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The Courts & Competition Law: The Irish Experience

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Under Ireland's judicial model of the application of competition law the Courts play a particularly critical role in providing oversight, review and guidance to competition law enforcers, legal advisors, businesses and consumers. The Courts have articulated a clear and unequivocal objective for competition law: consumer welfare. However, there is a significant disconnect between this objective and Court's performance in addressing substantive competition law issues: (i) there is no coherent sentencing methodology in criminal cartel cases, and the sanctions imposed are well short of those required to act as a deterrent; (ii) the quality of the Court's analysis in non-criminal cartel and abuse of a dominant position cases suffers from important shortcomings; and, (iii) although the Courts have set a sensible standard of review of the competition agency's merger determinations, it did not always adhere to those standards. These tendencies have important implications. Firms are less likely to use the Cartel Immunity Programme, an essential tool for detecting secret cartels, due to the lack of deterrence. Settlement is preferred rather than taking complex civil cases to Court. Merger review by the competition agency might favour accepting conditions/commitments rather than applying a prohibition and taking the risk of the Court overturning the decision. A variety of measures, many of which are in train and/or do not require legislative change, offer the prospect of securing a more congruent relationship between the consumer welfare objective of competition law and the treatment of substantive competition issues by the Courts.

1. INTRODUCTION

In contrast to most other European Union (EU) Member States (MS) the Courts in Ireland decide all criminal and civil law competition cases. It is thus the Courts that decide on the substantive merits of a case and the appropriate sanction. Although the competition agency, the Consumer and Competition Protection Commission (CCPC),[1] is the initial decision maker with respect to mergers, the Courts have wide ranging powers of review. Ireland's institutional arrangements for the application of competition law are characterised by the "judicial", as compared to the much more common "administrative"

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1 The CCPC was formed through the merger of the Competition Authority and the National Consumer Agency in October 2014. The term CCPC as used in this paper also includes the record of the Competition Authority.

model. In the latter model "a single administrative authority investigates cases and takes enforcement decisions subject to judicial control".[2]

The purpose of this paper is to evaluate the success of the Courts in Ireland in providing efficient and effective oversight, review and guidance on the administration, enforcement and interpretation of competition law. We will employ the following criteria:

- Did the Courts articulate a clear objective for competition policy?
- Did the Courts set out a coherent criminal cartel sentencing policy?
- Did the Courts set out a credible analysis of competition issues in civil cases?
- Did the Courts show appropriate curial deference to the CCPC in merger appeals?
- Were the Courts' judgments consistent with Court of Justice of the European Union (CJEU) jurisprudence?[3]

These questions are, of course, inter-related. The objective of competition law informs the Court's analysis of the behaviour of undertakings in the marketplace, whether unilateral or collective. In other words, the Court's analysis of substantive competition issues should be consistent with and reinforce the Court's view as to the objective of competition policy.

The criteria refer to all the major categories of competition law: anticompetitive agreements; abuse of a dominant position; and anticompetitive mergers. The reference to European jurisprudence reflects a number of considerations. There is a shared competition law objective between the CJEU and the Irish Courts and a common condemnation of hard core cartels. The CJEU is much more familiar with issues of competition law in view of the high volume of such cases compared to the handful on which the Irish Courts have had to adjudicate. The CJEU has the benefit of the opinion of the Advocate General. Hence it seems reasonable to assume that the CJEU provides a template or benchmark against which to compare Irish Court judgments.

Missing from the list of criteria are procedural issues relating to investigation and prosecution of alleged breaches of competition law. These issues, which can be important for the administration and enforcement of competition law, tend not to be competition law specific. Some important examples illustrate the point. The Courts restricted the scope of material that could be seized by the CCPC in a dawn raid so as to avoid a conflict with Article 8 of the European Convention on Human Rights.[4] In another competition law case the Courts ruled that an individual could be prosecuted even though the

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[2] European Commission, *Enhancing Competition Enforcement by Member States' Competition Authorities: Institutional and Procedural Issues*." SWD (2014) 231/2, para. 10. For further discussion of the two models see OECD, *The Standard of Review by Courts in Competition Cases – a Background Note* (2019) DAF/COMP/WP3 (2019) 1.

[3] The term CJEU is being used here in a broad sense to include both the European Court of Justice (ECJ) and the General Court of the European Union (GCEU).

[4] *CRH Plc v The Competition and Consumer Protection Commission* [2016] IEHC 162; *CRH Plc, Irish Cement Ltd & ors v The Competition and Consumer Protection Commission* [2017] IESC 34. For discussion see: Andrews, "Death Knell for Dawn Raids?" (2016) Aug/Sept *Law Society Gazette*, p. 16.

undertaking of which they are a corporate officer is not prosecuted.[5] Finally, the Courts found that the CCPC cannot prohibit the same lawyer representing multiple defendants in a cartel case.[6]

In order to determine the degree to which the five criteria set out above have been met by the Courts in Ireland the major criminal and civil competition cases in Ireland will be assessed:

- Criminal cartel cases: heating oil; Irish Ford Dealers Association (IFDA); Citroen Dealers Association (CDA); and, commercial flooring (with particular attention devoted to the latter two);
- Civil cases: *BIDS*; *ILCU*; and, *Panda Waste*; and,
- Merger appeal cases: *Kerry/Breeo*.[7]

All of these cases, with the exception of *Panda Waste*, were instituted either by the CCPC or the Director of Public Prosecutions (DPP). The period covered is from approximately 2002, for reasons set out in Section II, to the present.

Effective and efficient oversight by the Courts with respect to competition law is essential for the CCPC, the DPP, legal advisors and business. Clarity with respect to competition law tells competition law enforcers, legal advisors and business what can and cannot be done within the confines of competition law. The oversight, review and guidance should ideally provide a predictable stable set of rules – legal certainty - within which market-based competition takes place. Such certainty is usually considered conducive to the promotion of competition on the merits, thus enhancing economic growth and societal welfare.

Legal certainty is more than a stable set of rules. It is also the use of a sound and consistent method of analysis by the Courts. Competition cases frequently involve analysis of novel forms of behaviour or theories of harm. If sound and consistent analysis is employed by the Courts, then it makes predicting the likely view to be taken by the Court easier to determine. Business and the CCPC can thus conduct their activities with a reasonable degree of confidence as to the likely position of the Courts. Failure to provide such confidence can result in increased uncertainty and chill competition.

The paper is divided into eight sections. The background to the administration and enforcement of competition law in Ireland is briefly set out in Section 2. The channels, such as judgements, through which the Court's provide oversight, review and guidance is considered in Section 3. Attention then turns to the substantive provisions of competition law: goals/objectives (Section 4); criminal cartel sentencing (Section 5); civil cases (Section 6); and, curial deference in merger appeals (Section 7). The influence of

[5] *DPP v Pat Hegarty* [2011] IESC 32. This case is discussed in Andrews, Gorecki, & McFadden, *Modern Irish Competition Law* (2015), pp. 106-107. (Andrews, Gorecki, & McFadden).

[6] *The Law Society of Ireland v The Competition Authority* [2005] IEHC 455. For discussion see Andrews, Gorecki, & McFadden, pp. 143-144.

[7] The *Kerry/Breeo* case is the only appeal from a CCPC merger determination under the Competition Act 2002.

the CJEU will not be considered separately but rather part of Sections 4 to 7. The paper concludes with Section 8.

2. BACKGROUND

The passage of the Competition Act 2002 marked the modernisation of competition law and policy in Ireland.[8] The notification system was revoked. Ignorance as a defence was abolished. Mergers were to be assessed on competition grounds with published reasoned decisions by the CCPC rather than by the Minister responsible for competition policy on broad public interest criteria in an opaque manner. An appeal to the Courts from a CCPC merger determination was confined solely to the merging parties. Sanctions were increased for cartel offences.[9] A Cartel Immunity Programme (CIP) was first introduced in Ireland on 20 December 2001. The resources of the CCPC were substantially increased; staff numbers more than doubled between 2000 and 2005.

These changes led to the initiation of a series of criminal and civil cases in the early to mid-2000s.[10] However, since 2008/09 there has been little criminal or civil enforcement: one criminal cartel prosecution in 2015, (the commercial flooring cartel) and one civil case in 2013 (concerning the Irish Medical Organisation, which was settled). The lack of Court cases reflects a number of factors including a hostile political environment following the financial crisis of 2008 (e.g. the lack of appointments to the CCPC which led to emergency legislation to prevent the agency becoming inquorate, and, arguably, the merger of the Competition Authority and National Consumer Agency).[11] To some degree this was offset by the 2010-2013 EU-IMF Programme of Financial Support for Ireland (e.g. the passage of the Competition (Amendment) Act 2012, which increased penalties for cartels, and the allocation of extra resources for cartel enforcement).

The CCPC has extensive powers to investigate alleged breaches of competition law. It can, on application to the Courts, issue a witness summons, compel the production of documents, including electronic, and search premises, including homes, unannounced (aka dawn raids). On its own initiative the CCPC not only can institute summary criminal prosecutions and civil proceedings, but also provide guidance to business on competition law. For more serious criminal prosecutions (i.e. by way of indictment) the CCPC refers the case to the DPP who is solely responsible for prosecutorial decisions in such instances. The CIP is operated jointly by the CCPC and the DPP.

The success of the new competition regime depends, however, not only on the activity of the CCPC/DPP but also, critically, on the Courts. As noted above under the judicial model the Courts decide the issue of whether or not a competition law breach has

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8 For further details see Andrews, Gorecki, & McFadden, n 5, 7-26.

9 For details see Table 1.

10 Andrews, Gorecki & McFadden, n 5, Table 2.3, p. 77 & Table 3.1 pp. 182-183, list all the criminal and civil Court cases, respectively, taken by the CCPC over the period 2000 to 2015. This was updated by an examination of the CCPC's website where all successful criminal and civil cases are recorded.

11 For details see Gorecki, "Competition Policy in Ireland's Recession" (2012) (43) 4 *Economic and Social Review*, pp. 597-629; Gorecki & O'Toole, "The Dangers of Ad Hoc Changes to Merger Control Regulation: The Irish Financial Crisis" (2016) (4) 1 *Journal of Antitrust Enforcement*, pp. 210-218.

occurred and the appropriate sanction. Hard core cartel cases in Ireland are typically prosecuted as criminal matters, again in contrast to most Member States. The success of cartel prosecutions and the CIP depends crucially on the sentencing policy of individuals and undertakings by the Courts. Low fines and lack of custodial sentences for hard core cartel offences, for example, is likely to undermine the effectiveness of the CIP. Equally the ability of the Courts to understand and digest complex economic arguments will influence the success of civil actions for the abuse of a dominant position as well as assessing appeals from CCPC merger determinations.

Procedural measures were introduced - The Rules of the Superior Courts (Competition Proceedings) 2006[12] - to assist the Courts is dealing with competition cases. A separate Competition List (the List) was established, with a High Court judge designated as responsible for the List. Provision for the appointment of assessors - competition economics experts – to "assist the Court in understanding or clarifying a matter" was made. Such experts were employed by the Courts on a number of civil Court cases. Case management processes were specified and employed. But the proof of the pudding is in the eating. How well did this new competition regime work?

3. THE COURTS

3.1. Introduction

A wide variety of sources are potentially available to inform and determine the attitude and approach of the Courts in Ireland to competition law. These sources include speeches, papers, articles and books written by the judiciary as well as, of course, the judgments and sentencing rendered by the Courts. These sources might reveal, for example, the judiciary/Court's view on white collar crime in general and competition law breaches in particular. This, in turn, might explain in part at least the Court's approach to sentencing in such cases.

What is striking, however, is the lack of such material easily available in the public domain. There appears to be little in the way of speeches, papers, articles and books by the judiciary on competition law. The website for the Court Service contains no web pages listing such material for judges or even a brief CV, which might be of assistance.[13] Apart from a Wikipedia page, a Google search for the current Competition Court judge, Max Barrett, again draws a blank.[14]

Somewhat surprisingly, although obviously to a lesser extent, the same conclusion applies to the Courts. However, here we need to draw a distinction between matters tried as criminal as compared to civil.

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12 S.I. No. 461 of 2006: Rules of the Superior Courts (Competition) 2006. The original Rules were made in 2005, and subsequently amended in 2006. For details see: http://www.courts.ie/rules.nsf/Superior AmdLookup/No63B-S.I.+No.+461+Of+2006:+Rules+Of+The+Superior+Courts+(Competition)+2006.

13 www.courts.ie.

14 https://en.wikipedia.org/wiki/Max_Barrett_(judge). The Google search used the term 'Max Barrett' and only the first two pages were reviewed. The entries generally referred to Court judgments authored by Max Barrett.

3.2. Criminal Cases

Criminal cases in Ireland are confined solely to hard core cartel cases. Hard core in this instance refers to agreements between competing undertakings (i.e. horizontal not vertical agreements), that indirectly or directly fix prices, limit output or sales and/or share markets or customers and have as their 'object' (i.e. in contrast to their effect) the prevention, restriction or distortion of competition.[15]

Under the Competition Act 2002, all criminal cartel cases are tried before the Central Criminal Court (Figure 1). Appeals can be made to the Court of Appeal and ultimately the Supreme Court. The Court of Appeal was only established in 2014; prior to that Court's creation appeals would go directly to the Supreme Court. Criminal cartel cases instituted under pre-Competition Act 2002 legislation were initially tried before the Circuit Court. The heating oil prosecutions, for example, were largely held in the Circuit Court, while in the commercial flooring case the trial was in the Central Criminal Court and appealed to the Court of Appeal.

A large volume of documentation is produced during the course of a criminal cartel case, including but not limited to: the charges; Book of Evidence; legal and other written submissions; expert reports; transcripts; leniency applications; jury's verdict as to guilt or innocence; and, sentencing and sanction by the Court, which may be memorialised as a written judgment. Additional material will be generated should either the DPP or the individuals/undertakings charged decide to appeal the trial Court verdict.

Since 2002 there have been four major successful criminal cartel prosecutions in Ireland (i.e. heating oil; IFDA; CDA; and commercial flooring)[16] and two major unsuccessful criminal cartel prosecutions (i.e. Irish Rail, also known as the Hedge Cutters Case; and Mayo Waste also known as the Mayo Waste Disposal Case).[17] We confine our attention to the former set of cases.[18] Almost without exception in these cases the defendants pleaded guilty; in only two prosecutions was this not the case.

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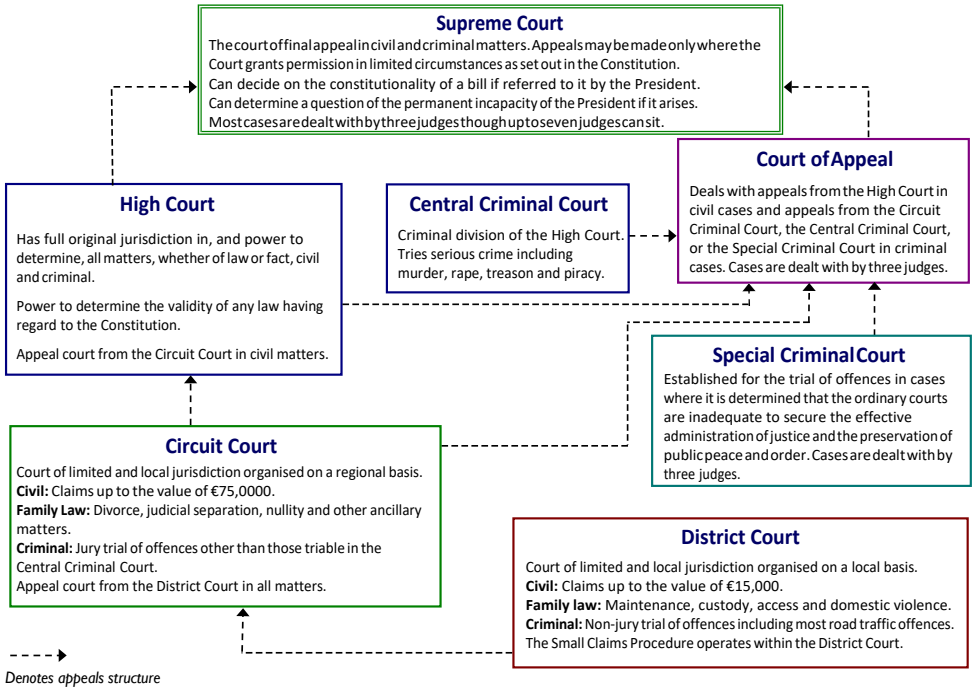
15 Competition Act 2002, s. 6.

16 These first three cases are discussed in Andrews, Gorecki & McFadden, pp. 154-160, 379-392; heating oil in Gorecki & McFadden, "Criminal Cartels in Ireland" (2006) (27) 11 *European Competition Law Review,* pp. 631-640; IFDA, Curtis & McNally, "The Classic Cartel- Hatchback Sentence?" (2007) (4) *The Competition Law Review*, pp. 41-50; CDA, McNally, "Case Comment: *D.P.P. v. Duffy and Duffy Motors (Newbridge) Limited*" (2010) (1) *Irish Journal of legal Studies*, pp. 116-141; and on the commercial flooring case see references in footnote 54.

17 *The DPP v John Joe McNicholas Trading as John Joe McNicholas Plant Hire, Oliver Dixon and Oliver Dixon (Hedge Cutting and Plant Hire) Limited* [2011] IECCC 2; and, *DPP v Bourke Waste Removal etc.* [2012] IECCA 66. These cases are discussed in Andrews, Gorecki, & McFadden, pp. 161-165; 393-400.

18 This does not mean, of course, that valuable lessons cannot be learnt from unsuccessful criminal cartel prosecutions. However, in Irish Rail and Mayo Waste the lessons relate to case selection by the CCPC/DPP rather than the questions set out above with respect to the behaviour of the Courts. A former member of the CCPC in charge of cartels took the view that neither of these two unsuccessful criminal cartel prosecutions should have been instituted. In the case of Irish Rail it was argued that it "is ill-advised [to bring a prosecution] where it is incontroverted that the conspiracy was never implemented," while in the Mayo Waste as "a general rule of thumb, we argue that authorities ought not to initiate criminal cartel prosecutions if one can reasonably debate whether the conduct was a legitimate joint venture or otherwise." For details see: Calvani & Carl, "The Competition Act 2002, Ten Years later: Lessons from the Irish Experience of Prosecuting Cartels as Criminal

Figure 1 – The Courts in Ireland



Source: Courts Service

Given the admission of guilt or its determination by a jury after a not guilty plea, the Court determines the appropriate sanction within the constraints of competition law. Sentencing typically consists of the facts of the case being recited before the Court, with pleas from both the DPP (typically referring to past sanctions in criminal cartel cases) and the defendants (typically pleas in mitigation), prior to the Court setting the sanction.

The material that is available in criminal cartel cases that is in the public domain is quite limited: two Court judgments;[19] and, two sentencings.[20] The CCPC records on its website, for each of the four successful criminal cartel prosecutions: the identity of each

Offences" (2013) (1) 2 *Journal of Antitrust Enforcement,* p. 311, 313-14. On the Mayo Waste see also Walker, "The Importance of a Theory of Harm" (2009) *CRA Competition Memo.*

19 *The DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited* [2009] IEHC 208 (*Duffy* judgment); and, *The DPP v Aston Carpets and flooring Limited, and Brendan Smith* [2018] IECA 194 (*DPP v Aston Carpets*).

20 *DPP v Pat Hegarty* in the Circuit Criminal Court, Galway, in 2012 (*DPP v Pat Hegarty*). For the transcript see: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/DPPvPatHegartyJudgement_0.pdf; and *DPP v Aston Carpets and Flooring, and Brendan Smith,* Central Criminal Court, 2017, (*Aston Carpets* sentencing). For the transcript see Gorecki, *Sentencing in Ireland's First Bid-Rigging Cartel Case: An Appraisal*, MPRA Paper 80787 (2017), Annex A, pp. 44-56. The public availability of the sentencing in *DPP v Pat Hegarty* was made pursuant to a request to the Circuit Court by the solicitor for the CCPC, while the availability of the *Aston Carpets* sentencing was due to a request from the author to the Central Criminal Court.

defendant; whether they pleaded guilty or were found guilty; the date of sentencing; and the sanction.[21]

3.3. Civil Cases

Civil cases in Ireland refer to: non hard core cartels; vertical agreements; and abuse of a dominant position. In such cases analogous documentation to that in a criminal cartel case is generated. There is, of course, no Book of Evidence or leniency application, while expert reports, especially by competition economics experts, are more likely to be in evidence.

Civil cases are typically held before the High Court, both before and after the Competition Act 2002. Appeals from High Court judgments can be made to the Court of Appeal and, ultimately, to the Supreme Court (Figure 1). Under certain circumstances, however, the CJEU can become involved in civil cases.[22] In the *BIDS* case, for example, the Supreme Court made a reference to the Court of Justice (ECJ) on whether or not an agreement to limit capacity was a by object breach of competition law.[23]

There have been two major civil Court cases competition cases initiated by the CCPC: the *ILCU* and *BIDS*. We exclude from consideration civil Court cases in which a settlement was reached by the CCPC or in which the CCPC instituted legal proceedings where an undertaking had breached a Court order.[24] These are of limited relevance to the questions set out in the Introduction. Attention is devoted to one major private civil Court case: *Panda Waste*.

The material available in the public domain in these cases is more extensive than for successful criminal cartels. In all three cases considered there is a High Court judgment, and, where relevant, appeal and CJEU judgments.[25]

3.4. Commentary

In order to be able to determine the influence of the Courts in Ireland on competition law it is essential that there is sufficient material available to fully understand the underlying methodology employed by the Courts. In criminal cartel cases there is limited availability, while in civil court cases the judgments are available, although not the underlying background documentation. The availability of such material would enhance transparency and thus contribute toward accountability. It is important that justice is not only done but seen to be done.

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[21] https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/.

[22] On the relationship between EU and national competition law see Whish & Bailey, *Competition Law*, 9th edn (2018), pp. 75-81.

[23] This is discussed further in Section 6.2.

[24] For details see: https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/.

[25] The author has access for the *BIDS*, *ILCU*, and *Panda Waste* cases to the Court transcripts, the pleadings and the expert reports. For the *BIDS* and *ILCU* cases this reflected the fact that the CCPC instituted the legal proceedings, while Dublin City Council provided access to the *Panda Waste* documentation.

It would be remiss not to mention the Supreme Court's Practice Direction, *SC15-Written Submissions*, issued in October 2013, under which a member of the public may gain access to the written submissions in cases before that Court, irrespective of whether or not the appeal concerns a criminal or civil case.[26] However, while a positive move, gaining access to the submissions is a somewhat cumbersome process.[27] Furthermore such access has not been followed by the Court of Appeal which was set to relieve the work load from the Supreme Court.[28]

The lack of transparency of the criminal and to a lesser extent in the civil Courts in Ireland contrasts with the approach adopted of more recently created decision making bodies. The CCPC, for example, publishes reasoned determinations for all notified mergers.[29] Regulatory agencies in Ireland for utilities and telecommunications publish reasoned decisions, with the various submissions made in the course of reaching the decision.[30] The UK Competition Appeals Tribunal publishes not only judgments but ancillary documentation such as transcripts;[31] in the case of the UK Supreme Court biographies of the justices and video recordings of the cases heard before the Court are available online.[32]

4. OBJECTIVE OF COMPETITION LAW

4.1. Introduction

The objective(s) or goal(s) of competition law are a vital consideration that will colour the way in which the Courts interpret the substantive provisions of that law relating to cartels, abuse of a dominant position, and mergers. The objective(s) provide a method of framing the interpretation of the facts in relation to a particular breach of competition law.

There are a number of potential objectives of competition law. At one extreme the objective of competition law might be designed to satisfy a menu of desirable public policy outcomes. For example, prior to the Competition Act 2002, mergers in Ireland

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26 http://www.courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/07951e8087c6b9ff802581210053330e?OpenDocument.

27 The author used the procedure to gain access to the written submissions in *CRH Plc, Irish Cement Ltd & ors v The Competition and Consumer Protection Commission* [2017] IESC 34. This required a visit to the Four Courts, payment of cash (no credit cards permitted strictly cash only and not payable online) at the stamping office, taking a piece of paper demonstrating payment to the Supreme Court office. Later that day the written submissions were received by email.

28 The author requested access to the written submissions in the commercial flooring case from the Court of Appeal but was refused by the President of that Court. The exchange of correspondence took place in June and July 2018.

29 These may be found at: https://www.ccpc.ie/business/mergers/merger-notifications/. The CCPC took responsibility for merger determination in January 2003.

30 See, for example, the Commission for Communications Regulation (https://www.comreg.ie/) which was established in 2002; or the Commission for the Regulations of Utilities (https://www.cru.ie/) which was established in 1999.

31 For details see: https://www.catribunal.org.uk/, which was established in 2002/03.

32 The UK Supreme Court was created on 1 October 2009 (https://www.supremecourt.uk/index.html).

were evaluated taking into consideration not only the impact on consumers, but also, inter alia, on the level of employment, research and development, employees as well as shareholders and partners.[33]

At the other extreme competition law might be designed to meet a single objective such as promoting consumer (i.e. consumer surplus) or total (i.e. consumer plus producer surplus) welfare. Although the objective might be consumer (or total) welfare particular decisions may nevertheless be coloured by the priorities of the day.[34]

The Competition Act 2002 does not specify an objective for competition law. However, in the preamble to the legislation reference is made to the "prohibition of activities which prevent, restrict or distort competition ... or which constitute an abuse of a dominant position."[35] These words are subsequently repeated in the substantive provisions of the legislation relating to agreements and unilateral conduct, respectively.

Under the Competition Act 2002, the CCPC is the initial decision maker for assessing mergers. In doing so the CCPC uses a competition test set out in the Competition Act 2002 – whether or not the merger will lead to a "substantial lessening of competition (SLC)." In issuing guidance on how this should be interpreted the CCPC in both its initial 2002 and revised 2013 guidance stresses the importance of consumer welfare.[36] Equally the CCPC in other publications refers to consumer welfare as the object of competition law in Ireland.[37]

4.2. Court's View

The clearest statement of the objective of competition law in Ireland is set out by the Supreme Court in the *ILCU* judgment in 2007:

> "106. The *entire aim and object of competition law is consumer welfare*. Competitive markets must serve the consumer. That is their sole purpose. Competition law, as is often said, is about protecting competition, not competitors, even if it is competitors who most frequently invoke it. Its guiding principle is that open and fair competition between producers of goods and services will favour the most efficient producers, who will thereby be encouraged to satisfy consumer demand for better quality products, wider choice and lower prices. Their reward is a greater market share. Production of better and newer products may necessitate expensive market research, involving a degree of economic resources and market power. Competition law does

[33] Mergers, Take-overs and Monopolies (Control) Act 1978, s. 8(2) (b) & s. 9(1) (a). This legislation was repealed by the Competition Act 2002.

[34] Government in Ireland did try, which appears to have been unsuccessful, to ensure that independent regulators should consider evolving government priorities. For further discussion see Gorecki, "Economic Regulation: Recentralisation of Power or Improved Quality of Regulation?" (2011) (42) 2, *Economic and Social Review,* pp. 177-211.

[35] The same wording appeared in the preamble of the Competition Act 1991.

[36] Competition Authority, *Notice in Respect of Guidelines for Merger Analysis*, Decision No. N/02/004 (2002), para.1.3; & CCPC, *Guidelines for Merger Analysis* (2014), paras. 1.9, 1.10.

[37] The CCPC's mission statement for 2006-2008 is, for example, "To ensure that competition works for the benefit of consumers throughout the Irish economy." (Competition Authority, *Strategy Statement 2006-2008* (2006), para. 2.1).

> not outlaw economic power, only its abuse. Economic power may, indeed should, be the reward of effective satisfaction of consumer needs. It would be inconsistent with the objectives of free competition that successful competitors should be punished. It is not the existence but the abuse of a dominant position which offends principles of free and open competition (emphasis supplied)."[38]

There is but one objective of competition law in Ireland and that is consumer welfare. Competition on the merits is to be promoted. Competition law protects competition not competitors.

The Supreme Court's view is echoed in other Court judgments. In the 2009 *Duffy* judgment is imbued with the adverse effects of the CDA price fixing on consumers. For example, Court states,

> "22. … These are 'hard-core' infringements of competition law, and rightly so have been repeatedly described, as involving odious practices. They stifle competition and discourage new entrants; damaging economic and commercial liberty. As with this association [i.e. the CDA], 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. They are offensive and abhorrent, not simply because they are malum prohibitum, but also because they are malum in se. They are in every sense anti-social. Cartels are conspiracies and carteliers are conspirators."

In sentencing in Pat Hegarty in the heating oil cartel in 2012 the Circuit Court refers to the victims of the price fixing as "ordinary consumers [who are] ... presented with a fake market when competitive forces do not operate, and the motivation for this crime was one of greed."[39]

4.3. Commentary

The consumer welfare objective of Irish competition law is aligned with the objective of European Union competition.[40] This should come as no surprise. The wording of Irish competition law with respect to anti-competitive agreements and abuse of dominance parallels that of the Treaty on the Functioning of the European Union (TFEU) (with the exception of the single market imperative); while the competition test for mergers in Irish competition law is similar to that of the EU. The preamble to the Competition Act 2002 states that it is making a "new provision, by analogy with Articles 81 [currently 101] and 82 [currently 102] of the Treaty Establishing the European Community [currently the TFEU]." The Irish Courts frequently draw on CJEU case law which implicitly, at least, assumes a common or shared objective.

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38 *Competition Authority v John O'Regan & ors* [2007] IESC 22. (*ILCU* judgment). In this passage the Supreme Court raises the issue of the use of competition law by competitors. For further discussion, which relates to businesses rather competitors specifically, see Gorecki, "Private v. Public Interest: the Strategic Use of Competition Law in Ireland by Private Interests" (2008) (31) 3 *World Competition*, pp. 401-420.

39 *DPP v Pat Hegarty*, p. 13.

40 Whish & Bailey, *Competition Law*, 9th edn (2018), pp. 18-24.

A single objective does not involve the Courts or those charged with administering and enforcing competition law having to make difficult trade-offs between mutually exclusive and conflicting objectives. It considerably simplifies the task of determining whether or not, given a particular set of facts, that competition law is breached. This does mean, of course, that deciding whether competition law is breached is straightforward in all cases, as we shall see in forthcoming sections of the paper. Nevertheless, consumer welfare does provide a reliable benchmark against which to gauge Court judgments and sentencing.

The first criterion for assessing the Courts and competition law asked the question: Did the Courts articulate a clear goal for competition policy? On this the answer is clearly in the affirmative, consumer welfare. This is an objective widely shared by not only the European Union, but also other jurisdictions such as the US.[41] The fact of this shared objective will be used in Section 5 to draw on the approach of the EU and the US to sentencing in cartel cases.

5. SENTENCING IN CRIMINAL CARTEL CASES

5.1. Introduction

As noted above in criminal cartel cases in which convictions were secured, individuals and undertakings typically pleaded guilty. The main issue in such cases is thus whether or not the Courts had a coherent sentencing methodology.[42] Such a methodology should, of course, be viewed in the light of the consumer welfare objective of competition law. The decision to plead guilty may, of course, be related to the anticipated sanction. If, for example, the Court-imposed sanctions are, in some sense low or minimal, then this may encourage individuals and undertakings to plead guilty, particularly if hard core cartel offences are not viewed as serious criminal offences.

5.2. Guidance: Competition Law, DPP & the CCPC

Courts do not make decisions concerning sentencing in cartel cases in a vacuum. There are at least four possible sources of guidance: general principles of criminal law; competition law; the DPP; and the CCPC. We considered each in turn.

First, the Court in the *Duffy* judgment, under the heading 'Sentencing – Ireland,' sets out the broad principles of sentencing in criminal cases while also making, within these principles, reference to sentencing in competition cases:

> "35. In Irish Law it has been established for many years that any sentence imposed must reflect the crime and the criminal. It must be rational in its connection to both. It must be proportionate. Therefore, factors such as the seriousness of the offence (culpability, harm, behaviour etc.), the circumstances in which it is committed and the prescribed punishment must be looked at. As of course must be any aggravating

41 Kovacic, "Competition Policy in the European Union and the United States: Convergence or Divergence?" in Vives, ed, *Competition Policy in the EU, Fifty Years on from the Treaty of Rome* (2009), p. 322 (Kovacic).

42 If those charged with criminal cartel breaches of competition law plead not guilty then the decision as to guilt or innocence is for the jury not the Court to decide.

circumstance as well as any mitigating one. The latter would include, if the evidence so established, matters such as a guilty plea, co-operation, remorse, absence of previous convictions, good character, unlikely to re-offend etc. This list must be added to by any other individual factor which is legally capable as attracting credit. Having done this exercise the appropriate sentence to fit the crime and the offender is then arrived at.

36. Whilst there is no place in the criminal justice system for either vengefulness or vindictiveness, there is, for deterrence. O'Malley, in *Sentencing Law and Practice,* (2nd Ed.) at para. 2-11 says:-

> *"Deterrence may be general or specific in nature. A penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing. Specific deterrence is more concerned with the particular offender, and aims to impress upon him the punishment he will suffer if he re-offends. Both forms of deterrence are grounded on an assumption of rationality. Actual and potential offenders are presumed to have the inclination and capacity to weigh up the likely costs and benefits of any crime they may be tempted to commit."*

This last passage is particularly apt for offences such as insider trading and competition breaches. Subject to the stricture that a punishment can never exceed that available on the facts and must always be proportionate, both general and specific deterrence have an important role to play in many areas of criminal behaviour, including the examples herein given.

37. Werden (see para. 24 *supra*.)[43] emphasises this point when he says that:

> *"Cartel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, but deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders." (p. 7)*

In these respects I would agree. Competition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place (emphasis in original)."

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[43] Paragraph 24 of the *Duffy* judgment reads as follows (emphasis in original):

> "24. Werden, in an essay entitled "*Sanctioning Cartel Activity: Let the Punishment fit the Crime"*, delivered at a Seminar organised by the Irish Competition Authority on the 22nd November 2008, observes that:
>
> > "Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses. Cartel activity, therefore, is not like tortious conduct, which is redressed with a liability rule focussing on the harm to victims and providing the incentive to take due care. Like other property crimes, cartel activity should be prohibited rather than merely taxed. As Judge Richard Posner explained of criminal sanctions generally, they 'are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it.'" (p. 6)
>
> Werden's essay was subsequently published: Werden, "Sanctioning Cartel Activity: Let the Punishment Fit the Crime (2009) 5 (1) *European Competition Journal*, pp. 19-36.

The Court of Appeal in the commercial flooring case quoted two of these paragraphs.[44]

Second, while competition law does not provide, for example, a list of factors to be considered in determining the appropriate sanction, it nevertheless does set maximum penalties that the Court may impose. These maximum statutory penalties for hard core cartel offences, as they have evolved since 1996, are set out in Table 1. As can be readily observed the statutory penalties for breaching competition law have been increased for both individuals and undertakings. The Competition (Amendment) Act 2012, for example, raised the maximum gaol sentence for an individual from 5 years to 10 years and the nominal threshold for a fine for an individual and an undertaking from €4 million to €5 million.[45] The legislature is clearly signalling to the Courts that cartels are serious breaches of the law and should be dealt with appropriately.[46]

Table 1
Maximum Sentences, Cartel Cases, On Indictment, Individuals & Undertakings, Ireland, 1996-2019[a]

Legislation	Individuals	Undertakings[b]
Competition (Amendment) Act 1996	A fine not exceeding the greater of 10 per cent of turnover of the individual[c] in the 12 months prior to conviction or €3.81 million and/or a prison sentence of 2 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €3.81 million
Competition Act 2002	A fine not exceeding the greater of 10 per cent of turnover of the individual in the 12 months prior to conviction or €4.0 million and/or a prison sentence of 5 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €4.0 million
Competition (Amendment) Act 2012	A fine not exceeding the greater of 10 per cent of turnover of the individual in the 12 months prior to conviction or €5.0 million and/or a prison sentence of 10 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €5.0 million

a. Cartel offences refer to hard core offences such as price fixing, allocating markets, bid-rigging and limiting production or capacity.
b. Undertaking is the legislative term used for a firm.
c. The turnover of the individual is not defined. One definition might be the gross income of the individual from all sources.

Source: Competition (Amendment) Act 1996, Competition Act 2002, Competition (Amendment) Act 2012 & Competition and Consumer Protection Act 2014.

The maximum fines relate to turnover of the undertaking in the year immediately prior to conviction or a fixed sum, whichever is the larger. In other words, the fine does not

44 *DPP v Aston Carpets*, paras. 14, 15.

45 In the explanatory memorandum that accompanied the Competition (Amendment) Bill 2011 it was stated that "the purpose of the Bill is to strengthen competition law enforcement by providing for new and increased sanctions and penalties."

46 See, for example, the Minister for Jobs, Enterprise and Innovation speech at second reading concerning the Competition (Amendment) Bill 2011 on 8 November 2011: https://www.oireachtas.ie/en/debates/debate/dail/2011-11-08/31/?highlight%5B0%5D=competition&highlight%5B1%5D=amendment&highlight%5B2%5D=bill&highlight%5B3%5D=2011.

relate to the economic impact or damage (i.e. price-enhancing effect) of a cartel or the volume of sales covered by a cartel. This does not mean, of course, that the Court cannot employ such considerations in sentencing, subject to the statutory maximum not being exceeded. In other words, the Court has considerable discretion in setting the sanction.

A third possible source of guidance for the Courts is the DPP. The DPP as prosecutor is in full possession of the facts of the case and is familiar with past criminal cartel cases. Since the DPP can also, under the Criminal Justice Act 1993, appeal criminal cartel sentences on grounds of "undue leniency" this implies the DPP must, of necessity, have a view as to the appropriate sanction. Nevertheless, notwithstanding these considerations, the DPP, apart perhaps from reciting the record of past sanctions in similar cases, does not recommend to the Courts the appropriate sentence or even a methodology resulting in a range of sanctions.

Currently the role of the DPP in sentencing is severely restricted. The DPP, for example, in its *Guide to Prosecutors* states that,

> "unless the Court of Criminal Appeal or the Court of Appeal has itself given guidance on the range or band of sentencing for particular offences or classes of offences, it is not appropriate for the prosecutor to submit to the sentencing court bands or ranges of sentencing"[47]

In the case of criminal cartel cases neither Court has provided any such sentencing guidance.

The reluctance of the DPP is understandable given that the Courts are quite jealous of their discretion to determine the appropriate sentence. There is a concern that in doing so the DPP infringes on the Court's discretion. In the sentencing of an individual in heating oil, for example, when the solicitor for the CCPC drew attention to the fact that the judge had previously stated that some members of the heating oil cartel were minnows but other larger firms were, but before he was able to say precisely how they had been characterised by the Court, the judge said, "I'm not comfortable with a commentary from the witness on the sentencing policy of the Court."[48]

The fourth possible source of guidance is the CCPC. Here, however, the influence is more indirect and nuanced. The CCPC held a conference in November 2008 entitled, "Sanctions, Fines and Settlements in Cartel Cases: Developments and Deterrence in the EU and Ireland." Members of the judiciary with an interest in competition law were invited, while several judges acted as moderators. Leading experts on cartels and sentencing were invited such as Gregory Werden, Senior Economic Counsel, US Department of Justice. It is difficult to quantify or trace the impact such an event, but in the *Duffy* judgment, cited above, the Court quotes Werden's presentation at the conference.

47 DPP, *Guide for Prosecutors,* 4th edn (2016), para. 8.14.

48 *DPP v Pat Hegarty*, p. 8.

5.3. Court Methodology

One of the features of the sentencing methodology set out in the *Duffy* judgment and cited in Section 5.2, is, of course, the crime. A useful starting point might therefore be to determine what view the Courts take of criminal cartels. As the above quotes in Section 4.2 from the *Duffy* judgment and the sentencing in *DPP v Pat Hegarty* suggest the Courts consider cartels a serious criminal offence. Indeed, in one judgment the Court presents a view of the world that borders on dystopian when it states that cartels

> "stifle competition, they damage economic and commercial liberty and, in fact, if they were to continue unabated, they could seriously impact upon the economic and commercial welfare of, not only customers and consumers, but also of an entire nation."[49]

In the 2018 Court of Appeal judgment in the commercial flooring case the Court repeats several passages from the *Duffy* judgment concerning the shocking disservice of the CDA cartel and the particularly pernicious impact of cartels.[50]

The range of Court imposed sanctions for individuals and undertakings in the four successful cartel convictions are set out in Table 2. In determining the methodology used by the Courts we start with the most recent case, the commercial flooring case, which in turn draws extensively on the *Duffy* judgment. In part this approach is dictated by the greater availability of material relating to these two recent cases, in part because the methodology for dealing with cartel cases is likely to evolve and develop through time and in part because it was anticipated that the Court of Appeal, which was established in October 2014, would bring greater consistency to sentencing, not just for cartels.[51]

Table 2
Criminal Cartel Prosecutions, On Indictment, Individuals & Undertakings, Sanctions, Ireland, 2000 to 2019

Date[a]	Case	Sanctions[b]
2004	Home heating	18 convicted/€1,000-€30,000/0-2 years suspended
2006	Irish Ford Dealers Association (IFDA)	1 convicted/€30,000/1 year suspended
2007	Citroen Dealers Association (CDA)	14 convicted/€2,000-€80,000/3-9 months suspended
2015	Commercial flooring	2 convicted/€10,000-€45,000/no gaol

a. Dated by when charges first laid. In the home heating and CDA individuals and undertakings had different trial dates.
b. Sanctions refer to: the number of individuals and undertakings convicted/the minimum & maximum fine/the goal sentence, if any imposed. The sanctions only refer to convictions for criminal cartel offences.

[49] *DPP v James Bursey & Bursey Peppard Limited*. This is a judgment concerning a participant in the CDA cartel. It is not in the public domain, but the CCPC nevertheless quote from it in one of their publications. For details see, Competition Authority, *Annual Report 2009* (2010), p. 17.

[50] *DPP v Aston Carpets*, paras. 15, 16.

[51] Gorecki, "Cartel Enforcement in Ireland Post the Court of Appeal's Bid-rigging Judgment: a Bleak Future?" (2019) (40) 7, *European Competition Law Review*, p. 299.

In commercial flooring Brendan Smith was given a suspended sentence but that was for obstruction of justice. Source: https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/

The starting point for determining the appropriate sanction in the commercial flooring case was the *Duffy* judgment.[52] This was agreed by both the DPP and those acting for Brendan Smith and Aston Carpets & Flooring (Aston Carpets).[53] This approach reflected the fact that the *Duffy* judgment was the leading case in the public domain in cartel sentencing. The Court in the commercial flooring case – either at trial or on appeal - could have used the *Duffy* judgment as the basis on which to develop a methodology for sentencing in cartel cases. The *Duffy* judgment contains references to many of the factors that need to be taken into account in developing such a methodology such as the importance of general as opposed to specific deterrence, the future use of custodial sentences, the centrality of the impact on consumers, and reliance on sentencing guidelines and so on. However, neither at trial nor appeal was such an approach taken in the commercial flooring case taken. Instead, the approach used by the trial Court to determine the appropriate sanction in the commercial flooring case became whether or not that case was more or less serious than the CDA cartel. If more serious, then the sanction in commercial flooring should be greater, if less serious, lower. The trial Court determined that the commercial flooring cartel was less serious than the CDA cartel. The Court, for example, argued that the bid rigging arrangements in the commercial flooring cartel didn't really constitute a cartel. Hence a lower penalty was imposed.[54]

This, of course, begs the question of the methodology used in the *Duffy* judgment.[55] The Court in the *Duffy* judgment argues that it would be inappropriate on grounds of equality and equity to set a sanction on Patrick Duffy and Duffy Motors (Newbridge) Limited (Duffy Motors) that would be out of line with those already imposed on individuals and undertakings convicted and sentenced in the CDA cartel.[56] In the *Duffy* judgment reference is made to the earlier sentencing of Mr Doran and Mr Durrigan.[57] However, since the sentencing of these two individuals and their associated undertakings is not in the public domain there is no way in which the sentencing methodology can be determined. The *Duffy* judgment contains no clues or hints as to that methodology.

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52 For a discussion of the *Duffy* judgment see Gorecki & Maxwell, "Sentencing in Criminal Cartels Cases in Ireland: the Duffy Judgment" (2013) (34) 5, *European Competition Law Review*, pp. 239-248.

53 Based on an examination of the transcript of the sentencing hearing before the Central Criminal Court held on 4 May 2017.

54 The commercial flooring trial and appeal judgments are discussed in, respectively: Gorecki, "Sentencing in Ireland's First Bid-rigging Cartel Case: Serious Underenforcement?" (2017) (38) 12, *European Competition Law Review,* pp. 567-578; and, Gorecki, "Cartel Enforcement in Ireland Post the Court of Appeal's Bid-rigging Judgment: a Bleak Future?" (2019) (40) 7, *European Competition Law Review*, pp. 299-305.

55 This, of course, ignores the appropriateness of setting the sanction in the commercial flooring cartel by comparison with the CDA cartel, without considering the important and significant differences between the two cartels. The inappropriateness of such an approach is discussed further in the first of the two papers in the previous footnote.

56 *Duffy* judgment, paras. 64-73.

57 In the *Duffy* judgment at para. 68 the judge implies that if he had been dealing with these two individuals that he would have imposed a different – presumably higher – sentence.

Nevertheless, despite that there are some pointers in the *Duffy* judgment and the commercial flooring concerning sentencing. In the *Duffy* judgment, as in earlier cartel cases, suspended not custodial sentences were imposed by the Courts (Table 2). In *Duffy* the Court stated quite clearly that the next generation of cartelists would "almost certainly" receive custodial sentences, since any period of "leniency could not be prolonged."[58] However, in the commercial flooring case, no gaol sentence was imposed for breaching competition law on Brendan Smith, whether custodial or suspended. Indeed, the issue is not even addressed by the trial or appeal Court. Hence the current attitude of the Courts to gaol in cartel cases is put it mildly somewhat uncertain.

In the commercial flooring case on appeal the Court states that the "fine should more closely have reflected the actual financial gain accruing from the activity in question."[59] This is consistent with the *Duffy* judgment where the Court approvingly cites Gregory Werden of the US Department of Justice as to the importance of general as opposed to specific deterrence.[60] However, in the commercial flooring case the appeal Court incorrectly estimates the cartel-induced financial gain, imposes the fine reflecting the financial gain on Brendan Smith (i.e. the individual) rather than Aston Carpets (i.e. the undertaking) and takes no account of the fact that not all cartels are detected or successfully prosecuted.[61]

5.4. Are There Alternatives Consistent with the Consumer Welfare Objective?

The lack of success in setting out and applying on a consistent basis a sentencing methodology in cartel cases in Ireland raises the obvious question of whether such methodologies exist in, for example, other jurisdictions, and if they do what sentences would result if these methodologies were applied to cartel cases in Ireland. It may be, for example, that the application of such methodologies would yield very similar results to those contained in Table 2. Thus, the Irish Courts are, it could be argued, acting *as if* they were employing a coherent and consistent sentencing methodology.

The EU and the US share with Ireland not only that the objective of competition law is consumer welfare but also that cartels are serious offences that require corresponding sanctions.[62] The EU imposes sanctions on undertakings, while in the US, where cartels are like Ireland criminal offences, individuals can be gaoled while both individuals and undertakings can be fined. In both the EU and US sentencing guidelines have been developed and are employed extensively. These guidelines are centred on the consumer harm caused by the cartel, with allowance for aggravating and mitigating factors. As such they are consistent with the general approach to sentencing set out in the *Duffy* judgment, quoted at the beginning of Section 5.2. The EU sentencing guidelines result in a point

58 *Duffy* judgment, para. 67.

59 *DPP v Aston Carpets,* para. 23.

60 *Duffy* judgment, para. 37.

61 For details see: Gorecki, "Cartel Enforcement in Ireland Post the Court of Appeal's Bid-rigging Judgment: a Bleak Future?" (2019) (40) 7, *European Competition Law Review*, pp. 299-305.

62 Kovacic, for example, states, "Both the European Union and the United States treat cartels harshly. Speeches of EU and DoJ officials today depict cartels as the most serious form of anticompetitive behaviour ...." p. 323.

estimate while the US sentencing guidelines result in a range. In the *Duffy* judgment reference is made to the EU guidelines, but nothing more.

The results of applying the EU and US sentencing guidelines to facts of the CDA and commercial flooring cases are set out for individuals with respect to gaol and for undertakings with respect to fines in Tables 3 and 4, respectively. In both tables the sanction of the Irish Court and that by the application of the EU and US sentencing guidelines is presented. In the case of the CDA cartel, for example, Patrick Duffy would have been sentenced to between 12 and 18 months in gaol under the US sentencing guidelines, but actually received only a nine month suspended sentence, while Duffy Motors would have been fined between €4.491 million and €8.982 million under the US sentencing guidelines or €6.736 million under the EU sentencing guidelines, rather than €50,000.

Several inferences can be drawn from Tables 3 and 4. First, the sanctions imposed by the Courts in the CDA and commercial flooring cases were almost without exception below, often well below, the maximum sanctions set under Irish competition law (Table 1). In other words, had the Courts been so minded, there was considerable scope for increasing the costs to individuals and undertakings of breaching competition law by imposing heavier sanctions.

Table 3
Gaol for Individuals, CDA & Commercial Flooring Cases: US Sentencing Guidelines and Irish Courts[a]

Defendant	Irish Court Sentence[a]	US Sentencing Guideline Range
CDA Case		
James Durrigan	3 months - suspended for 2 years	12-18 months
Jack Doran	3 months - suspended for 5 years	12-18 months
Patrick Duffy	6 months and 9 months - suspended for 5 years	12-18 months
James Bursey	6 months and 9 months - suspended for 5 years 28 days custodial sentence (imposed for non-payment of fine)	12-18 months
Bernard Byrne	9 months - suspended for 1 year	10-16 months
Michael Patrick Gibbs	6 months - suspended for 3 years	12-18 months
Brian Smyth	6 months - suspended for 3 years	12-18 months
John McGlynn	6 months and 9 months - suspended for 5 years	37-46 months
Commercial Flooring Case		
Brendan Smith	None, either suspended or custodial	10-16 months

a. In all cases where there were convictions on more than one count and sentences imposed (e.g. James Bursey) the suspended gaol sentences were to run concurrently.

Source: Gorecki & Maxwell, "Alternative Approaches to Sentencing in Cartel Cases: the European Union, Ireland and the United States" (2013) (9) 2, *European Competition Journal*, Table X, p. 369; and, Gorecki, "Sentencing in Ireland's First Bid-rigging Cartel Case: Serious Underenforcement?" (2017) (38) 12, *European Competition Law Review*, Table 5, p. 577.

Table 4
Fines for Undertakings, CDA & Commercial Flooring Cases: EU, US Sentencing Guidelines and Irish Courts

Undertaking	Irish Court Sentence	US Sentencing Guideline Fine Range	EU Sentencing Guideline Fine[a]
	€	€ million	€ million
CDA Case			
James Durrigan and Sons Ltd.	12,000	4.032 – 8.065	6.140
Ravenslodge Trading Ltd. t/a Jack Doran Motors	20,000	2.903 – 5.806	4.838
Duffy Motors (Newbridge) Ltd.	50,000	4.491 – 8.982	6.736
Bursey Peppard Ltd.	80,000	6.223 – 12.445	8.864
Finglas Motors (M50) Ltd.	35,000	1.675 – 3.351	3.417
Gowan Motors (Parkgate) Ltd.	30,000	4.162 – 8.323	6.094
Commercial Flooring Case			
Aston Carpets & Flooring Limited	10,000	0.156-0.311	0.225

a. Gorecki & Maxwell estimate a range of EU fines for the CDA cartel depending on the value of the parameter which measures the gravity of the offence. It can vary between 0 and 0.30, but research suggested that in practice the average was 0.18. In the table the results of presented for a= 0.20. In the case of Aston Carpets & Flooring Limited a=0.25.

Source: Gorecki & Maxwell, "Alternative Approaches to Sentencing in Cartel Cases: the European Union, Ireland and the United States" (2013) (9) 2, *European Competition Journal*, Tables III, XI & XIII, pgs. 351, 370 & 378; &, Gorecki, "Sentencing in Ireland's First Bid-rigging Cartel Case: Serious Underenforcement?" (2017) (38) 12, *European Competition Law Review*, Table 5, p. 577.

Second, the EU and US sentencing guidelines yield similar results in terms of the optimal fines. The EU point estimate is always within the US sentencing guidelines sentencing range. Thus, considerable confidence can be placed in the estimates, given that although both the EU and the US competition law have a consumer welfare objective, the methodology used to estimate the appropriate fine is not identical.

Third, the actual sanctions imposed by the Irish Courts fall well short of that yielded by the application of the EU and US sentencing guidelines to the facts of the CDA and commercial flooring cases. The fines should be in € millions, not the € thousands; gaol should be custodial, not suspended or none.

Fourth, the Courts could have substantially increased the sanctions imposed in the CDA and commercial flooring cases to at least the minimum sanction yielded by these guidelines. Brendan Smith, for example, in the commercial flooring case merited a 10-16 month gaol sentence according to the US sentencing guidelines, but the Court did not

sentence him to either a suspended or custodial sentence for breaching competition law, despite a maximum statutory sanction of five years.[63]

5.5. Commentary

The second criterion for assessing the Courts and competition law asked the question: Did the Courts set out a coherent criminal cartel sentencing policy? On this the answer is clearly negative. However, this understates the gravity of the situation. The sanctions imposed are consistently substantially less when benchmarked against what is considered optimal using either the EU or US sentencing guidelines. This implies serious cartel under-enforcement in Ireland. It might also explain why individuals and undertakings plead guilty in cartel cases. Sub-optimal enforcement is likely to undermine the effectiveness of the CIP, an important tool worldwide in the fight against cartels. Finally, the Court of Appeal was specifically set up in 2014 to provide guidance. In the commercial flooring case, it singularly failed in this respect. Indeed, arguably things are worst after the judgment with the lack of any gaol time, custodial or suspended, for the individual who pleaded guilty to breaching competition law, while, at the same time, not disputing the Central Criminal Court finding that the commercial flooring bid rigging cartel was not a cartel.

Prior to the commercial flooring case there was a clear expectation that the next cartelist would receive gaol time. This was unambiguously signalled in the *Duffy* judgment and seen as such by legal advisors[64] and other members of the judiciary.[65] However, as noted above, no such sanction was imposed in the commercial flooring case and no explanation offered. The needlessly creates legal uncertainty for the CCPC, the DPP, business and their legal advisors.

There are also likely to be other adverse effects of the underenforcement of competition law implicit in the low penalties imposed by the Courts. The CCPC, which is responsible for investigating and then referring criminal cartel cases to the DPP, has to weigh the costs of its cartel investigation as against the likely impact of any successful prosecution on consumer welfare. If the Court-imposed sanctions constitute an ineffective deterrent, then the CCPC may decide that there are other areas of enforcement or other activities within its remit that yield a higher return.

Prior to the creation of the CCPC in 2014, the Competition Authority's sole remit was to enforce competition law. Its enforcement priority was cartels. For example, in 2006 the Competition Authority in its *Strategy Statement 2006-2008* stated, "Cartels are generally recognised as the most serious form of anti-competitive behaviour and the Competition

63 It should be noted that in the US it was not until sentencing guidelines were introduced that "significant custodial sentences" were imposed. At first in 1984 they were mandatory but later become advisory. For details see Calvani & Carl, "The Competition Act 2002, Ten Years later: Lessons from the Irish Experience of Prosecuting Cartels as Criminal Offences" (2013) (1) 2 *Journal of Antitrust Enforcement*, p. 316.

64 Ryan, "Ireland," (2010) (6) 3, *European Competition Journal*, p. 756.

65 *DPP v Pat Hegarty*, p. 14.

Authority has identified cartel investigations as its top priority."[66] The same statement also appears in Competition Authority *Annual Reports*.[67]

The CCPC has a broader mandate than the Competition Authority had since it is also responsible for the enforcement of consumer law. As a result, the priorities of the CCPC may be different. There is some evidence to support this with respect to cartels; the importance of cartels as an enforcement priority has been reduced. In its first *Strategy Statement* although the CCPC acknowledges the "most serious breaches of competition law are cartels,"[68] its ranking as an enforcement priority is not stated; in its second and most recent *Strategy Statement* there is no reference to the serious breach of competition law occasioned by cartels.[69] However, notwithstanding this lacuna, in its 2018 *Annual Report* the CCPC states that cartels "are, and will continue to be, one of the CCPC's main enforcement priorities;"[70] the other main enforcement priorities are not stated.[71] The treatment of cartel enforcement as 'a' rather than 'the' primary enforcement priority is consistent with the UK Office of Fair Trading which also had a dual competition and consumer law mandate and stated that cartels were one of its priorities.[72]

The CCPC in consulting on its first *Strategy Statement* set out six criteria for enforcement priorities. The last two are: "Whether enforcement action is likely [to] be of sufficient effect;" and "The scale of resource required and the likelihood of achieving the desired outcome."[73] Given the sub-optimal sanctions imposed by the Courts and the resource intensive nature of cartel investigations, it is all too easy for cartels to be given less importance by the CCPC than would otherwise be the case. This should not be construed as criticism of the CCPC; they are reacting quite rationally faced with limited resources and likely outcomes.

6. CIVIL CASES

6.1. Introduction

In contrast to criminal cases where the focus of attention was on the Courts sentencing methodology, the focus switches for civil cases to the Court's analysis of the competition

66 Competition Authority, *Strategy Statement 2006-2008* (2006), para. 2.9. A similar statement appears in subsequent strategy statements of the Competition Authority, *Strategy Statement 2009-2011* (2008), p. 7; Competition Authority, *Strategy Statement 2012-2014 (pending amalgamation)* (2011), p. 5.

67 See, for example, Competition Authority, *Annual Report 2011* (2012), p. 9.

68 CCPC, *Strategy Statement of the CCPC 2015-2018* (2015), p. 9.

69 CCPC, *Strategy Statement 2018-2020* (2018). In its earlier *Strategy Statement,* the CCPC refers to the fact that "the most serious breaches of competition law are cartels," but does not say that cartels are its top enforcement priority.

70 CCPC, *Annual Report 2018* (2019), p. 7.

71 Presumably these relate to the consumer law enforcement actions of the CCPC, which include investigations into crashed/clocked cars as well as product safety inspections and investigations.

72 https://webarchive.nationalarchives.gov.uk/20100913124537/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/.

73 CCPC, *Consultation on Strategy* (2015), p. 13. These six criteria are consistent with the priorisation principles on the CCPC website, in particular that relating to "Risk, resources and costs." See https://www.ccpc.ie/business/about/decide-take-action/.

issues, the merits of the case. In other words, does the Court's analysis of alleged anti-competitive conduct stand up to critical scrutiny? The shift in focus reflects the fact that in Ireland there are no civil fines under the Competition Act 2002,[74] while uncertainty surrounds the application of Articles 101 and 102 of the TFEU under Regulation 1/2003 by the Courts.[75] Under the Competition Act 2002 the only sanction in civil cases is an injunction and/or declaration. In other words, the Courts, of necessity, became involved in a competition economics analysis of individual markets and whether the behaviour of undertakings had strayed over the line between legality and illegality. Drawing this line was often difficult in view of the complex nature of the cases.

This complexity reflects the fact that if the alleged infringement is a clear breach of competition law, then the offending undertakings are much more likely to settle with the CCPC, rather than going to Court.[76] Settlement involves the undertakings alleged to have breached competition law signing an Agreement and Undertaking (A&U) with the CCPC. Under such an A&U the undertakings, while not admitting a breach of competition law, agree, for example, a certain course of action (e.g. institute a programme of competition law compliance and/or abandon the alleged anticompetitive conduct) and

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74 Under Ireland's constitution fines can only be imposed for criminal charges. The CCPC, in a widely accepted position, takes the view that only hard core cartel offences, as set out in Section 6(2) of the Competition Act 2002, should be treated as criminal. For non-hardcore cartel breaches of the Competition Act 2002 (e.g. abuse of a dominant position) a civil, rather than criminal, standard is considered appropriate. For further discussion: FitzGerald & McFadden, "'Filling a Gap in Irish Competition Law Enforcement: the Need for Civil Fines," 9 June 2011, Competition Authority. See https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/2011-06-09-Filling-a-gap-in-Irish-competition-law-enforcement-the-need-for-a-civil-fines-sanction.pdf; and, Law Reform Commission, *Regulatory Enforcement and Corporate Offences* (2016), pp. 19-27.

75 Ireland's Courts are designated for the purposes of Article 5 under Regulation 1/2003 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* OJ [2003] L 1/1. Notwithstanding this designation some ambiguity surrounds whether the Courts in applying Articles 101 and 102 can impose fines. The situation is summarised as follows by the CCPC in its 2016 response to a European Commission survey, "Empowering the national competition authorities to be more effective enforcers:"

> "With regard to civil fines, an argument can be made that the Irish courts, as a designated competition authority under Council Regulation (EC) 1/2003 of 16 December 2002, can already impose civil fines under Article 5 for infringements of Article 101 and 102 TFEU given that a Regulation is directly applicable by virtue of Article 288 TFEU. 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 Ireland is 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. The CCPC disagrees with this argument since, in practice, only hardcore competition law infringements will be the subject of criminal prosecution. All other infringements are therefore, in reality, sanction-free in Ireland. It is hard to see how this can constitute effective compliance with Ireland's obligations under Article 5. Nonetheless, this and other possible arguments create uncertainty regarding the interpretation of Article 5."
>
> (https://ec.europa.eu/competition/consultations/2015_effective_enforcers/the_competition_and_consumer_protection_commission_ccpc_ireland_en.pdf, p. 52).

The issue is discussed further in Section 8.4.4 in light of the ECN+ Directive.

76 CCPC practice favours an approach that involves settlement rather than instituting legal proceedings. See Andrews, Gorecki, and McFadden, pp. 171-172.

not to repeat the alleged anticompetitive behaviour.[77] This avoids the need for a time consuming and potentially expensive civil Court case.

In order to assist the Court in its competition economics analysis of the markets at issue in a civil Court case, the procedural rules mentioned in Section II permit the Court to appoint, with the agreement of the CCPC and defence, a Court-appointed expert. In the *BIDS* case, for example, Jorge Padilla was appointed; in the *ILCU* case, Martin Cave was appointed. The Court also has available to it the written and oral evidence of competition economists representing the CCPC and defendants. If the Court requires clarification on any issue relating to competition economics it could ask for the CCPC and the defendants to make representations.

In Section 6.2 the *BIDS* case, an agreement between competitors, is reviewed while in Section 6.3 attention turns to the *ILCU* case, an alleged abuse of a dominant position. These are the major civil Court cases taken by the CCPC where the Court has rendered a judgment.[78] In Section 6.4 reference is made to perhaps the most important case taken by private parties, the *Panda Waste* case. This involves both an alleged anticompetitive agreement and an alleged abuse of a dominant position. In each of these three cases the salient facts will be outlined, together with the alleged infringement, the Court's view of the alleged anticompetitive conduct, and a discussion of the Courts competition economic analysis. Section 6.5 concludes.

6.2. Non-Criminal Cartels: the *BIDS* case

6.2.1. Introduction

The *BIDS* case concerns an agreement between competitors to reduce capacity. It is important on the European stage since it added to the list of 'by objective' agreements which prevent, restrict or distort competition. However, the initial High Court judgment delivered in July 2006 found that there was *no* breach of Article 81(1), currently 101(1), but if there had been then only three of the four conditions in Article 81(3), currently 101(3), would have been satisfied.[79] The CCPC appealed the High Court decision to the Supreme Court. The latter decided to refer the question of whether an agreement to reduce capacity was a by object breach of Article 81(1) to the ECJ for a preliminary ruling. The ECJ, in a judgment delivered in November 2008, found that such an agreement was a by object breach of competition law.[80] The Supreme Court in November 2009 referred back to the High Court the question of whether the conditions set out in Article 81(3)

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77 Gorecki, "Section 14B Court Orders & Civil Enforcement of Competition Law in Ireland: A New Direction?" (2019) (40) 2, *European Competition Law Review*, pp. 63-66.

78 In the other civil court proceedings initiated by the CCPC a settlement between the CCPC and the defendants was reached. See Andrews, Gorecki & McFadden, Table 3.1 pp. 182-183. There have been no subsequent civil competition cases taken by the CCPC. For details see: https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/.

79 *The Competition Authority v Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited* [2006] IEHC 294. (*Competition Authority v BIDS*).

80 Case C-209/07 *The Competition Authority v Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited* [2008] ECR I 08637. (Case C-209/07 *BIDS*).

were satisfied.[81] The onus on proving that all of these four conditions are satisfied rested with BIDS. However, before the High Court could render a judgment BIDS withdrew its case in January 2011 and agreed to pay a substantial portion of the CCPC's costs.[82]

6.2.2. The Facts: Three Features of the BIDS Arrangements

The Beef Industry Development Society Ltd (BIDS or the Society) arrangements can be characterised in terms of three features.

- *Capacity Reduction:* in view of the widespread acceptance of substantial excess capacity in beef processing, an agreement was reached among beef processors accounting for 93 per cent of capacity to reduce capacity by a quarter. BIDS was the mechanism or vehicle which was designed to reduce capacity.
- The processors that exited the market are referred to as goers, those that remain active in the market, stayers.
- *Exit Agreement*: a goer would sign a two year non-compete clause with the Society in relation to the processing of beef on the entire island of Ireland; their plants would be decommissioned; the land associated with such plants could not be used for beef processing for at least five years; the equipment of the goers would only be sold to the stayers for spare parts/back-up or sold outside of Ireland; goers would self-select (i.e. there was no requirement, implicit or explicit, that they should be the least efficient) until the required capacity reduction was reached; goers would be compensated by the stayers via the Society; and only undertakings could avail of the BIDS arrangements (i.e. not individual plants of a multi-plant undertaking that would continue to operate its remaining beef processing plants).
- *The Levy*: the stayers paid a voluntary levy to the Society at the rate of €2 per head of their traditional percentage kill and €11 per head of cattle kill above that figure. Once the goers had been paid off, which was projected to be in about two years, the levies would cease.
- The freedom of the stayers in matters of production, pricing, conditions of sale, imports and exports, increases in capacity and otherwise would not be affected the BIDS arrangements.

The BIDS arrangements were based on a series of reports commissioned by the State which quantified the degree of excess capacity and made proposals for its removal. Several of the witnesses to appear for BIDS in the High Court were former and current government officials. The leading four meat processors accounted for 59 per cent of the national kill. One of the State sponsored reports envisaged the number of processors dropping from "20 to a figure between 4 and 6."[83]

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[81] *The Competition Authority v Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited* [2009] IESC 72.

[82] For details see: https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/agreements-reduce-capacity-irish-beef/.

[83] Case C-209/07 *BIDS,* para. 4.

The CCPC took the view that the BIDS arrangements were an anti-competitive agreement under Section 4(1) of the Competition Act 2002 and/or Article 81(1). In taking legal proceedings against BIDS the CCPC was seeking a declaration that the BIDS arrangements should be prohibited and were void.

6.2.3. High Court Judgment

The High Court determined that the BIDS arrangements did *not* breach Article 81. It was not an agreement that had either objective or effect of preventing, restricting or distorting competition. But on what basis did the Court conclude that the BIDS arrangements did not breach Article 81(1) by object?

The Court's judgment is an extensive and detailed analysis of the BIDS arrangements, extending to 138 paragraphs. However, the treatment as to why the BIDS arrangements did not breach Article 81 by object is very brief, only two paragraphs.[84] The Court argues that what is normally considered a per se or by object violation are agreements that fix price, limit output and share of markets/customers plus exchanging price information and collective exclusive dealing. The issue, in the Court's view, is whether or not the three features outlined above of the BIDS arrangements fell foul of the by object restriction.

In answering this question the Court points out that "as appears from its rules and as minuted in many of its meetings held throughout 2002, the fundamental purpose for establishing [BIDS] ... was to implement the conclusions and recommendations" of two reports into the problems of the beef sector.[85] The Court then states it cannot see any clause in the BIDS arrangements "which could be said to fix prices or share customers." Furthermore, the Court states that it does not believe "that the arrangements can in any way be described as plainly or evidently limiting output, sharing markets or prohibiting investment." There is no "injunction on those who might remain ... to reduce output or indeed freeze it at a certain level," or "production quotas."

The Court continues by stating that:

> "[U]nless therefore, a reduction per se in capacity must necessarily be equated with a limitation on output, which in my view is unlikely, ..., then I cannot set how the arrangement is objectionable in this regard; which is of course the major suggested violation by object restriction."

Similarly, there is according to the Court no question of market sharing since if the excess capacity is removed the "destination of cattle will be subject to ordinary market forces." Furthermore, there is nothing to prevent the output of the goers being captured by non-BIDS meat processors and new entrants. Hence in "consequence, I do not believe that these arrangements restrict competition by object."

Several points should be noted concerning the Court's reasoning. First, the Court explicitly considers the object and purpose of the BIDS arrangements in terms of implementing the recommendations of two State-sponsored reports to reduce the level

84 *Competition Authority v BIDS,* paras. 97-98.

85 All references in this and the next paragraph are from *Competition Authority v BIDS,* para. 98.

of excess capacity. Second, in determining whether or not the BIDS arrangements prevent, restrict or distort competition the Court only pays attention to the types of agreements set out in Article 81(1) (a) to (c). The Court does this despite the fact that it cited by objective anticompetitive agreements (exchanging price information and collective exclusive dealing) which are not included explicitly in the list set out in Article 81(1)(a) to (c).

6.2.4. The Court of Justice of the EU

The ECJ took the view that the BIDS arrangements were a breach of Article 81(1) by object and that as a result there was no need to determine whether or not the BIDS arrangements had an anti-competitive effect. The ECJ makes a number of preliminary observations. Even though the Parties to an agreement might be acting without any subjective intention to restrict competition (e.g. to reduce excess capacity), such "considerations are irrelevant for the purposes of applying" Article 81(1), although not Article 81(3)."[86] Furthermore the "types of agreements covered by Article 81(1) (a) to (c) ... do not constitute an exhaustive list of prohibited collusion."[87] The ECJ then proceeds to analyse the impact of the BIDS arrangements.

The ECJ initially assesses the BIDS arrangements as a whole:

> "32. The matters brought to the Court's attention show that the BIDS arrangements are intended to improve the overall profitability of undertakings supplying more than 90% of the beef and veal processing services on the Irish market by enabling them to approach, or even attain, their minimum efficient scale. In order to do so, those arrangements pursue two main objectives: first, to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and, second, to eliminate almost 75% of excess production capacity.
>
> 33. The BIDS arrangements are intended therefore, essentially, to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale.
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> 34. That type of arrangement conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article 81(1) EC is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition."

The ECJ next considers the counterfactual:

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86 Case C-209/07 *BIDS,* para. 21.

87 Case C-209/07 *BIDS,* para. 23.

> "35. In the context of competition, the undertakings which signed the BIDS arrangements would have, without such arrangements, no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the BIDS arrangements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of EUR 2 per head processed by each of the stayers."

The ECJ then examines the measures necessary to put the BIDS capacity reduction in place and determines that some of them are "restrictions whose objective is anti-competitive."[88] The first concerns the levies on the output of the stayers to finance the payments to the goers:

> "37. As regards, in the first place, the levy of EUR 11 per head of cattle slaughtered beyond the usual volume of production of each of the stayers, it is, as BIDS submits, the price to be paid by the stayers to acquire the goers' clientele. However, it must be observed, as did the Advocate General in point 85 of her Opinion, that such a measure also constitutes an obstacle to the natural development of market shares as regards some of the stayers who, because of the dissuasive nature of that levy, are deterred from exceeding their usual volume of production. That measure is likely therefore to lead to certain operators freezing their production."

The Court then turns to the exit arrangements:

> "38. As regards, secondly, restrictions imposed on the goers as regards the disposal and use of their processing plants, the BIDS arrangements also contain, by their very object, restrictions on competition since they seek to avoid the possible use of those plants by new operators entering the market in order to compete with the stayers. As the Competition Authority pointed out in its written observations, since the investment necessary for the construction of a new processing plant is much greater than the costs of taking over an existing plant, those restrictions are obviously intended to dissuade any new entry of competitors throughout the island of Ireland.
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> 39. Finally, the fact that those restrictions, as well as the non-competition clause imposed on the goers, are limited in time is not such as to put in doubt the finding as to the anti-competitive nature of the object of the BIDS arrangements. As the Advocate General observed in point 86 of her Opinion, such matters may, at the most, be relevant for the purposes of the examination of the four requirements which have to be met under Article 81(3) EC in order to escape the prohibition laid down in Article 81(1) EC."

In sum, the ECJ concludes:

> "40 In the light of the foregoing considerations, the reply to the question referred must be that an agreement with features such as those of the standard form of contract concluded between the 10 principal beef and veal processors in Ireland, who are members of BIDS, and requiring, among other things, a reduction of the

[88] Case C-209/07 *BIDS,* para. 36.

order of 25% in processing capacity, has as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC."

6.3. Abuse of a Dominant Position: the *ILCU* case

6.3.1. Introduction

The *ILCU* case is commonly considered one of the most important competition cases in Ireland. It is certainly the only one in which the Supreme Court has opined on abuse of dominance under the Competition Act 2002. The High Court found in a judgment delivered in October 2004 that the ILCU had abused its dominant position by tying access to its Savings Protection Scheme (SPS) to the credit union representation services (CURS) supplied by the ILCU.[89] The Supreme Court in a subsequent May 2007 judgment decided that the ILCU had *not* in fact breached competition law by its behaviour.[90] In particular since savings protection and CURS were *not* distinct products there could be no tying. In the discussion attention will be confined solely to the Supreme Court judgment.

6.3.2. The Facts & the CCPC's Theory of Harm

The facts of the case and the CCPC's theory of harm may be summarised as follows:

- The CCPC argued that there are two inter-related relevant product markets: the market for the provision of savings protection to credit unions for their member deposits (i.e. deposit insurance); and the market for CURS. The latter is a range of activities involved in representing credit unions to, for example, the political and regulatory authorities;
- The ILCU is an association of undertakings (and an undertaking), established in 1960. The ILCU's SPS was set up in 1989. The ILCU is and has been the only provider of savings protection to credit unions in the State. All credit unions formed since 1 August 2001 are required to belong to an approved saving protection scheme. Existing credit unions regard access to the SPS as "vital."[91] There are substantial barriers to entry to the savings protection market. Risk diversification is important, with estimates of the minimum number of credit unions required varying from 50 to between 100 and 200. Hence it is reasonable to conclude that if savings protection were a separate relevant product market that the ILCU is dominant in that market.
- There were two providers of CURS: the ILCU; and the Credit Union Development Association (CUDA). The latter consisted of credit unions that were dissatisfied with the CURS provided by the ILCU and set up their own representative body or trade association in 2001. Prior to that the ILCU was the sole provider of CURS. In 2002 the ILCU had 414 members; CUDA, 21, but in 2003 two CUDA members switched back to the ILCU; and, there were three credit unions that supplied their own CURS;

[89] *Competition Authority v John O'Regan & ors* [2004] IEHC 330.

[90] *ILCU* judgment.

[91] *ILCU* judgment, para. 127.

- The ILCU tied access to its SPS to CURS. In other words, a credit union cannot avail of SPS unless it becomes a member of the ILCU, thus tying savings protection to CURS; and,
- The CCPC argued that tying access to the SPS to membership of the ILCU forecloses rival CURS providers such as CUDA. This will deny credit unions the benefits of competition on the CURS market. In other words, the ILCU is leveraging its dominance in one market – the saving protection market – into an adjacent or related market – CURS.

In abuse of dominance cases it is quite often the case that the alleged abuse takes place in one market but the effect is felt in another.[92]

6.3.3. The Supreme Court: No Separate Markets, No Tying

The Court stated that if the savings protection and CURS were separate relevant product markets then the ILCU was almost certainly abusing its dominant position: "Assuming that the ILCU enjoys that position of dominance in a distinct market for SPS, it is probably inescapable that it is engaged in abusive tying."[93] However, the Court determined that there were *not* two separate markets and hence concluded that there could be no abusive tying.

In order to determine whether or not savings protection was a separate market the Court used the market practices test (MPT): whether or not the product or service "was something bought and sold in an open way like any other commodity or service."[94] The Supreme Court stated that there was no evidence of the existence of an "independent commercially provided SPS anywhere."[95] One of the CCPC's expert witnesses is quoted to the effect that they "made no reference to any pre-existing evidence of such [SPS] sales either in Ireland or anywhere else in the world."[96] Hence the Court concluded the CCPC "has not established that SPS constitutes a distinct product, still less that it is a separate product market."[97]

Given that savings protection was not considered a separate product, the Court stated that it was not strictly necessary to consider whether CURS constituted a separate market. Nevertheless, the Court did make a few observations and left little doubt that the Court also felt that CURS was not a separate product.[98] The Court stated that the MPT was not met since "no evidence was presented of the existence of any market consisting of sellers

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[92] See, for example, Whish & Bailey, *Competition Law*, 9th edn (2018), pp. 210-213.

[93] *ILCU* judgment, para. 89.

[94] *ILCU* judgment, para. 132. The next sentence states: "From what I have said, it is clear that I consider it essential for the Authority to establish an affirmative answer to that question." See also *ILCU* judgment, paras. 117 to 119.

[95] *ILCU* judgment, para. 134.

[96] *ILCU* judgment, para. 133.

[97] *ILCU* judgment, para. 134.

[98] Much of the Court's concern was over the implications of whether CURS constituted a distinct product. *ILCU* judgment, paras. 138-139.

and buyers of representation services."[99] The Court further states that if a similar situation arises in another case it would hope that the CCPC would "produce cogent factual evidence of the existence of such a product in representation services."[100]

6.3.4. Assessment

The assessment of the Court's position on the tying revolves around the application and appropriateness of the MPT. The Court is correct the demand side factors are generally paramount in market definition. Such considerations are emphasised in the hypothetical monopolist test set out in the European Commission's *Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*.[101] In the European Commission's guidance on Article 82 cases, based on CJEU case law, the Commission states in relation to whether products "will be considered … distinct depends on customer demand."[102] The MPT is not based, however, on EU law or grounded in European Commission guidance. Instead in using the MPT the Court is relying on the work of Professors Areeda, Elhage and Hoverkamp.[103] Nevertheless, at one level the MPT has an intuitive appeal: if a product or service is bought and sold then it likely constitutes a separate product. However, there are some difficulties with the application by and appropriateness of the Court's use of the MPT with respect to savings protection and CURS.

There was evidence before the Court by experts for both the ILCU and the CCPC that there was, albeit of declining importance, private provision of savings protection in the US.[104] Equally in the case of CURS on the supply side there are two providers of CURS, the ILCU and CUDA, while on the demand side there are several hundred credit unions. There is evidence of switching between the ILCU and CUDA – of the 21 original members of CUDA two switched back to the ILCU, which suggests that they are alternatives in competition with one another. There was evidence before the Court of credit unions making decisions as to whether the ILCU or CUDA, while representatives of the ILCU attended meetings of credit unions to influence their choice of their CURS provider.

The MPT is an inappropriate test of determining whether or not two products are distinct since it does not cover all cases where there is a demand for a distinct product. It is unduly narrow and restrictive. Suppose a firm (ILCU) has a monopoly in A (SPS) and ties it to B (CURS). CUDA is also a provider of B. Some CUDA's customers (credit unions) would also like to buy A, but the monopolist refuses to supply A independently

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99 *ILCU* judgment, para. 140.

100 *ILCU* judgment, para. 142.

101 European Commission, *Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (1997)* OJ C 372, paras. 13 – 14. Although the Notice is not a source of law, "the EU Courts have referred to it on various occasions with approval." (Whish & Bailey, *Competition Law*, 9th edn (2018), p. 35).

102 European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (2009) OJ C 45/02, para. 51. (European Commission, *Article 82 Guidance*).

103 *ILCU* judgment, para. 118.

104 Gorecki, "The Supreme Court Judgment in the Irish League of Credit Unions Case: Setting New Standards or Misapplying Current Case Law?" *European Competition Law Review* (2008) (29) 9, p. 505.

of B. Hence even though there is a demand for A independent of B, because of the tying, only AB and B will be observed in the marketplace. In other words, if there is an independent demand for savings protection, the abusive tying results in the MPT not being satisfied.[105]

Such an interpretation would appear to be consistent with European Commission guidance based on European case law. The European Commission, for example, in detailing how it determines whether or not two products are distinct, states,

> "Two products are distinct if*, in the absence of tying or bundling*, a substantial number of customers would purchase or *would have purchased* the tying product without the also buying the tied product from the same supplier, thereby allowing the stand-alone production of both the tying and the tied product (emphasis supplied)."[106]

In the *ILCU* case the tying product is SPS, the tied product CURS.

There is no commercial or technological reason why the ILCU should not provide SPS as a separate product to non-ILCU members. It is clear that there is a demand for SPS by CUDA members.[107] Furthermore there are sound economic and business reasons for the ILCU to provide savings protection to as large a pool of credit unions as possible, but the fact that it does not reinforces the view that the ILCU was engaged in abusive tying.[108] The greater the diversification of risk – the more credit unions that are members – the more stable and the lower the SPS premiums. Credit unions are formed by a common bond such as membership of profession or a location meaning that the risks of insolvency are likely to be independent. The ILCU would, of course, have to monitor non-ILCU members of the SPS.[109]

6.4. Regulation, Non-Criminal Cartels, & Abuse of a Dominant Position: the *Panda Waste* case

6.4.1. Introduction

The Panda Waste case is perhaps the most important private civil competition case in Ireland in view of the intersection of competition and regulatory law. Panda Waste argued that Variation to the Waste Management Plan for the Dublin Region 2005-2020 (the Variation) made by the four Dublin local councils in March 2008 breached Irish and European competition law in the market for household waste collection (HHW). The

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[105] The argument here is analogous to the cellophane fallacy: the cellophane monopolist raises price above the competitive level until the price is just below that of the closest substitute(s). When the SNNIP test is applied to current prices – reflecting the monopoly mark up – the test incorrectly concludes that cellophane is part of a wider market. For discussion see Whish & Bailey, *Competition Law*, 9th edn (2018), pp. 31-32.

[106] European Commission, *Article 82 Guidance,* para. 51. For its interpretation the Commission relied on Case T-201 *Microsoft v Commission* [2007] ECR II-3601, paras. 917, 921, 922.

[107] See, for example, *ILCU* judgement, para. 127.

[108] This is consistent with the sacrifice test used to determine whether exclusionary conduct is unlawful. It is discussed further in Vickers, "Abuse of Market Power," in Buccirossi, ed. *Handbook of Antitrust Economics* (2008), pp. 423-426.

[109] If there were concerns about such information being in some used to the disadvantage of CUDA members then the requirements could be certified by a third party independent of the ILCU and CUDA.

High Court delivered its judgment in December 2009 finding that the Variation was an anticompetitive agreement and an abuse of a dominant position under the Competition Act 2002.[110] The subsequent appeal to the Supreme Court by the four Dublin local councils (the local councils) was dropped later.

6.4.2. The Facts

The following are the salient facts.

- In contrast to much of the rest of the EU, the US and Canada, Ireland operates a side-by-side market structure for the collection of HHW. In other words, HHW collectors competed with each other for the right to collect a household's waste.
- Three of the four local councils collected HHW competing with one or more private operators, including Panda Waste.
- The Variation was made by the local councils under the Waste Management Acts 1996-2007 (WMA). This Act in turn implemented various EU directives on waste including the Waste Framework Directive, the Waste Packaging Directive and so on.
- The Variation permitted each of the four local councils to decide whether or not HHW should be reserved either for the local council itself or for an operator selected by a public tendering process. In other words, instead of side-by-side competition a single operator would collect HHW in a given local Council area. Attention is confined here largely to the competitive tendering option.
- The Variation was justified on the grounds of "encouraging and supporting the recovery of waste and preventing environmental pollution."[111]

6.4.3. The High Court Judgment

In a lengthy judgment the Court made a number of important findings. First, the four local councils were undertakings both when they collected HHW and in making the Variation. Second, the Variation was an agreement between undertakings that prevented, restricted or distorted competition by object and effect. The Court's reasoning was brief (as in the *BIDS* judgment), a single paragraph:

> "81. The next question is whether the agreement or concerted practice had as its "*object or effect the prevention, restriction or distortion of competition*". In this regard it must be stated firstly, that any question of the Variation creating more favourable conditions for competition, albeit competition-for-the-market, as opposed to competition-in-the-market, is irrelevant. That is a justification argument which is more properly dealt with under s. 4(5) CA 2002 (see paras. 83 *et seq., infra*.). The real question is: does the Variation, by its object or effect, prevent, restrict or distort competition? The Variation seeks to remove private operators from a market in which there is currently competition, and instead replace it with a system whereby

[110] *Nurendale Limited Trading as Panda Waste Services v Dublin City Council, Dun Laoghaire/Rathdown County Council, Fingal County Council & South Dublin County Council* [2009] IEHC 588 (*Panda Waste* judgment).

[111] Andrews & Gorecki, "The Use by Irish Courts of EU Jurisprudence to Resolve Conflicts Between National Competition Law and Regulation: *Panda Waste*" (2010) (6) 3 *European Competition Journal*, p. 547. (Andrews & Gorecki).

> either the local authority, or a successful tenderer (as the former decides), will be the sole collector within the entire region or within any single or multiple sections, that the respondents should so designate. Its object is thus the removal of operators from the market and its effect will be likewise. That this prevents, restricts or distorts competition is patent. It would cause the market to move from many multiple competing undertakings to only a few, or even perhaps one, with no or only limited competition between them. It would foreclose competition and prevent entry. It is therefore clear that the Variation has as both its object and effect the restriction of competition, contrary to s. 4(1) CA 2002."

Third, that each of the local council's is dominant with respect to their local council area. Fourth, the local councils abused their dominant position and there was no objective justification. The grounds for finding an abuse are summarised as follows by the Court:

> "141. As is evident from what I have previously stated, I cannot agree with any of the arguments advanced to support objective justification or efficiencies which may otherwise have provided a defence to the respondents' actions. Further, I would add that the intentions of the respondents are irrelevant for the purpose of my findings in relation to s. 5, the abuse being judged objectively. The respondents, therefore, in my opinion have abused their dominant position:
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> i) By virtue of the finding that the Variation is an agreement or concerted practice contrary to s. 4 CA 2002; and/or,
>
> ii) Because the Variation would substantially influence the structure of the market to the detriment of competition and *a fortiori* the consumer; and /or,
>
> iii) Because the Variation would significantly strengthen the position of the respondents on the market."

Fifth, the local councils were collectively dominant and abused their collectively dominant position, with the grounds being the same as those set out above for single firm dominance by each local council in its own council area. Sixth, the Court determined that since the alleged breaches did not affect trade between Member States the conduct was not subject to Articles 81 or 82, but only the Competition Act 2002. Nevertheless, the Court relied extensively on CJEU case law.

6.4.4. Assessment

There are good grounds for disputing virtually every one of these six findings.[112] However, attention will be confined here to the Court's findings: that the local councils are undertakings for the purposes of making the Variation;[113] that the Variation is an anti-competitive agreement by object; that the local councils are dominant in their own

[112] Further details and argumentation on all the points made in the assessment may be found in Andrews & Gorecki.

[113] For a discussion of the High and Supreme Court's treatment of whether a regulatory body, the Medical Council, can be an undertaking and/or an association of undertakings see: Gorecki & Mackay, "*Hemat v Medical Council*: Its Implications for Irish and EU Competition Law" (2007) 28 (5) *European Competition Law Review*, pp. 285-293; Gorecki, "A Decision of an Association of Undertakings: Reflections on a Recent Irish Supreme Court Decision: *Hemat v the Medical Council*" (2011) 32 (3), *European Competition Law Review*, pp. 153-160.

local council geographic areas; and, that the Variation constitutes an abuse of a dominant position.

There would be little or no disagreement that the local councils are undertakings for the purposes of HHW collection in which households are charged by the council for the HHW service and compete with private operators. On the other hand, it is not at all clear that councils are undertakings for the purposes of making regulations pursuant to the WMA. In justifying this finding, the Court cites a number of CJEU judgments. Particular attention is devoted by the Court to the *MOTOE* judgment.[114] In this case the licensing authority for holding Greek motorcycling events, the ELPA, also organised such events itself. However, the ECJ concluded that while the ELPA was an undertaking for the purposes of organising motorcycling events, it was *not* for the purposes of acting as a regulatory authority licensing such events. This distinction was not given any weight by the High Court, despite the fact it clearly points towards the local councils not being undertakings for the purposes of making the Variation. If this is indeed a correct interpretation of *MOTOE* then the local authorities cannot, of course, breach competition law in making the Variation.[115]

Accepting that the local councils are undertakings for the purposes of making the Variation and that the Variation is an agreement, does the agreement prevent, restrict or distort competition? The answer to this question depends critically on the counterfactual. In other words, what will replace side-by-side competition between public and private HHW collectors? The Court's reasoning – as set out above – is consistent with an unconstrained monopoly as the appropriate counterfactual. The Variation will thus result in a monopoly that is able to charge HHW customers a monopoly price, given statutory protection from any possible entrant. The difficulty with the Court's counterfactual is that is grossly mischaracterises and distorts the intentions of the local councils.

The Variation itself refers to "a public tendering process." Evidence was led in the case that demonstrated that HHW collection charges were lower with competitive tendering compared to side-by-side competition. A background paper prepared for the local councils was consistent with the competitive tendering model, not an unconstrained monopolist. Finally, the Court's assertion that "any question of the Variation creating more favourable conditions for competition, albeit competition-for-the-market, as opposed to competition-in-the-market, is irrelevant" in considering whether or not the Variation is a by object breach of competition law seems inconsistent with the way in which the ECJ analysed the competitive impact of the BIDS arrangements as set out in Section 6.2.4. The Court's counterfactual - that local councils, given the history of resistance by householders to charges for HHW collection, would allow a single supplied to act as unconstrained monopolist – is simply not credible. Hence the Variation's

114 Case C-49/07, *Motosykletistiki Osmospondia Ellados NPID (MOTOE) v Elliniko Dimosio,* 1 July 2008.

115 In citing *MOTOE* little or no attention is paid by the High Court that the ECJ found "that the national rule at issue in MOTOE – that conferred on ELPA, a legal entity, regulatory authority to control market entry in a downstream market on which it competes – was held ... to be contrary to EU law by virtue of the combined effect of Article 86 and Article 82." Andrews & Gorecki, p. 551.

proposed tendering would not appear to be a by object anticompetitive agreement; if anything, it enhances consumer welfare.

The Court argues that the local authorities are dominant in their own geographic areas and that they abused that position. However, for Dun Laoghaire/Rathdown County Council there are good grounds for arguing, based on the available evidence, not only that the local council was not dominant but that it did not abuse any market power that it might have had. The council accounted for 46.4 per cent of the local council HHW collection market in 2008 and, according to the Court, had the power to make regulations that might inhibit a competitor. However, Panda Waste accounted for 50.0 per cent of the market in 2008 after entering in 2006, suggesting that there were no substantial barriers to entry. Furthermore, the entry of Panda Waste had caused Dun Laoghaire/Rathdown County Council to freeze its HHW collection charges. As to abuse Dun Laoghaire/Rathdown County Council actively assisted the entry and expansion of Panda Waste and did not use its regulatory powers to inhibit entry.

Next attention turns to the three specific grounds outlined in *Panda Waste (*and set out in Section 6.4.3) as to how the local councils abused their dominant position. The first of the three grounds for the abuse of a dominant position is inconsistent with CJEU judgments concerning the recycling of facts:

> "The General Court overturned the [European] Commission's decision on collective dominance on the grounds that the Commission had simply 'recycled' the facts relied on as constituting an infringement of Article 101, instead of properly defining the relevant product market and geographic market in order to weigh up the undertakings' market power, as is necessary in Article 102 cases."[116]

Indeed, arguably the second grounds are merely a restatement of the finding concerning an anti competitive agreement, while the third assumes that the local council will act as an unconstrained monopolist, which for reasons set out above, is not credible.

6.5. Commentary

The third criterion for assessing the Courts and competition law asked the question: Did the Courts set out credible analysis of competition issues in civil cases? On this the evidence suggests that in all three cases reviewed here the Court's analysis suffered important shortcomings. In the *BIDS* case this was recognised by the ECJ, which reversed the High Court's judgment that the BIDS arrangements were *not* a by object breach of competition law. But for the ECJ an anticompetitive agreement would have been permitted by the High Court. However, neither the *ILCU* nor *Panda Waste* cases benefited from a hearing before the CJEU.

It seems reasonable to argue that in the *Panda Waste* that there are good grounds for the High Court's decision that there was an anticompetitive agreement and an abuse of a dominant position being questioned if not reversed by the CJEU. This would have given the local authorities the opportunity to move towards the norm in HHW collection in the EU by implementing the Variation; there would be only a single collector for a given

[116] Whish & Bailey, *Competition Law*, 9th edn (2018), pp. 586-587.

geographic area. However, this outcome was prevented by the High Court judgment. The issue of market design for HHW collection is still subject to debate. Indeed, the side-by-side system continues to this day but without participation of local authorities as HHW collectors. The CCPC recently recommended a regulator be established to determine the optimal HHW collection market design.[117] However, application of the methodology employed by the CCPC suggests competitive tendering is the appropriate market design; there should be no need for an industry regulator.[118]

In *ILCU* case the argument is more nuanced. The Court correctly used a demand side test for determining whether or not two products are distinct. Nevertheless, there are doubts concerning both how the MPT test was applied by the Court and its restrictive nature. Competition in the provision of credit union representation services is thus less than it otherwise might be.

7. MERGER REVIEW

7.1. Introduction

Since January 2003 the CCPC has been the initial decision maker for the purposes of merger assessment. Appeals from a CCPC merger determination may only be made by the merging parties on grounds of fact and/or law.[119] However, with regard to fact that the High Court "shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be a fact by the ... [CCPC] in exercising the relevant powers ... were correctly so accepted or found." The timelines for the appeal process are tight: the appeal "shall be made within 1 month after the date the undertaking is informed by the … [CCPC] of the determination"; and, "it shall be the duty of the High Court, in so far as it is practicable, to hear and determine an appeal … within 2 months after the date on which the appeal is made to it." The High Court may: annul the determination; confirm the determination; or confirm "subject to modifications of it [i.e. the determination] as the court determines or specifies in its decision."

The vast majority of mergers are cleared by the CCPC either unconditionally or with conditions agreed with the merging parties. Hence it is only where the CCPC prohibits a merger that an appeal is even a possibility. There have been three instances where the CCPC has blocked a merger:[120] M/04/032 – *IBM/Schlumberger*; M/06/039 – *Kingspan/Xtratherm*; and, M/08/009 – *Kerry/Breeo.*[121] It is only in the latter case that an appeal against the CCPC's determination was instituted. The CCPC prohibited the proposed acquisition of Kerry Group plc (Kerry) of Breeo Foods Limited and Breeo

[117] CCPC, *The Operation of the Household Waste Collection Market* (2018).

[118] Gorecki, *Reforming the Regulation of Household Waste Collection Services in Ireland: the Competition and Consumer Protection Commission Study,* MPRA Paper 95000 (2019)*;* and Gorecki, "Household Waste Policy in Ireland: Options for Competition, Environment and Regulation" (2020) (51) 2 *Economic and Social Review,* pp. 305-326.

[119] For details see s. 24, Competition Act 2002. All quotes in this paragraph refer to this section.

[120] Arguable there is a fourth: *Easton/Argosy* was a two to one non-notifiable merger that was abandoned when the CCPC threatened to take legal action under s. 4, Competition Act 2002, which prohibits agreements that restrict competition. For details see Competition Authority, *Annual Report 2012* (2013), pp. 30-31.

[121] These merger determinations may be found on the CCPC's website: www.ccpc.ie.

brands Limited (Breeo) in August 2008 (*Kerry/Breeo*).[122] The CCPC took the view that the *Kerry/Breeo* merger would result in an SLC in three markets: processed cheese; rashers; and, non-poultry cooked meats. An appeal against the CCPC determination was launched by the acquirer. The High Court agreed with the arguments of the acquirer sufficiently to annul the CCPC prohibition in a judgment delivered in March 2009.[123] In April 2009 the CCPC appealed the High Court decision to the Supreme Court. However, in April 2016 in view of the passage of time and a satisfactory financial settlement relating to the CCPC's High Court costs, the CCPC decided not to proceed with its appeal.[124]

7.2. The CCPC's Findings

The CCPC's findings in relation to competition in the non-poultry cooked meats market were as follows:

- "The HHI results place the proposed acquisition in Zone C of the ... [CCPC's] *Merger Guidelines* meaning that the non-poultry cooked meats would be defined as highly concentrated and more liable to raise competition concerns;
- The merged entity will have a [45-50]% market share by value post acquisition in comparison to the combined market share of the other brands in the non-poultry cooked market of [5-10]% by value with no one supplier having more than [0-5]%;
- Breeo's and Kerry's combined market share has increased over the period 2005 to 2007 from [40-45]% to [45-50]%;
- Evidence from a variety of sources indicates that Kerry and Breeo are each other's closest competitor in the market for non-poultry cooked meats;
- Private label's share of the non-poultry cooked meats market has declined from [50-55]% in 2005 to [45-50]% in 2007. Private label non-poultry cooked meats are not considered by retailers to be a sufficiently close competitor to Kerry or Breeo;
- There are no credible alternative brands in the non-poultry cooked meats market that will enable retailers to credibly threaten to discipline the merged entity from raising prices post-acquisition;
- New entrants will be unable to establish a sufficiently strong presence in the non-poultry cooked meats market within a two-year period such that they will be able to constrain the merged entity from raising prices post-acquisition; and,
- Retailers do not have sufficient countervailing buyer power to enable them to credibly threaten to discipline the merged entity post-acquisition because (a) there are no credible alternative branded non-poultry cooked meats suppliers,

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122 M/08/009 – *Proposed acquisition of Kerry Group plc of Breeo Foods Limited and Breeo brands Limited.* (*Kerry/Breeo*).

123 *Rye Investments v the Competition Authority* [2009] IEHC 140. (*Rye Investments v Competition Authority*). It should be noted that there was a Supreme Court preliminary decision concerning the nature of submissions made to the Court by the Competition Authority and Rye Investments. For details see *Rye Investments v Competition Authority* [2012] IESC 52.

124 https://www.ccpc.ie/business/m08009-kerry-breeo-update/. The CCPC had been unsuccessful in persuading the Supreme Court to grant a priority hearing.

> (b) entry of branded non-poultry cooked meats will not be sufficient within a two-year period, and (c) private label non-poultry cooked meats are not considered a sufficiently close competitor in the market and, thus, could not be used to replace the merged entity's non-poultry cooked meats offering."[125]

Similar findings were made with respect to rashers, a breakfast meat,[126] and processed cheese.[127] Thus the critical issue was whether or not the retailers have sufficient countervailing buyer power to defeat any post-merger price increase in these markets.

Attention is confined here to the Court's treatment of countervailing buyer power with respect to non-poultry cooked meats and rashers. In the case of processed cheese, the Court did not deal with the issue of countervailing buyer power. This reflected the fact that the Court, correctly, raised concerns over the CCPC's treatment of market definition.[128] While, for example, the CCPC argued that processed cheese was a separate market in some of the CCPC's analysis the processed cheese market was sub-divided into three segments a conclusion that, in the Court's view, generated "ambiguity and lack of coherence."[129]

7.3. Standard of Review

The High Court accords the CCPC's merger analysis curial deference comparable to the margin of appreciation or margin of discretion that the CJEU does with respect to the European Commission.[130] In this respect the Court states in *Rye Investments v Competition Authority*:

> "5.17 Although the scope of an appeal under s. 24 [of the Competition Act 2002] is wider than that of the review procedure of the European Courts under Article 230 EC (those courts cannot substitute their views on the merits,) the Court considers that a standard of review for the purposes of s. 24 of the Act based upon the formulation expressed by Keane C.J. in the *Orange* case and adopted by Finnegan P. in *Ulster Investment Funds Ltd.* is consistent with the standard of review applied to analogous decisions of the European Commission by the European Court of Justice and the European Court of First Instance.
>
> 5.18 The concept referred to in the Common Law jurisdictions as 'curial deference' is reflected in the jurisprudence of the Community Courts in the recognition of a 'margin of appreciation' or 'margin of discretion' accorded to the European Commission in its appraisal of the complex economic situations that arise in the application of both competition rules and the provisions of the Merger Regulation."

125 *Kerry/Breeo,* para. 6.166.

126 *Kerry/Breeo*, para. 5.96.

127 *Kerry/Breeo*, para. 8.114.

128 *Rye Investments v Competition Authority*, paras. 7.1-7.23.

129 *Rye Investments v Competition Authority*, para. 7.7.

130 *Rye Investments v Competition Authority*, paras. 5.3-5.21.

The Court, after citing CJEU case law sets, sets out its standard for review in the context of the CCPC's *Kerry/Breeo* determination:

> "5.20 Accordingly, in a case such as the present, where primary findings of fact have not been put in issue, the Court considers that a determination by the … [CCPC] that a merger or acquisition will result in a substantial lessening of competition ought not to be set aside by this Court unless:
>
> (a) The … [CCPC] is shown to have committed a serious error in drawing inferences or conclusions from facts, such that the inferences or conclusions become untenable or unsound by reason of the error having been made; or
>
> (b) It is demonstrated that the … [CCPC] has failed to take into consideration or adequately to consider, relevant information or data such that an inference or conclusion material to the determination is unsupported by or is rendered inconsistent with the clear force and effect of the available evidence taken as a whole; or
>
> (c) A significant appraisal of economic or technical factors material to the functioning of competition in the relevant market is shown to be so inconsistent with the available evidence as to be manifestly unreasonable and unsound; or
>
> (d) The … [CCPC's] statement of its reasons for reaching conclusions material to the basis of the determination is lacking in cogency or coherence or is contradicted by the evidence which was available to it; or
>
> (e) The … [CCPC] has made a material error of law either in the construction and application of the Act or by otherwise infringing some applicable principle of constitutional or natural justice.
>
> 5.21 In other words, where the ... [CCPC] has, without committing significant error, exercised its specialist expertise in making judgments as to the prospective consequences of the economic and commercial factors which govern or influence competition in the relevant market, this Court should not intervene even if it is demonstrated that an opposite conclusion might plausibly have been reached by placing weight on different aspects of the available evidence or data or by attributing different or greater significance to other pertinent factors in the economic assessment. Nevertheless, the Court will be entitled and obliged to intervene to set aside a material economic conclusion if it is shown to be incorrect because it is unsupported by or inconsistent with the clear effect of the evidence, information or data upon which it is based."

7.4. Assessment

In a number of instances the Court accepts the CCPC's assessment even though the CCPC might have taken, in the Court's view, the "most favourable view of the information at its disposal, the Court does not consider that it [i.e. the CCPC] has gone beyond the margin of judgment which it is accorded in such matters and has not

committed any obvious or significant error of assessment of the material before it."[131] For example, the Court accepted the CCPC's conclusion that cooked meats could be divided into two separate product markets: poultry cooked meats; and non-poultry cooked meats.[132] However, in a number of important, indeed critical instances, the Court decided that the CCPC had gone beyond the margin of judgment and made a significant error.[133]

The merging parties submitted documents (e.g. letters from retailers) allegedly demonstrating that retailers had exercised countervailing buyer power which the CCPC had discounted for a variety of grounds. The Court took the view that these were examples of direct evidence of the manifestation of buyer power. This documentation together with the Court's interpretation was one of the main grounds for concluding there was countervailing buyer power sufficient to defeat any post-merger price rise and hence there was no SLC. The Court found that the CCPC "had failed to assess correctly the post-acquisition existence of sufficient countervailing buyer power on the part of the retailers such as will deter a price increase imposed by the merged entity."[134] The CCPC prohibition was thus annulled.

Tesco, a major retailer, had threatened to delist 23 Breeo breakfast meats stock keeping units (SKU) unless it received an improved margin.[135] The Court's view of the letter is as follows:

> "9.58 The significance of the example is that it is direct evidence of pre-acquisition exercise of buyer power and if such a tactic can be employed pre-acquisition in order to obtain an improvement in margin by a retailer there is no reason for supposing that it might not be equally exercised post-merger in order to deter a price increase. It is true that, post-acquisition, Tesco would be dealing with a single undertaking as owner of both leading brands, but the 'must have' character attaches to the brand and not to ownership of the business."

Was this an example of countervailing buyer power as the Court claimed? Several points should be noted in this context.

First, the Tesco letter was dated 15 August 2008; the merger was notified to the CCPC on 20 March 2008. The CCPC took the view that little weight should be given to the letter since such evidence "may be influenced or impacted by the position taken by the players in the market about the proposed merger."[136] Such a view is consistent with the International Competition Network advice on drawing reliable inferences from documents and the experience of US courts in considering evidence where the merger

131 *Rye Investments v Competition Authority*, para. 8.21.

132 *Rye Investments v Competition Authority*, para. 8.25.

133 The section draws heavily on Gorecki, "The Kerry/Breeo Merger: Two Views of Countervailing Buyer Power – the Competition Authority and the High Court" (2009) (5) 2 *European Competition Journal*, pp. 585-612 (Gorecki, Kerry/Breeo). This paper provides much more extensive argumentation.

134 *Rye Investments v Competition Authority*, para. 11.1.

135 This is used an illustrative example.

136 *Kerry/Breeo*, para. 2.63.

that is being challenged has already been consummated. However, the Court stated that there was no evidence that the threat in the Tesco letter was in any way influenced by the CCPC merger assessment process.[137]

Second, the Tesco letter was received by the CCPC on 15 August 2008 along with the Written Response of the parties to the equivalent of the Statement of Objections under EU merger control. The final CCPC written determination had to be completed by 28 August 2008. In such a short time it was not possible for the CCPC to ascertain whether or not: (i) the incentives created by the CCPC merger assessment process had influenced the generation of the Tesco letter as evidence supporting the countervailing buyer theory; and/or (ii) whether the threat to delist had a sound business justification such as the fact the 23 SKUs had lower than anticipated sales, thus requiring a compensating margin increase if Tesco was to continue to use the shelf space for these SKUs.[138] Hence it is no surprise that there is no evidence that the Tesco letter was influenced by the merger review process.

Third, accepting the threat at face value, as the Court does, is the inference in the sentence – "It is true that, post-acquisition, Tesco would be dealing with a single undertaking as owner of both leading brands, but the 'must have' character attaches to the brand and not to ownership of the business" – correct? Pre-merger retailers such as Tesco could play off Kerry and Breeo against each other by credibly threatening to delist the breakfast meats SKUs of one of these undertakings. The evidence suggested that Kerry and Breeo were each other's closest substitutes and both were so-called 'must have' brands. Hence pre-merger it would be unprofitable for Kerry (Breeo) to increase the price of their breakfast meats since enough consumers would likely switch to Breeo (Kerry) breakfast meats.

Post-merger, of course, the Tesco or any other retailer could still threaten to delist a Breeo (Kerry) SKU and consumers would switch to the Kerry (Breeo) SKU as in the pre-merger situation. However, post-merger all these SKUs would be owned by the merged entity. In other words, pre-merger sales would be diverted to Kerry, but post-merger the sales are diverted within the merged entity. The externality has been internalised. It would thus be more profitable post-merger for the merged entity to raise price and there would be an SLC.

In sum, the threat to delist is much less effective post-merger. The Court by stating that the "'must have' character attaches to the brand and not to ownership of the business" while correct misses the point concerning pre and post-merger exercise of countervailing buyer power.

7.5. Commentary

The fourth criterion was: Did the Courts show appropriate curial deference to the CCPC in merger appeals? While the High Court in the Kerry/Breeo merger sets a reasonable

[137] *Rye Investments v the Competition Authority,* para. 9.57.

[138] In cases where similar allegations had been made and the CCPC had time to investigate the claims of countervailing buyer power these were dismissed by the CCPC as unfounded, a judgment accepted by the Court. See, for example, Gorecki, Kerry/Breeo, pp. 599-600.

standard for reviewing the merger determinations of the CCPC, it did not consistently apply the standard. In concluding that the CCPC had a made a significant error with respect to the weight it gave certain evidence, it is argued that the Court erred as did its interpretation of that evidence as a manifestation of buyer power. It is argued that the CCPC advanced plausible arguments consistent with the Court's standard of review. If this view is accepted then an anti-competitive merger was cleared by the Court; consumers, as a result, are worst off.

8. CONCLUSION

8.1. Introduction

In the Introduction five criteria were set out for evaluating whether or not the Courts in Ireland had provided efficient and effective oversight, review and guidance on the administration, enforcement and interpretation of competition law:

- Did the Courts articulate a clear objective for competition policy?
- Did the Courts set out a coherent criminal cartel sentencing policy?
- Did the Courts set out a credible analysis of competition issues in civil cases?
- Did the Courts show appropriate curial deference to the CCPC in merger appeals?
- Were the Courts' judgments consistent with European Court jurisprudence?

Section 8.2 addresses the degree to which these criteria have been satisfied, Section 8.3 considers the wider implications while Section 8.4 explores what can be done to better realise the consumer welfare objective of the Courts. Section 8.5 concludes.

8.2. Are the Criteria Satisfied?

There can be little doubt that Irish Courts have articulated a clear objective of competition law in terms of promoting consumer welfare. It was stated explicitly by the Supreme Court in the 2007 *ILCU* judgment. The Courts have condemned cartels in the strongest terms as deleterious to consumer welfare. Consumer welfare is a widely shared objective of competition law. The CCPC uses the consumer welfare standard when interpreting the statutory SLC test for mergers. The EU and US also use this standard in competition law.

Notwithstanding such a clear and unequivocal endorsement of the consumer welfare standard, the Courts have consistently failed to uphold that standard in criminal cartel cases, civil cases and merger review. The Courts have provided no coherent criminal cartel sentencing policy. It was expected that the newly created Court of Appeal would provide such guidance, but it declined to do so in the commercial flooring case. There is a lack of predictability. After the *Duffy* judgment it was widely anticipated that a custodial sentence would be imposed on the next convicted cartelist. However, in the commercial flooring case there was no gaol sentence, custodial or suspended, nor was there any explanation or justification for this absence by the Court.

Despite the lack of a criminal cartel sentencing policy set out by the Courts, it may nevertheless be the case that the actual sanctions imposed by the Courts are consistent

with the consumer welfare standard. This is not, however, the case. The EU and the US have sentencing guidelines firmly grounded in the consumer welfare standard, while at the same considering aggravating and mitigating factors. When these guidelines – which are consistent with the general methodological approach set out in the *Duffy* judgment - are applied to the facts of the CDA and commercial flooring cases, the fines the Irish Courts should have imposed should be in the €millions not €thousands, custodial sentences varying from 10 to 46 months, not suspended or none.

Turning to civil cases the outlook is as bleak. The High Court's view that the BIDS arrangements were not a by object anti competitive agreement was overturned by the ECJ. In other words, had the ECJ not been involved a by object anticompetitive agreement amongst competitors would have been cleared by the High Court. In the *ILCU* case consumers were denied the benefit of competition in the credit union representation market by a judgment that erred in fact and applied an overly restrictive and narrow test to determine whether or not two products are separate. Finally, in *Panda Waste* the Court denied consumers of household waste services in the Dublin region the benefits of competitive tendering by misapplying CJEU jurisprudence in the regulatory/competition interface, using an inappropriate counterfactual when considering whether or not competitive tendering is a by object breach of competition law and finding that a local council was dominant and had abused that position in the collection of household waste despite the fact a competitor had in the space of two years increased its market share from zero to 50 per cent, on its entry the local authority had frozen its household waste collection charges and that the local authority encouraged the entrant rather than use any regulatory power it might have to had to deter or restrict entry.

While the Court set out an appropriate standard for reviewing merger determinations in some important respects it did not follow its own test in *Kerry/Breeo.* As a result, an arguably anticompetitive merger was cleared. Consumers of rashers and non-poultry cooked meats are paying higher prices than would otherwise be the case.

In sum there is a profound disconnect between the valid consumer welfare objective of the competition articulated by the Courts and its application in sentencing in criminal cartel cases, competition analysis in civil cases and reviewing CCPC merger determinations on the merits. This disconnect results in a failure to maximize consumer welfare with the tools available to the Courts.

8.3. Implications

A rational cartelist will compare the benefits of a cartel – higher prices, higher profits, a quiet life, better relationships with competitors – with the costs if detected and successfully prosecuted – a Court imposed sanction, reputational damage. If the sanctions are set correctly, they act as a deterrent by offsetting the benefits to the cartelist. Furthermore, appropriately set sanctions also provide the correct incentives for the cartelists to avail of the CIP, a vital tool in the detection of what are usually secret arrangements to fix prices, allocate customers and so on. The Court-imposed sanctions in cartel cases in Ireland fall well short of those required to act as a deterrent. Indeed,

they are closer to what a Canadian judge referred to a "periodic licensing of illegality."[139] The CIP will be underutilised.

There may be further adverse impacts of the failure to impose appropriate sanctions in cartel cases in terms of negative feedback on CCPC cartel investigations. The CCPC has both a consumer as well as competition mandate. The effort required to bring a successful cartel case is substantial; the result less than satisfactory in terms of the sanction. Hence, at the margin, the CCPC may decide quite rationally to devote fewer resources to criminal cartel competition law enforcement and more (say) to consumer law criminal enforcement (e.g. car clocking). It is, of course, impossible to test this hypothesis in a rigorous manner. Nevertheless, it is the case that apart from the commercial flooring case, there have been no criminal cartel cases since the CDA case in 2007; the CCPC organises its consumer and competition criminal enforcement activities in one division so resources can be easily switched from cartel to consumer criminal enforcement; and, although in the past twelve months the CCPC has reported unannounced inspections with respect to consumer law, it has reported none with respect to cartels.[140]

Turning to civil enforcement, the Courts have not been receptive to the CCPC's competition analysis and theories of consumer harm. If the *BIDS* judgment had not been overturned by the ECJ both the major civil cases taken by the CCPC would have been lost. Furthermore there seems to be an inconsistent attitude by the Courts to State intervention: in the *BIDS* case the Court approved of a State-sponsored scheme to reduce capacity, which had no legal basis; while in the *Panda Waste* case where the State (i.e. the local authority) had a clear legislative basis for the regulatory measures it took, the Court nevertheless, by misapplying CJEU case law, decided otherwise. Such considerations are likely to deter the CCPC (and the private sector) from taking more difficult cases or those involving novel theories of consumer harm to the Courts for resolution.

The record of *Kerry/Breeo* suggests that Courts are quite willing to overturn a determination of the CCPC and replace it with their own judgment, even though arguably this is inconsistent with the Court's own standard of review. In part because of the delay in the matter coming before the Supreme Court, the CCPC abandoned its appeal against the High Court judgment annulling its prohibition of the *Kerry/Breeo* merger. The CCPC is thus likely to think long and hard before prohibiting a merger. Conditions and commitments are more likely to be accepted where a prohibition might have been seriously considered as the appropriate option.

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[139] This phrase was used in a Canadian competition law judgment in 1956 in describing the enforcement by conviction and fines. For further details see Stanbury, "Penalties and Remedies Under the *Combines Investigation Act* 1889-1976" (1976) (14) 3 *Osgoode Hall Law Journal*, p. 572. https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2152&context=ohlj.

[140] Based on an examination of CCPC news and press releases over the period 1 October 2018 to 1 October 2019. There were two CCPC press releases concerning consumer criminal inspections: "CCPC Undertakes Unannounced Inspections of Dublin Car Traders," 10 September 2019; and, "CCPC Undertakes Unannounced Product Safety Inspections if Galway Business," 3 September 2019. For details see: https://www.ccpc.ie/business/news/current-news/.

Again, it is difficult to test this hypothesis in a rigorous way. However, it is the case that between 2003 and 2008 the CCPC prohibited three mergers, while between 2009 and the present, not one merger has been prohibited by the CCPC under the merger provisions of the Competition Act 2002.[141] It may be, however, notwithstanding the *Kerry/Breeo* appeal, that the CCPC had during 2003-2008 established a credible track record of merger enforcement that meant undertakings and their legal advisers were aware of when a merger would likely be prohibited by the CCPC due to an SLC and acted accordingly.[142]

In terms of conditions/commitments there has been a recent increase in the number of mergers cleared with conditions/commitments:[143] one in 2015;[144] two in 2016;[145] four in 2017;[146] and eight in 2018.[147] Some law firms have commented on the increased use of conditions/commitments to clear mergers in Ireland.[148] Notwithstanding this apparent trend, the annual average number of mergers cleared by the CCPC with conditions/commitments remained unchanged at two comparing 2003-2009 with 2010-2018. In some of the post-2009 merger determinations the conditions/commitments are clearly justified,[149] while in others the conditions/commitments are redundant[150] and/or else there is no adequate theory of harm that would justify the conditions/commitments.[151]

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141 However, as noted in Section 7.1, in the case of a non-notifiable merger involving the only two Irish-based wholesalers of new books in Ireland, the CCPC was concerned the proposed merger would lead to an increase in prices to consumers. As a result, the CCPC decided to bring proceedings under s.4 of the Competition Act 2002, which prohibits agreements that prevent, restrict or distort competition. On learning of these proceedings, the merger was abandoned.

142 i.e. only notify a merger that is likely to lead to an SLC where a suitable remedy acceptable to both the CCPC and the parties is available.

143 These numbers are derived by considering the outcome of all mergers notified to the CCPC each year, irrespective of whether the CCPC made a determination in that or in a subsequent year.

144 M/15/020 – *Topaz/Esso*.

145 M/16/008 – *PandaGreen/Greenstar*; and, M/16/040 – *Bon Secours/Barringtons Hospital*.

146 M/07/012 – *Kantar Media (WPP)/Newsaccess*; M/17/017 – *Dalata/Clarion Liffey Valley/Clayton Cardiff Lane*; M/17/021 – *Petrogas (Applegreen)/ 50% interest in the JFT*; and, M/17/036 – *Sean Loughnane/Crinkle*.

147 M/18/009 – *BWG/4 Aces*; M/18/016 – *Trinity Mirror/Northern & Shell*; M/18/031 – *Uniphar/SISK Healthcare*; M/18/036 – *Enva/Rilta*; M/18/042 – *Oaktree/Alanis Capital/Lioncor JV*; M/18/053 – *Pandagreen/Knockcharley Landfill and Natureford*; M/18/063 – *Berendsen (Elis)/Kings Laundry*; and, M/18/067 – *LN Gaiety/MCD Productions*.

148 See, for example, McCann, Head EU, Competition and Procurement, Beauchamps, who remarked on 17 July 2019, that the CCPC "has increasingly cleared mergers subject to commitments." For details see: https://beauchamps.ie/publications/748.

149 See, for example, M/15/020 – *Topaz/Esso*.

150 In, for example, M/17/021 – *Petrogas (Applegreen)/50% interest in the JFT,* the behavioural conditions/commitments are redundant. For discussion see Gorecki, "The Competition and Consumer Protection Commission of Ireland clears the acquisition subject to a number of structural remedies in the fuel sector (*Topaz/Esso*)" e-Competitions, 15 October 2015. For details see: https://www.concurrences.com/en/bulletin/news-issues/october-2015/the-irish-competition-and-consumer-protection-commission-clears-subject-to.

151 In, for example, M/16/040 – *Bon Secours/Barringtons Hospital,* no credible theory of harm is presented by the CCPC, while the behavioural remedies do not appear to have any practical effect in terms of protecting competition. The CCPC analysis suggests that due to the impact of countervailing buyer power of the private health insurers combined with the presence a competitor that the merged entity would be unable to raise price.

In some instances, however, given the shortcomings in the conditions/commitments in addressing the CCPC's competition concerns, arguably prohibition would have been a better option.[152] In the *Berendsen (Elis)/Kings Laundry* transaction, for example, the CCPC cleared the merger on 8 July 2019 on condition that Berendsen (Elis) divest itself of three hospital flat linen contracts; an entrant from an adjacent market purchased the contracts on 7 July 2020.[153] The CCPC made a compelling case that the three to two merger in the outsourced supply of flat linen rental and maintenance services to healthcare customers such as hospitals would lead to an SLC.[154] But based on the CCPC's analysis of existing and potential (i.e. entry and/or expansion) competitors suggested that the purchaser's entry would not meet all three cumulative conditions for entry to mitigate the CCPC's competition concerns. Given the fix-it-first nature of the remedy, however, entry was likely and timely. Preliminary ex post analysis of the merger suggests that entry is unlikely to be sufficient.[155] In other words, despite the conditions attached to the *Berendsen (Elis)/Kings Laundry* merger, prohibition would have been a better option.

8.4. What Can Be Done?

8.4.1. Introduction

There are a number of measures that can be taken to ensure that the outcome of the investigation, enforcement and judicial decision-making is more closely aligned with the widely shared objective of maximizing consumer welfare. These measures need to be taken not only by the Courts, but also by the CCPC and the DPP. There may also be a role for the EU. Many of the measures require no legislative or other major change and can be accommodated within existing structures and resources.

8.4.2. Transparency and Accountability: Letting the Light In

To understand the rationale, background and arguments made in a competition case, whether criminal or civil, requires more than just the verdict, which is often all that is available in a criminal cartel case before the Central Criminal Court. Justice needs to be not only done but seen to be done. Without easy access to a wider set of Court related

For discussion see, Gorecki, "The Irish Competition Authority clears a merger subject to two behavioural remedies in the private technologically advanced hospitals market (Bon Secours/Barringtons)" e-Competitions, December 2016. For details see: https://www.concurrences.com/en/bulletin/news-issues/december-2016/the-irish-competition-authority-clears-a-merger-acquiring-sole-control-of-an-en.

[152] These instances include: M/17/012 – *Kantar Media (WPP)/Newsaccess, (*see Gorecki, *A Change in Direction for Merger Control in Ireland: An Ex Ante/Ex Post Case Study Evaluation.* MPRA Paper 108743 (2021)); M/18/036 – *Enva/Rilta* (see Gorecki, "Proposals to Reform Non-Notifiable Mergers in Ireland: A Step in the Right Direction? (2021) 42 (9), *European Competition Law Review,* p. 492); and M/18/0663 - *Berendsen (Elis)/Kings Laundry* (see Gorecki, "Procedural Versus Competition Perspectives on Recent CCPC Merger Remedies: the Berendsen (Elis)/Kings Laundry Transaction" (2020) 19 (3), *Competition Law Journal,* pp. 128-135). The discussion of the Berendsen (Elis)/Kings Laundry transaction is largely based on the latter source.

[153] It should be noted that on 28 March 2018 in M/18/063 – *Berendsen (Elis)/Kings Laundry* the CCPC issued an Assessment (a Statement of Objections in European Commission parlance). Prior to that date the previous issuing of an Assessment by the CCPC was on 25 July 2008 in M/08/009 – *Kerry/Breeo.*

[154] The CCPC's analysis of unilateral effects in the healthcare market is summarised at M/18/0663 - *Berendsen (Elis)/Kings Laundry,* para. 4.378.

[155] The author's preliminary analysis is in process.

materials it is not possible to understand how and why the Court made its judgment. Comment and discussion, in part designed to lead to better future judgments, is stifled if not impossible. The EU and US sentencing guidelines provide a framework within which sanctions can be set while at the same time considering the specific circumstances of a case.

The issue is thus what should be released and how. Clearly there has to be a balance between costs and benefits. However, as noted in Section III, newer administrative bodies in Ireland with economic decision making powers frequently release substantial material relating to their decisions, while Courts in other jurisdictions dealing with competition issues also release considerable ancillary documentation. This suggests that it is quite feasible to issue more than the verdict in a criminal cartel case and the judgment in a civil case.

At a minimum it is proposed that the following is made available: for all criminal cartel cases the transcripts as well as the written submissions of both the DPP and the defence; and, similarly for civil cases, in addition to the judgments the transcripts of the case together with the written submissions of both the CCPC (or the private party bringing the case) and the defence. In the case of civil cases such material could be made available by amending *The Rules of the Superior Courts (Competition Proceedings) 2005* referred to in Sections II and III; in criminal proceeding presumably the issuance of Practice Directions similar to that issued by the Supreme Court with respect to written submissions referred to in Section III. All this material should be posted on the Courts' website.

8.4.3. Criminal Cartel Cases: Better Information/Sentencing Guidelines

Under s. 11 of the Competition Act 2002 cartel criminal prosecutions on indictment shall be tried by the Central Criminal Court. This Court, however, typically tries serious crime such as murder, rape, treason and piracy (Figure 1). Prosecutions under competition law are few and far between before this Court. The commercial flooring case, which the Central Criminal Court tried in 2017, was the only such case since the *Duffy* judgment delivered in March 2009. In other words, over the decade 2009-2019 the Central Criminal Court tried one criminal cartel case. There is no institutional memory; a different judge was involved in the *Duffy* judgment and the commercial flooring cases.

Under these circumstances there is a strong argument that in the commercial flooring case – the only criminal cartel case before the Central Criminal Court where we have a copy of the transcripts concerning the sentencing – that the DPP should have set out the key factors to be considered in sentencing Brendan Smith and Aston Carpets. Since both the defence and prosecution agreed that the *Duffy* judgment was the point of departure, the DPP might have stressed the *Duffy* judgment's view: that the next cartelist to be convicted almost certainly should go to gaol; the importance of general deterrence in such cases; the pernicious nature of cartels in terms of damaging consumers; and so on. Furthermore if, as was the case, the defence argued in mitigation that the commercial flooring case was not really a cartel, the DPP could have convincingly argued that the commercial flooring cartel bore all the hallmarks of a classic cartel. An examination of the transcripts of the commercial flooring case reveals that the DPP did none of these things. Rather the DPP said that the judge should read the *Duffy* judgment without any

commentary and did not rebut the plea in mitigation characterising the commercial flooring cartel as not really a cartel.

On the question of proposing a sentence, as noted in Section 5.2, the DPP is reluctant to make a recommendation unless the Court of Criminal Appeal or the Court of Appeal has given guidance which in the case of cartels it has failed to do. The DPP's position is based in part on a number of Court judgments. In *DPP v Z,* for example, the Court of Criminal Appeal stated that:

> "In this Court's view, there is now an obligation on the prosecution to draw to the attention of a sentencing judge any guidance, whether arising from an analysis carried out by this Court or from ISIS [Irish Sentencing Information System] or otherwise, which touches on the ranges or bands of sentences which may be considered appropriate to any offence under consideration and the factors which are properly, at least in ordinary cases, to be taken into account. In many cases, this should not impose any significant burden on the prosecution for the sources ought be easily recognised. In addition, it seems to this Court that it is incumbent on the prosecution to suggest, where such guidance is available, where the offence under consideration fits into the scheme of sentencing identified and why that is said to be the case. Finally, the prosecution should indicate the extent to which it is accepted that factors urged in mitigation by the defence are appropriate and give at least a broad indication of the adjustment, if any, in the overall sentence which it is accepted ought to be considered appropriate in the light of such mitigation."[156]

This, it would seem, however, provides ample opportunity for the DPP to bring to the attention of the Court many of the factors identified in the EU and US sentencing guidelines as being relevant in assessing the appropriate sanction for the individual and the undertaking in a cartel case.[157] Indeed, one interpretation of this passage would suggest that explicit reference to the application to the guidelines to facts of the cartel case before the Courts is permissible, since it is consistent with the general approach to setting sanctions outlined in the *Duffy* judgment referred to in Section 5.3. Finally, the discussion of mitigation provides ample opportunity for the DPP in a cartel case to argue the importance of general deterrence in sentencing when considering pleas in mitigation.

Although the Court of Appeal failed to provide guidance on sanctions in the commercial flooring case recent legislative developments suggest that there are other avenues through which such guidance might be furnished. The Judicial Council Act 2019 contains under s. 23 provisions for a Sentencing Guidelines and Information Committee which will have the power to prepare and submit sentencing guidelines for approval by the Judicial Council. However, it is unlikely that criminal cartel sentencing will be a high priority given the lack of guidelines across many aspects of criminal law.

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[156] *DPP v Z* [2014] IECCA 13, para, 2.7. This judgment was made before the sentencing in the commercial flooring case.

[157] For further discussion of this judgment see: O'Malley, *The Role of the Prosecution at Sentencing in the Aftermath of People (DPP) v Z (2014)*. Paper presented to the 15th Annual National Prosecutors' Conference, 23 October 2014. https://www.dppireland.ie/app/uploads/2014/10/PAPER_-_Tom_OMalley_BL_-_2014.10.18.pdf.

8.4.4. Civil Cases: Better Competition Analysis

Civil competition cases initiated by the CCPC, like criminal cartel cases, are comparatively infrequent. Over the decade 2009 to 2019 apart from the CCPC's appeal in the *Kerry/Breeo* merger, the High Court did not have to opine on any civil competition case taken by the CCPC. In one case in which the CCPC did initiate legal proceeding - against the Irish Medical Organisation - a settlement was reached.[158] Furthermore in the important civil competition cases cited in this paper – *BIDS*, the *ILCU* and *Panda Waste* as well as *Kerry/Breeo* – there are good grounds for arguing that there were shortcomings in the Irish Courts' analysis. In the case of the BIDS case of course, this led to the High Court finding being overturned. In the other cases, the CJEU was not involved since it was argued that trade between Member States was not affected.

The question of better analysis can be addressed in at least two possible ways. First, the Courts in smaller Member States operating the judicial model for the application of competition law - such as Ireland - with a low volume of civil competition cases are unlikely to be able to develop and sustain the analytical capability of dealing with competition cases. It is not a good use of the Member State's judicial resources. In contrast, the CJEU, as argued in Section I, has developed and can sustain such a capability. Hence it may be possible to develop a branch of the CJEU – perhaps as a kind of EU Circuit Court – that could decide such civil competition cases as the court of first instance in those Member States adhering to the judicial model. Member States would have the discretion to opt into such a system.

A second option is to change the model of the application of competition law in civil cases in Ireland to the administrative model. Under this model the CCPC, like many of its sister competition agencies in the EU, would have the power to make findings concerning whether or not competition law had been breached as well as setting appropriate level of fines. Although the CCPC might take few civil cases to Court, it nevertheless investigates alleged civil breaches of competition law, reaches settlements with undertakings as well as conducting complex competition economic analysis in merger determinations.[159] Thus, the CCPC is likely to have developed and sustained the analytical capability of dealing with competition cases. Furthermore, in setting fines the CCPC would be guided by the EU sentencing guidelines.

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[158] For details see: https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/irish-medical-organisation-price-fixing/

[159] In relation to merger determinations the CCPC is the initial decision maker. In view of the discussion in Section 8.3 in relation to the implications of the *Kerry/Breeo* High Court decision and that under the Competition Act 2002 only the merging parties can appeal a CCPC merger determination, in cases where the CCPC accepts a divestiture remedy it should publish a separate implementation decision setting out why the purchaser of the divested assets, be they trade marks, contracts, a business and so on, meet the criterion of being a suitable purchaser. These criteria are set out in the European Commission's *Remedies Notice* (European Commission, 2008, *Commission Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and Under Council Regulation (EC) No 802/2004*, 2008/C 267/01. (EC, *Remedies Notice*). For an example of an implementation decision evaluating the suitability of a purchaser see European Commission, M.7278 – *General Electric/Alstom (Thermal-Renewable Power Grid Business) Decision on the implementation of remedies - Purchaser approval*, 22 October 2015. https://ec.europa.eu/competition/mergers/cases/decisions/m7278_6893_3.pdf.

A recently enacted Directive holds out the possibility of the administrative model being applied to the competition law in Ireland with respect to non-hard core cartels and abuse of a dominant position. The Directive in question, the ECN+ Directive,[160] has to be transposed into Member State law. The ECN+ Directive contains a number of measures relating to national competition agencies including independence, funding, powers, leniency and fines. In the case of Ireland, the important issue is whether or not the CCPC or the Courts are designated as having the power to administer fines in cases that breach EU competition law. The CCPC is of the view that not only should it be designated with the power to administer fines in such cases, but also that the new enforcement regime should also apply to breaches of Irish competition law.[161] If the CCPC were given this power then it would imply also that it would have the power to determine whether or not a breach of competition law had occurred. As yet the draft legislation transposing the ECN+ Directive into law has not been published.

8.4.5. More Criminal Prosecutions and Civil Cases

The Courts cannot make decisions on criminal and/or civil cases without the CCPC (and to a lesser extent private parties) bringing cases before it. As noted in Sections 8.4.3 and 8.4.4 there have been a dearth of criminal and civil cases in the past ten years, especially when compared to the 2000-2008 period. Between 2015 and 2020, for example, the CCPC referred only one criminal cartel case to the DPP.[162] Hence the CCPC needs to pursue such cases with more vigour.

8.5. Conclusion

Under Ireland's judicial model of the application of competition law the Courts play a particularly critical role in providing oversight, review and guidance to competition law enforcers, legal advisors, businesses and consumers. The Courts have articulated a clear and unequivocal objective for competition law: consumer welfare. There are no 'ifs' or 'buts'. However, there is a significant disconnect between this objective and Courts performance in addressing substantive competition law issues.

A variety of measures many of which are in train and/or do not require legislative change offer the prospect of securing a more congruent relationship between the consumer welfare objective of competition law and the treatment of substantive competition issues by the Courts. The Judicial Council offers the possibility of the development of coherent guidelines on criminal cartels, while the DPP might – in the meantime - take a more pro-

[160] Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3.

[161] Butler, "ECN+Directive: The Irish Experience," presentation to the Irish Society for European Law, held at McCann FitzGerald, Dublin, 24 January 2019, Slide 5. Butler was the Director of Legal Services and General Counsel to the CCPC.

[162] For 2015-2019, the CCPC's *Annual Report on Competition Policy Developments in Ireland* to the Competition Committee of the Organization for Economic Cooperation and Development. (These reports may be accessed at: https://www.oecd.org/daf/competition/annualreportsbycompetitionagencies.htm). For 2020, CCPC, *Annual Report 2020* (2021). The CCPC case that was referred to the DPP alleged bid-rigging in the procurement of publicly-funded transport services in certain parts of Munster and Leinster.

active stance during sentencing than has been the case heretofore.[163] This, in turn, should have a positive feedback impact on the use of the CIP by undertakings. However, without CCPC criminal cartel investigations and references to the DPP there is no prospect of these developments bearing fruit.

If the government department with responsibility for competition law were to designate the CCPC for the purposes of imposing fines under the ECN+ Directive and extend its provisions to breaches of Irish competition law, this would mark a profound change in the treatment of civil competition cases. Essentially Ireland would move from a judicial to an administrative model for the application of civil competition law. This would no doubt require substantial changes in the structure of the CCPC. However, what it would not do would be to remove entirely the role of the Courts. Presumably decisions from the CCPC would be appealable to the Courts, in much the same way that merger determinations can be appealed today. To ensure as much buy in as possible the CCPC should develop sentencing guidelines preferably adapted from those currently employed by the European Commission.

[163] Sentencing guidelines together with coherent arguments from the DPP as to the appropriate sanction, based on the consumer welfare standard, not only provide a sound framework for judicial decision-making, but also offer a corrective to possible biases in current judicial approaches to setting sanctions. Such bias and other relevant considerations are discussed in, for example, Kahneman, *Thinking, Fast and Slow* (2011) and Stafford, "Bias in Decision-Making" (2017), Tribunals Journal, pp. 19-21