
Briefing

The Competition (Amendment) Act 2022: A New Administrative Enforcement Regime for Competition Law



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The long-awaited commencement of the Competition (Amendment) Act 2022 (the “**2022 Act**”) on 27 September 2023 has brought about a fundamental change to the enforcement of Irish competition law. The 2022 Act gives effect to Directive (EU) 2019/1 (the “**ECN+ Directive**”) and for the first time allows the Competition and Consumer Protection Commission (“**CCPC**”) to sanction anti-competitive behaviour itself.

This briefing, which is the second in our series discussing the 2022 Act, focuses on the introduction of a new administrative enforcement regime for breaches of Irish competition law. This will operate alongside the existing judicial enforcement regime.

The new administrative regime will bring Ireland in line with the majority of other EU Member States, where competition law authorities have long had the power to impose administrative fines. That said, the regime has certain particularities, such as the requirement for Court blessing of administrative fines and the need for fining decisions to be taken by independent Adjudication Officers (“**AOs**”), which are explained by the requirements of the Irish constitution. It is likely the most significant reform since the adoption of Ireland's first competition law, the Competition Act 1991.

The CCPC has issued a suite of new guidance documents to cater for the administrative regime, which can be found on its [website](#).

This briefing will discuss the main features of the new regime, and what it will mean for companies operating in Ireland.

Overview of the New Administrative Enforcement Regime

Until now, to obtain sanctions for a breach of competition law, the CCPC was required to either:

- a *bring civil proceedings* (where the outcomes were limited to declarations, remedial Court orders or injunctions),
- b *bring criminal proceedings on a summary basis* (where the CCPC could only obtain small fines or short terms of imprisonment), or
- c hand the file the Director of Public Prosecutions (the “DPP”) who would decide whether to institute *criminal proceedings on indictment* before the Central Criminal Court.

The requirement to bring a criminal prosecution on indictment to secure a meaningful sanction, and the associated procedural and evidential hurdles, have contributed to the comparatively low enforcement rate of competition law infringements in Ireland.

The 2022 Act now gives the CCPC the power to itself impose significant financial sanctions on companies upon a finding of a breach of competition law. The lower evidential burden for administrative cases (‘balance of probabilities’ as opposed to ‘beyond reasonable doubt’) could mean a substantial increase in competition law enforcement in Ireland.

The new regime is applicable to undertakings only. To obtain fines or imprisonment for individuals, the CCPC and/or DPP will continue to be required to pursue the criminal track.

Adjudication Officers

AOs will play an important role in the new regime, and though they will be functionally independent of the CCPC, the CCPC will nominate a panel of AOs with the final decision of appointment to be taken by the Minister of Enterprise, Trade and Employment. As at the time of writing, AOs have not yet been appointed.

The role of AOs is to make determinations in relation to alleged infringements of competition law, procedural requirements, commitments, structural or behavioural remedies or prohibition notices. AOs will have the same powers as a High Court judge hearing civil proceedings and will be able to: (i) arrange for further written submissions, (ii) request further information from any person, (iii) conduct oral hearings, including summoning witnesses, taking evidence on oath and compelling the production of records.

Procedure

Going forward, where the CCPC forms a preliminary view upon investigation that an undertaking may have “*intentionally, recklessly or negligently*” infringed competition law, it may issue a Statement of Objections (“**SO**”). The SO forms the first step in the initiation of administrative enforcement proceedings and draws inspiration from the equivalent process at EU level.

The power to issue an SO is an alternative to the civil and criminal routes outlined above. The CCPC propose to inform the targets of its investigation of the envisaged enforcement route as early as practicable, though this may be subject to change.

Statement of Objections

Upon receiving an SO, the relevant undertakings will have the opportunity to make written submissions to the CCPC. This also marks the point at which they will be granted access to the file of material relied upon by the CCPC for the purpose of issuing the SO.

Following receipt of the written submissions, the CCPC may refer the matter to an AO, who may then (i) direct a CCPC authorised officer, or one or more of the parties subject to the investigation, to answer questions, adduce evidence or clarify an issue of fact; and/or (ii) conduct an oral hearing. If an oral hearing is conducted, the AO will also have the power to summons a witness(es) to give evidence, including under oath. Non-compliance with an AO’s directions or summons is a criminal offence.

The AO may make a determination in relation to the alleged infringement of competition law and potentially impose administrative fines. To do so, the CCPC must first prepare a full investigation report and the relevant undertaking must be given access to this report, including any material relied upon (in a non-confidential form).

Alternatively, the CCPC may close the investigation without further action, agree legally binding commitments with the relevant undertaking(s) or agree a settlement with the relevant undertaking(s) which is then referred to an AO for confirmation.

Decision by Adjudication Officers

Following a referral, if the AO considers that, on the balance of probabilities, an undertaking has “*intentionally, recklessly or negligently*” breached competition law, the AO will have the power to impose:

- a administrative fines on the relevant undertaking(s);
- b periodic penalty payments on the relevant undertaking(s);
- c structural or behavioural remedies on the relevant undertaking(s), including the sale of a business, assets or property or a requirement to grant specified undertakings access to assets, facilities, technology, infrastructure, information or services.

Importantly, however, a decision by an AO to impose any of the above (including the level of any financial sanction) will not take effect unless confirmed by the High Court. Such confirmation may arise by way of appeal of the AO's decision or, if no appeal is made, by way of application by the CCPC which must be made for this purpose.

Administrative Fines

The CCPC will be able to impose administrative fines of up to a maximum of *€10 million or 10% of an undertaking's worldwide turnover in the preceding financial year* for competition law infringements, as well as financial sanctions for procedural breaches.¹

The introduction of administrative fines is a major change for Irish competition enforcement.

To date, defendant undertakings have faced criminal fines of up to the greater of €5 million or 10% of worldwide turnover. However, the fines imposed by Irish criminal courts have been well below these thresholds. In 25 years of competition law enforcement, companies have been fined a mere €323,000 in total. The highest single fine to date is €80,000, imposed on a Citroen car dealer in 2008 for participation in a price fixing cartel.

When speculating on the impact of the new administrative regime on the level of fines in Ireland, the previous case law is unlikely to provide a meaningful guide. In particular, regulatory fines in Ireland have in general been increasing, with the Data Protection Commission recently imposing a €345 million fine, and the Central Bank of Ireland imposing its highest ever fine in 2022, of just over €100 million.

Administrative Leniency Policy

The CCPC has issued an Administrative Leniency Policy (“ALP”), under which undertakings may apply for immunity or reductions from administrative fines for cartel conduct or resale price maintenance. This which will sit alongside the existing Cartel Immunity Policy (“CIP”), jointly issued by the CCPC and the DPP with respect to the criminal enforcement route.

¹ The CCPC will be able to impose administrative fines of up to the greater of €1 million or 1% of worldwide turnover for breaches of procedural requirements, including, the provision of false, incomplete or misleading information, and periodic penalty payments of up to 5% of average daily total worldwide turnover in order to compel an undertaking to, inter alia, comply with a prohibition notice or to comply with commitments entered into with the CCPC.

Other Outcomes of Administrative Enforcement Proceedings

In addition to administrative financial sanctions, the new regime provides for a number of other possible outcomes of administrative enforcement proceedings.

Commitment Decisions

Under the 2022 Act, undertakings will be able to propose measures to the CCPC to address any suspected or alleged infringement of competition law at any point. Where the CCPC is satisfied that the proposal is capable of being complied with and that it addresses the matters to which the investigation relates, it may agree to the proposal. Commitments will be binding on the parties and for the duration of the commitments, the CCPC will not (i) issue a prohibition notice; (ii) refer the matter to an AO; or (iii) continue any other proceedings except where it has formed a preliminary view that the relevant undertaking has failed to comply with the commitments.

Settlement Decisions

The 2022 Act provides the CCPC with the power to agree a settlement with the relevant undertakings at any point prior to a decision being made by an AO. The settlement may be for a structural or behavioural remedy, or an administrative fine. To avail of a settlement, the relevant undertaking must make a submission acknowledging its responsibility for the infringement.

Prohibition Notices

Under the 2022 Act, the CCPC is also empowered to impose a prohibition notice as a form of interim measure where it suspects that there is a risk of infringement of competition law which will cause irreparable harm to competition.

A prohibition notice may specify measures to be taken by the undertaking, including (i) remedy any suspected infringement of relevant competition law to which the notice relates; (ii) avoid or limit serious and irreparable harm to competition; or (iii) otherwise comply with, or address matters specified in the notice.

Timing considerations

The new Administrative Enforcement Regime became effective from 27 September 2023 and can apply to infringements of competition law which, in whole or in part, took place on or after 4 February 2021. Where an investigation relates to wholly to conduct that took place before 4 February 2021, the new Administrative Enforcement Regime will not be applicable.

What this means for companies operating in Ireland

The changes brought about by the 2022 Act are designed to enable a significant increase in the amount of competition law enforcement in Ireland. Where previously, the benefits of competition compliance programmes may have been muted in a jurisdiction with such low enforcement levels, they will become increasingly important as the administrative regime matures, and the number of cases increases.

Competition compliance programmes not only help to ensure that companies' business operations remain compliant, but also enable early internal detection of any potentially problematic conduct should it nevertheless occur. This is strategically critical as it puts companies in a better position to make an application under the Cartel Immunity Programme and/or the new Administrative Leniency Policy, which will be covered in more detail in the next of our briefing series.

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