

Two Cheers for the Ireland's Competition and Consumer Protection Commission's Action Against Potentially Anti-Competitive Conduct by Private Landlords

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Introduction

With great alacrity Ireland's Competition and Consumer Protection Commission (CCPC) has intervened successfully to hold the Irish Property Owners' Association (IPOA), an association of undertakings, to account for potentially anti-competitive behaviour. Notwithstanding the CCPC's prompt action, its conduct nevertheless raises issues: (i) weak or under enforcement of competition law, given the IPOA's past behaviour; and, (ii) inconsistent application of competition law in the face of collective action by trade associations in the response to Government policy.

The CCPC's Intervention

On 16 December 2016 the IPOA, (founded in 1993 to "protect and promote the interests of private residential property owners and to encourage the supply of good quality accommodation and professional standards of management"),^[1] issued a press statement in reaction to Government legislation capping rent increases to 4% in so-called pressure zones.

According to the IPOA press statement, following a meeting of its members, private landlords are "seriously considering" a series of measures including withdrawing from State sponsored rental schemes and introducing a number of new charges to tenants relating to, for example, service charges, registration fees and car parking fees.^[2]

As the CCPC noted in relation to the IPOA's press statement, competition "law expressly forbids a trade association from co-ordinating the business conduct of its members, including the terms and conditions under which they are prepared to supply a product or service."^[3]

On 19th January 2017, the CCPC and the IPOA signed an Agreement and Undertaking (A&U) under which the IPOA undertook to, amongst other things: "retract the Press Statement" and inform IPOA members; remind IPOA members that rents and charges/fees "are matters for individual landlords

and their tenants;" and, "not to issue recommendations or suggestions to, or otherwise influence decisions of, members of the IPOA or other landlords ... with respect to the setting of rents and charges and/or withdrawal from State-sponsored rental schemes and/or any recommendations that have similar effect."[4]

Weak Enforcement of Competition Law?

Under competition law in Ireland an agreement between the CCPC and a representative or trade association can be memorialized either through:

- an A&U as implemented and described above; or
- an agreement can, under section 14B of the Competition (Amendment) Act 2012, be made an Order of the Court provided certain conditions are fulfilled (Section 14B Court Order).[5] This provision has been used only twice by the CCPC,[6] despite some commentators arguing its use "*would appear set to increase.*"[7] The Section 14B Court Order was introduced into law because of the perceived shortcomings of the A&U option with respect to enforceability.

There are two important differences between these choices.

The agreement has to be published under the Section 14B Court Order, but is discretionary under A&U, although in practice it appears that the A&U is invariably published.

If the parties to the Section 14B Court Order fail to comply with the Court Order, this constitutes contempt of Court, with tougher sanctions, including fines and imprisonment, compared with non-compliance with an A&U.

There are good reasons why the CCPC might have selected the Section 14B Court Order option in the IPOA case.

The IPOA had instituted similar collective action in response to earlier Government policy. In December 2011 the IPOA issued a press release stating that landlords in the private rental sector would be levying the new Government household charge on their tenants. When it was pointed out by the CCPC that this may breach competition law the IPOA withdrew their recommendation and stated that individual members should make their own pricing decisions.[8] Moreover, the IPOA appears to be well aware of the provisions of competition law – in 2009 it referred issues relating to rent control to Ireland's competition agency for possible breaches of competition law.[9]

There are, of course, reasons why the CCPC selected the A&U route.[10] Hence the CCPC should consider publishing the factors that determine how it memorializes agreements reached with trade or representative associations. Otherwise the inference is weak or under enforcement of competition law.

Inconsistent Application of Competition Law in the Face of Collective Action in Response to Government Policy?

In commenting on the CCPC/IPOA A&U on 20th January 2017 the CCPC stated "[W]hile trade associations have the right to represent the interests of their members, it is important that they not only take an active role in ensuring their own compliance with competition legislation, but they must

not allow or facilitate commercially sensitive discussions between their members.” This is an important statement the role and responsibility of a trade association in relation to competition law. However, it is not at all clear that it has been enforced by the CCPC when faced with other examples of collective action by trade associations in response to government policy.

In March 2016 the Irish Waste Management Association (IWMA), an association of undertakings, announced that it was freezing household waste collection charges from 20th June 2016 to 1st July 2017. This announcement followed Government support for a price freeze to address public concerns of prospective increases in household waste collection charges. In my earlier blog^[11] it was argued that the CCPC decision to take no action in the IWMA case – at least judging by its public statements/actions to date – was inconsistent not only with competition law, CCPC guidance on trade associations but also CCPC court action when a different trade association announced a price freeze.

Given the facts of the IPOA and IWMA cases it is difficult to detect a consistent thread in the application of competition policy in terms of CCPC intervention.

Conclusion

The CCPC acted with commendable speed in the face of collective action by the IPOA. However, the CCPC's action merits only two cheers. There are good reasons why the CCPC should have used the Section 14B Court Order, not an A&U, to memorialize the CCPC/IPOA agreement, especially since the IPOA had undertaken similar collective action in 2011. There is also an apparent lack of consistency in the CCPC's intervention when collective action is taken by trade associations in response to Government policy. In some cases the CCPC intervenes – as with the IPOA – while in others – as with the IWMA – the reverse appears to be the case.

The author was a member of the Competition Authority between 2000 and 2008. This agency and the National Consumer Agency were merged in October 2014 to form the Competition and Consumer Protection Commission. In this blog we refer to the CCPC throughout even when the action was taken by the Competition Authority prior to the merger.

[1] From <http://ipoa.ie/about-us/>.

[2] The press statement is contained in Newstalk, “Dail passes all stages of legislation on 4% rent increase caps.” 16 December 2016. It may be accessed at: <http://www.newstalk.com/Rent-amendment-passed-in-Dil-after-drafting-error->

[3] CCPC, “CCPC Concludes Investigation into the IPOA Following Retraction & Signed Undertaking.” Press Release, 20 January 2017. (See www.ccpc.ie).

[4] Section 1 of the A&U.

[5] Section 14B requires the Court to be satisfied that the following conditions have been satisfied: (i) the undertaking consents to the Order; (ii) the undertaking has obtained legal advice; (iii) the agreement is clear and unambiguous and capable of being complied with; (iv) the undertaking is aware that failure to comply with the Order would constitute contempt of Court; and, (v) that the CCPC has published the terms of the agreement on its website and published a notice in two daily

newspapers providing details of the proposed application for a High Court Order. For further discussion see Philip Andrews, Paul K Gorecki and David McFadden, *Modern Irish Competition Law*, Kluwer, 2015, pp. 190-191 and reference in next footnote.

[6] Competition Authority, *Resale Price Maintenance of Fitflops Footwear Products*, Decision E/12/01, 19 April 2013; and a Court Order of an agreement with the Irish Medical Organisation dated 28 May 2014 which may be found at:

<http://www.ccpc.ie/sites/default/files/documents/2014-05-28%20CA%20v%20IMO%20Signed%20Settlement%20Agreement.pdf>

[7] Marco Hickey, "Section 14B Orders of the Court," LK Shields, June 2014, p. 3.

[8] For details see Competition Authority, *Annual Report 2011*, the Authority, 2012, p. 26. There appears to have been no A&U in this case.

[9] IPOA, "Rent control is unfair and anti-competitive," Press Release, 29 May 2009. This may be accessed at: <http://ipoa.ie/landlord-press/>.

[10] These are not stated in the CCPC press release referred in to in footnote 4 above.

[11] Paul K Gorecki, 'A Price Freeze on Household Waste Collection Charges in Ireland: Consistent with Competition Law and Policy?' *Kluwer Competition Law Blog*, 12 July 2016. This may be accessed at: <http://kluwercompetitionlawblog.com/2016/07/12/a-price-freeze-on-household-waste-collection-prices-in-ireland-consistent-with-competition-policy-and-law/>



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