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

Joint Committee on Business, Enterprise & Innovation:

CCPC Opening Statement by Isolde Goggin

I would like to thank the Committee for the opportunity to speak to you today. I am accompanied by two Members of the CCPC's Commission, Mr Brian McHugh, who has responsibility for our Competition Enforcement and Mergers function and Mr Fergal O'Leary who has responsibility for our Consumer Protection Division and our policy function.

From our engagement with the sector in recent years the CCPC is acutely aware of the difficulties which beef farmers are experiencing. We are also very well aware that competition law, and indeed the CCPC, has been variously identified both as an obstacle and as a potential solution to resolving these issues. We very much welcome the opportunity to appear before you today and address some of this commentary as part of the wider discussion of competition law and trade associations.

As the Committee will be aware, the CCPC has an extensive and important remit across the economy to promote consumer welfare. This involves enforcing over 40 competition and consumer protection legislative instruments. Currently, we are active in a number of markets including; motor insurance, ticketing and public transport procurement. We are also conducting inspections in the motor sector and in the retail sector for pricing and product safety. We have recently published guidelines for the residential care sector and have just commenced a major study on the public liability insurance market.

Before I speak about some of the obligations placed on businesses and trade associations by competition law, it is important to say that the legality of any conduct or agreement

can only be determined by the Courts. The CCPC's role is to investigate suspected breaches of Irish and European competition law and to take appropriate enforcement action to deter such breaches and encourage compliance. This means we cannot give legal advice. We can, however, provide general guidance on the parameters of competition law which we hope will be of use to you today.

Competition Law in Ireland

Competition is important for businesses, consumers and the economy as a whole. It ensures businesses maintain competitive prices and look for innovative ways to compete. As a result, customers benefit from the best prices and the most efficient and effective products and services. When businesses break the laws which exist to protect competition, those very same customers, which can include businesses, can lose out and that's when the CCPC steps in.

Our role is to enforce competition law and we work to promote competition for the benefit of consumers and the economy as a whole. The objective of this work is to protect the process of competition in the interests of consumers. As this Committee will know, the competitive process has delivered real benefits to the Irish economy in terms of growth and jobs.

Both Irish and EU law forbid agreements, decisions and co-ordinated business practices which prevent, restrict or distort competition. Very broadly, it requires businesses to act independently. This means they should set their own prices and the conditions under which they are prepared to provide their products/services, based on their own commercial strategy and circumstances.

One of the most obvious ways that businesses compete is on price. Price-fixing therefore, where competitors secretly agree to charge a certain price, or to fix a minimum price, is considered one of the worst offences under competition law as it leads to inflated prices

and consumers paying more than they should. It has a very detrimental effect in a market. For these reasons, price-fixing is illegal under both Irish and EU competition law. Over the years, the CCPC has been active in taking enforcement action against a number of businesses who we suspected had engaged in price-fixing. *One such case related to a number of home heating oil companies across the West of Ireland who had together decided to increase their margin on the retail price of kerosene and gas oil in a price fixing agreement. An extensive investigation resulted in 18 separate convictions against 10 companies and 8 individuals.*

Competition Law and Trade Associations

While competition is based on businesses making their own commercial decisions, there are some activities and functions which are better suited to collective effort. Trade associations can provide pro-competitive benefits both to their members and their grouping by encouraging compliance, setting industry standards, and advocating legislative reforms that enhance competition and protect consumers. However, from our experience of engaging with trade associations, we know that their work sometimes involves collective behaviour which creates a risk of stepping outside the boundaries of competition law.

Irish and EU competition law prohibits trade associations and their members from anti-competitive co-ordinated conduct. Among the types of activities of concern are: co-ordination on pricing, market allocation, collective boycotts, collective negotiations and the sharing of commercially sensitive information, such as future pricing intentions.

If such co-ordinated practices are allowed, competition between these firms, or in the market as a whole, is lessened. The ability of individual businesses to decide their business strategy autonomously may also be lessened and crucially customers – both businesses and individuals – would most probably pay higher prices. Where the buyer is

the State, the inflated price is passed on to consumers in the form of higher taxes or cuts in public spending.

Trade associations have the right to represent the interests of their members, but it is important that they take an active role in ensuring their compliance with competition law. This means that they must not allow or facilitate commercially sensitive discussions between their members. Over the years we have had reason to engage with many associations across all sectors of the economy. We monitor markets and where we identify issues of concern, our approach is to firstly contact the associations and their members to make them aware or remind them of the boundaries of competition law. If we can bring about compliance quickly and efficiently without requiring enforcement action, we will. Where there is potential for considerable detriment, we will work with the trade association to obtain commitments stating that they understand the requirements of the law and we often assist associations with providing compliance training to their members. A recent example of this was our engagement with the Irish Property Owners Association (IPOA). *The IPOA became the subject of an investigation by the CCPC when, in December 2016, it released a press statement in response to Government legislation introducing rent controls in the private residential rental sector. In this statement, the IPOA stated that following a meeting of its members, property owners were considering a range of potential measures, including the introduction of a number of new charges to tenants and the withdrawal from State-sponsored rental schemes. The setting of rents and charges in the private rental sector are matters for individual landlords and their tenants and tenants would be worse off if such measures were allowed to be introduced on a blanket basis across the sector.* The CCPC's level of engagement with trade associations is consistent with those in other EU countries and the European Commission itself.

Competition Law in the Agriculture Sector

Over the years, the CCPC and its predecessor organisations have been very active in the food sector, in the enforcement of competition and consumer protection law, the

publication of grocery surveys, product pricing inspections, in assessing a number of mergers and in the fulfilment the Grocery Goods Regulations. In terms of enforcing competition law, we took a case all the way to the Supreme Court against the Beef Industry Development Society (BIDS). This centred on an agreement between competitors to reduce capacity in the Irish beef processing industry *(further details are provided below)*.

The EU provides a specific status for the agriculture sector, which is unique. The Treaty on the Functioning of the European Union (TFEU) allows for certain agreements, decisions and practices, which under normal circumstances would be considered a breach of competition law.

One such major exemption allows for the formation of Producer Organisations (POs). These are agricultural associations that provide benefits for their members in terms of collective action and co-operation. Recognised POs can benefit from exemptions from EU competition rules for certain activities, such as collective negotiations on behalf of their members, planning of production or for certain supply management measures. POs can take different legal forms, including agricultural cooperatives. In Ireland POs must apply to the Department of Agriculture, Food and the Marine and they must undertake certain activities for their members (*detailed below*). The CCPC has informed and reminded various trade associations in the agriculture sector about the availability of the PO status in competition law.

In the context of the current situation, legislation facilitating the establishment of Beef POs has been in place in Ireland since 2016. We note the first Beef PO, Glasson Beef Producers Limited, was established in September 2019 by the Beef Plan Movement. POs provide a legal means by which farmers can organise themselves when negotiating with processors on a collective basis. Although it does not allow the market-wide fixing of prices or quotas, individual POs can negotiate prices with individual processors. Any

businesses acting outside of a PO, including meat processors and individual farmers, who are not part of a PO, are subject to competition law.

Issues in the Beef Sector

I would like to use the last few minutes to address some of the recent commentary in relation to the issues in the Irish beef sector.

The CCPC had no role in the industry talks which took place and as the enforcement body we cannot provide legal advice to parties attending those talks. However, we did engage with various representative bodies, as we have done in many other sectors, to remind them of their obligations and to remind them of the PO status available to them. The Department of Agriculture has extensive guidance available on its website also to assist.

Notwithstanding these exemptions, both Irish and EU law forbids the entirety of businesses involved in a sector from getting together and agreeing to set prices for products or services. Prices must be negotiated with individual processors.

Closing Thoughts

The CCPC must be, is, and always will be, at its heart, an enforcement agency. We exercise our enforcement powers independently, in the public interest, with integrity and professionalism.

Competition law works for the benefit of businesses as well as consumers. It ensures that businesses are free to negotiate and set their own prices. And as the body responsible for the enforcement of competition law we are committed to ensuring that businesses and consumers in Ireland are protected from the effects of anti-competitive agreements.

We are happy to take any questions and provide any further detail that is required.

Additional Notes

Producer Organisations

The TFEU provides a specific status for the agricultural sector with regard to competition rules. The objectives of the Common Agricultural Policy (CAP) are set out in Article 39 of the TFEU and take precedence over the objectives of competition law. TFEU defines CAP objectives as follows:

- increasing productivity of agricultural production
- ensuring a fair standard of living for agricultural communities
- stabilising markets
- assuring supplies and,
- ensuring reasonable prices for the consumer

EU competition law as set out in the TFEU applies to the agricultural sector subject to a number of derogations and exemptions. This principle is laid out in an EU Regulation specifically designed for agricultural markets, known as the CMO Regulation.

The CMO Regulation 1308/2013

The CMO Regulation states that Articles 101 to 106 TFEU apply to all agreements, decisions and practices relating to the production and trade in agricultural products "save as otherwise provided in that Regulation".

Producer Organisations

The CMO which has been supplemented by further regulations known, as the Omnibus Regulation, specifically allows for the formation of Producer Organisations (POs). These

are agricultural associations that provide benefits for their members in terms of collective action and co-operation.

Article 152 of the CMO Regulation sets out the required activities that the PO must undertake for its members, which must include at least one of the following;

- joint processing;
- joint distribution, including by joint selling platforms or joint transportation;
- joint packaging, labelling or promotion;
- joint organising of quality control;
- joint use of equipment or storage facilities;
- joint management of waste directly related to the production;
- joint procurement of inputs.

These requirements indicate that, in line with Article 39 TFEU, there must be an increase in agricultural productivity through the use of the PO mechanism.

Responsibilities of POs

Each PO must be recognised by a Member State in order for the derogation from EU competition rules to apply.

Activities permitted by Producer Organisations

- A Member State must recognise the PO or an association of POs (APO) in order for the derogation from EU competition rules to apply. If the organisation is not a recognised PO or APO then its activities will be subject to competition rules.

- Agreements or concerted practices are exempt from competition law only insofar as they are between members of the same PO or an APO. Co-ordination practices between different POs or APOs is not permitted and will be subject to competition rules.
- While the co-ordination of pricing policy within a PO or APO is permitted, it is not permitted for a PO or APO to set a collective minimum sales price. Producers must be free to sell below the agreed price.
- Exchanges of strategic information are limited to information that is strictly necessary for the achievement of the objectives of the PO of APO is permitted.
- Co-ordination of the quantities of agricultural product to place on the market is permitted.
- Co-ordination of pricing policy of individual agricultural producers (in particular where members assign the responsibility to the PO or APO for marketing all its products) is permitted.

Beef Industry Development Society Investigation

In 2003, the Competition Authority began legal proceedings against the Beef Industry Development Society (BIDS). This arose as a response to an agreement between competitors, who formed BIDS, to reduce capacity in the Irish beef processing industry.

This case centred on an agreement between competitors to reduce capacity in the Irish beef processing industry. The agreement involved the major players in the industry agreeing to pay those players who would voluntarily leave the industry. In return for that payment, the players leaving would agree to decommission their plants, refrain from using the associated lands for processing for a period of five years and sign a two-year non-compete clause with regard to processing anywhere in Ireland.

The case then proceeded through a number of stages.

- In 2006, the High Court held that the agreement had neither the object nor the effect of preventing, restricting or distorting competition and therefore did not breach European competition law. On foot of this ruling we made an appeal to the Supreme Court.
- In 2007, the Supreme Court sought a preliminary ruling from the European Court of Justice (ECJ) on the question of whether an agreement like the BIDS agreement, where the competitors in that industry agreed between themselves to restructure the entire industry, had the object of restricting competition.
- In 2008, the ECJ found that the BIDS agreement had as its object the restriction of competition and is incompatible with European Competition law.
- In 2009, the Irish Supreme Court then held that the BIDS agreement had infringed European law. The Supreme Court remitted the case to the High Court to decide whether the conditions for exemption set out in European law were satisfied. The onus was on BIDS to prove that all four conditions under European law were satisfied, namely, the agreement:
- Must contribute to improving the production or distribution of goods (or services) or to promoting technical or economic progress.
- Must allow consumers a fair share of the resulting benefit.
- Must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives.
- Must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- During the High Court proceedings in 2010, the European Commission decided to intervene in the case and submitted written observations in accordance with European Council regulations. Under a specific regulation, the European Commission may submit written observations to courts of the Member States where the coherent application of European law requires doing so. This is only the

fourth time that the European Commission has intervened in this way before a national court.

- In January 2011, before the High Court had the opportunity to reach any decision on the application of the exemption to the BIDS agreement, BIDS withdrew its claim for exemption under European Competition law and agreed to pay a substantial contribution to our costs in the case.

As a result, the BIDS agreement remains prohibited, as it has the object of preventing, restricting or distorting competition.