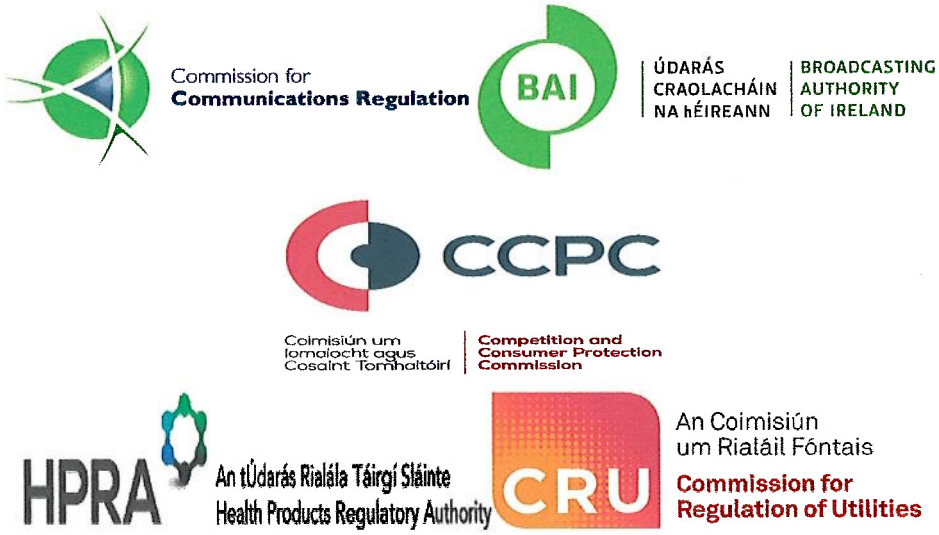

Submission to the Law Reform Commission

Enforcement of Competition and Regulatory Law: The Case for Reform

Introduction

1. We reiterate and give an update on the case for reform following our December 2012 submission that was taken up in the Commission's Fourth Program of Law Reform.

2. Regulatory objectives are set to pursue public welfare objectives, such as competitive markets, consumer empowerment, citizen protection and safe goods and services amongst other things.

3. Our submission is twofold: we submit (a) that an effective and consistent enforcement regime applicable to all regulatory bodies[1] be put in place, and (b) that effective penalties for competition and other regulatory infringements be established.

4. Regulatory breaches harm consumers, citizens, firms and industry. Strong regulation is thus critical to the economy and society in general. The availability of robust enforcement powers is, in turn, crucial to the efficacy of regulation. Effective powers of enforcement and sanction ensure that

[1] In this submission, any reference to "regulatory bodies", "regulatory agencies" or "regulatory authorities" includes the Competition and Consumer Protection Commission (CCPC). It should be noted however that - in addition to certain specific regulatory functions – the CCPC has an economy-wide remit to enforce competition and consumer protection law.

regulatory action acts as a genuine deterrent, both to the party being punished and to other regulated parties. The recommended reforms aim to address enforcement powers and enforcement penalties, the better to deter non-compliant behaviour and thus deliver the statutory objectives as set out by the Oireachtas on foot of Government proposals in addition to other issues raised by a review of the law. We address each issue separately in what follows.

Enforcement Powers

5. Enforcement powers need to be a meaningful deterrent. To be effective the threat of enforcement must be real. This means that any enforcement procedure must be timely and efficient, particularly where there are high value dynamic markets and limited resources with which to regulate them.

6. Currently there is an ad-hoc legislative approach to enforcement powers, with slightly different procedures applying to, for example, search powers and summons powers (to mention but two). As a result, there is not a reliable set of precedents that can apply to enforcement powers exercised by all agencies, and courts have to apply a case-by-case approach which is neither efficient nor ultimately useful.

7. We submit that there is need for a consistent legislative approach towards enforcement powers exercised by regulatory agencies. This would improve the efficiency and effectiveness of regulation. However, we welcome the acknowledgment in the Issues Paper that individual regulated sectors (and regulators) have different requirements and needs and that this would be taken into account in any standardisation. Different requirements and needs could be accommodated in a standardised regime by replacing the current *ad-hoc* legislative approach to enforcement powers within a single Act levelling up the range of powers that could be made available to regulators. This Act could list the enforcement powers capable of being exercised by regulatory bodies, and a schedule to the Act could indicate which bodies can exercise which powers (clearly, this schedule could be amended, as appropriate).

Enforcement Penalties

8. A basic tenet required by the EU legislation which underpins most of the regulatory and competition laws is that sanctions and penalties are required to be effective, proportionate and dissuasive. Proportionality is a keystone of good regulation. The ability to index fines to profits achieved as a result of a breach, enables regulation which is not only proportionate to the harm, but also provides a strong economic deterrent. Criminal prosecutions are often not an effective and efficient approach to ensuring regulatory compliance. In most regulatory cases (with the exception of some consumer cases and anti-competitive hard-core cartels), criminal prosecution may be either not practical or not appropriate because of the evidentiary requirements, the complex economic analysis which may be required, and the criminal standard of proof. As a result, a market participant may not view criminal prosecution as likely and therefore the risk of prosecution may not act as a realistic deterrent in those cases.

9. In such cases, a civil or administrative fining regime may be more practical and appropriate. Even in the realm of competition law, criminal offences are appropriate only for what are known as "hard-core" cartel offences, which are readily understood by a jury. Nevertheless, at present, all competition infringements are criminal offences, although in practice the Competition and Consumer Protection Commission will attempt to enforce non-hard-core infringements only in the civil courts.

10. While civil enforcement is more appropriate to regulatory offences than criminal prosecution, the challenge is that the orders that a court can impose are not effective. In general, the court in such a case is limited to making a declaration or issuing an injunction. A fine would be an appropriate penalty, but the civil courts would need to impose a fine of sufficient size to be effective.

11. For penalties to be dissuasive and a realistic deterrent to the potential gains from non-compliance they need to be proportionate to the harm incurred, for example to the market and/or proportionate to the turnover of the infringing entity. In severe cases, the revenues from breaking the law may be several million euros. Unless penalties can match or exceed these gains, businesses could make a commercial decision to break the law, with any financial penalty being viewed as merely a *de facto* tax or levy, rather than an actual punishment intended to act as a deterrent. EU law consistently requires that competent authorities should be empowered to impose pecuniary penalties which are sufficiently high to be effective, dissuasive and proportionate, in order to offset expected benefits from behaviour which infringes the requirements laid down in EU legislation. In addition, in the field of competition law, the introduction of effective, dissuasive and proportionate administrative sanctions would create incentives for parties to seek leniency (i.e. reduction in fines) under available leniency programmes and to provide full co-operation with the national competition authority in its ongoing investigation of the alleged competition law infringements.

12. We strongly agree with the statement at paragraph 2.19 of the Issues Paper that: *"Although concerns have been raised in relation to their adequacy, effectiveness and constitutionality, it would appear possible to design a civil financial sanction regime that is sufficiently strong to deter non-compliance while respecting the constitutional requirements."* It is well established in the case law of the European Court of Human Rights that regimes such as those of the European Commission and of national agencies – in which an administrative body can itself impose a financial sanction for breach of competition law – comply with the requirements of the European Convention on Human Rights if the decision of the administrative body is subject to appropriate judicial review by a court with full jurisdiction to review the administrative decision. Without fully empowered regulatory enforcement regimes comparable with other jurisdictions, other positive changes and improvements to the regulatory landscape may lose their value in application.

13. We submit that the Law Reform Commission is in a position based on its research findings articulated in the Issues Paper to advocate for non-

criminal fines under two headings: (a) fines imposed by courts in civil cases, and (b) administrative fines imposed directly by regulatory bodies.

Fines imposed by the courts in civil cases

14. Fines imposed directly by the courts in civil cases are a very effective method of deterrence, if such fines are proportionate to the infringement in question.

Administrative fines

15. A number of different models of fining power have been pursued by the State in recent years. Some are essentially voluntary (e.g. on the spot fines). One can pay the fine imposed or instead go through the judicial process. Others involve application by the regulatory authority to court. It should also be noted that where national regulatory authorities are given certain powers of a quasi judicial nature, the legislature has to observe the principle of *nemo iudex in causa sua*. Thus, for example, one finds provisions in the Broadcasting Act, 2009 for a Compliance Committee, provisions in Part III C of The Central Bank Act, 1942 (as amended) for an appeal to an Appeals Tribunal and in the Energy Act, 2016 providing sanctions imposed by the Commission for Regulation of Utilities shall not take effect unless the decision is confirmed by the High Court.

16. Under the Constitution, limited powers and functions of a judicial nature can be conferred on bodies other than courts.

National and EU concerns

17. Concerns on the lack of an effective civil or administrative enforcement regime have been raised both nationally and by the EU. The EU recently proposed a new directive empowering the National Competition Authorities (NCAs) to be more effective enforcers of the EU competition rules with proposed standardized enforcement across the Member States[2]. The responses to the preceding consultation highlighted the need for effective enforcement across the EU which could be better achieved by a convergence of enforcement powers in particular given the increasing scope for more 'borderless' markets (such as in the increasingly prominent digital and online sectors). Such an approach could facilitate the following benefits: **for consumers** – if all NCAs have a sufficient enforcement toolkit which is actively used and helps enable a level playing field across Europe, that should boost both consumer confidence and the effective competition that delivers significant benefits to consumers in terms of increased choice, lower prices and more innovation; **for businesses** – a level playing field also serves to boost business confidence and creates an environment in which markets can develop efficiently across EU borders and in which businesses can compete effectively throughout the EU; **for**

[2] 2017/0063 (COD)

the EU-wide economy and markets – effective enforcement of the antitrust rules across the EU supports competition in the Single Market, which itself helps to create jobs and deliver productivity and economic growth; and **for enforcers** – ensuring NCAs are appropriately set up and have the necessary tools and resources to do their jobs increases effective enforcement of the rules, and enhances the scope for beneficial cooperation between enforcers where there are cross-border issues.

18. Other jurisdictions have valuable models which evidence how civil or administrative fining regimes can best meet the need for regulatory enforcement to be effective, proportionate and dissuasive. We welcome the confirmation of this evidence as set out in the Issues Paper. For example in Spain as in most civil law jurisdictions administrative fines are imposed directly by the national regulatory authority for breaches of obligations under the electronic communications framework. Additionally, common law jurisdictions also have valuable models. For example, the UK allows for the imposition of fines by administrative bodies and Australia has a model that also embraces administrative fines.

19. It should however be noted that civil or administrative fines are not intended to replace criminal enforcement of the law, but to complement it. It should also be noted that it can be argued that they may involve a lenient alternative to criminal punishments that allow corporate bodies to treat the cost of financial sanctions simply as part of the price of doing business[3]. Therefore, to be effective, their maximum statutory levels need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance[4]. They must also be proportionate to the non-compliance to which they are applied. In cases where the maximum civil or administrative financial sanction is not high enough to reflect a suitable sanction for non-compliance, the most appropriate enforcement action will be criminal prosecution[5]. Legislation should provide regulators with a range of options for pursuing financial sanctions, including fines following criminal prosecution, fines imposed by regulators rather than courts, and fines imposed by a court following a civil action by a regulator. Regulators should have adequate discretion to choose the tools that best achieve their statutory objectives.

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[3] Coglianese and Ors, "The Role of Government in Corporate Governance" (2004) Regulatory Policy Program, Center for Business and Government, John F. Kennedy School of Government, Harvard University

[4] Elderfield, "Opening Remarks by Deputy Governor (Financial Regulation) Matthew Elderfield to Central Bank Enforcement Conference" (Central Bank Enforcement Conference, Dublin, 11 December 2012)

[5] de Moor-van Vugt, "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 5, 37

Submitted By:

The Commission for Communications Regulation

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Communications Regulation

Signed:

Gerry Fahy, Chairperson

Dated: 09 January 2018

The Broadcasting Authority of Ireland

BAI | ÚDARÁS CRAOLACHÁIN NA hÉIREANN | BROADCASTING AUTHORITY OF IRELAND

Signed:

Celene Craig, Deputy Chief Executive

Dated: 15 January 2018

The Competition and Consumer Protection Commission

CCPC

Coimisiún um Iomaíocht agus Cosaint Tomhaltóirí | Competition and Consumer Protection Commission

Signed:

Isolde Goggin, Chairperson

Dated: 09 January 2018

The Health Products Regulatory Authority

HPRA An tÚdarás Rialála Táirgí Sláinte
Health Products Regulatory Authority

Signed:

Rita Purcell, Deputy Chief Executive

Dated: 17 January 2018

The Commission for Regulation of Utilities

CRU An Coimisiún um Rialáil Fóntais
Commission for Regulation of Utilities

Signed:

Paul McGowan, Chair of the Commission

Dated: 11 January 2018