition and Consumer Protection Act 2014 (the "2014 Act") allows the CCPC to enter into arrangements with certain prescribed bodies to facilitate co-operation in the performance of their respective functions relating to (i) consumer protection and welfare issues, or (ii) issues of competition between undertakings. This allows the CCPC to enter into co-operation agreements with various statutory bodies to facilitate co-operation, avoid duplication and ensure consistency between our actions and those of other statutory bodies.

5.4. The CCPC entered into its first co-operation agreement under section 19 of the 2014 Act with ComReg on 11 November 2015. This agreement provides for co-operation between the CCPC and ComReg in relation to our respective consumer protection functions. The CCPC's predecessors (i.e. the Competition Authority and the National Consumer Agency) entered into a number of co-operation agreements with other statutory bodies which remain binding on the CCPC by virtue of section 42(1) of the 2014 Act. These include co-operation agreements with the Central Bank of Ireland, the Commission for Energy Regulation, ComReg, the Broadcasting Authority of Ireland, the Commission for Aviation Regulation, the Health Insurance Authority and the National Transport Authority.

5.5. The experience of the CCPC (and of its predecessors) is that these co-operation agreements provide a clear and transparent legal framework which facilitates active co-operation and co-ordination between regulators and promotes effective regulation. Section 19 of the 2014 Act, which sets out the statutory basis for co-operation agreements entered into by the CCPC, provides very welcome clarity regarding the provisions to be included in such agreements.

5.6. In the CCPC's view, statutory provisions similar to section 19 of the 2014 Act should be put in place to enable all relevant regulators to enter into co-operation agreements with each other. It is very important that such provisions contain a clear legal basis for the sharing of information between regulators in a manner that complies with all applicable laws (e.g. data protection law and privacy rights). The CCPC considers that it is important that regulators are enabled to share information on the basis of an information request made by one regulator to another, and also on a proactive basis whereby one regulator may provide information to another regulator without it having been requested by the latter.

"Lead Agency" Approach under Competition Law

5.7. Separately, as noted above, Part 4A of the Competition Act 2002 sets out specific provisions relating to the exercise by the CCPC and ComReg of their overlapping competition law functions in the field of electronic communications networks and services. In the CCPC's view, the "lead agency"-type approach provided for in Part 4A of the Competition Act 2002 works well in practice. It has allowed the CCPC (and its predecessor, the Competition Authority) to work closely with ComReg insofar as the exercise of their respective competition law functions is concerned.

5.8. It should be noted that no dispute has ever arisen as to which body should be competent to deal with a given case involving a suspected breach of competition law. Accordingly, it has never been necessary for a question to be referred for resolution by the Minister for Business, Enterprise and Innovation under section 47E of the Competition Act 2002.

5.9. In the CCPC's view, a "lead agency"-type approach – such as that provided for in Part 4A of the Competition Act 2002 – is highly desirable in any situation in which two or more agencies have been conferred with overlapping mandates i.e. where two or more agencies have concurrent functions under the same piece of legislation. A clear statutory framework which sets out detailed provisions on how the bodies should interact with each other and resolve any potential disputes provides very welcome legal certainty and should ultimately improve the efficiency and effectiveness of regulators.

ISSUE 6: Jurisdiction for Regulatory Appeals

A. Competition law

6.1. As noted previously in this response to the Issues Paper, the CCPC does not have the power to adopt prohibition decisions or to make orders, grant remedies (procedural or structural) including interim relief, or to impose penalties in respect of breaches of section 4 or 5 of the Competition Act 2002 or Articles 101 and 102 of the TFEU. Instead, the Irish courts have sole competence to adopt prohibition decisions, make orders, grant remedies (procedural or structural) including interim relief, and impose penalties in respect of breaches of Irish and EU competition law. The only area in which the CCPC has decision-making powers is under the merger review provisions of the Competition Act 2002.

6.2. Merger cases typically involve complex economic issues and analysis, (relating to, for example, the scope of the relevant markets affected by the notified merger and the extent of competition on such markets) such that an appeal of a merger determination is likely to require the person hearing the appeal to review and understand evidence presented by expert witnesses, e.g. economists. It is therefore of the utmost importance that such person has the necessary expertise to deal with the appeal.

6.3. Pursuant to section 24(1) of the Competition Act 2002, the parties to a merger or acquisition notified to the CCPC may appeal to the High Court against a determination of the CCPC that the notified merger or acquisition may not be put into effect or may be put into effect subject to specified conditions being complied with. Under the current Rules of the Superior Courts, competition law proceedings (including appeals of merger determinations) are transferred to the "Competition List" in the High Court and typically heard by the High Court judge who is assigned to the Competition List.[52] The High Court also has the ability to appoint an expert to assist the judge in understanding or clarifying a particular matter[53] (e.g. an economist).

6.4. The CCPC considers that the abovementioned measures are vital to ensure that the adjudication of merger appeals (as well as other competition law proceedings) are conducted by a judge with sufficient knowledge and experience of competition law. In the CCPC's view, the current framework for the hearing of competition proceedings in the High Court, including those relating to merger appeals, works fairly well in practice. The measures referred to above have been of considerable value in facilitating understanding by the High Court of the complex issues arising in competition cases.

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[52] Order 63B, Rule 4(1) of the Rules of the Superior Courts provides that: "*Competition proceedings, and any motions or other applications in competition proceedings, shall be heard in the Competition List by the Judge.*"

[53] Order 63B, Rule 23(1) of the Rules of the Superior Courts provides that: "*The Court may, on the application of a party or of its own motion and having heard the parties, appoint a person to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person (in this rule hereinafter called an "expert") has skill and experience*."

6.5. The CCPC does not consider that a system of appeal to another lower court, such as the Circuit Court, would be an appropriate alternative to the High Court given the complexity of the issues of fact and law which typically arise in merger appeals. It is likely to be more challenging to develop specialist expertise amongst Circuit Court judges since they are assigned to a particular circuit[54], whereas all competition law proceedings (including merger appeals) are currently heard by a single judge in the High Court.

6.6. While there may be certain benefits to establishing a single, uniform regulatory appeals body, the CCPC considers that this option is likely to be unworkable in practice. Such a body would only be of benefit if it is comprised of individuals with sufficient expertise and is appropriately resourced. Given the diversity of the sectors and legislative regimes governed by the various regulators throughout the State, it is likely to be highly challenging in practice to identify a sufficient number of experts with the requisite level of expertise across the various sectors to staff the appeals body on a permanent basis.[55] In addition, it is highly likely that decisions of the appeals body would be reviewable by the Irish courts and therefore that it would introduce another layer to the appeal process, making appeals of regulators' decisions more costly and time-consuming for both the regulator in question and the party who initiates the appeal.

6.7. The CCPC considers that it would not be feasible to establish a body dedicated to hearing appeals of CCPC merger determinations (e.g. a limited version of the UK's Competition Appeals Tribunal) given the very limited number of appeals of this nature. To date, there has only been one appeal of a merger determination in Ireland.[56] In light of this, it would be difficult to justify establishing a dedicated appeals body for merger cases given the costs and resources involved in doing so.

6.8. As argued earlier in this submission (see our response to Chapter 2 of the Issues Paper), the CCPC believes that it is essential for the effective enforcement of competition law in Ireland that the law be amended to provide for civil or administrative financial sanctions for breaches of competition law. As noted in our response to Chapter 2 of the Issues Paper, the CCPC's preference is for an administrative enforcement regime in which the CCPC would itself have the power to impose fines for breaches of competition law. If the power to make infringement decisions and to impose fines for breaches of competition

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[54] Please also see paragraph 12.06 of the Issues Paper and paragraph 4.9.7 of the Report of the Competition and Mergers Review Group (2000).

[55] The CCPC notes that one criticism of the former Electronic Communications Appeal Panel, established under the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, was that it was assembled on an ad hoc basis which gave rise to difficulties in terms of identifying panellists with the necessary expertise but without conflicts of interest and resulted in significant delays.

[56] *Rye Investments Limited v Competition Authority* [2009] IEHC 140 in which the High Court overturned the decision of the Competition Authority to prohibit the acquisition of Breeo Foods Limited and Breeo Brands Limited by Rye Investments Limited, a subsidiary of Kerry Group plc. The CCPC announced its decision not to proceed with the appeal to the Supreme Court against the High Court judgment on 21 April 2016.

law were to be conferred on the CCPC, the CCPC considers that the High Court should have jurisdiction to hear appeals of decisions of the CCPC for the reasons given above.

B. Consumer protection law

6.9. Rights for consumers are enshrined in various Irish and EU legislation. Under such legislation, the CCPC may employ various measures to help achieve compliance with consumer protection law. These include: prosecution of traders who have committed criminal offences, prohibition orders[57], compliance notices[58], undertakings[59] and fixed payment notices.[60]

6.10. As far as the CCPC's consumer protection remit is concerned, the only measure which would appear to comprise an appealable "decision" of the CCPC for the purpose of Issue 6 is the compliance notice. Pursuant to section 75 of the Consumer Protection Act 2007, an authorised officer of the CCPC may serve a compliance notice on any person where the authorised officer is of the opinion that the person is committing or engaging in, or has committed or engaged in, an act or practice prohibited by specified consumer protection legislation.[61] The person on whom the compliance notice is served may appeal the notice to the District Court in the district in which the notice was served within 14 days.

6.11. The CCPC considers that the current system whereby appeals against compliance notices issued by the CCPC under section 75 of the Consumer Protection Act 2007 are heard by the District Court works well in practice. The CCPC does not consider that there would be any particular benefit in giving the High Court exclusive jurisdiction to hear appeals against such compliance notices.

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[57] Pursuant to section 71 of the Consumer Protection Act 2007, any person, including the CCPC, can apply to the Circuit Court or the High Court for an order prohibiting a trader from committing or engaging in a prohibited act or practice.

[58] Under section 75 of the Consumer Protection Act 2007, the CCPC has the power to issue a compliance notice to a trader who is deemed to be committing or have committed a 'prohibited practice'. A compliance notice is a written notice directing them to remedy the relevant contravention of consumer protection legislation. The trader has the right to appeal the notice to the District Court within 14 days. Failure to comply with the direction and requirements of a compliance notice without reasonable excuse is an offence.

[59] Under section 73 of the Consumer Protection Act 2007, the CCPC can seek and obtain a written undertaking from a trader that it will comply with the requirements of consumer protection law. Undertakings provide for a range of measures to remedy the conduct including, where appropriate, publication of a corrective statement or compensation of a consumer.

[60] Under section 85 of the Consumer Protection Act 2007, the CCPC can issue fixed payment notices (FPNs) for breaches of price display regulations and certain breaches of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013). An FPN requires a trader to pay a penalty of €300 per breach and must be paid within 28 days. More than one fixed payment notice may be issued to a trader. Failure to pay an FPN is an offence that may be prosecuted by the CCPC.

[61] The legislation in respect of which compliance notices may be issued is set out in Schedule 5 of the Consumer Protection Act 2007.

ISSUE 7: Corporate Criminal Liability

A. Competition law offences

7.1. As noted in our response above to Chapter 2 of the Issues Paper, the Competition Act 2002 provides for a system of both criminal and civil enforcement of competition law. At the conclusion of an investigation, the CCPC may form the view that an infringement of either section 4 or section 5 of the Competition Act 2002 (and/or Article 101 or 102 of the TFEU) has occurred and may decide to initiate either civil or criminal proceedings in the courts against the undertaking(s)[62] and directors/managers involved. Where the CCPC considers that civil proceedings are warranted, it can institute such proceedings either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself initiate a summary prosecution in the District Court. In the case of more serious breaches, the CCPC sends a file to the Director of Public Prosecutions (DPP) who will decide whether to bring a prosecution on indictment in the Central Criminal Court.

7.2. For the purpose of determining liability for a criminal offence involving a breach of either section 4/Article 101 TFEU or section 5/Article 102 TFEU, the Competition Act 2002 states that any act done by an officer or an employee of an undertaking for the purposes of, or in connection with, the business or affairs of the undertaking shall be regarded as an act done by the undertaking.[63]

7.3. The CCPC, and previously the Competition Authority, have investigated a number of cases in which the DPP has ultimately secured criminal convictions on indictment against corporate entities (and individuals) for breach of section 4 and/or Article 101 TFEU.[64]

7.4. The CCPC's experience has been that the provisions on attribution of criminal liability to corporate entities set out in the Competition Act 2002 (i.e. in sections 6(6) and 7(3)) work well in practice and have not given rise to any significant issues. It is worth noting that the majority of corporate convictions that have been secured to date in Ireland for competition law offences have involved relatively small businesses in which the company directors were heavily involved in managing the businesses and, in most instances, owned substantial stakes in the companies concerned.[65]

[62] The term "undertaking" is defined in section 3(1) of the Competition Act 2002, as amended, as 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 and, where the context so admits, includes an association of undertakings.

[63] See section 6(6) and section 7(3) of the Competition Act 2002.

[64] To date, 18 individuals and 17 companies have been convicted in Ireland in respect of anti-competitive price fixing contrary to competition law.

[65] Andrews, Gorecki and McFadden, *Modern Irish Competition Law*, Wolters Kluwer (2015), p.105.

B. Consumer protection law offences

7.5. The Consumer Protection Act 2007 creates a large number of offences, some of which can be prosecuted by the CCPC on a summary basis only and some of which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP.[66] The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013[67], which transpose the EU Consumer Rights Directive[68], also create a significant number of offences which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP. Further consumer protection offences are set out in various other Regulations which transpose EU Directives.[69]

7.6. The consumer protection offences referred to in the preceding paragraph are generally offences that are capable of being committed by a "trader" – a term which is defined to include corporate entities.[70] Section 77(6) of the Consumer Protection Act 2007 effectively provides for vicarious criminal liability in respect of offences under that Act i.e. a corporate body will be liable if it can be established that the offence was committed by an employee, officer, director or agent of the corporate body. This same principle applies in respect of other consumer protection offences provided for in various Regulations which transpose EU Directives.[71]

7.7. The CCPC's experience has been that the provision on attribution of criminal liability to corporate entities in section 77(6) of the Consumer Protection Act 2007 has worked well in practice and has not given rise to any significant issues. Most of the consumer protection offences prosecuted to date by the CCPC and its predecessor, the National Consumer Agency, constitute strict liability offences. As noted in paragraph 4.9 above, all criminal enforcement actions for breaches of consumer protection law taken by the CCPC and its predecessors have to date been taken on a summary basis in the District Court.

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[66] It should be noted that the offence relating to pyramid promotional schemes set out in section 65(2) of the Consumer Protection Act 2007 can be prosecuted on indictment only.

[67] S.I. No. 484/2013.

[68] Directive 2011/83/EC of the European Parliament and of the Council of 25 October 2011.

[69] See, for example, the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 (S.I. No. 343/2015), the European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015 (S.I. No. 500/2015), the European Union (Textile Fibre Names and Related Labelling and Marking of the Fibre Composition of Textile Products) Regulations 2012 (S.I. No. 142/2012), the European Union (Protection of Consumers in respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) Regulations 2011 (S.I. No. 73/2011) and the European Communities (Prepacked Products) Regulations 2008 (S.I. No. 566/2008).

[70] The term "trader" is defined in the Consumer Protection Act 2007 as (a) a person who is acting for purposes related to the person's trade, business or profession, and (b) a person acting on behalf of a person referred to in paragraph (a). The term "trader" is defined in the 2013 Regulations as (a) a natural person, or (b) a legal person, whether - (i) privately owned, (ii) publicly owned, or (iii) partly privately owned and partly publicly owned, who is acting for purposes related to the person's trade, business, craft or profession, and includes any person acting in the name, or on behalf, of the trader.

[71] See, for example, Regulation 38(2) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484/2013).

ISSUE 8: Liability of Corporate Officers

A. Competition law offences[72]

8.1. As set out in paragraph 7.1 above, the Competition Act 2002 provides for a system of both criminal and civil enforcement of competition law. At the conclusion of an investigation, the CCPC may decide to initiate either civil or criminal proceedings in the courts against the undertaking(s) and directors/managers involved. An undertaking that breaches section 4 of the Competition Act 2002 or Article 101 of the TFEU is guilty of an offence under section 6 of the Competition Act 2002. An undertaking that breaches section 5 of the Competition Act 2002 or Article 102 TFEU is guilty of an offence under section 7 of the Competition Act 2002.

8.2. Section 8(6) of the Competition Act 2002 states:

> "*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*[73]*, 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*."

8.3. Section 8(7) of the Competition Act 2002 creates a presumption that certain individuals have consented to the commission of a competition law offence by an undertaking. Section 8(7) provides:

> "*Where a person is proceeded against as aforesaid for such an offence [under section 6 or 7 of the Competition Act 2002] and it is proved that, at the material time, he or she was a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that that person consented to the*

[72] For completeness, the Competition Act 2002 establishes a number of offences (for undertakings and individuals) in relation to the merger review regime provided therein. For example, section 26(6) of the Competition Act 2002 provides that an individual shall be personally liable for the contravention by an undertaking of a commitment or determination of the Commission with respect to a notified merger or acquisition, if such contravention was committed with the consent or connivance of, or is attributable to the neglect of that individual. Section 28I(3)-(5) of the Competition Act 2002 provides for an equivalent offence in respect of the media merger review regime. The CCPC does not propose to respond in detail with regard to such offences.

[73] Section 3(4) of the Competition Act 2002 states: "*In this Act references, however expressed, to an act that is done with the consent of a person shall be construed as including references to an act that is done with the connivance of a person*."

doing of the acts by the undertaking which constituted the commission by it of the offence concerned under section 6 or 7."

8.4. Once the prosecution in competition proceedings has established that a particular individual defendant was a director of the undertaking or made decisions affecting its management, section 8(7) of the Competition Act 2002 operates to transfer the burden of proof to that defendant to show that he or she did not in fact consent to the acts constituting the prohibited activity. Although the presumption is rebuttable, in order to do so the defendant would have to demonstrate that he or she did not know about the activity in question or that he or she either took steps to try to stop the activity or to bring it to the attention of others within the corporate body, i.e. he or she cannot have simply ignored the activity.[74] This is of important practical benefit since competition law offences, particularly cartel activity, tend to be of a highly secretive nature and it may be very difficult to prove to the relevant criminal standard that the individual did consent to or authorise the commission of an offence.

8.5. The CCPC considers that personal liability for competition law offences acts as a significant deterrent to engaging in anti-competitive activity. It is widely recognised that criminal penalties, in particular, the imprisonment of the responsible individuals and/or disqualification from acting as a company director[75], have strong deterrent effects. Personal liability for breaches for the Competition Act 2002 may encourage senior personnel to seek to improve competition law awareness and introduce competition law compliance policies within their organisation.

8.6. The CCPC's experience has been that the provisions on liability of corporate officers set out in the Competition Act 2002 (i.e. in sections 8(6) and 8(7)) work well in practice and have not given rise to any significant issues.

B. *Consumer protection law offences*

8.7. As noted in paragraph 6.9 above, rights for consumers are enshrined in various Irish and EU legislation. Under such legislation, the CCPC may employ various measures to help

[74] Note that Section 3(3)(a) of the Competition Act 2002 provides that, where the defendant in competition proceedings has the burden of proof in relation to a particular matter, it is sufficient for the defendant to prove the matter on the balance of probabilities. Section 3(3)(b) of the Competition Act 2002 provides that, where any matter is presumed to be fact unless the contrary is shown (as distinct from being presumed to be fact unless or until the contrary is proved) the defendant will have an evidential burden only with respect to that matter.

[75] Section 839(1)(a) of the Companies Act 2014 provides that the sanction of automatic director disqualification applies to any person convicted on indictment of any offence under the Companies Act 2014 or any other prescribed enactment. The Companies Act 2014 (Section 839) Regulations 2016 (S.I. No. 147 of 2016) prescribes competition law offences for the purposes of section 839(1)(a) of the Companies Act 2014. This means that the sanction of automatic disqualification from acting as a company director applies following an individual's conviction on indictment for a competition law offence under section 6 or section 7 of the Competition Act 2002.

achieve compliance with consumer protection law. These include: prosecution of traders who have committed criminal offences, prohibition orders, compliance notices, undertakings and fixed payment notices.

8.8. The Consumer Protection Act 2007 creates a large number of offences, some of which can be prosecuted by the CCPC on a summary basis only and some of which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP.[76] As noted in paragraph 7.5 above, there are also various Regulations transposing EU Directives (such as the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013) which also create a significant number of offences which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP.

8.9. All criminal enforcement actions for breaches of consumer protection law taken to date in Ireland by the CCPC and its predecessors have been taken on a summary basis in the District Court.

8.10. Section 77(1) of the Consumer Protection 2007 attaches criminal liability to human persons for wrongful acts done by a corporate body in breach of consumer protection law. It states:

> "*If an offence under this Act is committed by a body corporate and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any neglect on the part of any person being a director, manager, secretary or any other officer of the body corporate or a person purporting to act in any such capacity, that person, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished as if that person were guilty of the first-mentioned offence*."[77]

8.11. The test for attributing personal criminal liability for consumer protection offences under the Consumer Protection 2007 is consistent with the formulation put forward in the Issues Paper which refers to "*consent, connivance or neglect*". The Consumer Protection Act 2007 gives effect to the Unfair Commercial Practices Directive.[78] Article 11(2) of the Unfair Commercial Practices Directive requires that powers shall be conferred upon national courts or administrative authorities to enable them to take action if necessary with respect to prohibited commercial practices "'*even without proof… of intention or negligence on the part of the trader*".

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[76] It should be noted that the offence relating to pyramid promotional schemes set out in section 65(2) of the Consumer Protection Act 2007 can be prosecuted on indictment only.

[77] This same principle applies in respect of other consumer protection offences provided for in various Regulations which transpose EU Directives - see, for example, Regulation 38(2) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484/2013).

[78] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Unfair Commercial Practices Directive").

8.12. Section 77(2) of the Consumer Protection Act 2007 reverses the evidential burden for offences under that Act by introducing a presumption that certain categories of individual consented to the commission of the offence. Section 77(2) provides that:

> "*If… it is proved that, at the material time, the person was a director of the body corporate or an employee of it whose duties included making decisions that, to a significant extent, could have affected the management of the body corporate, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that that person consented to the doing of the acts or defaults that constitute the offence.*"

8.13. The presumption in section 77(2) of the Consumer Protection Act 2007 operates in the same way with respect to consumer protection offences as the presumption in section 8(7) of the Competition Act 2002 operates with respect to competition law offences. The defendant must rebut the presumption by demonstrating that he did not in fact consent to the acts or defaults constituting the offence. This is a very strong provision and strengthens the high level of protection afforded to consumers under the Consumer Protection Act 2007.

8.14. Product safety regulation in Ireland reflects the development of a harmonised EU system to address the placing on the market of unsafe products. The General Product Safety Directive[79] requires Member States to lay down rules on penalties that will apply in the event of a breach and take all necessary measures to ensure that they are implemented. A similar formulation to that used in section 77(1) of the Consumer Protection Act 2007 is found in Regulation 24 of the European Communities (General Product Safety) Regulations 2004[80] (the "General Product Safety Regulations"), whereby an individual also commits an offence if he/she consents to, connives in or approves of the commission of an offence by a body corporate or acts negligently.[81] The CCPC considers that such formulation is justified to ensure that producers[82] and distributors of products fulfil their obligations with respect to product safety and to protect consumers from dangerous products. The CCPC considers that it is important to guarantee a high standard of protection for consumers

[79] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (the "General Product Safety Directive").

[80] S.I. No. 199 of 2004 which gives effect to the General Product Safety Directive.

[81] Regulation 24 provides that: "*Where an offence under these Regulations is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of any director, manager, secretary or any other officer of such body or a person who was purporting to act in any such capacity, such person is also guilty of an offence and is liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.*"

[82] It should be noted that the term "producer" is defined in the General Product Safety Directive and in the General Product Safety Regulations as including (i) the manufacturer of a product, (ii) the manufacturer's representative, when the manufacturer is not established in the EU or, if there is no representative established in the EU, the importer of the product, and (iii) other professionals in the supply chain whose activities may affect the safety properties of the product.

where the conduct of a producer or distributor may potentially result in harm to the consumer.

8.15. The CCPC considers that the ability to seek criminal sanctions for individuals (as well as the corporate body) is a very effective deterrence tool. Both the Unfair Commercial Practices Directive and the General Product Safety Directive require EU Member States to lay down penalties for violations which must be "*effective, proportionate and dissuasive*".[83] The CCPC considers that, in order for such penalties to be effective, proportionate and dissuasive, it is necessary that they are applied on a strict liability basis.

8.16. The CCPC's view is that the provisions on liability of corporate officers set out in section 77 of the Consumer Protection Act 2007 are appropriate. The fact that an offence has been committed by a corporate entity should not necessarily absolve the corporate officers from criminal liability. We note that section 78 of the Consumer Protection Act 2007 provides for a defence of due diligence which may be available to corporate officers in certain circumstances.

[83] Article 13 of the Unfair Commercial Practices Directive and Article 7 of the General Product Safety Directive.

ISSUE 9: The Defence of Due Diligence

A. Competition law offences

9.1. The Issues Paper draws a distinction between different categories of offence, namely (i) intention-and-act based offences; (ii) strict liability offences; and (iii) absolute liability offences.[84] The Issues Paper suggests that a defence of due diligence is relevant only to strict liability offences, i.e. the prosecution is not required to prove intent by the accused but only that the accused committed the act constituting the offence.[85]

9.2. Competition law offences do not fall neatly into any one category. Section 6(1) of the Competition Act 2002 provides that an undertaking engaging in conduct prohibited by section 4(1) of the Competition Act 2002 (or its counterpart under EU law, Article 101 TFEU) shall be guilty of an offence. Section 4(1) distinguishes between agreements or concerted practices which have as their object the restriction of competition and agreements or concerted practices which have that effect.[86] Section 7(1) of the Competition Act 2002 provides that it is an offence for an undertaking to abuse its dominant position as prohibited by section 5(1) of the Competition Act 2002 or by Article 102 TFEU.

9.3. So-called "by object" restrictions of competition (prohibited by section 4(1) of the Competition Act 2002) are concerned with the purpose of the agreement or practice in question. "Hardcore" infringements of competition law (e.g. price-fixing, restricting output or sales, sharing markets or customers) are presumed, pursuant to section 6(2) of the Competition Act 2002, to have as their object the prevention, restriction or distortion of competition.[87] Such infringements are considered by the legislature to be so serious that they are presumed to be anti-competitive and, thus, illegal (subject to the defendant proving otherwise[88]). A defence of due diligence would not, in the CCPC's view, sit well with such infringements.

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[84] Paragraph 9.01 of the Issues Paper.

[85] Paragraph 9.02 of the Issues Paper.

[86] Section 4(1) of the Competition Act 2002 states that: "*…all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void…*" (emphasis added)

[87] Section 6(2) of the Competition Act 2002 states that: "*…it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to – (a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice, (b) limit output or sales, or (c) share markets or customers, has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State or within the common market, as the case may be, unless the defendant proves otherwise.*"

[88] The defendant would have to show that the agreement or concerted practice did not contravene the prohibition in section 4(1) by virtue of section 4(2) of the Competition Act 2002, which provides that: "*An*

9.4. Moreover, the CCPC considers that such a defence would not be appropriate for "by object" restrictions of competition, particularly hardcore cartel activity, given the serious detrimental consequences that these offences have on the markets in which they operate as well as on the economy and society as a whole. The consequences of hardcore cartel activity were described by McKechnie J in his judgment in *DPP v Patrick Duffy & Duffy Motors (Newbridge) Limited*:

> "*They stifle competition and discourage new entrants; damaging economic and commercial liberty… they remove price choice from the consumer, deter customer interest in product purchase and discourage variety. They reduce incentives to compete and hamper invention. They cause a transfer of consumer's money to themselves*." [89]

9.5. In the CCPC's view, the consequences of hardcore cartel activity justify the imposition of severe penalties on undertakings and/or individuals involved in the operation of a cartel. Accordingly, the CCPC believes that a due diligence defence (no matter how formulated) would not be appropriate for offences committed by undertakings and/or individuals involving "by object" restrictions under section 4(1) of the Competition Act 2002, and certainly would not be appropriate for those engaging in hardcore cartel activity.

9.6. For the same reasons, the CCPC considers that a statutory duress defence would not be appropriate for hardcore competition law offences committed by undertakings and/or individuals. It may be alleged that, in some exceptional cases, an undertaking may feel compelled to participate in anti-competitive conduct as a result of pressure from other cartelists or individuals. However, such undertaking would have the option of applying to the relevant competition authority for immunity from prosecution, or for a reduction in fines if the competition authority's leniency programme provided for this (there is currently no system of leniency in Ireland). In any case, the CCPC considers that such exceptional cases do not justify the introduction of a statutory defence of duress which all defendants could seek to rely upon to avoid sanction for criminal activity. This is particularly the case given that, under the current competition enforcement regime in Ireland, criminal prosecutions are in practice pursued for only the most serious competition law offences, namely hardcore cartel activity, which has very harmful consequences for the economy and ultimately for consumers. The CCPC's view is that duress is a factor that may be relevant to the sentencing of an undertaking and/or individual found to have committed an offence under section 4(1) of the Competition Act

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agreement, decision or concerted practice shall not be prohibited under subsection (1) if it complies with the conditions referred to in subsection (5) or falls within a category of agreements, decisions, or concerted practices the subject of a declaration for the time being in force under subsection (3)." Section 4(3) of the Competition Act 2002 provides that the CCPC may declare that specified categories of agreements or concerted practices comply with the conditions referred to in section 4(5) of the Competition Act 2002. Section 4(5) of the Competition Act 2002 provides that there are "efficiencies" which justify the existence of the agreement or concerted practice.

[89] Judgment of Mr Justice McKechnie delivered on 23 March 2009 in *DPP v Duffy and Duffy Motors (Newbridge) Limited*, 1(2) Irish Journal of Legal Studies, at paragraph 22.

2002, but is not something should be taken into account when assessing whether or not an offence has in fact been committed.[90]

9.7. Introducing a due diligence or duress defence to offences involving a non-hardcore infringement of competition law would be unlikely to have any significant impact on the enforcement of such offences in practice since the CCPC does not currently pursue criminal proceedings in relation to non-hardcore competition law infringements[91]. To date, the CCPC has not initiated summary criminal prosecutions in cases involving non-hardcore infringements of competition law, nor has it referred any such cases to the Director of Public Prosecutions for prosecution on indictment. Instead, for the reasons set out in paragraph 2.9 above, the CCPC considers that civil enforcement mechanisms are more suitable for non-hardcore infringements of competition law. For this reason, the CCPC considers that there is at present no need in practice for a due diligence or duress defence in relation to non-hardcore competition law offences committed by undertakings and/or individuals.

B. Consumer protection law offences

9.8. As noted in paragraphs 8.7 and 8.8 above, rights for consumers are enshrined in various Irish and EU legislation. Both the Consumer Protection Act 2007, and various Regulations which transpose EU Directives, create a significant number of consumer protection offences some of which can be prosecuted on a summary basis only, and some of which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP.[92] All criminal enforcement actions for breaches of consumer protection law taken to date in Ireland have been taken on a summary basis in the District Court.

9.9. The vast majority of consumer protection offences constitute strict liability offences i.e. the prosecution is not required to prove intent by the accused but only that the accused committed the act constituting the offence. Section 78 of the Consumer Protection Act 2007 provides for a defence of due diligence which is applicable to all offences under that Act (with the exception of the offence relating to pyramid promotional schemes set out in section 65(2) of the Act). The same due diligence defence also applies in respect of other consumer protection offences provided for in various Regulations which transpose EU Directives.[93]

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[90] The CCPC notes that section 6(5) and section 7(2) of the Competition Act 2002 contain a limited statutory duress-type defence. These provisions state that, in proceedings for an offence under section 6 or section 7 of the Competition Act 2002, it shall be a good defence to prove that the act or acts concerned was or were done pursuant to a determination made or a direction given by a statutory body.

[91] As explained elsewhere in this response, breaches of competition law, by either an undertaking or an individual, can be pursued either through civil or criminal proceedings in the Irish courts.

[92] It should be noted that the offence relating to pyramid promotional schemes set out in section 65(2) of the Consumer Protection Act 2007 can be prosecuted on indictment only.

[93] See, for example, Regulation 38(2) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484/2013).

9.10. Section 78(1) of the Consumer Protection Act 2007 states:

> "*In proceedings for an offence under this Act, other than an offence under section 65(2), it is a defence for the accused to prove both of the following:*
>
> *(a) commission of the offence was due to a mistake or the reliance on information supplied to the accused or to the act or default of another person, an accident or some other cause beyond the accused's control;*
> (b) *the accused exercised due diligence and took all reasonable precautions to avoid commission of the offence*."

9.11. In the context of consumer protection offences, the CCPC considers it appropriate that traders should be held to account for negligent or careless actions. We consider it appropriate to expect that traders will take reasonable steps to ensure that they comply with their obligations. The CCPC also recognises that, given the size of the consumer marketplace and the scale of sales and supply of services, a defence should be available to traders who can demonstrate that they made reasonable efforts to prevent the commission of an offence. The defence of due diligence also acts as an important incentive for traders to take reasonable steps to avoid an infraction. If the defence was not available, there might be less incentive for traders to trade diligently.

9.12. The due diligence defence set out in section 78(1) of the Consumer Protection Act 2007 requires that the trader made an effort to avoid committing the offence and that the commission of the offence was attributable to the actions of someone or something other than the trader. The defence is therefore broad in that it allows a trader to rely on factors such as an accident, mistake, information provided by others, the acts of others or some other cause beyond the accused's control. There is, however, a conjunctive aspect to the defence in that the trader must satisfy a two-limb test in proving (i) the factor to which the commission of the offence was attributable, and (ii) that the accused exercised due diligence and took all reasonable precautions to avoid commission of the offence. What constitutes "reasonable precautions" will be assessed on a case-by-case basis. To date, the defence of due diligence set out in section 78(1) has not been successfully relied upon in any criminal proceedings brought under the Consumer Protection Act 2007.

9.13. As noted in paragraph 7.6 above, section 77(6) of the Consumer Protection Act 2007 effectively provides for vicarious criminal liability in respect of offences under the Consumer Protection Act 2007 i.e. a corporate body will be liable if it can be established that the offence was committed by an employee, officer, director or agent of the corporate body. Section 77(7) provides for a defence of due diligence in such circumstances by stating that subsection (6) does not apply if the defendant establishes that the defendant exercised due diligence to prevent the commission of the offence.

9.14. The CCPC's experience has been that the due diligence defence set out in the Consumer Protection Act 2007 has not given rise to any significant issues in practice. The successful reliance on a defence of due diligence will in the CCPC's view more than likely depend on

the circumstances of each case. Each infraction will have to be judged on a case-by-case basis given the differences in the product markets in which traders operate and the capability of particular traders to exercise due diligence and to take reasonable precautions given the size of the entity, number of employees and corporate structure. The due diligence defence may well require the defendant to demonstrate that active measures were taken including adequate supervision, training and instruction for a court to conclude that there was a sufficient level of due diligence to allow the defence to be relied upon.

ISSUE 10: Are Irish Fraud Offences Adequate?

10.1. The CCPC does not have any observations in relation to Issue 10.

ISSUE 11: Reckless Trading

11.1. The CCPC does not have any observations in relation to Issue 11.

ISSUE 12: Appropriate Trial Venue

12.1. The Issues Paper seeks views on the appropriate venue and jurisdiction for the prosecution of corporate criminal offences, including the question as to whether a more flexible approach should be provided for the transfer of certain corporate offences either from one particular Circuit Court circuit to the Dublin Circuit Court, or from the Circuit Criminal Court to the Central Criminal Court. We note that the questions set out in the Issues Paper in relation to Issue 12 (appropriate trial venue) are concerned with the appropriate trial venue for indictable criminal offences involving a corporate body.

A. *Competition law offences*

12.2. As set out in paragraph 7.1 above, the Competition Act 2002 provides for a system of both criminal and civil enforcement of competition law. At the conclusion of an investigation, the CCPC may decide to initiate either civil or criminal proceedings in the courts against the undertaking(s) and directors/managers involved. An undertaking that breaches section 4 of the Competition Act 2002 or Article 101 TFEU is guilty of an offence under section 6 of the Competition Act 2002. An undertaking that breaches section 5 of the Competition Act 2002 or Article 102 TFEU is guilty of an offence under section 7 of the Competition Act 2002.

12.3. Where the CCPC considers that civil proceedings are warranted, it can institute such proceedings either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself initiate a summary prosecution in the District Court. In the case of more serious breaches, the CCPC sends a file to the Director of Public Prosecutions (DPP) who will decide whether to bring a prosecution on indictment in the Central Criminal Court.

12.4. It should be noted that the Central Criminal Court has exclusive jurisdiction to hear prosecutions on indictment in respect of competition law offences. This is provided for in section 11 of the Competition Act 2002 which states:

> "*A person indicted (whether as a principal or an accessory) for an offence under section 6 or 7 or the offence of attempting to commit such an offence or the offence of conspiracy to commit such an offence shall be tried by the Central Criminal Court*".

12.5. This provision came into force on 1 July 2002.[94] Prior to that date, all indictable competition law offences were prosecuted in the Circuit Criminal Court. As indicated in the Issues Paper[95], the adoption of the Competition Act 2002 followed the publication in 2000 of the final report of the Competition and Mergers Review Group (the "Review

[94] The majority of the provisions of the Competition Act 2002 came into force on this date, with the exception of provisions relating to mergers and acquisitions, which came into force on 1 January 2003.
[95] Paragraph 12.02 of the Issues Paper.

Group"), which set out recommendations for reform of the competition law enforcement regime in Ireland. The Review Group's report recommended *inter alia* that any criminal prosecution on indictment for a breach of competition law should be tried in the Central Criminal Court.[96]

12.6. In its report, the Review Group recommended that, insofar as possible, civil competition law cases should be heard by specialist judges of the High Court. The Review Group concluded that it seemed to be logical that if it was recommending that civil actions should be heard, so far as possible, by a specialist High Court judge, then the same should apply to a serious criminal prosecution. For that reason, the Review Group considered that any criminal prosecution on indictment for a breach of the Competition Acts should be returnable before the Central Criminal Court. The report stated that "*it would be a matter for the administrative discretion of the President of the High Court to try to ensure that in the event of a prosecution on indictment for a breach of the Competition Acts, one of the specialist competition law High Court judges was assigned to the Central Criminal Court for the purpose of that prosecution*".[97]

12.7. The Rules of the Superior Courts were amended in 2005[98] to provide for civil competition proceedings to be transferred to the High Court's "Competition List". The new Rules provide that such proceedings may be heard by the specialist judge in charge of the Competition List. The CCPC considers that the designation of a single judge to preside over all civil competition proceedings has been an important step in ensuring the development of specialist expertise and experience amongst the judiciary in order to deal effectively and efficiently with competition cases.

12.8. To date there have been a number of prosecutions on indictment in the Central Criminal Court in respect of competition law offences. In most of these cases, the judge assigned to the High Court's civil Competition List was assigned to the Central Criminal Court for the purpose of the prosecution. The CCPC considers that there are undoubtedly merits in having a judge with specialist knowledge of competition law as the trial judge in an indictable competition case. Where possible, the CCPC considers that it is important that any judge assigned in future to the Competition List should have prior experience and expertise in relation to competition law.

12.9. As regards the appropriate trial venue for indictable competition law offences, the CCPC believes that the Central Criminal Court is the most appropriate trial venue. There are a number of factors inherent in competition cases which, in the CCPC's view, point to the Central Criminal Court being the most appropriate trial venue for prosecuting indictable competition law offences.

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[96] Report of the Competition and Mergers Review Group (2000), at paragraphs 4.4.26 and 4.4.33(e), and Recommendation 7(e).

[97] Report of the Competition and Mergers Review Group (2000), at paragraph 4.4.26.

[98] Order 63B of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Competition Proceedings) 2005 (S.I. No. 130/2005).

12.10. In particular, the CCPC considers that there are important procedural reasons why the Central Criminal Court is the most appropriate venue for prosecuting cartel activity. The Issues Paper notes that, in the Circuit Criminal Court, the trial of the undertaking accused of committing an offence could be heard in one circuit while a related trial of its directors or senior managers could be heard in another circuit, potentially resulting in "*duplication of costs and inconsistency in outcomes*".[99] Multiplicity of proceedings in the Circuit Criminal Court for related offences is possible by virtue of section 25(3) of the Courts (Supplemental Provisions) Act 1961, which provides that venue depends on where the offence was committed or where the defendant was arrested or currently resides.[100]

12.11. If cartel cases were to be prosecuted in the Circuit Criminal Court rather than in the Central Criminal Court, this provision might be particularly problematic in practice since cartels, by their nature, involve multiple participants – both undertakings and, potentially, individuals. There would therefore be a very real possibility that a director of an undertaking accused of participating in cartel activity could reside, and therefore be prosecuted, in a different circuit to the circuit in which the undertaking itself resides and is prosecuted (i.e. where its head office is located). This would have the result of significantly increasing the time and resources involved in bringing separate prosecutions and could result in entirely different outcomes being reached by the relevant courts at the end of the proceedings. In contrast, the ability to bring proceedings against the undertaking accused of committing a competition law offence and any related individual in the same venue, i.e. the Central Criminal Court, has significant benefits in terms of timing, resources and consistency of outcomes.

B. *Consumer protection law offences*

12.12. As noted in paragraph 7.5 above, the Consumer Protection Act 2007 creates a large number of offences, some of which can be prosecuted by the CCPC on a summary basis only and some of which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP.[101] Various Regulations transposing EU Directives (such as the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013) also create a significant number of offences which can be prosecuted either on a summary basis by the CCPC or on indictment by the DPP.

12.13. The majority of consumer protection offences are so-called "hybrid" offences, i.e. they can be tried summarily in the District Court or on indictment in the Circuit Criminal Court. All criminal enforcement actions for breaches of consumer protection law taken to date in Ireland by the CCPC and its predecessors have been taken on a summary basis in the

[99] Paragraph 12.07 of the Issues Paper.

[100] Section 25(3) provides that: "*The jurisdiction vested in the Circuit Court… shall be exercised by the judge of the circuit in which the offence charged has been committed or in which the accused person has been arrested or resides*."

[101] It should be noted that the offence relating to pyramid promotional schemes set out in section 65(2) of the Consumer Protection Act 2007 can be prosecuted on indictment only.

District Court. Defendants in these actions have a right of appeal to the Circuit Court against conviction or sentence or both.

12.14. In the case of more serious breaches of consumer protection law, the CCPC may exercise a discretion to refer a file to the DPP who may decide whether to bring a prosecution on indictment in the Circuit Criminal Court. All prosecutions on indictment are brought by the DPP. Whether the Circuit Criminal Court is in practice the appropriate trial venue for indictable consumer protection offences is therefore primarily a question for the DPP. (As noted above, no file has to date been referred to the DPP in respect of a consumer protection offence.)

12.15. Nonetheless, the CCPC considers that – in the case of its consumer protection functions – there are a number of advantages to the current 'decentralised' system of bringing prosecutions on indictment before a Circuit Court judge sitting in the circuit in which the offence in question was committed or in which the accused resides or has been arrested.[102]

12.16. Some (but by no means all) consumer protection offences are "localised" offences, in that they affect individual consumers within a particular locality. Key witnesses are likely to reside or work in the locality in which the offence has allegedly been committed or in which the defendant is based and, in such cases, it will be generally be more practicable and less costly for witnesses to attend a hearing in that same locality. The CCPC does not consider that there would be any particular benefit in, or justification for, giving the Central Criminal Court exclusive jurisdiction to try indictable consumer protection offences. Nor does the CCPC see any particular benefit in, or justification for, introducing a procedure for the transfer of consumer protection prosecutions from the Circuit Criminal Court to the Central Criminal Court.

12.17. With regard to the suggestion in the Issues Paper that the nature of the Circuit Court means that it is unlikely that judges will develop specialist knowledge[103], the CCPC has generally found in appeals from the District Court to date in summary consumer protection prosecutions that Circuit Court judges have been well equipped to understand and deal with the issues involved in consumer protection prosecutions. Notwithstanding this fact, the CCPC would welcome the opportunity to provide professional development and current awareness training to the Irish judiciary on consumer protection issues if invited to do so in future.

[102] As explained in paragraph 12.10 of the Issues Paper.
[103] Paragraph 12.06 of the Issues Paper.


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Cosaint Tomhaltóirí
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