



Guidance Note on the CCPC's Choice of Enforcement Regime for Breaches of Competition Law



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

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INTRODUCTORY NOTE

On the 31st January 2022, the Competition (Amendment) Bill 2022 (no. 12 of 2022) was initiated and published, thereby commencing the legislative procedure in the Oireachtas. The Bill aims to implement Directive (EU) 2019/1 of the European Parliament and of the Council, also known as the ECN+ Directive.

This Guidance Note is based upon the text of the Bill, as it was published and will refer to the Bill as the Competition (Amendment) Act 2022 (the title as is envisaged by the Bill) and all references to the Act, or any of the proposed amendments to other legislation, will be cited as if the Act had been enacted and will, if required, be updated in accordance with the final version of the Act.

1. Introduction

- 1.1. Directive (EU) 2019/1¹ (“ECN+ Directive”) has been transposed into Irish Law by the Competition (Amendment) Act 2022 (“the 2022 Act”) which introduces changes to the competition enforcement regime in Ireland. This Guidance Note provides further information on the high-level principles that the Competition and Consumer Protection Commission (“the CCPC”) may consider when selecting an appropriate enforcement regime for suspected infringements of competition law in the State.²
- 1.2. Competition law is defined in the 2022 Act as meaning sections 4 and 5 of the Competition Act 2002, as amended (“the 2002 Act”) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”).
- 1.3. Pursuant to the 2022 Act, the CCPC may, for the first time, impose administrative financial sanctions on undertakings and associations of undertakings for breaches of competition law, subject to Court confirmation. Alternatively, breaches of competition law can continue to be prosecuted as criminal offences pursuant to the provisions of sections 6, 7, 7A and 8 of the 2002 Act.
- 1.4. Accordingly, the CCPC has carefully considered the interaction between the two potential enforcement routes, i.e., criminal and administrative. This Guidance Note describes the choice(s) of enforcement options available to the CCPC when investigating suspected breaches of competition law and the criteria to be applied.
- 1.5. The CCPC will, as far as practically possible, have regard to this Guidance Note, and other relevant guidance that may be published on the CCPC’s website from time to time, when assessing or investigating suspected breaches of competition law.

¹ Directive of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

² This Guidance Note represents the CCPC’s views as at the date of publication. The Guidance may be revised from time to time and published on the CCPC’s website, to reflect changes in best practice or law, as well as the CCPC’s developing experience assessing and investigating suspected breaches of competition law.

- 1.6. Nothing in this Guidance Note is intended to limit the CCPC's discretion in carrying out its statutory functions and any departure by the CCPC from the guidance in this document shall not invalidate an enforcement action.

2. Legal framework

- 2.1. Competition law in the State is regulated by two main pieces of legislation, being the 2002 Act and the TFEU, with two main sets of prohibitions, as follows:
- 2.2. Section 4(1) of the 2002 Act prohibits and renders void “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”. The 2002 Act lists some specific types of behaviour which are expressly prohibited. These include agreements, decisions of associations of undertakings, and concerted practices which:
- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) Limit or control production, markets, technical development or investments;
 - (c) Share markets or sources of supply;
 - (d) Apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
 - (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts (e.g. tying); and
 - (f) Are concerned with bid-rigging.³

³ Section 4(1)(f) of the 2002 Act as amended (as inserted by Section 5 of the 2022 Bill)

2.3. Section 5 of the 2002 Act prohibits the abuse by one or more undertakings of a dominant position. Generally, an undertaking is considered to be dominant if it is able to act without taking account of the reaction of its customers or competing undertakings, i.e., where there are few, if any, satisfactory alternative sources of supply and therefore little choice. Examples of an abuse of a dominant position includes a dominant undertaking:

- (a) Directly or indirectly imposing unfair purchase or selling prices or other trading conditions;
- (b) Limiting production, markets or technical development to the prejudice of consumers;
- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- (d) Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

2.4. Articles 101 and 102 of the TFEU prohibit the same kind of conduct as that prohibited by sections 4 and 5 of the 2002 Act respectively, provided it can be shown that the conduct in question may have an effect on trade between Member States of the EU.

2.5. It is the CCPC's role to enforce competition law in the State by investigating suspected breaches of the above provisions.

2.6. Part 4A of the 2002 Act⁴ gives the Commission for Communications Regulation ("ComReg") the power to enforce competition law in the field of electronic communications services or electronic communications networks, or associated facilities. Before performing any of its functions under the 2002 Act, ComReg shall

⁴ Inserted by the Communications Regulation (Amendment) Act 2007 and amended by the Competition and Consumer Protection Act 2014.

notify the CCPC in writing of its intention to perform that function. Likewise, the CCPC shall notify ComReg in writing of any suspicion of a possible breach of sections 4 or 5 of the 2002 Act, or of Articles 101 or 102 of the TFEU, relating to the provision of an electronic communication service or electronic communications network, or associated facilities.

- 2.7. Section 6(1) of the 2002 Act makes it an offence for an undertaking to enter into, or implement, an agreement or to make or implement a decision or to engage in a concerted practice in contravention of section 4(1) of the 2002 Act or Article 101(1) of the TFEU and intentionally or recklessly acts to prevent, restrict or distort competition or intentionally or recklessly makes omissions having the effect of preventing, restricting or distorting competition.⁵
- 2.8. Section 7(1) of the 2002 Act provides that it is an offence for an undertaking to breach section 5(1) of the 2002 Act or Article 102 of the TFEU and intentionally or recklessly acts to prevent, restrict or distort competition or intentionally or recklessly makes omissions having the effect of preventing, restricting or distorting competition.
- 2.9. Section 8(6) of the 2002 Act provides for criminal liability for individual directors, managers or other similar officers of the undertaking. Individual liability is “derivative liability” in that where an offence under section 6 or 7 of the 2002 Act has been committed by an undertaking and the doing of that act was authorised or consented to by such an individual, that individual (as well as the undertaking) is guilty of an offence and may be prosecuted criminally for such offence.
- 2.10. Section 8 of the 2002 Act sets out the criminal penalties that may be imposed by the criminal courts on undertakings and/or individuals following conviction, either

⁵ Section 3 of the 2002 Act assigns the following definition: “Undertaking” means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings.

on summary conviction or indictment for an offence under section 6 or 7 of the 2002 Act.

2.11. Pursuant to the 2022 Act, the CCPC is also empowered to pursue administrative enforcement proceedings against undertakings or associations of undertakings, in respect of breaches of competition law, i.e., sections 4 and 5 of the 2002 Act or Articles 101 and 102 of the TFEU, in lieu of the criminal proceedings against undertakings referred to in section 8 of the 2002 Act.

2.12. Therefore, on completion of an investigation into a suspected breach of competition law, where the CCPC has formed the preliminary view that an undertaking or association of undertakings has infringed sections 4 or 5 of the 2002 Act or Articles 101 or 102 of the TFEU, the CCPC may elect to:

- (a) refer the matter to the Director of Public Prosecutions (the “DPP”) to consider commencing criminal proceedings on indictment in relation to an offence under section 6 or 7 of the 2002 Act;
- (b) bring summary criminal proceedings itself in relation to an offence under section 6 or 7 of the 2002 Act pursuant to section 8(9) of the 2002 Act;
- (c) pursue administrative enforcement proceedings in accordance with the procedures set out in the 2022 Act; or
- (d) in the circumstances set out in section 3 of the 2002 Act, pursue civil proceedings in accordance with the provisions of sections 14A and 14B of the 2002 Act.⁶

2.13. The choice of appropriate enforcement route is at the CCPC’s discretion and will depend on the particular circumstances of a given case. However, the CCPC recognises that relevant stakeholders may require guidance as to when, in general, the CCPC may seek to enforce competition law through criminal

⁶ Section 3 of the 2002 Act refers to the transitional provisions. The choice of enforcement mechanism is outlined in Section 15K of the 2002 Act.

proceedings in the Irish courts or in accordance with the CCPC's administrative enforcement regime. Chapter 5 of this Guidance Note provides further guidance on how the CCPC will make this choice of enforcement decision.

3. Sources of competition law investigation

3.1. The CCPC receives information from a variety of internal and external sources such as:

- (a) Complaints;
- (b) Research and market intelligence;
- (c) Immunity applications under the Cartel Immunity Programme (“CIP”);⁷
- (d) Leniency applications under the CCPC’s Administrative Leniency Policy (“ALP”) (currently available only for participation in cartels)⁸; and
- (e) Confidential information obtained through the CCPC’s anonymous whistleblowing platform.⁹

3.2. In accordance with section 10(1)(c) of the Competition and Consumer Protection Act 2014 (the “2014 Act”), the CCPC may choose to investigate a suspected breach of competition law either on its own initiative (including, for example, where it has received information relating to a suspected breach of competition law) or in response to a complaint made to it.

3.3. In assessing any suspected breach of competition law and in deciding whether to open a formal investigation into any such breach, the CCPC applies its Prioritisation Principles. They consist of the following four high-level principles and are not ranked or weighted in any particular order:

- (a) Level of harm (economic and/or physical);
- (b) Likely impact of the CCPC’s action;

⁷ Information on the CCPC’s Cartel Immunity Programme is available on the CCPC’s website [here](#).

⁸ The CCPC’s Administrative Leniency Policy for cartels is currently under consultation and can be found [here](#).

⁹ The CCPC’s anonymous whistleblowing platform can be found [here](#).

(c) Strategic significance; and

(d) Risks, resources and costs

(together referred to as the "[Prioritisation Principles](#)").

3.4. The CCPC's Prioritisation Principles also assist the CCPC in determining what issues to prioritise at any given time while remaining flexible. Each complaint and potential investigation will be dealt with and evaluated on a case-by-case basis taking all relevant factors into account.

4. Phases in a competition law investigation

4.1. Key phases and decision-making points in a competition law investigation conducted by the CCPC include the following:

- (a) Receipt of information and preliminary assessment;
- (b) Decision to open an investigation or close an assessment matter;
- (c) Opening of a formal investigation;
- (d) Decision to use investigation powers e.g. Requirement for Information (RFI), summons, search etc.;
- (e) Investigation report and recommendation;
- (f) Decision to initiate enforcement proceedings which may include:
 - (i) bringing administrative enforcement proceedings under the 2002 Act by referring the matter to an Adjudication Officer¹⁰ for decision;¹¹
 - (ii) bringing summary criminal proceedings pursuant to section 8(9) of the 2002 Act;
 - (iii) referring a file to the DPP with a recommendation to consider commencing criminal proceedings on indictment in relation to an offence under sections 6 or 7 of the 2002 Act;
 - (iv) or closing an investigation; and
- (g) Action enforcement decision either by issuing a Statement of Objection (“SO”) in relation to administrative enforcement

¹⁰ Adjudication Officers are individuals appointed by the Minister for Enterprise Trade and Employment to make decisions under section 15X of the 2002 Act on behalf of the CCPC. Adjudication Officers are independent in the performance of their functions.

¹¹ Section 15M(2) of the 2002 Act.

proceedings or instituting criminal proceedings as described above.

Figure 1 below describes the phases in a competition law investigation.

Figure 1. Key phases in a CCPC competition law investigation:



4.2. Regardless of the way in which information on a suspected breach of competition law comes to the attention of the CCPC, or the substance of the suspected breach itself, the investigation phases are generally as set out in Figure 1. However, these phases may vary for example, depending on the nature of the investigation or

where an application for immunity from criminal prosecution or leniency from administrative sanctions has been made.

Phase 1: Preliminary Assessment

4.3. The overall objective of the preliminary assessment phase is to gather further information to assess whether there are grounds to suspect that a breach of competition law is occurring or has occurred. The CCPC will also consider whether to open an investigation in respect of such suspected breach.

4.4. Specifically, the objectives of the preliminary assessment phase are to:

- (i) Receive, examine and assess the validity of the issue(s) outlined in the information provided to the CCPC by the complainant, ALP/CIP applicant or other information source, such as the CCPC's anonymous whistleblowing platform;
- (ii) Conduct research, open-source intelligence gathering, an analysis of market information and enquiries, such as speaking to a complainant, ALP/CIP applicant or other information provider etc.; and
- (iii) Gather the relevant information to identify factual and legal issues and decide whether or not to progress to the next phase or to close the matter.

4.5. The CCPC is not obliged to formally investigate every suspected breach of competition law.¹² In deciding whether to progress a matter from a preliminary assessment to an investigation, the CCPC will consider whether the information gathered gives rise to grounds to suspect that a breach of competition law is occurring or has occurred.

¹² See section 10(8) of the 2014 Act.

- 4.6. Where the CCPC decides not to progress a matter from preliminary assessment to an investigation but rather to close the matter, the CCPC may send an advisory or warning letter to the undertaking and/or individual whose conduct is the subject of the preliminary assessment. The purpose of the letter is to remind them of their competition law obligations and inform them that the CCPC has become or has been made aware of a suspected breach of competition law and that, although the CCPC is currently not minded to open an investigation, it may do so in future, including if the CCPC receives further evidence of a suspected breach or the CCPC's prioritisation assessment changes.

Phase 2: Investigation

- 4.7. Following completion of a preliminary assessment of a suspected breach of competition law, the CCPC may decide to open an investigation under section 10(1)(c) of the 2014 Act.
- 4.8. In the investigation phase, the CCPC will make further and more in-depth enquiries and gather all relevant evidence or information to assist the investigation. The CCPC may use investigative powers, pursuant to the provisions of the 2014 Act and the 2022 Act,¹³ where necessary and appropriate. The CCPC has a range of powers to obtain information to help it form a preliminary view as to whether a breach of competition law has been committed. The CCPC can require the production of specified documents or information, ask questions of individuals and/or carry out interviews with individuals, and enter and search premises with a warrant.

The CCPC may periodically review investigations and consider the information and evidence available at the time, including any relevant risks, to assess whether to continue with the investigation or close the matter.

- 4.9. The CCPC will consider whether enforcement action may be appropriate when sufficient evidence has been gathered to support a suspicion that a competition

¹³ Most new investigative powers, insofar as they relate to cartel enforcement, will be inserted into the 2014 Act, the Criminal Justice (Surveillance) Act 2009, and the ComReg Act 2002.

law breach has occurred or is occurring. In that instance, the CCPC will afford the suspect(s) or target of the investigation an opportunity to understand the allegations and answer to those, either by way of issuing a Statement of Objections or a cautioned interview, for example.

Phase 3: Enforcement Decision

4.10. An investigation can be resolved in a number of ways. The CCPC may:

- (a) close an investigation following an application of its Prioritisation Principles and/or consideration of the nature of the breach or the likelihood of prosecution, having regard to the information and evidence available;
- (b) issue a decision that there are no grounds for action if the CCPC has not found evidence of a breach of competition law;
- (c) accept commitments as to future conduct where the CCPC is satisfied that these commitments address the identified competition concerns;
- (d) refer a matter for adjudication in accordance with the administrative enforcement procedures contained in the 2022 Act and, if the CCPC decides that the undertaking or association of undertakings in question has committed an infringement, the CCPC can issue an infringement decision against them and impose administrative financial sanctions, structural or behavioural remedies and/or such directions as the CCPC considers appropriate to bring the infringement to an end; and
- (e) in respect of a criminal offence under sections 6, 7 and 8 of the 2002 Act, bring summary criminal proceedings or refer the matter to the DPP to consider commencing criminal proceedings on indictment. In the case of the former, although bringing summary criminal proceedings on its own behalf, the CCPC may need to consult and coordinate such proceedings with the DPP, in case a District Court may decide to refuse

jurisdiction and send the matter up to the Central Criminal Court.

- 4.11. The CCPC may decide that an investigation no longer merits the continued allocation of resources because it no longer fits within the CCPC's Prioritisation Principles and/or because the CCPC does not have sufficient evidence in its possession to form a preliminary opinion as to whether a breach of competition law has been committed and the CCPC considers that further investigation is not warranted. The CCPC may take this decision at any stage of the investigation

5. Choice of potential enforcement route

- 5.1. Prior to the commencement of the 2022 Act, the CCPC enforced competition law offences through criminal law proceedings (itself or by referral to the DPP) or through civil proceedings under the 2002 Act. Following the commencement of the 2022 Act, in addition to enforcement through the criminal courts, the CCPC also has the power to impose administrative financial sanctions for all breaches of competition law, including cartel offences.
- 5.2. The CCPC exercises its statutory discretion, on a case-by-case basis, to decide on the appropriate enforcement route for any suspected breach of competition law.



As set out in section 15K of the 2002 Act, where the CCPC refers a matter to the DPP and the DPP commences criminal proceedings against an undertaking or an association of undertakings which is determined other than by way of *nolle prosequi*, the CCPC may not pursue administrative enforcement proceedings against that undertaking or association of undertakings in respect of the same matter. However, if such criminal proceedings are determined by way of *nolle prosequi*, or if the DPP decides not to commence criminal proceedings, the CCPC may pursue administrative enforcement proceedings against that undertaking or association of undertakings in respect of the same matter.

Further, where the CCPC initiates administrative enforcement proceedings against an undertaking or association of undertakings, the CCPC may not subsequently pursue criminal proceedings against the same undertaking or association of undertakings in respect of the same matter where (i) an Adjudication Officer finds that there has been no infringement, or (ii) an Adjudication Officer finds there has been an infringement but no administrative sanctions have been imposed, or (iii) an Adjudication Officer finds there has been an infringement and administrative sanctions are imposed, or (iv) the administrative enforcement proceedings have been otherwise determined, including by entering into commitments under section 15AE or relevant remedies under 15Z of the 2002 Act.

- 5.3. The CCPC will inform parties under investigation of the envisaged enforcement route at as early an opportunity as practicable, bearing in mind however that the CCPC may elect to change the particular enforcement route at a later stage, depending on evidence gathered and/or the criteria set out below. The CCPC may elect to start an investigation, complying with the rules and procedures relating to evidence gathering in criminal investigations, until such time as a particular enforcement route has been chosen. In such cases, the CCPC will apply criminal standards of evidence gathering in order to maintain the admissibility of evidence in any potential resulting criminal proceedings.
- 5.4. The CCPC will select the appropriate enforcement mechanism once the evidence supports the CCPC's preliminary view that a breach of competition law has occurred or is occurring.¹⁴ This decision is based on the information and evidence gathered, the individual circumstances of a given case and relevant factors including the criteria set out below.
- 5.5. The CCPC's objectives are detection, investigation, enforcement, compliance and deterrence and in exercising its discretion and throughout the phases of the investigation, the CCPC may consider the following broad criteria¹⁵:
- (a) The nature of the suspected breach of competition law;
 - (b) The likelihood of successful enforcement action / prosecution;
and/or
 - (c) The CCPC's Prioritisation Principles.

The nature of the suspected breach of competition law

- 5.6. When assessing the nature of the suspected breach, the CCPC may take factors such as the following into account:

¹⁴ This is subject to any decision by the DPP to commence criminal proceedings on indictment where the CCPC elects to refer a file to the DPP recommending a prosecution.

¹⁵ Examples provided in this document are intended to form guidance only, and are not exhaustive, but will set a benchmark for identifying the appropriate enforcement route which may be applied in a particular case.

- (a) The type of conduct comprising the suspected breach of competition law (e.g., explicit price fixing, market sharing, bid-rigging or abuse of dominance);
- (b) The duration of the suspected breach;
- (c) The economic harm caused by the suspected breach;
- (d) Whether there is a clear public interest in ensuring that a crime is prosecuted and that the wrongdoer is convicted and punished.¹⁶ In particular, the CCPC may consider whether the potential consequences of a successful criminal conviction are an appropriate possible outcome to be imposed on an individual, notably: (i) automatic disqualification as a company director in accordance with section 839 of the Companies Act 2014; and/or (ii) possible imprisonment in accordance with section 8 of the 2002 Act. The CCPC may typically consider this criterion in relation to hardcore cartel conduct.
- (e) Whether the breach was connected to other breaches and/or crimes, such as fraud and corruption or obstruction of justice for instance; and/or
- (f) Previous similar breaches of competition law by the undertaking(s) and or individuals involved (recidivism).

5.7. In assessing whether an investigation concerning any suspected breach of competition law is suitable for enforcement through criminal proceedings in the courts, the CCPC may have regard to the role of the undertakings and/or individuals involved in the suspected breach.

5.8. The CCPC treats all instances of cartel conduct extremely seriously. Cartel conduct has severely negative consequences for consumers, businesses and the economy in general, as it causes them to pay more for goods and/or services than they

¹⁶ The CCPC will have regard to the DPP's *Guidelines for Prosecutors* in applying this criterion. The 5th Edition of the DPP's *Guidelines for Prosecutors* is available [here](#).

otherwise would have paid. Cartels are particularly harmful due to their secret nature and can in general be seen as conspiracies against consumers and the public interest in having competitive markets. The exercise of the CCPC's discretion with regards to the appropriate enforcement route, in particular for cartel conduct, does not imply that the CCPC considers some types of breaches of competition law to be 'less serious' than others.

- 5.9. Cartel conduct is secret and covert, with the participants in a cartel going to considerable efforts to conceal their conduct, particularly from their customers and from competition authorities. The extent to which suspected cartelists attempted to conceal their behaviour may be among the factors that informs the suitability for enforcement through criminal proceedings in a particular investigation.

Likelihood of successful prosecution

- 5.10. In exercising its discretion, the CCPC may have regard to suitability of a given case for criminal proceedings, and in particular, the likelihood of successful prosecution in the courts.

- 5.11. In assessing which cases to refer to the DPP, the CCPC may have regard to the DPP's *Guidelines for Prosecutors* and, in particular, paragraphs 4.11 and 4.12 which state the following:

*"Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. [...] In evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, relevance, sufficiency and strength of the evidence which will be presented at the trial."*¹⁷

- 5.12. For the avoidance of doubt, this paragraph does not suggest that the CCPC will pursue suspected breaches of competition law through its administrative enforcement regime only when it does not consider the evidence available to it to be conducive to criminal prosecution. Nor does this subsection imply that the

¹⁷ DPP Guidelines for Prosecutors, 5th Edition, December 2019.

CCPC will be obliged to pursue suspected breaches of competition law through criminal proceedings where there is particularly strong *prima facie* evidence of proof beyond a reasonable doubt. Rather, the strength of the evidence available will be considered in conjunction with other factors, such as the likelihood of a successful prosecution and always in light of the particular circumstances of a given case.

Prioritisation Principles

- 5.13. As mentioned, the CCPC will have regard to its Prioritisation Principles in exercising its discretion on whether to pursue suspected breaches of competition law through criminal proceedings in the Irish courts or through the CCPC's administrative enforcement regime.
- 5.14. In conclusion and in addition to the above, the CCPC will continue to apply best international practice during all stages of its investigations into suspected breaches of competition law and may issue additional guidance as and when the need arises, both in terms of priorities and/or choice of potential enforcement route.

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