



The Competition Authority

An tÚdarás Iomaíochta

INVESTIGATIVE PROCESS IN IRELAND

EU-China Competition Week

21 to 24 October 2013

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Issues to cover

1. Preliminary remarks
2. Pre-investigation
3. Opening an investigation
4. Evidence collection
5. Screening evidence
6. Digital evidence
7. Use of Experts
8. Leniency
9. Commitment procedure



1. Preliminary Remarks

- **Institutional structure** of the Irish antitrust system (anticompetitive agreements and abuse of dominance): mixed enforcement system which involves:
 - an administrative authority - the Irish Competition Authority (the ICA) - that conducts the investigation
 - a judicial organ that conducts the adjudicatory function – decides whether or not there has been a breach of Irish/European competition law, imposes remedies and fines.

- **The nature of the proceedings:**
 - criminal: hard-core cartels (i.e. price fixing, limit output or sales and market sharing)
 - civil: other anticompetitive agreements and abuse of dominance)



1. Preliminary Remarks

- Hard-core cartels (i.e. price fixing, limit output or sales and market sharing) are **criminal offences** which can lead to the imposition of criminal fines and imprisonment.
- The Cartel Immunity Program gives **full immunity from criminal prosecutions** to companies and/or individuals that are the first to come forward before the ICA.
- The Cartel Immunity Program **does not give a reduction of fines** to companies/individuals that do not qualify for full immunity.



1. Preliminary Remarks

■ Criminal sanctions

on summary conviction—

- in the case of a company, to a fine not exceeding €3,000, or
- in the case of an individual, to such a fine or to imprisonment for a term < 6 months or to both such fine and such imprisonment

on conviction on indictment—

- in the case of a company, to a fine not exceeding whichever of the following amounts is the greater, namely, €4,000,000 or 10% of the turnover of the company in the financial year prior to the conviction, or
- in the case of an individual, to a fine not exceeding whichever of the following amounts is the greater, namely, €4,000,000 or 10% of the turnover of the individual in the financial year ending in the 12 months prior to the conviction or to imprisonment for a term < 5 years or to both such fine (that is to say a fine not exceeding the greater of the foregoing monetary amounts) and such imprisonment



1. Preliminary Remarks

- **Power to conduct inspections:**

- business and non-business premises
- compulsory
- court warrant
- power to enter by force
- criminal sanctions if obstruction: criminal fines and/or imprisonment

- **Requests for information**

- voluntary

- **Witness summons procedure**

- the ICA can require individuals to attend before it to be examined under oath and to produce documents in their power or control

- **Commitment procedure**



no commitment decision

The Competition Authority

An tÚdarás Iomaíochta

2.a Pre-investigation

Detecting an infringement

- Formal complaints from consumers/companies
- Leniency applications
- Own initiative, e.g.
 - market studies
 - press
 - documents published by trade associations
 - advocacy



2.b Pre-investigation

Screening phase

- The ICA conducts an initial assessment of the complaint (which may involve preliminary investigative work) to:
 - verify allegations
 - examine whether the case merits further investigation
- This may involve:
 - requiring additional information from the complainant
 - contacting other competition agencies/regulators
 - informal fact finding (e.g. current and historical news, legal and economic literature, statistics and the internet).
- The screening phase will lead to an Internal Case Note including the assessment of the complaint including information on the parties, the markets, the assessment of the facts, potential theories of harm and recommendation.



2.c Pre-investigation

Prioritisation principles

- Antitrust investigations are a discretionary function of the ICA.
- The ICA is entitled to prioritise its work in relation to antitrust investigations to achieve the best outcome for consumers, business and the economy by allocating resources to the right projects and endeavour to deal with the case in a timely manner.
- The ICA has put in place project selection and prioritisation criteria.
- The ICA will consider issues such as the potential effects of the alleged anticompetitive conduct, strategic significance, economic significance of the market involved, risks, resources and costs.



3. Opening an investigation

- When the initial assessment leads to the conclusion that there are reasonable indications of an infringement and the prioritisation principles are met, the ICA will open an investigation.
- Breakdown of the number of complaints received by the Authority in 2012 and what stage they reached.

Total Complaints Received in 2012	
Total received	233
Resolved at screening	209

4.a Evidence collection

What to look for?

- Once an investigation has been opened, the ICA will seek evidence to demonstrate the alleged infringement
- Books, documents and business records irrespective of the medium on which they are stored (e.g. marketing plans, minutes of meetings, internal and external correspondence, electronic mail, financial records and agreements)
- Oral statements and interviews
- Economic evidence



4.b Evidence collection Sources

- The ICA has a general power to collect evidence so the sources are not limited to the company(ies) suspected of infringing competition law.
- Evidence can be obtained from:
 - the complainant
 - the company(ies) directly suspected of infringing competition law
 - third parties such as competitors, customers, suppliers and Government departments
 - expert economists
 - other National Competition Authorities and/or European Commission
 - informal fact finding (e.g. current and historical news, legal and economic literature, statistics and the internet)



4.c Evidence collection

Investigative tools

- The ICA will determine which of the investigative tools available is best suited to obtain the relevant information/evidence to establish a breach of Irish/EU competition law.
- **Inspections of business and non-business premises**
 - compulsory
 - oral explanations
- **Requests for information**
 - voluntary
- **Witness Summons procedure**
- **Interviews**
 - statements



4.d Evidence collection

Inspections

Type of premises

- The ICA has the power to conduct inspections (without prior warning) of:
 - **business** premises (premises at, or vehicles in, which a business activity is carried on)
 - **non-business premises** (e.g. vehicles and any dwelling occupied by a director, manager or any member of staff of an company or association of companies)

Compulsory

- Companies must submit to the inspection - voluntary inspections are not allowed under the Irish system.



4.d Evidence collection

Inspections

Requirements

- Court Warrant issued by the District Court (local Court) to the authorised officer.
- In the case of non-business premises, the ICA must have reasonable grounds to believe that records relating to the business and to the subject-matter of the inspection are being kept in premises other than those of the company.



4.d Evidence collection

Inspections

Extent of the inspection powers

- Enter, if necessary by force, into business premises and non-business premises.
- Seize and retain books, documents and records.
- Inspect, copy or take extracts from any such books, documents and records.
- Ask for explanations in respect of any entries in books, documents or records.
- Take statements during inspections.
- The ICA does not have the power to seal premises.
 - However, an authorised officer can take any steps which appear to the officer to be necessary for preventing interference with any books, documents and records found.



4.d Evidence collection

Inspections

Limitations

- Legal professional privilege
- Privilege against self-incrimination



4.d Evidence collection

Inspections

Criminal sanctions for obstruction

- In the context of inspections, the ICA can impose criminal sanctions on individuals for obstructing an inspection, e.g.
 - denying/delaying access, destroying documents
- A person who obstructs or impedes an authorised officer the exercise of an inspection shall be guilty of an offence and shall be liable:
 - to a fine not exceeding €3,000
 - imprisonment for a term not exceeding 6 months
 - to both a fine and imprisonment



4.d Evidence collection

Inspections

The practice of the ICA

- The ICA has used the power to conduct inspections in business premises in many occasions, mainly to detect cartel activity but also to obtain evidence of other type of anticompetitive practices (e.g. Vertical agreements).
- The ICA also has experience in conducting inspections in non-business premises but the exercise of this power is less frequent.



4.e Evidence collection

Requests for information

- RFIs are usually sent in the form of a simple letter (usually attaching one or more annexes).
- Documents requests, specific questions and data requests.
- RFIs in antitrust cases are **voluntary**. The ICA cannot issue compulsory RFIs. In practice, firms almost always respond to RFIs.
- **The ICA cannot impose fines** where the representatives of the company(ies) under investigation fail to respond to an RFI or where intentionally or negligently they supply incorrect or misleading information.
- RFIs are one of the most frequently used tools by the ICA to gather evidence in the context of potential anticompetitive vertical agreements and abuses of dominance.



4.f Evidence collection

Interviews

- The ICA can interview and take statements from any natural or legal person for the purpose of collecting information relating to the subject-matter of an investigation (this investigative tool is different from asking oral questions during inspections).
- Usually in person.
- The interview is carried out on a **voluntary basis**.
- The ICA **cannot impose fines** if the answers are incorrect, incomplete, misleading or if the representative of the company(ies) fails or refuse to provide information.



4.g Evidence collection

Witness Summons Procedure

- The ICA can require individuals to attend before it (usually at its offices) to be examined on oath and to produce documents in his or her power or control.

Procedure

- The ICA serves (by hand) a “Witness Summons” document to an individual representative of the company(ies) under investigation.
- The Witness Summons document:
 - states the legal basis and the purpose of the request
 - fixes the date (and time) when the addressee must attend to the offices of the ICA
 - specifies what information is needed
 - indicates the possibility of imposing sanctions if the addressee fails to comply



4.g Evidence collection

Witness Summons Procedure

Extent of the powers of the ICA

- The day (and time) when the addressee of the Witness Summons attends to the ICA 's offices, the ICA will:
 - examine under oath such witnesses
 - compel them to provide the information or produce the document(s) specified in the Witness Summons document

Limitations

- The person summoned is entitled to:
 - the privilege against self-incrimination
 - the right to refuse to produce documents covered by legal privilege
 - have a solicitor present during the hearing



4.g Evidence collection

Witness Summons Procedure

Penalties

- A failure to comply with a witness summons will result in:
 - a fine not exceeding €3,000
 - imprisonment for a term not exceeding 6 months



4.g Evidence collection

Witness Summons Procedure

Practice of the ICA

- In antitrust investigations, the ICA has used this investigative tool in a large number of occasions, for instance, in circumstances where:
 - the complainant does not want to be seen by its business partners to provide evidence of a breach of competition law to the ICA on a voluntary basis to avoid retaliation
 - the ICA suspects that a company is in possession of evidence of an antitrust violation
 - a company fails to respond to a voluntary RFI



5. Screening Evidence

- Screening of evidence/economic evidence can raise difficult issues, particularly when there are large quantities of potentially relevant.
- Some relevant questions:
 - what type and number of theories of harm to be developed and explored?
 - what relevant issues should be proved in a particular case?
 - is the available evidence is sufficient (and can be used) to establish a breach of Irish/EU competition law?
 - how to decide the relative weights to be given to different pieces of evidence?
 - how should assessors to respond to different pieces of evidence that appear to be of equal probative but that present conflicting signs/indications of whether there is a competition problem?



5. Screening Evidence

- During the screening process, the ICA endeavours to:
 - examine all evidence available and not be selective in the treatment of evidence
 - reach conclusions based on sufficient, accurate, reliable and coherent evidence
- More prominence given to the assessment of economic evidence – shift from a formalistic, *per se* type approach towards a ‘more economic’ approach, centred around ‘effects-based’ analysis.
- **Direct evidence:** a document which clearly proves the infringement.
- **Circumstantial evidence:** all other documentation or oral statements corroborating an allegation of infringement.



6.a Digital Evidence Requirements

- The ICA has the power to gather digital evidence during inspections, through RFIs or Witness Summons procedures.
- The ICA has increased the use of digital evidence gathering as a frequent tool, mainly in the context of inspections – trend to keep more electronic material than paper.
- **Requires:**
 - hardware and software
 - training/specialised staff (the staff from the ICA's information technology (IT) department and, in some instances, external IT experts such as members of the police from IT specialised units)
 - substantial budget



6.b Digital Evidence

Extent of powers

- **Seizing** the data carrier such as a physical hard-drive, CD-ROM/DVD, floppy discs, USBs, tapes, and other devices in which information, sounds, visual images or photographs are embodied.
- Taking digital **copies** (file copies, etc) of electronic documents.
- Possible relevant documents are collected and indexed.
- Company receives list + copies of documents.
- The ICA will work on duplicates and not on the originally acquired digital information.
- Authenticity and the chain of custody of the digital evidence.



6.c Digital Evidence Analysis

- The most used method for analysis is keyword searching to find relevant documents.
- Other analytical options include:
 - search for connecting documents
 - search for encrypted information, review registry files, cache files and internet history files
 - investigate traces of web chats
- IT specialists will report to officers about the relevant digital evidence
 - gaps in information, such as none or extremely few emails during a certain period or from a certain employee
 - a cleanly installed hard disk should also be noted



6.d Digital Evidence Sanctions

- A person who, during an inspection, refuses to provide access to the computer systems covered under the search warrant or destroys digital evidence will be considered to obstruct the inspection and can, therefore, be subject to criminal sanctions (fines and/or imprisonment).



7. The use of experts

- In-house economic experts.
- Out-house (more complex cases) – opinion provided orally at meetings or telephone calls or embodied in an expert report.
- Experts may assist in:
 - data processing and analysis
 - review and comment on parties' economic submissions
 - identifying theories of harm
 - establishing the anticompetitive effects
 - providing assistance in the development of cases before litigation
- In court proceedings, the ICA has used the opinion of such an expert as evidence substantiating its case and has called the experts as expert witnesses.



8.a Cartel Immunity Program

Key features

- Tool to uncover and put to an end cartels.
- The CIP gives **full immunity from criminal prosecutions** to companies and/or individuals that are the first to come forward before the ICA.
- **The CIP is open to companies and individuals:**
 - a company may choose to initiate an application for immunity on behalf of its employees (current and former) including its directors and officers
 - employees who are neither directors nor officers of the company may approach the ICA on their own behalf
- **The CIP does not give a reduction of fines** to companies/individuals that do not qualify for full immunity.



8.b Cartel Immunity Program Procedure

- An application for immunity is made to the designated officer of the ICA but only the Director of Public Prosecutions (DPP) can make a decision to grant immunity.
- Marker system – time to verify the information given.
- The whistleblower must comply with a series of conditions in order to qualify for immunity, including:
 - come forward as soon as possible take effective steps to terminate the participation in the cartel
 - do nothing to alert former associates that you have applied for immunity
 - not force another party to participate in the cartel
 - not have been the instigator of the cartel



9.a Commitment procedure

Commitment discussions

- The ICA will communicate any competition concerns arising from the antitrust investigation to the companies involved orally at a meeting or in writing.
- The ICA will indicate the timeframe within which the discussions on potential commitments should be concluded.
- Companies may contact the ICA at any point in time during the investigation (i.e. before or after the ICA has communicated any competition concerns) to enter into commitment discussions.
- The ICA encourages companies to signal at the earliest possible stage their interest in discussing commitments



9.b Commitment procedure

Decision to offer commitments

- Should the parties, after being confronted with the ICA's concerns, decide to offer commitments, they need to submit a first draft document describing the main elements of the commitments.
- The commitments should address the competition concerns identified.
- The parties can offer commitments of a behavioural or structural nature.
- Market testing possible but rare in antitrust investigations.
- No commitments decision in the Irish system.



9.c Commitment procedure

Decision to offer commitments

- If the ICA is satisfied with the commitments:
 - The commitments will be included in a document called Agreement & Undertakings which will be signed by the ICA and the company(ies) involved
 - The commitments will become legally binding upon the company(ies) involved
 - The ICA will not initiate legal proceedings against the company(ies) subject to the investigation



9.d Commitment procedure

Practice of the ICA

- The ICA has positive experience regarding settlements as they enable rapid solutions of some cases and avoid court proceedings.
- The ICA may reopen the proceedings where the companies concerned act contrary to their commitments.
- Commitment decisions are excluded in the case of hard-core cartels (i.e. price fixing, limiting output and market sharing).
- The ICA has recently closed two important investigations on foot of commitments offered by the companies concerned: the *RTÉ* case involving a loyalty rebate scheme (January 2013) and the *Fitflops* case involving vertical restrictions such as retail price maintenance (April 2013).

