

# Sentencing in Ireland's First Bid-Rigging Cartel Case: Unduly Lenient?

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## **Introduction**

The Director of Public Prosecutions (DPP) has decided to appeal the sentences imposed by the Central Criminal Court (the Court) on 31 May 2017 in Ireland's first bid-rigging criminal cartel case. The grounds are "undue leniency" under section 2 of the Criminal Justice Act 1993.

At first glance the case looks straightforward. The sentence imposed on the company director for initiating and participating for 2 years and 4 months in the commercial flooring bid-rigging cartel was only three weeks wages or €7,500. No gaol sentence was imposed for breaching competition law. The undertaking was fined €10,000; the value of the rigged tenders it won totalled €556,000.

Philip Andrews and colleagues were right to raise in their 6 June 2017 Kluwer Competition Law Blog, the question of whether that such sentences "may raise questions as to how Ireland's criminal cartel regime is working."

Nevertheless, first impressions may be misleading. Undue leniency occurs, according to the DPP, when the sentences "connote a clear divergence by the court of trial from the norm." However, "great weight is attached to the trial

judge's reasons for imposing the sentence." Are these conditions met?

The first condition begs, of course, the question of what is the norm. The trial judge relied heavily on the 2009 *Duffy* judgment in the Citroen Dealers Association (CDA) cartel – the leading case in cartel sentencing.

### **The CDA Cartel Sanctions**

Every one of the eight individuals convicted in the CDA case received a gaol – albeit suspended – sentence. Fines for individuals ranged from €0 to €80,000. The six undertakings that were convicted in the CDA case were fined between €12,000 and €80,000, with Duffy Motors fined €50,000.

Hence the lack of a suspended gaol sentence was likely unduly lenient, while the fine on the undertaking at only 83 (12.5) % of the lowest (highest) fine in the CDA case appears to be lenient, but it is not clear whether it is unduly lenient.

### **Changing Norms: Legislative Sanctions**

The charges in the *Duffy* case were brought under the Competition Act 1991, as amended by the Competition (Amendment) Act 1996, the commercial flooring bid-rigging cartel charges were brought under the Competition Act 2002, as amended by the Competition (Amendment) Act 2012.

The 2002 and 2012 legislation substantially increased the sanctions for cartels available to the Court compared to 1991 and 1996 legislation. The maximum gaol term increased from 2 to 10 years; the maximum nominal fine for an individual and an undertaking from €3.8 million to €5 million.

This suggests that the legislature is signalling that sanctions should increase for cartels charged under more recent competition legislation.

### **Changing Norms: Precedence**

The Court in the 2009 *Duffy* judgement clearly indicated that future cartelists

should receive custodial sentences. The 2017 commercial flooring cartel was the next criminal cartel case to appear before the courts, but company director received neither a suspended or custodial gaol sentence.

## **The Trial Judge's Reasons**

The trial judge's methodology for determining the sanctions was to use the *Duffy* judgment's characterisation of the CDA cartel as a template to determine whether or not the bid-rigging case was less or more serious. Since the Court found that the CDA cartel was "exponentially more serious" - using four dimensions - lower sanctions were imposed for bid-rigging than in the *Duffy* case.

Notwithstanding that this approach largely ignores changing norms the Court's reasoning does not stack up. Admittedly the **duration** of the Duffy's participation in the CDA cartel was longer than the bid-rigging cartel: 5 years v 2 years and 4 months.

While the CDA was **national** in scope, the charge and evidence in the *Duffy* judgment only related to the province of Leinster, which is dominated by the greater Dublin area. In contrast, the charge in the bid-rigging cartel referred to the State, although in practice all of the examples of bid-rigging referred to the greater Dublin area.

The **victims** of the bid-rigging cartel were other businesses, often multinational entities which, according to the Court, were in a position to exercise "independent judgment because of their commercial capacity." These businesses did not "stand on the same footing" as consumers, the victims of the CDA cartel.

But businesses pass on cartel-induced higher prices to consumers.

There is also an implicit assumption that businesses are better able to detect and combat cartels, but where is the evidence for this? Businesses that purchased commercial flooring services often did so on an irregular basis, which varied by the characteristics of the premises being outfitted.

In contrast, a consumer purchasing a Citroen car, a large household expenditure, could, in principle, shop around various Citroen dealers, observe similarities in prices and report this to the competition agency.

In any event cartels are difficult to detect, irrespective of whether the victim is a business or a final consumer. Hence the joint Competition and Consumer Protection Commission/DPP Cartel Immunity Programme has played an important role in Ireland in cartel enforcement.

The final dimension was **organizational complexity/effectiveness**. Here the Court observed that the CDA cartel had agreed on an extensive array of prices and employed mystery shoppers to detect possible cheating. In contrast, the bid-rigging cartel consisted of the two cartelists agreeing who should put in the higher bid. Indeed, the Court went so far as to say that the bid-rigging arrangements “didn’t involve a cartel.”

In comparing the CDA cartel and the bid-rigging cartel, like is not being compared with like, a fact that the Court did not take into account.

The bid-rigging cartel was arguably as effective, if not more so, than the CDA cartel:

- There were only two participants in the commercial bid-rigging arrangements, but seven for CDA in the Leinster region.
- There was no necessity for a complex agreed price list as occurred in the *Duffy* case, only on who should put in the higher commercial flooring bid.
- Detection of breaches of the commercial flooring bid-rigging cartel was easy and did not require the hiring of a mystery shopper. The winner of a commercial flooring contract quickly becomes apparent.
- Given on average once every seven weeks a bid was rigged, there was little incentive to deviate from the agreed cover bid in order to gain a competitive advantage.
- The punishment mechanism for any deviation, albeit implicit, is a return to competition and the loss of the gains from the bid-rigging cartel arrangements.

In other words, the bid-rigging cartel poses a greater threat to consumers than the CDA cartel because it is easier to sustain and hence will tend to last longer and may be harder to detect.

A comparison of the degree of seriousness in the CDA and commercial flooring cartels, using these four dimensions, does not provide the Court with justification for imposing lower, let alone strikingly lower, sanctions in the bid-rigging cartel

compared to the corresponding parties in the *Duffy* case. On the contrary, the evidence, if anything, suggests that there is little to choose between the two cartels. Indeed, it could be argued that the commercial flooring bid-rigging cartel was likely more effective.

## **Specific v General Deterrence**

In terms of the sentencing methodology in the *Duffy* judgment reference is made to a passage in O'Malley's *Sentencing Law and Practice* (2<sup>nd</sup> ed) in which the judge says is "particularly apt for offences such as ... competition breaches." O'Malley talks about a penalty reflecting general deterrence which, "aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing," while specific deterrence "is more concerned with the particular offender, and aims to impress upon him the punishment he will suffer if he re-offends."

On the balance between general v specific deterrence in sentencing in competition infringements, the *Duffy* judgment comes down decisively on the side of general deterrence. It cites approvingly, for example, the following passage from Werden,

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.

The Court in sentencing in the bid-rigging case paid particular attention to specific rather than general deterrence.

The use of general deterrence as the benchmark suggests that the fine for a cartel should be based on the fraud perpetrated on consumers. This is a suitable metric to measure the seriousness of a cartel.

While the *Duffy* judgment does not develop a sentencing methodology consistent with these views, the US Sentencing Guidelines do provide such a methodology. The US legal system with respect to cartels is similar to Ireland in that cartels are criminal offences, with fines and imprisonment as sanctions.

If the US Sentencing Guidelines were applied to the facts of the commercial flooring bid-rigging cartel, then here are the implied results:

<b>Sanction</b>	<b>Company Director</b>	<b>Undertaking</b>
<b><i>Fines</i></b>		
Central Criminal Court	€7,500	€10,000
US Sentencing Guidelines	€5,560 to €27,800, but not less than €16,000	€155,680 - €311,360
<b><i>Imprisonment</i></b>		
Central Criminal Court	None	N/a
US Sentencing Guidelines	10-16 months	N/a

## **Conclusion**

There are good grounds for arguing that the sentences imposed by the Court in the commercial flooring bid-rigging cartel case are unduly lenient. The appeal by the DPP to the Court of Appeal opens up the possibility of not only a more appropriate sanction being imposed, but of also developing a methodology for sentencing in cartel cases that incorporates general rather than specific deterrence and concentrates on consumer welfare/harm, the objective of competition law in Ireland.

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*This blog is based on a Munich Personal RePEc Archive paper: <https://mpra.ub.uni-muenchen.de/80787/>. The author was a member of the Competition Authority between 2000 and 2008, prior to the commencement of the commercial flooring case investigation. The author was not involved for either side or for any third party in the commercial flooring bid-rigging cartel case. The usual disclaimer applies. The blog pays attention to the competition infringements only: the company director also received a suspended sentence for obstruction of justice.*