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Price Signalling and Private Motor Insurance in Ireland: A Breach of Competition Law?

By

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Abstract

The Competition and Consumer Protection Commission (CCPC) allegations of price signalling in 2015 and 2016 by five insurers, a broker, and a broker representative body with respect to private motor insurance (PMI) premium increases did not reach, based on publicly available information, the threshold required to establish a concerted practice that breached competition law. There was a plausible alternative explanation, the underwriting cycle, for the premium increases. The failure of the CCPC to articulate a clear position on when public announcements on future prices are likely to breach competition law is likely to chill competition and damage consumer welfare. Had the CCPC investigated the alleged price signalling under the Competition (Amendment) Act 2022, which implements the ECN+ Directive, there is no reason to assume that the outcome would have been any different, despite extra powers such as civil fines.

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JEL Codes: D22; D43; G22; K21 ; L13; L41.

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28 November 2022

I. Introduction

The Competition and Consumer Protection Commission (CCPC), Ireland's competition agency,¹ announced on 20 August 2021 that it had secured "legally binding commitments" from six parties supplying private motor insurance (PMI) "to reform their internal competition law compliance programmes."² In the CCPC's view reform of these competition compliance programmes was necessary since the existing programmes had failed to identify and flag "the [price signalling] behaviours of concern that were under investigation."

On obtaining these legally binding commitments, referred to as Agreement and Undertakings (A&U) and posted on the agency's website,³ the CCPC closed its five year investigation into price signalling in PMI. So long as there is compliance by the parties with the commitments, the CCPC will refrain from undertaking civil proceedings under Section 14A of the Competition Act 2002 as amended (the 2002 Act). The binding commitments may be reviewed by the CCPC within a specified number of years.⁴ The commitments may not be construed as meaning that the party concerned had breached Section 4(1) of the 2002 Act and/or Article 101(1) of the Treaty for the Functioning of the European Union (TFEU).

In February 2022 the CCPC (2022) released a "report [further] detailing ... [its] investigation into suspected anti-competitive practices in the provision of private motor insurance in the State." There remain, however, important gaps. The CCPC (Competition Authority, 2005, Vol 1, p. 6) does not refer, for example, to its earlier conclusion that "there is little or no evidence of price co-ordination" in PMI; a finding strengthened by subsequent insurance sector reforms which were, in part, promoted by the CCPC. The purpose of this paper is to present a more complete analysis of PMI price signalling in 2015 and 2016 and thus be in a position to assess the CCPC's case that in those two years there was anticompetitive PMI price signalling.

The paper is divided into eight sections. Section II outlines the steps and timeline in the CCPC's investigation into alleged anticompetitive PMI price signalling. The next three sections are concerned with procedural and administrative matters: the form of the binding legal agreements together with their substance (Sections III and IV, respectively), and the question of why one of the seven parties that was issued with the CCPC's preliminary findings refused to sign a legally binding agreement (Section V). An economic and legal assessment of the nature, extent and validity of the competition concerns raised by price signalling in PMI is the subject of Section VI. In short, was the PMI price signalling a breach of competition law? Whether or not the outcome of the CCPC's PMI investigation would have been different if it had been conducted under the ECN+ Directive is discussed in Section

¹ The CCPC was formed in 2014 as a result of the merger of the Competition Authority and the National Consumer Agency. Unless otherwise stated reference to the CCPC also includes the conduct of the Competitive Authority.

² All citations in this paragraph are from CCPC (2021b).

³ Available at: <https://www.ccpc.ie/business/motor-insurers-set-to-introduce-new-compliance-measures-following-ccpc-investigation/>.

⁴ In four of the legally binding agreements there is an explicit 'Review Clause,' with review periods of two, three and five years. In the remaining two legally binding agreements there is no 'Review Clause.'

VI.⁵ Finally, Section VIII raises the issue of the extent to which price signalling is subject to or covered by competition policy in view of the outcome of the PMI investigation.

II. The Investigation

The CCPC commenced a formal investigation into price signalling in the supply of PMI on 31 August 2016 (Table 1). The CCPC’s (2021b) investigation was “opened on the foot of public statements made by a number of parties in the [PMI] sector which appeared to be forecasting with confidence that premiums would rise.” These statements were made over a 21 month period. Public statements reported in 2015, for example, include: in January 2015 Brokers Ireland (formerly the Irish Brokers’ Association) stated that PMI premiums would go up between 8 and 15 per cent, depending on the type of business;⁶ in August 2015 FBD Insurance plc (FBD) anticipated raising its PMI premiums 10 per cent over the next 10 months;⁷ and, in November 2015 Brokers Ireland expected PMI premiums to increase by between 10 and 15 per cent.⁸ Subsequent to the opening of the investigation the CCPC (2021b) monitored the PMI sector and “observed no further statements of concern.”

Table 1
Critical Dates & Announcements in the Competition and Consumer Protection Commission (CCPC) Investigation into Private Motor Insurance (PMI) Price Signalling, Ireland, 2016-2021

Date	Event
31.08.2016	CCPC commenced a formal investigation into suspected anticompetitive practices in the provision of PMI.
13.09.2016	CCPC issued witness summons & requests for information to major motor insurance providers, representative bodies of insurers & brokers.
01.01.2017/ 31.12.2017	The CCPC reported 37 witness summons hearings, 1.25 million emails & documents obtained.
17.09.2020	CCPC issued its preliminary findings that five insurers, an insurance broker representative body and an insurance broker had engaged in 2015/16 in anticompetitive price signalling. ^a These undertakings were invited by the CCPC to offer commitments by signing s 14B Court Orders regarding future behaviour.
17.09.2020	Brokers Ireland, the broker representative body, “strongly rejected [the CCPC’s preliminary findings] ... [which] would be vigorously challenged.”
20.08.2021	CCPC signed Agreement and Undertakings, not s 14B Court Orders, with all of the parties (bar one) under which each agreed to implement or enhance an existing internal competition law compliance programme. Brokers Ireland did not sign an A&U nor a s 14B Court Order. No legal proceeding were commenced against Brokers Ireland by the CCPC.
08.02.2022	CCPC publishes its <i>Investigation Report & Outcome</i> on its PMI investigation.

- a. These were respectively: AIG Europe S. A., Allianz plc, AXA Insurance DAC, Aviva Insurance Limited, and FBD Insurance plc; Brokers Ireland, formerly the Irish Brokers Association; and AA Ireland Limited.

Source: Brokers Ireland (2021), CCPC (2016; 2017b; 2018, p. 6; 2020; 2021b; 2022).

⁵ The ECN+ Directive was incorporated into Irish law through the Competition (Amendment) Act 2022 (the 2022 Act). For details of the 2022 Act see: <https://www.irishstatutebook.ie/eli/2022/act/12/enacted/en/html>.

⁶ Weston (2015).

⁷ Mulligan (2015).

⁸ Quinn (2015).

In 2016 and 2017 the CCPC issued numerous witness summons and requests for information (RFI), which, in turn, led to 37 witness summons hearings and, on the foot of the RFIs, 1.25 million emails and documents being obtained. On 17 September 2020, the CCPC (2020) issued its preliminary findings:⁹ alleging that five insurers, an insurance broker, and an insurance brokers representative body (collectively the parties) had been involved in “anti-competitive cooperation [which] consisted of public announcements of future private motor insurance premium rises as well as other contacts between competitors, all of which reduced competition between the parties.” The CCPC indicated that it was open to the parties offering binding legal commitments under Section 14B of the 2002 Act. Six of the seven parties subject to the CCPC’s allegations of anticompetitive signed an A&U August 2021 and as noted above, that concluded the CCPC’s investigation into price signalling in PMI.

III. Form of the Binding Legal Commitments: Agreement & Undertakings vs Section 14B Court Order

At the time that the CCPC was conducting its PMI investigation two options were open to the agency and the party subject to an investigation for memorialising legally binding commitments: an A&U or a Section 14B Court Order.¹⁰ Under an A&U, signed by a representative of the CCPC and the undertaking subject to the A&U, if the undertaking breaches the A&U then the CCPC can go to court to enforce the terms under contract law. However, this requires an examination on the merits of the alleged anti-competitive behaviour, since typically in an A&U the undertaking does not admit a breach of competition law. If the CCPC is successful in its court action, then the Court may grant an injunction and/or declaration, but not impose a fine.¹¹

In contrast, under a Section 14B Order, which only became an option in 2012 due to an amendment to the 2002 Act designed to strengthen the enforcement of competition law, the CCPC could apply to the High Court to have a modified A&U made an order of the court. The High Court had to be satisfied, inter alia, that the undertaking subject to an Section 14B Court Order consented to the Order, had taken legal advice and was aware that breaching the Order constituted contempt of court, which could result in a fine and/or jail sentence.

The CCPC’s evidentiary burden is thus lower in showing a breach of a Section 14B Court Order compared to an A&U while the potential sanction for breaching a Section 14B Court Order is greater than for breaching an A&U. Given these trade-offs the CCPC is likely to favour, other things being equal, a Section 14B Court Order since it is more effective at securing compliance with the legally binding commitments than an A&U. On the other hand, parties that are alleged to have breached the 2002 Act are likely to prefer that any legally binding commitments be memorialised in an A&U.

It is thus not surprising that the CCPC signalled it had a clear preference for a Section 14B Court Order as the method for settling its PMI price signalling investigation. When the CCPC (2020) announced on

⁹ Preliminary findings are similar to a Statement of Objections at the European Union (EU) level. The CCPC (2022, fn. 1, p. 1) discusses the term preliminary finding. The PMI investigation preliminary findings are unpublished.

¹⁰ For further discussion of Section 14B Court Orders see Gorecki (2019a). Section 14B Court Orders were repealed and replaced under the 2022 Act. For details see the discussion in Section VII.

¹¹ If, however, the undertaking were to breach the declaration and/or injunction this would constitute contempt of court, with the resultant potential sanction of a fine and/or jail sentence.

17 September 2020 that it was issuing its preliminary findings to the parties “setting out its position that it has reasonable grounds to suspect that a breach of the law has occurred,” the CCPC stated,

[T]he relevant parties now have the opportunity to consider responding to the preliminary findings. It is open to them, under section 14B of the 2002 Act, to engage with the CCPC to offer commitments regarding their future behaviour to address the CCPC’s competition concerns. The CCPC will carefully consider any responses before deciding if it will bring civil court proceedings pursuant to section 14A of the 2002 Act or to take some other course of action.

In the ‘Notes’ to the September 2020 announcement the CCPC (2020, p. 2) devoted several paragraphs to a discussion of the merits of a Section 14B Court Order including that it “allows the CCPC to obtain enhanced protections for consumers without bearing the full cost of full legal proceedings.” Reference to an A&U as an option to resolve the CCPC competition concerns was, at least arguably, conspicuous by its absence.

When the CCPC (2021b) announced, almost a year later in August 2021, that it had agreed legally binding commitments with six of the seven parties to which it had issued its preliminary findings, there was no mention of the form of these agreements. The CCPC stressed the fact that the commitments were legally binding, but with no reference to the way in which those commitments were memorialised in an agreement. It is only by examining the agreements themselves is it clear that these are A&Us, rather than Section 14B Court Orders. No explanation is offered by the CCPC for the use of the A&U option. The CCPC did point out, however, that its enforcement powers are to be strengthened by the enactment of the ECN+ Directive, an issue addressed in Section VII.

Matters were clarified, albeit to a limited extent, in the CCPC (2022, para. 5.5) *Investigation Report & Outcome*, where it is stated that,

The CCPC initially sought to agree with the Parties commitments which would be made an order of Court pursuant to section 14B of the 2002 Act. The main advantage of this process is perceived to be that a breach of the relevant Court order puts the relevant party in contempt of Court. Some Parties indicated their willingness to enter into this process. However, on further reflection by the CCPC it was decided that legally-binding contractual commitments [i.e. an A&U] would be more appropriate in the particular circumstances of this case.

However, there is no elaboration on why it was “more appropriate” to settle for an A&U rather than a Section 14B Court Order.

IV. Substance of the Legally Binding Commitments: Prohibition of Conduct vs Compliance Programmes

The purpose of legally binding agreements, irrespective of whether the form is an A&U or a Section 14B Court Order, is to set out conditions that some or all of the parties under investigation agree so as to mitigate the competition concerns of the CCPC. These conditions can be divided into two broad categories.

The *first* category is prohibited conduct. In other words, the parties commit to refrain from certain specified behaviour such as long term exclusive agreements, setting and/or enforcing minimum resale price maintenance (RPM) and so on. The prohibited conduct reflects the competition concerns of the CCPC investigation. Such conduct, if proved, would likely breach competition law. By setting out the prohibited conduct in publicly available binding legal commitments the CCPC signals to the wider business community conduct that will likely raise competition concerns thus leading to an investigation.

In the *second* category the parties undertake to institute compliance training which may consist of a formal compliance programme for the party concerned, perhaps certified by an external expert whose report is forwarded to the CCPC. Such programmes are designed to promote a culture of compliance with competition law, while at the same time removing ignorance as a possible mitigating factor in any future legal proceedings. Indeed, it could be argued that having a compliance programme in place and at the same time breaching competition law should be an aggravating factor in setting any sanction in legal proceedings.

In the period from 2012 to 2021, immediately prior to the PMI A&Us, the CCPC had entered into four A&Us and three Section 14B Court Orders. (See Table 2 for details). All of the Section 14B Court Orders are confined to specifying prohibited conduct. For the *FitFlop* and *Coach House* Section 14B Court Orders the prohibited conduct referred to minimum RPM; for *Ticketmaster Ireland*, lengthy exclusivity agreements. The Section 14B Court Orders did not include provisions for compliance training or the introduction of ongoing compliance programmes.

The four A&Us prior to the PMI A&Us also each included conditions relating to prohibited conduct. The first two A&Us, *Booking.com* and *Relay Software*, for example, prohibited a wide Most Favoured Nation arrangements and the sharing future price information, respectively. The two most recent A&Us - with the *Irish Property Owners Association* and *Nursing Homes Ireland* - also committed the parties to compliance training and/or programmes. In other words, prior to the PMI A&Us, the CCPC had developed a practice of combining both prohibited conduct and a commitment to compliance training in an A&U.

The PMI A&Us are an exception, given the previous pattern of legally binding commitments. In contrast to all other prior commitments, the PMI A&Us do not specify the prohibited conduct. The A&Us place obligations on the parties – except, of course, *Brokers Ireland* - to implement or enhance existing internal competition law compliance programmes. No reference is made in the A&Us to the compliance programmes including what is and what is not permitted with respect to PMI premium announcements and communications.

Although the CCPC (2022, para. 3.20) does not specify the nature of the prohibited conduct, it appears based on the agency's analysis, that it would have been satisfied by a commitment by PMI insurers that they would "keep [their] ... intentions and future actions secret." In other words, it appears that the parties would have had to commit not to make *any* public statements concerning future PMI premiums whether in the form of responses to media inquiries or in press releases or in public fora such as shareholders meetings, irrespective of whether the public announcements concerning future premiums were intended or binding. It is an issue that is discussed further in Section 6.5.3.

Table 2

Legally Binding Commitments, Content, Agreement & Undertakings, Section 14B Court Orders, Competition and Consumer Protection Commission, Ireland, 2012^a -2021^b

Year ^c	Case/Prohibited Conduct/Competition Training and/or Compliance	
	Agreement and Undertakings	Section 14B Court Order
2012	-	<i>FitFlop</i> /enforce or enter agreements with retailers that set fixed or minimum resale prices/no training or compliance
2013	-	-
2014	-	-
2015	<i>Booking.com</i> /wide Most Favoured Nation (MFN)/no training or compliance	-
2016	<i>Relay Software</i> & five private motor insurers/sharing future price intentions through an intermediary i.e. <i>Relay Software</i> /no training or compliance	-
2017	<i>Irish Property Owners Association (IPOA)</i> /recommendations on rents and/or withdrawal from State-sponsored rental schemes/competition law training for IPOA Committee.	-
2018	<i>Nursing Homes Ireland (NHI)</i> /influencing NHI member pricing decisions, organising collective action that breaches the Act or Article 101, TFEU/competition law compliance programme for NHI senior management & Board of Directors.	-
2019	-	-
2020	-	<i>Ticketmaster Ireland</i> /exclusive agreements, especially long term/no training or compliance
2021	Five private motor insurers & an insurance broker/no prohibited conduct/ agreement to implement or enhance existing internal competition law compliance programmes.	<i>Coach House</i> /impose or agree t&c's that place obligations on customers to adhere to <i>Coach House's</i> suggested, minimum, or fixed resale prices/no training or compliance.

- a. Section 14B Court Orders were introduced in 2012 under the Competition (Amendment) Act 2012.
- b. 31 December 2021
- c. Year in which binding legal commitments were signed.
- d. Two of the five private motor insurers were part of the same group.

Source: Competition & Consumer Protection Commission website (www.ccpc.ie).

The substance of the legally binding commitments for the five private motor insurers and an insurance broker is weak both by reference to prior CCPC decisional practice and in comparison with the outcome of price signalling cases elsewhere in the European Union (EU).¹² Prohibited conduct is referred to in all legally binding commitments into which the CCPC has entered since 2012 bar that

¹² These cases are discussed in Sections 6.2, 6.5 and 6.9.

involving private motor insurers and an insurance broker. Furthermore, as discussed in Section 6.2, when the European Commission and the Netherlands Authority of Consumers and Markets settled recent price signalling cases they did so only after the parties agreed to cease certain prohibited conduct and agreeing the type of public price announcements (i.e. binding) that met the competition agency's competition concerns.

V. A Credible Threat: Calling the CCPC's Bluff

The CCPC in issuing its preliminary findings in a case typically sets out the alleged anticompetitive conduct that the parties are involved in, together with the evidence supporting the alleged infringement of the 2002 Act. The CCPC invites the parties to address the competition concerns expressed in the preliminary findings. In some instance the CCPC might specify the change in conduct desired or it may leave the parties to bring forward proposals to mitigate the competitive concerns. If the parties and the CCPC cannot come to an agreement that satisfies the latter, then the CCPC (2020) may "bring civil court proceedings pursuant to section 14A(1) of the 2002 Act."

In the CCPC's PMI price signalling case the agency's preliminary findings were sent in September 2020 to five motor insurers, an insurance broker, and an insurance brokers representative body. Scarcely a month after the CCPC had issued its preliminary findings, Brokers Ireland (2020) stated that the CCPC's findings in relation to price signalling 2015 and 2016 "are strongly rejected and vigorously challenged." Furthermore, Brokers Ireland stated that it had "adopted rigorous procedures to ensure ... compliance with all aspects of competition law." Perhaps not surprisingly after taking such an uncompromising position, Brokers Ireland was the only party to which the preliminary findings had been issued that did not sign a legally binding agreement with the CCPC in August 2021.

In announcing the A&Us in the private motor insurance price signalling case, the CCPC (2021b) noted that Brokers Ireland had declined to sign an A&U. The agency stated that its "preliminary findings identified specific conduct and behaviour by the Irish Brokers Association, one of the two associations that amalgamated to form Brokers Ireland, which raised serious competition concerns." The CCPC (2021b) also noted that the failure of Brokers Ireland to sign binding legal commitments, as the other parties had, "arguably calls into question the organisational attitude towards compliance." Nonetheless, despite these reservations the CCPC declined to institute legal proceedings under Section 14A of the Act against Brokers Ireland.

The CCPC (2022, para. 5.3) in its *Investigation Report & Outcome* explains at some length why it decided not to institute legal proceedings under Section 14A,

When considering the merits of pursuing litigation under section 14A of the 2002 Act, the CCPC was cognisant of the limitations of the potential outcomes which could be achieved through this process, namely an injunction or declaration of illegality. Given that the conduct had already ceased, it was not considered appropriate for the CCPC to pursue an injunction. The CCPC also considered that a declaration by the Court that the Parties had engaged in anticompetitive conduct was unlikely to have a substantial impact on the consumer, and would have limited deterrent effect given the Court's inability to levy fines or other sanctions in this process. The CCPC was also aware of the challenges it would face in proving a concerted practice before the

Irish courts, particularly in a case where much of the evidence related to public announcements on price. At the time of the Investigation, and indeed at the time of publication of this report, this was an area of competition law which was still developing; other European Commission and Member State cases involving so-called price signalling had resulted in commitments rather than a successful infringement decision. While the CCPC considered that the evidence as set out in the Preliminary Findings raised a case to answer by the Parties, the uncertainties of litigation coupled with the limited impact for consumers of a declaration under section 14A of the 2002 Act, meant that the CCPC could not justify the potential cost of pursuing this course of action in this case.

However, all of these factors were known to the CCPC at the time it threatened to institute Section 14A legal proceedings in 2020.¹³

The threat of Section 14A legal proceedings is an incentive for the parties to agree with the form and substance of the binding legal commitments that the CCPC requires in order to mitigate its competition concerns. For the threat to be effective, of course, means it has to be credible. In other words, if the party does not satisfy the CCPC's demands legal proceedings will be commenced.¹⁴ This is particularly the case where the CCPC had made public that it had issued preliminary findings that alleged Brokers Ireland was involved in anticompetitive conduct and that the CCPC expected Brokers Ireland to make proposals that would have been memorialised in a Section 14B Court Order.

The CCPC by not instituting legal proceedings under Section 14A of the 2002 Act against Brokers Ireland has at least two implications. First, in future cases undertakings may doubt the credibility of threats by the CCPC to institute legal proceedings if its demands are not satisfied. This undermines the enforcement of competition law in Ireland. Second, the failure to institute legal proceedings, combined with the substance of the A&U agreed with the other parties, suggests that the CCPC had a weak case that PMI price signalling constituted a breach of competition law.¹⁵

VI. PMI Price Signalling: An Assessment

6.1 Introduction

The purpose of this section is to provide, based on publicly available information, an economic and legal assessment of price signalling in the setting of PMI premiums in 2015 and 2016. The CCPC (2022) assessment of the evidence is only six paragraphs (paras. 3.12-3.17), while the grounds for concluding that PMI price signalling is a by object breach of competition law is also brief (ibid, paras. 3.18-3.24).

¹³ In issuing its preliminary findings the CCPC (2020) stated that it "will carefully consider any responses [by the parties to whom the findings were sent] before deciding if it will bring civil court proceedings pursuant to section 14A(1) of the 2002 Act or take some other course of action."

¹⁴ Unless, of course, in response to the preliminary findings a party is able to convince the CCPC that it does not have reasonable grounds for concluding that the party breached competition law. However, in the case of Brokers Ireland, the CCPC (2021b; 2022, paras. 4.1-4.2) reaffirmed its view that Brokers Ireland conduct breached competition law.

¹⁵ Of course, it could be argued that these points are somewhat moot with the advent of the implementation of the ECN+ Directive and the additional powers that will be conferred on the CCPC. However, the first point on credibility still holds, while if the case is weak then it is weak, irrespective of whether or not the ECN+ Directive is implemented in Irish law, a point discussed further in Section VII.

Although the CCPC (2022, paras. 3.25-3.27) summarised the parties' response to the agency's preliminary findings, the CCPC did not comment on or attempt to rebut the arguments made by the parties or the relevance of the case law cited.

This section is divided into ten parts, including this introduction. The definition of price signalling (Section 6.2), the evidence concerning price signalling in PMI premium increases (Section 6.3) and the characterisation of lobbying as price signalling (Section 6.4) are first addressed. Attention then turns to the pertinent issues surrounding whether or not the evidence of public PMI premium announcements would likely have led to supra-competitive prices: the existence of a focal point for PMI premium increases (Section 6.5); the degree to which the incentives of the seven parties to the price signalling are aligned (Section 6.6); the incentives of the parties to cheat or deviate from any agreed focal point PMI premium increase and the ease with which any cheating could be detected (Section 6.7); and whether or not factors external to the parties such as entry could have undermined any agreed PMI premium hike (Section 6.8).¹⁶ With this grounding the question of whether PMI price signalling was a breach of competition law by object and/or by effect can be addressed (Section 6.9). A plausible alternative explanation for the pattern of PMI premium hikes in 2015 and 2016 is raised in Section 6.10.

6.2 Definition

Price signalling was characterised by the CCPC (2020b) as follows:

Price signalling occurs when businesses make their competitors aware that they *intend* to increase prices, in turn causing further price increases across the sector. Price signalling can happen in public, through announcements or comments on prices, or in private through direct contacts between companies. If a business knows that their competitor is increasing prices then they may be encouraged to also increase prices, since their customers are less likely to move to their competitor (emphasis supplied).

Subsequently in its *Investigation Report & Outcome*, the CCPC (2022, para. 3.23) identified the content of the communications (i.e. future information, pricing intentions, sometimes individualised, confidential and commercially sensitive) that was "at least sufficient to highlight that there was a general impetus towards industry-wide PMI price increases in the State."

The European Commission (2011) in its *Guidelines on Horizontal Agreements* briefly considers the issue of price signalling. The European Commission (2011, para. 63, emphasis supplied) states that "[W]here a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this *generally* does not constitute a concerned practice within the meaning of Article 101(1)."¹⁷ There are, however, according to the European Commission (2011, para 63) two exceptions: where the "announcements involve invitations to collude," and, where a unilateral

¹⁶ The factors referred to in Sections 6.5 to 6.8 are widely recognised as relevant in the context of collusive behaviour. See, for example, Bishop & Walker (2010, pp. 163-187), Carlton & Perloff (2015, pp. 146-178) and Martin (2010, pp. 179-193).

¹⁷ A similar statement appears in the European Commission's (2022b, para. 434) *Draft Guidelines on Horizontal Agreements*.

announcement “was followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements [...] could prove to be a strategy for reaching a *common understanding* about the terms of coordination (emphasis supplied).”

Like the European Commission, the OECD (2012, p. 19) argues unilateral communications through, for example, press releases with respect to future pricing (and other) strategies can “offer focal points on which competitors can align themselves, which can result in higher prices and harm for social welfare.” The OECD (2012, p. 22) is, however, cognisant of two other factors which facilitate a collusive outcome besides agreeing to a ‘common policy’ through price signalling: “(ii) to monitor whether other firms are adopting this common policy; and (iii) to enforce it.” The OECD (2012, p. 22) continues, “without these three conditions firmly in place, a collusive equilibrium is not possible.” Price signalling can thus be seen as contributing towards satisfying the first condition – agreeing a common policy – but the other two conditions also need to be considered and analysed in order to conclude that price signalling will adversely affect competition.

There is limited guidance on price signalling from European Union case law.¹⁸ In *Wood Pulp*¹⁹ the European Court of Justice (ECJ) annulled a European Commission finding that the simultaneous or near simultaneous quarterly price announcements implied a constant flow of information between the parties.²⁰ The ECJ stated that parallel conduct “cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.”²¹ Since the ECJ determined that concertation was not the only plausible explanation for the parallel conduct,²² the European Commission decision was annulled.

In *Container Shipping*²³ the European Commission was concerned that prospective announcements of rate changes, typically three to five weeks, “before their intended implementation date ... may allow the Parties [i.e. 14 container line shipping undertakings that agreed to the legally binding commitments] to explore each other’s pricing intentions and to coordinate their behaviour.”²⁴ The Parties offered commitments to meet the European Commission issues, that consisted, inter alia, of placing constraints on the nature and form of announcements with respect to future prices.²⁵ In particular the Parties “shall be bound by their price announcements.”²⁶

¹⁸ Based on Whish & Bailey (2021, p. 601). See also Coninck (2016). The *Wood Pulp* and *Container Shipping* cases were also cited by the parties in their responses to the CCPC (2022, para. 3.26) preliminary findings. However, as noted in Section 6.1 the CCPC did not attempt to rebut or comment on these responses.

¹⁹ Cases C-89/95 etc *A. Ahlstrom Osakeyhtio v Commission* EU:C:1993:120. Hereinafter referred to as *Wood Pulp*.

²⁰ The European Commission had “no documents which directly establish the existence of concertation between the producers” and hence had to rely on inferences from the parallel conduct (*Wood Pulp*, para. 70).

²¹ *Wood Pulp*, para. 71.

²² *Wood Pulp*, paras. 126 & 127.

²³ European Commission Case AT.39850 – *Container Shipping*, decision of 7 July 2016. It may be accessed at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1473768188690&uri=CELEX:52016XC0906\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1473768188690&uri=CELEX:52016XC0906(01)). Hereinafter referred to as *Container Shipping*. For a discussion of *Container Shipping* see Claici et al (2016, pp. 596-602), Camesasca & Grelier (2016) and Rabinovici (2017).

²⁴ *Container Shipping*, paras. 7 & 9.

²⁵ The individual commitments of each of the parties may be accessed at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39850.

²⁶ *Container Shipping*, para. 13 and the discussion in Claici et al (2016, pp. 600-602).

Turning to Member States for guidance, the Netherlands Authority of Consumers and Markets (ACM) was concerned that mobile phone operators (MNOs) were making public announcements with respect, for example, to the likely reintroduction of connection charges that would result in an increase in such charges for consumers.²⁷ The three MNOs offered commitments to address the ACM's concerns. Compliance programmes were instituted. The MNOs undertook not to make price announcements "before the internal-decision making about such future prices and commercial conditions has been finalized and laid down in writing."²⁸

The nature of the resolution of the *Container Shipping* and *MNO* cases by commitments suggests that the European Commission and the ACM objected not so much to the fact that firms make public price announcements but rather the form of such announcements. Public announcements of *intended* prices used as a vehicle to reach a common understanding as to a focal point are to be prohibited, while binding public price announcements that are a commitment to future prices are permissible.²⁹ The latter provide valuable information on which consumers can rely on making buying decisions. As the OECD (2007, p. 35) remarked the "availability of information on the market and its development is generally viewed as critical to develop a competitive environment."

6.3 Evidence

The CCPC presents quite limited evidence concerning the nature and pattern of the PMI price signalling, notwithstanding the fact that such evidence is in the public domain via, for example, media reports. The CCPC (2022, para 3.12) *Investigation Report & Outcome* presents one undated quote from the CEO of FDB in the *Irish Times* and an excerpt from an article written by the CEO of Brokers Ireland, published on 17 January 2016 in the *Sunday Independent*. As a result the evidence for price signalling in PMI by the parties identified in the CCPC's preliminary findings had to be collected by the author by, inter alia, using a variety of search terms in order to capture the instances where the parties made statements about future PMI premium increases. In all instances the statements concerning premiums are drawn from newspaper reports.³⁰

²⁷ This Member State example was selected since it is cited in the CCPC (2022, fn. 30, p. 23) in its *Investigation Report & Outcome*. There are a small number of other price signalling cases at the Member State level. See, for example, the alleged price signalling with respect to mortgage interest rates in Norway, the details of which are set out and assessed in Hasselgard (2019). This case is consistent with the thrust of the discussion in this paper (e.g. price announcements can be pro-consumer, announcements with respect to intentions are of concern from a competition perspective).

²⁸ ACM (2014, para. 48)

²⁹ Rabinovici (2017), an official of the Directorate General for Competition at the European Commission in discussing *Container Shipping* forcefully makes the distinction between price announcements that are binding as opposed to merely intentions.

³⁰ The CCPC (2022, para. 3.12) divides price signalling into four types of conduct. Public PMI premium announcements capture the first two categories (i.e. public announcements by insurers and other industry operators). The third category refers to *bilateral* contact between the parties which appear to relate to contacts between insurers and Brokers Ireland, while the fourth refers to *multilateral* contacts between the parties initiated by Brokers Ireland "which shared information relating to future PMI premium increases." It is assumed that the fourth category also refers to Brokers Ireland reaction to the High Court *Setanta* judgment discussed in Section 6.4.

Table 3
Public Statements,^a Motor Insurance Premiums, Five Insurers,^b a Broker^c and Broker Representative Body,^d 2015-2016,^e Ireland

Date ^f	Statement ^g
15/01/2015	BI: <i>"There is no doubt about it - motor rates have gone up, and will go up between 8pc and 15pc depending on the type of business."</i> AA: <i>"would not be surprised if premiums go up by more than 8pc this year."</i>
14/05/2015	AA: <i>"warned drivers to expect premium increases of up to 20pc this year."</i>
26/06/2015	BI: <i>"The consumer price index data unfortunately reflects what we have been signalling since the beginning of the year – motor rates have gone up significantly and will continue to do so – they may increase a further 25% by year end."</i>
06/08/2015	BI: <i>"The recent motor premium increases of approximately 20pc over the last 12 months have reduced the loss-making in the sector, but there is still the probability of further increases over the coming months."</i> AA: <i>"Motor premiums have now jumped by 20pc compared with where they were a year ago and are due to keep going up."</i> Aviva: <i>"The pressure is on and it has not gone away. I can't say there will be no more increases."</i>
24/08/2015	FDB: <i>" ... expects to raise general motor insurance premiums by about 10pc over the next 10 months."</i>
02/11/2015	BI: <i>"Premiums are definitely going to increase in the local market. It will be (a rise of) 10% to 15% coming down the line, on average. By next autumn prices will be up to 15% higher on average."</i>
17/01/2016	BI: <i>"... the [September 2015] High Court's decision has indirectly made other insurers responsible for the €100m shortfall in their accounts. So insurers will have to come up with this money. Insurance companies are not charities, they are commercial shareholder organisations, so funds for these additional costs will have to be found somewhere, and there's no point in sugar coating it - motorists and all policyholders will bear the brunt of these costs in the form of increased premiums or additional levies. Aside from this €100m in Setanta claims, the ruling means that insurance companies need to substantially increase their reserves (ie, put aside millions in cash) in case another larger insurer goes bust. And again it is the policyholders who will ultimately fork out for this. We've spoken to people throughout the industry who say that these factors combined could result in continued increases in average motor premiums to the €1,000 mark, representing a 150pc increase on 2014 levels. This will create severe difficulties in the market for consumers and business interests alike and would severely undermine the economic recovery."</i>
01/03/2016	FDB: <i>"expected "hefty" motor premium increases in the "low teens" in 2016 following a 31% increase in the cost of motor insurance across the industry last year."</i> ⁱ
12/06/2016	Allianz: <i>"Allianz will increase the cost of car insurance by another 5pc by the half-year point as insurance prices continue to climb across the sector. It expects no more increases after that. The move means the company will have raised motor insurance prices by a total of around 10pc in 2016."</i>
12/08/2016	FDB: <i>"... plans to increase motor insurance rates by about 9 per cent over the next year as it seeks to return to profitability."</i>

- a. Internet search using terms such as the identity of the insurer (see note b), the broker (see note c) and the broker representative body (see note d), motor insurance premium, and so on.
- b. AIG Europe SA, Allianz plc, AXA Insurance DAC, Aviva Insurance Ltd, and FBD Insurance plc.
- c. AA Ireland Ltd.

- d. Brokers Ireland (BI) formerly the Irish Brokers Association (IBA).
- e. To 31 August 2016, when the CCPC launched a formal investigation into price signalling in PMI. See Table 1 for details.
- f. Date as per the posting on the Internet, which may be different from the print edition of a publication.
- g. If the public statement in the source is a direct quote from a party listed in footnotes b to d then the statement is in *italics*.
- h. The CCPC (2022, fn. 21, p. 23) refer specifically to this article.
- i. The CCPC (2022, fn. 20, p. 23) refer to an article where the CEO of FDB makes a similar statement.

Source: *Irish Examiner, Irish (Daily & Sunday) Independent, Irish Times, Sunday Business Post.*

Public statements in chronological order concerning future PMI premium increases by the parties that were subject to the CCPC's preliminary findings are reported in Table 3. In those instances where the newspaper article directly quoted a representative of one of the parties the statement is in italics. The exception is the 17 January 2016 statement concerning the implications of the High Court's *Setanta* judgement. In this instance the article was not written by a journalist, but by the CEO of the BI and as a result is entirely in italics. Where more than one media outlet covered the same public announcement only one instance is included in the table.

A caveat is in order concerning whether or not all of the PMI premium announcements by the seven parties have been captured. The substantial PMI premium increases over the period 2014-2017 attracted considerable political and media attention.³¹ Hence it is reasonable to assume that at least some of these statements would have been captured by at least one media outlet.³² The CCPC's regression analysis, reported in Section 6.5, however, appears to have included the price announcements of all of the five insurers subject to the preliminary findings.

The frequency of public statements among the seven parties subject to the preliminary findings varies considerably. Only five of the seven parties reportedly made public statements concerning PMI premium increases (i.e. the exceptions were found by AIG or AXA). Nonetheless, these two insurers may have been consulted by the Brokers Ireland in preparing its response to the High Court *Setanta* judgment. Among the five parties for which statements were found of particular importance were Brokers Ireland (five of the thirteen statements in Table 3), FDB (3/13) and the AA (3/13). The significance of FDB amongst insurers may reflect the fact that of the five insurers subject to the preliminary findings, FDB is Ireland's only publicly quoted insurance company and hence perhaps attracted more local media attention than the other four insurers.

³¹ There were, for example, a number of State-sponsored reports on PMI premium increases such as Cost of Motor insurance Working Group (2017).

³² The announcements in Table 3 are confined to newspaper reports. The CCPC (2022, fn. 19, p. 13) state that they "examined over forty public announcements as part of the investigation." However, public announcements are defined more broadly than newspapers to include "communications through the media, speeches, presentations and panel discussions at conferences including telecommunications conferences, as well as interviews and answers to questions through professional media, both traditional and digital." It is not clear to what extent there may be an element of double counting in the estimate of forty announcements. If, for example, Brokers Ireland made a statement concerning the implications of the High Court *Setanta* judgment and insurers also made statements would all these have been treated as one announcement by the CCPC or more than one?

6.4 The High Court *Setanta* Judgment: Pro-Competitive Lobbying vs. Anti-Competitive Price Signalling?

The Brokers Ireland 17 January 2016 statement on the impact of the precedent setting September 2015 High Court *Setanta* judgment - that shifted liability for the insolvency of insurers to motor insurance policy holders - is better characterised as lobbying not price signalling.³³ Even if the statement were characterised as price signalling, it is contingent the High Court's *Setanta* judgment being upheld, on appeal, by the Supreme Court. The highly contingent nature of the Brokers Ireland statement distinguishes it from the *Container Shipping* and *MNO* price signalling cases referred to in Section 6.2.

Brokers Ireland in its statement on the implications of the High Court *Setanta* judgment stressed that motorists would bear the brunt of the judgement. Brokers Ireland stated that it had spoken to others – presumably including some of the parties identified in the CCPC's preliminary findings - in order to quantify the judgment's impact.³⁴ Brokers Ireland envisaged premiums rising to €1,000 per motorist. The implied increase was estimated as a once off hike in PMI premiums of €100 per motorist.³⁵ Brokers Ireland stated that “while it is easy to blame the High Court for the decision, a solution to this gross unfairness and irrationality is within the control of the Irish government.”³⁶

Brokers Ireland was not alone in its concern over the implications of the High Court *Setanta* judgment. The Motor Insurance Bureau of Ireland (MIBI, 2016), an association of undertakings consisting of all PMI suppliers in Ireland, not only appealed this judgment – since under the judgment the MIBI would assume responsibility for the unpaid claims resulting from *Setanta*'s liquidation – but also that the judgment required “closer scrutiny by the industry and Government alike.”³⁷ The MIBI (2016) also estimated the likely increase in premiums due to the High Court *Setanta* judgment, but at €52.50, it was much lower than that of Brokers Ireland.³⁸ However, in both cases the increase was substantial.

It could be argued that both the Brokers Ireland and the MIBI announcements had a legitimate purpose in highlighting the likely consequences of the High Court judgment for PMI premiums thus stimulating public discussion concerning the most appropriate method of dealing with the

³³ It should be noted that some of the parties in their response to the CCPC's preliminary findings referred to the High Court *Setanta* judgment as an external factor “being relevant to the context of both the public announcements and any contacts between the parties” (CCPC, 2022, para. 3.27). However, there is no reference in the CCPC's *Investigation Report & Outcome* to the argument that Brokers Ireland reaction to the judgment should be characterised as lobbying not price signalling.

³⁴ Even if it is appropriate to characterise Brokers Ireland reaction to the High Court *Setanta* judgment as lobbying, it nevertheless behoves Brokers Ireland and any insurers it may have contacted to ensure that commercially confidential material was not shared either directly or indirectly between insurers.

³⁵ Brokers Ireland estimated that a liquidation liability of €300 million would translate into a one-off premium increase of more than €300 per motorist. Since the *Setanta* liquidation liability was €100 million, this implies, other things being equal, a once-off premium increase of €100 per motorist. For details see Phelan (2016), who was CEO of the Irish Brokers Association.

³⁶ Phelan (2016).

³⁷ The Motor Insurance Bureau of Ireland (MIBI, 2016) “was established in 1955 by an Agreement between the Government and the companies underwriting motor insurance in Ireland for the purpose of compensating victims of road traffic accidents caused by uninsured and unidentified vehicles.”

³⁸ The difference may be due, inter alia, that the Brokers Ireland estimate includes an increase in insurers reserves to take into account the possibility that another insurer might enter liquidation.

consequences of the liquidation of an insurer.³⁹ The High Court *Setanta* judgment did not, however, come into effect. It was overturned by the Supreme Court in May 2017, rendering any likely PMI premium increase linked to the High Court *Setanta* judgment moot.

6.5 Reaching a Common Understanding: A Focal Point?

6.5.1 What Kind of Understanding?

Collusion, whether explicit (i.e. a cartel) or implicit or tacit (e.g. price signalling), is designed as a mechanism by which the parties to the collusive arrangement reach an agreement as to the appropriate focal point. In cartels such as the *Citroen Dealers Association* or the *Heating Oil* cases in Ireland, the parties met in a room or some other venue and agreed a focal price.⁴⁰ If there has been a change in the underlying market conditions, for example, the parties may have had different views as to the new focal price and hence the need to meet in person or communicate in some other way so as to reach a consensus.

In case of a tacit understanding such as the *Wood Pulp*, *Container Shipping* and *MNO* cases, the exchange of information takes place in public as the parties set out their views as to the appropriate focal point. In doing so the parties indicate what they are minded or intend doing, rather than making firm announcements that they will, for example, raise price by 'x' per cent immediately or within a short time horizon. In other words, the announcements concern intentions, not binding price announcements that are implemented. In *Container Shipping*, for example, the European Commission stated that the "announcements are made several times a year and contain only the amount of the intended increase, the date of its planned implementation and the affected trade routes."⁴¹

Both explicit and tacit agreements can prevent, restrict, or distort competition and thus breach competition law.⁴² The CCPC, correctly, does not allege that PMI price signalling is an explicit agreement. Rather such conduct is characterised by the CCPC (2022, paras. 3.7, 3.24) as a concerted practice. Such a practice was defined in *Wood Pulp* (para. 63), drawing on earlier case law, as "a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them."⁴³

³⁹ For further discussion on public policy towards PMI premiums at this time see Cost of Motor Insurance Working Group (2017).

⁴⁰ For further discussion and description of the *Citroen Dealers Association* case see Andrews, McFadden & Gorecki (2015, pp. 158-160); on *Heating Oil* see Andrews, Gorecki & McFadden (2015, pp. 379-392) and Gorecki & McFadden (2006).

⁴¹ *Container Shipping*, para. 1. A similar pattern applied to the US *Ethyl* price signalling case. For details see Hay (1999).

⁴² However, it is much harder to establish that tacit collusion breaches competition law. Indeed, much tacit collusion probably falls outside competition law. For a discussion see, for example, Ezrachi & Stucke (2016, pp. 56-60) and Whish & Bailey (2021, pp. 588-602).

⁴³ For further discussion of the definition, meaning and proof of a concerted practice see Whish & Bailey (2021, pp. 117-120).

6.5.2 Price Signalling = A Concerted Practice?

The issue thus becomes the degree to which the public announcements concerning PMI premium increases recorded in Table 3, subject to the exception in Section 6.4, are consistent with the parties trying to reach a common understanding, a tacit agreement, a focal point. In short, a concerted practice. There are several reasons for arguing that the evidence is inconsistent with the parties reaching a common understanding.

First, the price signalling concerning PMI premium increases are generally not expressed in terms of a point estimate (e.g. 8 per cent), but rather as range (e.g. 8 to 15 per cent, more than 8 per cent, or the low teens). In other words, there is considerable uncertainty as to what is the focal point for the PMI premium increase. Indeed, there does not appear to be a focal point. This makes it difficult for insurers and brokers to set a common PMI premium increase. To compound matters while some public price announcements are individualised, others are predictions concerning anticipated market trends.⁴⁴ In illustrating PMI public announcements by insurers the CCPC (2022, fn. 21, p. 13) selects the following quote from the CEO of FDB: “[W]e need to see more increases that’s for certain but I would be talking about a double-digit increase, I think [it will be] market wide but a low double-digit increase.” Arguably this is not individualised nor is it point estimate.

Second, the insurer and brokers estimates of future PMI premium appear to bear little relationship to the actual PMI premium increases that would be consistent with the lack of a focal point to guide market participants in setting premiums. The expected PMI premium increases signalled by the insurers and brokers for 2015-2016 were, in chronological order: 8-15 per cent; > 8 per cent; <20 per cent; <25 per cent; 10 per cent; and 10-15 per cent (Table 3). However, the actual overall increase in PMI premiums for 2015-2016 was 21 per cent (Table 4). A similar result is also found for 2016-2017.⁴⁵ (The CCPC’s (2022, para. 2.7) own analysis, based on insurer level data, found an average premium increase of over 30 per cent between January 2015 and September 2016). In other words, most statements in 2015 and 2016 by insurers and brokers as to PMI premium increases for the next twelve months severely underestimated the actual increase, raising doubts as to the effectiveness of the PMI price signalling in reaching in a common understanding.

Third, notwithstanding the last point, the CCPC (2022) examined the relationship between public announcement of prices and subsequent increases in PMI premiums. Unlike Table 3, which largely reflects statements by a broker (AA) and a broker representative body (Brokers Ireland), the CCPC examination concerned only insurer public price announcements. The CCPC (2022, para. 2.8) found that based on its regression analysis “there was a statistically significant correlation between the public price announcements and a subsequent increase in the (insurer) Parties’ PMI premiums two months later (this timing being consistent with the application of pricing decisions by insurers).” No

⁴⁴ Individualised data are defined by Rabinovici (2017, fn. 17, p. 150) as “information referring to a specific undertaking (for example the prices charged by it) in contrast to information aggregating data from several undertakings (for example average prices across them).” It is the former that are of primary importance in reaching a common understanding.

⁴⁵ The PMI premium increases signalled by the insurers and brokers for 2016-2017 from Table 3 were, in chronological order: 10-13 or 14 per cent (i.e. ‘low teens’); 10 per cent; and 9 per cent. However, the actual increase in PMI premiums, set out in Table 4, for 2016-2017 was 15 per cent.

details were provided as to sample size, level of statistical significance, or the magnitude of the coefficient.

Table 4

Annual Changes, Private Motor Insurance Premiums Earned Per Policy, Ireland, 2009-2019

Year	Annual Average Change (%)	Year	Annual Average Change (%)
2009-2010	2	2014-2015	11
2010-2011	-3	2015-2016	21
2011-2012	-7	2016-2017	15
2012-2013	-5	2017-2018	3
2013-2014	3	2018-2019	-4

Source: CBI (2020, Table 27, p. 60).

The CCPC quantitative estimates suggests that the insurers that are party to the price signalling do not indicate by how much they *intend* to raise PMI premiums. Instead, the insurer public premium announcements are *implemented* two months after they are announced. If insurers announced their intended premium increases in a process designed to reach a focal point then it is unlikely that these announced increases would be implemented. In reaching an accommodation some intended premium increases would not be implemented as the response of other insurers might, for example, signal a lower (or higher) premium increase, to which the insurer would have to respond by adjusting (not implementing) their initial premium announcement so as to arrive at an agreed upon focal point.

In sum, the analysis to date strongly suggests that the PMI price announcements by the parties subject to the CCPC’s anticompetitive price signalling allegations do not constitute the basis for an agreed upon focal point premium increase. The Brokers Ireland price announcement in relation to the High Court *Setanta* judgment is better characterised as lobbying, for insurers the price announcements – by the CCPC’s own analysis – are more appropriately characterised as binding not intended, while the price announcements of the brokers and a broker representative body although intended typically are in the form of a range not a point estimate and often not individualised.

6.5.3 Reducing Uncertainty = Concerted Practice?

The CCPC does not frame PMI public price announcements by the parties as a mechanism to reach a focal point. Rather the CCPC (2022, para. 3.16) views such announcements in terms of “artificially increased transparency.” Absent this transparency “insurers would risk losing customers should they unilaterally increase prices, given the price sensitivity of consumers ...” (ibid, para. 3.21). The information that was furnished “was commercially useful and of practical value to the Parties and at least sufficient to highlight that there was a general impetus towards industry-wide PMI price increases in the State” (ibid, para. 3.23). Furthermore, some of this information was “that would otherwise be commercially sensitive” (ibid, para. 3.23). Price announcements allowed the parties “to develop a climate of mutual certainty as regards future PMI premiums” (ibid, para. 3.24). As a result of this conduct “the Parties made it possible to reduce strategic uncertainty for each of the parties and created conditions of competition that did not correspond to normal conditions and accordingly gave rise to a concerted practice” (ibid, para. 3.24).

In arguing that the PMI premium announcements artificially increased transparency the question of the counterfactual arises: what alternative characterisation of the availability of pricing information was the CCPC comparing PMI premium announcements? The CCPC's (ibid, para. 3.20) counterfactual is stated as follows:

Uncertainty between insurer and brokers is a vital element of competition in the PMI market. *Effective competition is possible only if each competitor can keep its intentions and future actions secret.* The CCPC's preliminary view was that the alleged conduct of the Parties artificially increased the transparency in the PMI market in the State (emphasis supplied).

It is not clear how exactly an insurer can keep such matters secret nor that effective competition is possible only if there is such limited disclosure of prices.

The CCPC (2022, para. 3.19) states that insurers (and brokers) should independently determine PMI premiums. The CCPC (ibid, 3.19) states that "economic operators ... [have] the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors." However, the CCPC (2022, para. 3.19) qualified this statement by stating that in adapting to the conduct of rivals, firms are "strictly preclude[d] [from] any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its competitors or disclose to them its *decisions* or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question (emphasis supplied)."⁴⁶

The issue thus becomes has the dividing line between independent conduct taking into account rivals reactions (i.e. legal) and a concerted practice to raise premiums (i.e. illegal) been crossed. Insurers announced PMI premium increases that were implemented aware not only that consumers are price sensitive, but that other insurers were also experiencing trading difficulties.⁴⁷ It was common knowledge – independent of any insurer PMI price announcements - that there was in 2015 and 2016 an impetus towards PMI premium increases due to the stage in the insurance cycle, an issue dealt with in Section 6.10. In making premium announcements individual insurers would have undoubtedly take into account the likely reaction of rivals to any price hikes. This is, however, no more than intelligently adapting to the conduct of rivals to arrive at some kind of non-collusive equilibrium. It is thus difficult to see how insurers in announcing upcoming premium increases that are implemented have strayed across the dividing line into a concerted practice.

This conclusion is reinforced in comparison with the earlier *Container Shipping* and *MNO* price signalling cases. Here price announcements refer to intended prices or other actions, so as to start a conversation to reach a common understanding in terms of a focal point. In short, the intended nature of the announcement points towards a concerted practice. However, given that the PMI insurer price announcements appear to be closer to commitments it is more difficult to see how such a

⁴⁶ The CCPC appears here and in the earlier reference to intentions/future actions to draw no distinction between decisions and intentions. However, as noted below in relation to the *Container Shipping* and *MNO* price signalling cases, publicly communicating future pricing decisions already taken does not appear to infringe competition law, whereas communicating publicly pricing intentions does.

⁴⁷ The reference to binding PMI premium increases is based on the CCPC analysis cited in Section 6.5.2.

conversation develops. This point is reinforced by the fact that the commitments accepted by the European Commission and the ACM so as to resolve their competition concerns transformed announcements of intended price changes into acceptable announcements of firm price changes.

The CCPC (2022, para. 3.20) also views uncertainty between brokers and insurers as to the latter's premiums as a vital element in competition in the PMI market. Public price announcements by insurers as to PMI premium hikes reduce this uncertainty. It is difficult to see, however, that there can be substantial uncertainty between an insurer and a broker as to the former's PMI premium; the brokers act as an agent for the insurer. The broker pays a wholesale price to the insurer and given industry norms as to the mark-up or commission yields the brokers likely insurance premium. Since the brokers sells in competition with the insurer if the latter charges a different price, then it will rapidly become obvious and the broker will ask for a better wholesale price.

The CCPC appears to place little or no weight on the dissemination of information on prices through public announcements. A major thrust of public policy towards reducing PMI costs has been increased and more timely public information on PMI premiums. Public price announcements convey valuable information to consumers on which purchasing decisions by consumers can be based and potential entrants can benchmark the profitability of entry. If information is secret then consumers are ill informed; search costs are likely to increase, resulting in insurers and brokers being able to raise prices.

It is perhaps worth point out that that Kuhn (2001, p. 196), in a widely cited paper, has designed a set of rules that if "consistently applied, could significantly improve competition policy towards collusive practices." Rule 1 is:

A prohibition of any private discussion of *future* output prices ... as a violation of Art. 81(1). As discussed above it is hard to see any potential efficiency gains from such communications. As soon as it is public (for example, in the form of public price announcements) and amounts to some form of commitment relative to consumers, the potential efficiency effects are significant enough that such practices by themselves should not be considered a violation of Art 81(1) (emphasis in original).

Given the CCPC (2022) finding that PMI insurer public price announcements were implemented suggests that the necessary commitment was satisfied.

6.6 Aligning Incentives

6.6.1 Introduction

The more closely aligned the incentives of the parties that are alleged to be involved in the PMI price signalling the more likely it is that the parties will not only be able to reach a focal point PMI premium increase but also adhere to that agreed upon focal point. Incentives are aligned the more closely the parties resemble each other. If each of the parties to the alleged price signalling have similar cost structures, market shares, ownership structures, product offerings and so on then they are likely to

see the world in much the same way. Agreement, for example, is more likely to be reached on a focal point that is satisfactory to all parties in terms of maximizing profits.

Two aspects of the degree to which the parties incentives are aligned are considered. First, attention is paid to insurers. Market share is selected as the dimension to examine the degree of similarity between the five insurers subject to the CCPC’s price signalling allegations. Second, the degree to which the incentives of insurers and brokers are compatible is examined. The PMI price signalling case is unusual – at least when compared to *Wood Pulp*, *Containers Shipping* and *MNO* – in that the allegations cover not only competitors at the same level in the value chain (i.e. insurers), but also downstream parties (i.e. brokers).

6.6.2 Insurers: Market Share

One important metric for measuring the degree of similarity or symmetry across the five insurers is market share. If there are substantial differences in market share, for example, then those parties with low market shares have an incentive to cheat on any agreed price, while those parties with larger market shares have less incentive to cheat. Furthermore, as Ivaldi et al (2003, pp. 14-15) point out, market shares are likely endogenous, such that with asymmetric market shares “one should suspect that firms have different (marginal) costs and/or provide differentiated goods or services,” both factors that are likely to inhibit collusion.

Table 5
Concentration & Market Share, Private Motor Insurance (PMI), Ireland, 2014-2019

Insurer	Market Share (%) ^a					
	2014	2015	2016	2017	2018	2019
Panel A: Five PMI Insurers Allegedly Price Signalling as per the CCPC Preliminary Findings						
AIG	5.3	7.5	8.1	7.9	6.5	5.5
Allianz	10.6	12.0	13.8	13.9	12.7	11.9
Aviva	14.3	15.8	16.4	16.1	15.2	14.4
AXA	21.8	24.1	23.8	25.2	27.1	28.6
FBD	14.1	12.1	10.1	9.7	9.8	9.7
<i>Sub Total</i>	<i>66.1</i>	<i>71.5</i>	<i>72.2</i>	<i>72.5</i>	<i>71.3</i>	<i>70.1</i>
Panel B: Other PMI Insurers						
Liberty	10.6	9.2	9.3	10.3	10.6	10.7
RSA	12.8	10.8	9.6	8.1	9.3	10.4
Zurich	8.9	7.5	7.9	7.9	7.4	7.2
Other ^b	1.7	2.0	0.8	1.2	1.3	1.3
<i>Sub Total</i>	<i>34.0</i>	<i>29.5</i>	<i>27.6</i>	<i>27.5</i>	<i>28.6</i>	<i>29.6</i>
Total	100	100	100	100	100	100
Panel C: Summary Statistics^d						
CR4 (%)	63.0	64.0	64.1	64.9	65.6	65.6
HHI	1380	1433	1437	1474	1521	1569
N	12	12	12	12	11	11

a. Market share measured as the insurers share of gross private motor insurance premiums.

- b. Market share of individual insurer is less than 1 per cent.
- c. May not add to 100 due to rounding.
- d. CR4 = market share of four largest insurers; HHI = Herfindahl-Hirschman Index; N = number of insurers.

Source: Insurance Ireland, *Factfile*, various issues (<https://www.insuranceireland.eu/news-and-publications/publications>).

In order to measure market share requires, of course, a definition of the relevant product and geographic market. The CCPC (2022, paras. 3.8-3.11) concluded that the supply of PMI in the State was the appropriate definition. Such a finding was based on, inter alia, the legal requirement for third-party PMI with the result that there are no substitutes (e.g. driving without insurance is an offence) and “consumers cannot substitute another form of insurance policy for PMI (ibid, para. 3.9 (b)).” The CCPC (2022, para. 3.10) also concluded that for the purposes of competition analysis it was not necessary “to define separate markets according to different risk factors (such as vehicle type or age).” The CCPC (2022, para. 3.1) did not find evidence that “competitive conditions materially differ according to distribution channel.” In this paper the CCPC approach to market definition is followed.⁴⁸

In 2015 while three of the five insurers that the CCPC alleged were involved in anticompetitive price signalling had market shares of PMI of between 12 and 16 per cent, one had a market share that was half of this range while the other had a market share that was 50 per cent larger (Table 5, Panel A). Such asymmetries are likely to make it harder to reach agreement on a focal PMI premium increase as compared to a situation where the five insurers had the same or similar market shares. Even if the insurers were able to agree a focal PMI premium increase, the insurer with the lower market share, 7.5 per cent, is more likely to gain from not following up any premium increase than the market leader on 24.1 per cent. The evidence is consistent with this in that AIG, which had the lowest market share in 2015, gained market share in 2016. In contrast, AXA, which had the largest market share in 2015, experience a loss. Those with a marker share between 12-16 per cent had mixed experienced with respect to market share gain/loss.

6.6.3 Insurers and Brokers

The regulatory framework under which brokers operates, brokers have a duty to act in the consumer’s best interest in supplying PMI and other products.⁴⁹ Hence brokers are required to secure as low a PMI premium as possible given the characteristics of the customer and the vehicle that is to be insured. Customers were likely to be particularly demanding in requesting lower premiums in 2015-16 and 2016-17 as premiums increased by 21 and 15 per cent, respectively, following an 11 per cent increase in 2014-15 (Table 4). Furthermore, evidence, albeit more recent than 2015-2016, shows that 62 per cent of consumers that switched insurer did so because of a premium increase.⁵⁰

⁴⁸ Such an approach is consistent with the recent European Commission (2022c, paras. 16–29) in its recent investigation into access to Insurance Ireland’s insurance claims database which is discussed in Section VIII.

⁴⁹ CBI (2016, p. 12).

⁵⁰ CBI (2021b, Table 17, p. 61).

On the other hand, the broker is compensated by a commission of between 7.5 and 10 per cent of the value of the PMI premium⁵¹ and thus other things being equal, has a preference for a higher as opposed to a lower premium. At a minimum, these conflicting forces mean that the broker's incentives to raise premiums above the competitive level are unlikely to be fully v aligned with those of insurers.⁵²

There is a further wrinkle concerning the relationship between the broker and the insurer. The insurer and the broker are simultaneously in a vertical and a horizontal relationship. It is vertical in that insurers provide the PMI (and other insurance) policies to brokers which in turn sell those policies as an agent to consumers. The insurer provides an essential input to the suite of services that a broker then retails to the consumer. It is horizontal in that insurers not only supply PMI products to the broker, but also sell directly to the consumer. The insurer in the direct to consumer distribution channel competes with the broker, with the latter accounting for around 40 per cent of the market.⁵³

6.7 Cheating & Detection

6.7.1 Introduction

Any agreement, whether explicit or tacit, to raise price above the competitive level so that super normal profits are earned has the problem that it is likely to create incentives for parties to the agreement to lower prices below the focal point (i.e. cheat) and thus increase their returns (i.e. the reduction in profits due to the small margin reduction on existing sales is more than offset on the increased profits due to extra sales). The profitability of cheating thus depends on the increase in business that the party can expect to secure. The larger the increase the greater the incentive to cheat.

A second important factor governing the decision as to whether or not to cheat is ease with which the cheating is detected by the other members of the agreement, leading to retaliation/punishment. Detection is likely to be difficult compared to a counterfactual in which there is a well established market price, given that each PMI premium is individualised to a specific customer. One retaliation/punishment mechanism is the so-called trigger strategy under which there is a reversion to the non-cooperative equilibrium once cheating is detected.⁵⁴ The longer the period until cheating is discovered the greater the return to cheating.

In a cartel it is of course easier to not only reach a common understanding but design a mechanism for the detection of cheating and subsequently imposing punishments for such behaviour. In the *Citroen Dealers Association* case, for example, there were elaborate agreed pricing schedules for various vehicle options, mechanisms to ensure compliance (i.e. mystery shopping surveys) and

⁵¹ CBI (2016, p. 7). Sometimes there a fee for advice may be added (Cost of Motor Insurance Working Group, 2017, p. 33).

⁵² The conflicting incentives of the brokers are discussed in CBI (2016, pp. 13-20) and Competition Authority (2005, Vol. I, paras. 10.41-10.92).

⁵³ CBI (2021b, Table 14, p. 57, Target Column), which showed that insurer : broker split was 58:42.

⁵⁴ For discussion see Martin (2010, pp. 180-185).

punishment mechanisms (i.e. a fine). There is no evidence of any of these in the case of PMI premium setting in 2015-2016.

6.7.2 Switching

One of the factors that will determine whether or not parties with lower market shares will gain market share through cheating is the ease and degree of switching by PMI policy holders. Public policy has facilitated switching/competition in PMI through a variety of policies.⁵⁵ The CCPC has undertaken a series of annual consumer switching surveys for 2012 to 2016 across nineteen different services/product, which can be grouped into various categories (Table 6).⁵⁶

Table 6
Switching Behaviour,^a Selected Goods & Services, Ireland, Annually, 2012-2016

Good/Service	Nov 2012	Dec 2013	Jul 2014	Nov 2015	Dec 2016
Insurance Services					
<i>Car Insurance</i>	19	26	25	29	28
Home Insurance Provider	10	15	13	16	11
Health Insurance Provider	8	13	9	9	6
Life Insurance/Mortgage Protection	2	4	3	5	3
Utilities					
Electricity Supply Service	8	15	17	18	15
Gas Supply Service	5	16	17	17	15
Mobile Phone Provider	10	12	9	14	10
Broadband/Internet Access Provider	11	20	13	16	14
Fixed Line Telephone Services	8	18	11	13	6
Goods					
Main Grocery Shop	20	17	14	17	10
Top-Up Grocery Shop	14	14	12	14	8
Other Services					
Gym Membership	15	15	15	14	13
TV Service Provider	6	10	7	9	9
Waste Provider	9	11	6	7	2
Financial Services					
Credit Card Provider	n/a	3	2	3	1
Savings/Investment Provider	3	4	3	4	1
Mortgage Credit Provider	0	0	2	3	1
Provider of Credit	n/a	4	1	5	3
Bank Financial Institution with c/a Service	4	6	3	5	2

⁵⁵ For a discussion see Cost of Motor Insurance Working Group (2017). More recently government has undertaken to establish an office to encourage greater insurance market competition. For details see Government of Ireland (2021, p. 7).

⁵⁶ It appears from the CPCC's website that no subsequent such switching surveys were conducted except with respect to mortgages. For details see: https://www.ccpc.ie/business/research/market_research/.

- a. Percentage that switched in the past year.

Source: CCPC (2017a, p. 5).

Amongst the four different insurance services for which the CCPC presented switching rates, PMI (i.e. car insurance) had by far the highest level of switching: 29 per cent in 2015, 28 per cent in 2016, with the next highest insurance service, house insurance, recording 16 and 11 per cent switching rates, respectively. Expanding the comparison to all of the services/products in Table 6 does not change the conclusion that PMI recorded the highest switching rates in these two years. Furthermore, during the years of rising PMI premiums – 2015 and 2016 – switching rates were higher, albeit by only a few percentage points, than prior years.

6.7.3 Transparency

The more transparent a market is the easier it is for rivals to be able to determine whether or not one of the parties to the agreement is cheating by not adhering to the terms of the agreement. If there is reliable current information available on PMI premiums preferably by each of the parties then that will make it easier to monitor adherence to the focal point. However, so far as the author is aware, there was no shared data platform in 2015 and 2016 between insurers and/or brokers that recorded details of PMI premiums.⁵⁷

Rather than offering a small number of PMI premiums, each insurer offers a distribution of premiums differentiated by risk, loyalty etc. If a competitor observes a change in the average PMI premium of a rival insurer, it is difficult if not impossible for the competitor to know if the change is due to a shift in the PMI premium distribution (i.e. all premiums increase by the agreed focal point PMI premium rise) or a change in the riskiness of customers, unless the whole distribution is visible. However, even if all premiums increase by the same amount, it may be that some insurers are including extra unpriced services (e.g. free window screen cover, an additional driver) thus, in effect, reducing the quality adjusted PMI premium.

Notwithstanding the lack of a forum to exchange PMI premiums in 2015 and 2016, it is the case that there existed a software product provided by Relay Software Limited (Relay) to brokers on which insurers posted future pricing information. It is not clear whether or not the insurers posting their own pricing information had access to that of their competitors. In any event in 2013 Relay undertook, after engagement with the CCPC, to “put in place [mechanisms] to ensure that each participating insurance company could only access its own pricing information and not the future prices of competitors.”⁵⁸

⁵⁷ Such a platform may also have provided information on future anticipated or intended PMI premium increase and, depending on how it was structured, a forum within which future pricing information could have been shared to arrive at a focal point. This occurred, for example, with respect to the Airline Tariff Publishing Company, owned by the major US airlines, which distributed information on prospective price changes to airline and travel agent computer systems. However, if the PMI insurers/brokers had such a system for exchanging premium increases then there would be little incentive to make public pronouncements on future premiums as a means of establishing a focal point. For details of the Airline Tariff Publishing Company case see Borenstein (2004).

⁵⁸ CCPC (2017c, p. 16). The CCPC subsequently signed, in 2016, A&Us with Relay and five insurers, two of which were the subject of the CCPC’s price signalling investigation (i.e. Allianz and AXA).

The insurer/broker interface is likely to further complicate detecting deviations from any agreed upon focal point for insurers. Brokers are likely to seek the best deal for their customer by shopping around amongst insurers, while insurers are likely to provide incentives (e.g. loyalty rebates, discounts etc.) to encourage insurers to distribute their product to the consumer. The outcome of such insurer/broker interactions will not be readily observable by other insurers. This will make it harder for insurers to maintain any PMI premium increase, since brokers could pass on, in part at least, the discounts they receive from insurers to customers in order to compete not only with other brokers but also insurers that sell direct to consumers. Any discounts offered by the broker may not be easily detected if, for example, they are paid in the form of a refund or are reflected in a reduction to the consumer for taking out several insurance products (i.e. bundling).

The situation is also complicated by the PMI market practice of differential pricing which, according to the Central Bank of Ireland (2021a, p. 3) “customers with a similar risk and cost of service are charged different premiums for reasons other than risk and cost of service.” Until it was prohibited by the Central Bank of Ireland in July 2022,⁵⁹ one prevalent form of differential pricing in PMI was dual pricing: a ‘high’ premium for loyal customers with the premium often positively related to the number of years with a particular insurer; and a ‘low’ premium for those customers that shop around/switch PMI insurer.⁶⁰ However, when a loyal customer received a PMI premium quote for the next year’s insurance from their existing insurer, if the customer shopped around or even contacted their existing insurer for a better deal they were likely to receive a discount off the ‘high’ renewal premium and/or the inclusion of some extra services at no additional cost.

An indirect method of determining whether or not cheating is occurring is the publication of reliable market volumes and shares of insurers such as those presented in Table 5. Other things equal, if all insurers agree to charge and adhere to the focal point PMI premium increase then insurer market volumes and shares should remain largely unchanged since there will always be an element of random variation. Hence if insurers observe market significant shifts in sales volumes and market shares then that it is prima facie grounds for believing that the insurers gaining market share have cheated.

Ideally for such a mechanism to work well requires the timely production of sales volumes/market shares. In the case of passenger cars, for example, the Society of the Irish Motor Industry (SIMI) releases monthly data on the number of new car sales by marque and on a various other dimensions soon after the conclusion of each month.⁶¹ However, PMI information is much less timely and more aggregated. The insurers representative body, Insurance Ireland, in its annual *Factfile* publication presents, by insurer, gross annual written premiums, but with a considerable lag, details of which are presented in Table 7.

The table presents the date of publication of *Factfile*. So, for example, the annual data for 2015 was published in October 2016. The detection lag is measured as a range: the maximum detection lag

⁵⁹ For details see: <https://www.centralbank.ie/regulation/industry-market-sectors/insurance-reinsurance/home-and-motor-insurance-rules>.

⁶⁰ PMI is purchased on an annual basis. Each policy holder is sent a renewal notice by their current insurer/broker that contains a quote for the next year. The notice is issued well before the renewal date, leaving the policy holder time to shop around for a better offer.

⁶¹ For details see <https://stats.beebEEP.ie/>. It should be noted that no suggestion is being made that there is anything untoward in the publication of such information by SIMI.

assumes that the cheating started is January of the year for which the data refers; the minimum assumes the cheating started in December of the year for which the data refers. Of course, if the cheating began towards the end of the year, then it is less likely to be reflected in annual reporting since for most of the year the insurer would have been adhering to the focal point. Hence cheating that commenced in January is more likely to be detected using these data and hence in terms of the detection lag the maximum is the most relevant.

Table 7
Insurance Ireland, Publication of PMI Gross Written Premiums & Market Share Data, Time Lag, 2012-2019.

Year	Publication Date (Detection Lag in Months)	Year	Publication Date (Detection Lag in Month)
2012	12/2013 (12-24 months)	2016	01/2018 (13-25 months)
2013	09/2014 (9-21 months)	2017	04/2019 (12-28 months)
2014	09/2015 (9-21 months)	2018	04/2019 (4-16 months)
2015	10/2016 (10-22 months)	2019	06/2021 (18-30 months)

Note: For 2012 AXA was not included in the data source. The data source presents gross written premiums by company from which market shares can be estimated. Lag is measured from January and December of each year and the date of the publication of gross written premiums.

Source: Insurance Ireland, *Factfile*, various issues.

The data in Table 7 suggests that in 2015 and 2016 that the maximum detection period was 22 months and 25 months, respectively, or around two years. While there is no benchmark concerning whether or not this is a short or long detection lag it would seem that any insurer that cheated on the agreed price would have had a substantial period in which to reap the rewards of pricing below the focal point.

The discussion on transparency needs to be qualified. First, Insurance Ireland members may gain access to the data in Table 7 earlier than the official publication date. Hence the estimated detection lags presented should be regarded as maximums. Second, although timely PMI price and quantity data might not be available for insurers to rapidly detect cheating, it nevertheless remains the case given the compulsory nature of motor car insurance that if an insurer party to the alleged PMI price signalling experiences a significant loss of business, then this is likely to raise a red flag that something is amiss. Loss of business, however, needs to be interpreted with care. Even if the five insurers had been successful in establishing a focal point increase in PMI premiums, non-price competition may result in some insurers being more successful than others. Furthermore, without further evidence the insurer that is party to the price signalling cannot readily ascertain whether the loss of business is due to competition from one of the other six members of the tacit arrangement or from competition from non-participants, an issue to which attention is now turned.

6.8 External Factors

6.8.1. Introduction

The stability and success of any anticompetitive agreement such as the alleged PMI price signalling depends not only on internal factors such as reaching a common understanding, ensuring that the

parties' incentives are aligned and discouraging cheating by rapid detection of any premium cutting below the focal point, but also factors outside of the direct control or responsibility of the parties to the agreement. These external factors have the ability to undermine an otherwise successful anticompetitive arrangement. Two such factors are considered: insurers that were not part of the price signalling; and the entry of new insurers.

6.8.2 Non Price Signalling Insurers & Brokers

Anticompetitive agreements can be undermined by the pricing decisions of firms that are not party to the agreement. These firms face a decision as to whether or not to adhere to the focal point. Such firms have an incentive – like the decision to cheat or not – to follow the PMI premium increase up but to price somewhat below the focal point. Such behaviour is likely to complicate the ability of members of the concerted practice to detect whether cheating has occurred amongst its member or not. The evidence suggests that insurers that were not named as participating in the price signalling arrangements accounted for a sizable proportion of the PMI market: 29.5 per cent in 2015 and 27.6 per cent in 2016 (Panel B, 'Other Insurers', Table 5). Furthermore there are three insurers – Liberty, RSA and Zurich – with market shares in the range 8 to 11 per cent, small enough to consider pricing below the focal point so as to increase market share and profits, but large enough collectively to make a difference in the feasibility of maintaining any focal point PMI premium increase.

6.8.3 Entry

Barriers to entry into PMI has not, historically speaking, been insuperable. The most successful recent de novo entrant was Quinn-direct. Established in 1996 it reached a market share of 10.4 per cent in 2003.⁶² However, for reasons unrelated to conditions in the PMI market Quinn-direct was acquired by Liberty Global in 2012 and rebranded Liberty, which had a market share of slightly under 10 per cent in 2015 and 2016 (Table 5). There has also been entry by insurers established in other EU member states such as the ill fated Setanta (referred to above) but which went into liquidation in 2014. Nonetheless despite some entry taking place the Competition Authority (2005, Vol. I, pp. 6-9) took the view that barriers to entry should be lowered through, for example, compulsory information sharing and restricted funding of MIBI costs associated with claims for uninsured drivers by entrants. More recently the European Commission (2021, 2022a, 2022c) has raised the issue of the conditions of access to an insurance claims database discouraging entry, an issue discussed in Section VIII. In any event no new entry occurred in 2015 and 2016 according to Table 5 that would have undermined any successful price signalling.

6.9 A Breach of Competition Law?

6.9.1 Introduction

Agreements such as the CCPC's alleged PMI price signalling may breach Section 4(1) of the 2002 Act and/or Article 101(1) of the TFEU either by object (i.e. the agreement is inherently anticompetitive but it is a rebuttable presumption, the CCPC only needs to establish that there was an agreement) and/or by effect (i.e. the agreement is not necessarily anticompetitive, the CCPC needs to show that

⁶² For details see Competition Authority (2005, Vol. I, para. 8.4 & Table 6.1, p. 67).

the conduct is anticompetitive after “an assessment ... based on a thorough analysis of the economic and legal context in which the agreement at issue ... and the specificities of the relevant market”⁶³). Price signalling is not included in the list of by object agreements set out by the European Courts.⁶⁴ This does not mean, of course, that new categories of agreements cannot be added to the list. Indeed, the Competition Authority, the forerunner of the CCPC, was responsible for bringing legal proceedings that resulted in agreements limiting capacity being considered by object agreements.⁶⁵ However, if a new type of agreement such as price signalling is to be considered a by object infringement then “deeper analysis will be required.”⁶⁶

6.9.2 By Object?

The CCPC (2022, para. 3.18) took the view that price signalling “amounted to a restriction of competition by object;” its reasoning brief, a mere seven paragraphs (ibid, paras. 3.18-3.24). No European Commission or other competition agency guidance or case law was cited by the CCPC in support of this position.⁶⁷ Rather it was the parties in their responses to the CCPC (2022, para. 3.26) preliminary findings that referred to *Wood Pulp* and *Container Shipping* while also making the broader point that “there was no decisional practice establishing it [i.e. price signalling] as an infringement of competition law.”⁶⁸ The CCPC did not, however, attempt to rebut or make any comment on the parties’ responses to the preliminary findings.

Despite the CCPC’s assertion that PMI price signalling was a by object breach of competition some of the other statements in its *Investigation Report & Outcome* suggest less than complete confidence in this position. As noted in Section V, the CCPC (2022, para. 5.3) in explaining why it did not institute legal proceedings against Brokers Ireland, said that it would face challenges “in proving a concerted practice before the Irish courts, particularly in a case where much of the evidence is in the public domain.” In a reference, albeit obliquely, to the case law cited in the previous paragraph and elsewhere in the paper, the CCPC stated that price signalling was an area of competition law that was “still developing” and that cases had resulted in commitments not infringement decisions.

If price signalling is characterised as an information exchange, then it may be that the European Commission (2011) *Guidelines on Horizontal Agreements* provide grounds for arguing that price signalling is a by object breach of competition law. The European Commission (2011, para. 74), states, for example, that “[i]nformation exchanges between competitors of individualised data regarding intended future prices ... should therefore be considered a restriction by object.” The purpose of such

⁶³ Whish & Bailey (2021, p. 138). For further discussion of the distinction between object and effect see ibid, pp. 127-142.

⁶⁴ Whish & Bailey (2021, pp. 132-136).

⁶⁵ Whish & Bailey (2021, p. 133).

⁶⁶ Whish & Bailey (2021, p. 131).

⁶⁷ The only case law cited by the CCPC (2022, fn. 23, pp. 14-15) was in support of the position that to establish a by object breach of competition law did not require taking into account the “concrete effects” of an agreement.

⁶⁸ Such an inference is strengthened by the statement in *Wood Pulp*, para. 65, that “... the system of quarterly price announcements on the pulp market is not to be regarded as constituting in itself an infringement of Article 85(1) of the Treaty.”

exchange of information is to “arrive at a common higher price level” (ibid, para. 73). In other words, a focal point.

There are, however, a number of grounds that strongly suggest that this guidance does not apply to PMI price signalling. First, the illustrative example used by the European Commission (2011, Example 1, para. 105) concerns a private not a public exchange. The focus of the PMI price signalling case is public announcements. As pointed out in Section 6.5.3 it is accepted that private exchanges of such information constitute a by object breach of competition law, while as noted in Section 6.2 in the European Commission’s discussion of price signalling it is stated that unilateral public price announcements fall outside competition law, let alone constituting a by object breach.

Second, the guidance is concerned with intended not binding prices. Indeed, the European Commission (2011, fn. 4, p. 16) states that binding announcements would not constitute a by object offence. Insurer public price announcements – by the CCPC’s own analysis – were not only statistically significantly related to subsequent PMI premium increases, but also subsequently implemented. In other words, these public price announcements do not appear to be intended premium hikes. The PMI premium announcement by Brokers Ireland in relation to the High Court *Setanta* judgment is not easily characterised as intended or binding; rather, as argued in Section 6.4, it is an example of lobbying.⁶⁹

Third, the guidance refers to individualised announcements; much, if not all, of the PMI premium announcements are not individualised. The broker and broker representative body public price announcements were typically in the form of a range of possible premium increases, not a point estimate designed to attain a commonly agreed focal point. The PMI premium announcement by Brokers Ireland in relation to the implications of the High Court *Setanta* judgment is a highly contingent average estimate of premium increases not individualised. Fourth, the PMI price signalling includes not only competitors but also firms in a vertical relationship with one another.

Turning to case law, in reviewing the *Container Shipping* case Claici et al (2016, p. 599)⁷⁰ refer to the *Chiquita* case “in which the exchange of information about companies’ intentions concerning future prices is particularly likely to lead to a collusive outcome and is considered a restriction of competition by object.”⁷¹ In *Chiquita* the ECJ stated “an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of modifications to be adopted by the undertakings in their conduct on the market must be regarded as pursuing an anticompetitive object.”⁷²

⁶⁹ As noted in Section 6.4 if confidential information is shared in formulating a response to the High Court *Setanta* judgment then further investigation by the CCPC is justified. However, the *Investigation Report and Outcome* does not refer to such sharing of information.

⁷⁰ Claici et al (2016) is drawn upon since the paper was written by officials in the Directorate General, European Commission including the former Chief Economist of the agency. Claici et al (2016, pp. 596-602) discuss *Container Shipping* in their review of recent EU competition developments in 2015/2016. Claici et al (2016) also referred to the paragraph cited above from the *Guidelines on Horizontal Guidelines*.

⁷¹ For a discussion of *Chiquita* see Whish & Bailey (2021, p. 551, p. 572).

⁷² *Dole v European Commission*, C-286/13, P EU:C:2015: 184, para. 122, (hereinafter referred to as *Dole v Commission*).

The three firms involved in *Chiquita* held bilateral *private* pre-pricing communications “in which they discussed banana price-setting factors, that is to say, factors relevant to the setting of quotation prices for the forthcoming week, or ... gave indications of quotation prices for the forthcoming week.”⁷³ After the quotation prices were sent to customers on Thursday morning, “they were exchanged ... bilaterally,”⁷⁴ which suggests that the quotation prices were not readily available in the public domain. Such an exchange according to the Court “enabled them to monitor individual pricing decisions in the light of previous pre-pricing communications and reinforced cooperation between those undertakings.”⁷⁵

Again there are doubts as to how applicable this precedent is to the PMI price signalling case.⁷⁶ In the PMI price signalling case the price announcements were public not private, for insurers binding not intentions, and often not individualised. Furthermore in *Chiquita* there was a monitoring mechanism in that the quotation prices were circulated immediately after they had been issued. As noted in Section 6.7 rapid detection of deviations from the agreed on focal price is important for detecting cheating and thus reducing the payoff from cheating. There was no suggestion or indication by the CCPC (2022) of a monitoring mechanism in PMI price signalling.

The CCPC treated PMI premium announcements by the parties as a method for reducing uncertainty, which is consistent with the *Chiquita* reference to exchanging information reducing uncertainty. However, in *Chiquita*, for reasons set out in the immediately preceding few paragraphs, the uncertainty was reduced to an extent not present in the PMI price signalling case. The CCPC ignores the fact that the binding price announcements of the insurers are more likely to result in insurers independently adapting their behaviour to the existing or anticipated conduct of their competitors. Indeed, the commitments entered into in the *Container Shipping* and *MNO* cases to resolve competition concerns with price signalling limited price announcements to future binding – not intended – price changes.

In sum there do not appear to be compelling grounds for arguing that the PMI price signalling is a by object breach of competition law drawing on competition agency guidance and case law. Indeed, as observed in Section 6.5.3 Kuhn (2001, p. 196) states that where public price announcements that amount to “some form of commitment relative to consumers, the potential efficiency effects are significant enough that such practices by themselves should not be considered a violation” of Article 101(1) of the TFEU.

6.9.3 By Effect?

While the CCPC (2022, fn. 23, pp. 14-15) also took the view that the PMI price signalling was a by effect breach of competition law, the CCPC presented no analysis to substantiate its view nor did it cite any competition guidance or case law. Nonetheless, the European Commission (2011, paras. 75-94) *Guidelines on Horizontal Agreements* sets out the market characteristics and conditions required in

⁷³ *Dole v European Commission* (para. 14). Quotation prices were set for each week and announced to customers on Thursday morning (ibid, para. 12)

⁷⁴ *Dole v European Commission* (para. 17).

⁷⁵ *Dole v European Commission* (para. 17).

⁷⁶ It should also be noted that Whish & Bailey (2021, p. 551) discuss *Chiquita* in the context of price fixing not price signalling.

order for an agreement such the alleged PMI price signalling conduct to be considered a by effect breach of competition law.⁷⁷ The European Commission (2011, para. 77) under 'Market characteristics,' for example, states that "[C]ompanies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric."

These and other related issues were addressed in Sections 6.5 to 6.8. That analysis suggest that PMI price signalling was not a by effect concerted practice that breached competition law. Section 6.5 cast doubt on the ability of the parties to reach a focal point. The incentives of the brokers and insurers are not fully aligned, while the inequality in the market shares of the five insurer provides the smaller insurers with an incentive to cheat with respect to any focal point. The high level of switching by consumers between insurers encourages cheating while the lack of transparency makes detection of cheating more difficult. Although not considered explicitly the market conditions were not stable as the PMI market transitioned from 'soft' to 'hard,' while constant media and government attention put the spotlight on the PMI market.⁷⁸

There were, however, some factors that facilitated tacit collusion in PMI premiums such as barriers to entry (i.e. lack of access to information by entrants), lack of entry in 2015 and 2016, the fact that there were a small number of insurers (i.e. five) allegedly involved in the price signalling and that these firms accounted for around 70 per cent of PMI premiums. It nevertheless remains the case that there were three insurers - Liberty, RSA, and Zurich – with PMI market shares between 8 and 11 per cent that were not, as far as the CCPC was concerned, part of the PMI price signalling concerted practice. Such insurers were likely to have undermined any price signalling premium enhancing by undercutting the agreed upon supra competitive PMI premium hike.

The conclusion the evidence does not support the reaching and sustaining of an anticompetitive agreement through PMI price signalling is consistent with the Competition Authority's (2005, Vol 1, p. 6) earlier finding, based on an extensive analysis of the non-life insurance market, that "[T]here is little or no evidence of price co-ordination in either motor or liability insurance markets in Ireland. This is not surprising: the characteristics of the insurance markets ensure that price collusion is unlikely." In reaching this conclusion the Competition Authority (2005, Vol. 1, paras 7.11-7.21) specifically considered price co-ordination in the context of price signaling and tacit collusion.⁷⁹ Given the public policy reforms to PMI since 2005 were designed to increase competition, there appear to be no

⁷⁷ This guidance refers to information exchanges, of which price signalling is arguably a form. The guidance is also consistent with the wider literature on collusion referred to in fn. 16.

⁷⁸ The distinction between 'soft' and 'hard' market is discussed in Section 6.10, while the Competition Authority (2005) and Cost of Insurance Working Group (2017) are examples of government interest in the PMI market.

⁷⁹ In doing so the Competition Authority (2005, Vol. 1, para. 7.12) follows the OECD approach, set out in Section 6.2, that three conditions need to be satisfied for tacit collusion to be effective in raising price in a sustainable manner above the competitive level.

obvious grounds for overturning the Competition Authority's conclusion with respect to price co-ordination.^{80,81}

6.10 A Plausible Alternative: the Underwriting Cycle?

As noted in Section 6.2 the ECJ in *Wood Pulp* stated that parallel conduct “cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.”⁸² This raises the issue of whether or not there is an alternative plausible explanation of the pattern of PMI premium hikes in 2015 and 2016. In considering this question attention is paid to the period 2011 to 2019 so that the 2015 and 2016 PMI premium increases can be seen within the broader pattern of PMI premium changes. Reliance on this wider canvass reveals that PMI premiums were subject to declines in the early to mid 2010s, followed by double digit hikes premium hikes until the late 2010s when premium increases were either single digit or, in the most recent year for which data is available, turned negative.

The pattern recorded in Table 4 for PMI premium changes over 2009-2019 is consistent with the insurance cycle which is summarised in Figure 1. The insurance (or underwriting) cycle is described by the Central Bank of Ireland (2020, p. 54) as follows:

The pricing of insurance risks will generally depend on the position in the insurance underwriting cycle. The cyclical nature of property and casualty (liability) insurance is well recognised. Insurance markets tend to move between hard and soft markets, as illustrated in Figure [1].

A hard market is characterised by higher premiums, stricter underwriting criteria and (relative) profitability. A soft market is characterised by lower premiums, looser underwriting criteria and (relative) unprofitability. An underwriting cycle lasts a number of years, typically 6-9 years.

The Central Bank of Ireland singled out the PMI market as an example of where “the underwriting cycle is particularly pronounced.” The period of double digit PMI premium increases coincided with the hard market, while the premium decline in the early 2010s coincided with the soft market.

The Cost of Motor Insurance Working Group (2017, Chart 1, p. 27) also used the underwriting cycle to explain the pattern of market behaviour noting that there was, after substantial underwriting profits between 2005 and 2008, “intense competition in the market and a challenging economic environment

⁸⁰ For example, the Competition Authority (2003, Vol. 1, pp. 78-83) made certain recommendations that related to “the provision of information to facilitate buyer decision-making on renewal” (p. 78), some of which were implemented in S.I. 74 of 2007 Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) Regulations 2007. These provisions of the S.I. are described in Cost of Motor Insurance Working Group (2017, p. 54).

⁸¹ While the CCPC (2022, fn. 6, p. 4) referred to this earlier research it did so in the context this being one of the three occasions since 2003 that the agency (and its predecessor) had examined potentially anticompetitive conduct in the insurance sector. No reference is made to the finding in the text from one of these three studies.

⁸² *Wood Pulp*, para. 71. In some US cases in which price signalling featured an analogous situation has arisen, but with the twist that the plausible justification is sometimes characterised as a business rationale for the use of the practice. For further details see Hay (1999; 2000).

[which] have put downward pressure on rates” (p. 38). While the CCPC presented evidence to the Cost of Insurance Working Group (2017, p. 68) concerning the state of competition in the pricing models for vehicle repair, there does not appear to be any reference by the Working Group to price signalling concerns of the CCPC, which were, for example, referred to in the agency’s *Annual Report* for 2016 (CCPC, 2017c, p. 14-15). Rather, the Cost of Motor Insurance Working Group (2017, pp. 41-43) refers to a series of factors from underpricing to increased frequency and cost of claims settled as factors behind increased PMI premiums between 2014 and July 2016.

Figure 1
The Insurance or Underwriting Cycle



The CCPC (2022, paras. 2.17-2.18) does not ignore the insurance cycle. The CCPC briefly describes the cycle and accepts that during 2015 and 2016 the “PMI market began to display the characteristics of a hard market (ibid, para. 2.18).” As a result the CCPC (2022, para. 2.10) states that “it is understood that consumers could be expected to incur higher PMI premiums once the market shifted.” The CCPC (2022, para. 3.20) position is that despite insurer desire to increase premiums faced with competitive uncertainty insurers resorted to price signalling to remove that uncertainty. The argument in the earlier sections of this paper is that the evidence does not support a finding of a PMI price signalling concerted practice. Rather, insurers intelligently taking into account rivals’ reactions is consistent with the facts and hence provides a plausible alternative explanation of the price rises in 2015 and 2016. It should also be remembered that insurers and brokers would have been familiar with the investment cycle and the pricing patterns that were associated with the cycle.

VII. ECN+ Directive: Next Time Will it be Different?

In announcing the A&Us the CCPC (2021b) alluded to the anticipated strengthening of its powers due to the enactment of legislation designed to implement the ECN+ Directive.⁸³ The Competition (Amendment) Act 2022 (the 2022 Act), which amended the 2002 Act, was signed into law in June 2022, but has, as yet, to be commenced.⁸⁴ Under the 2022 Act competition law and enforcement in Ireland will become more like other EU Member States in that fines can be imposed as a sanction for civil breaches of competition law.⁸⁵

As noted above the CCPC's options at the present time in civil matters is somewhat circumscribed. The new powers, it is argued, will lead to much better enforcement of civil matters, including in PMI.⁸⁶ The 2022 Act, it should be noted, contains measures beyond simply transposing ECN+ Directive into domestic law such as those measures relating to mergers and criminal enforcement. In considering the impact of the 2022 Act on the facts of the PMI case attention is paid to all of the provisions of the 2022 Act, irrespective of whether or not the provision stems from the ECN+ Directive or not.

The implicit assumption in the CCPC's (2021b) A&U announcement was that if the PMI price signalling case were to have been considered under the competition regime envisaged under the 2022 Act, then the outcome of the PMI case might have been different. Perhaps civil fines would have been imposed. Perhaps all the enjoined parties would have made binding commitments under Section 15AE of the 2022 Act, which repealed and replaced Section 14B Court Orders?⁸⁷ Perhaps the A&U would have included provisions under which the parties agreed not to price signal (i.e. the prohibited conduct discussed in Section IV). Perhaps the Brokers Ireland would have signed an A&U or made binding commitments under Section 15AE of the 2022 Act. But how credible are such expectations?

There are good grounds for arguing that the 2022 Act would have made little if any difference to the outcome of the CCPC's PMI case. First, based on the assessment in this paper, the CCPC had a weak case at best that the price signalling in 2015 and 2016 concerning PMI breached the 2002 Act. A weak case is a weak case irrespective of the competition enforcement regime.

Second, at the EU and Member State level there do not appear to have been any successful findings of price signalling by the Courts. These cases – *Wood Pulp*, *Container Shipping* and *MNO* – had much stronger evidence than the PMI price signalling case, yet were either unsuccessful in the Courts or were settled, but with much stronger commitments than in the PMI case. In each of these three cases

⁸³ CCPC (2021c, p. 5) provides a summary.

⁸⁴ For details of the 2022 Act see: <https://www.irishstatutebook.ie/eli/2022/act/12/enacted/en/html>. For commentary on the 2022 Act see Doherty (2022a; 2022b) and McKenna & Warren (2022).

⁸⁵ Criminal breaches of competition law already incurred – potentially at least – fines. In practice criminal prosecutions are confined to so-called hard core cartels. For details see Andrews, Gorecki & McFadden (2015, pp. 63-72).

⁸⁶ Implementing the ECN+ Directive is listed as one of the action points by the Government of Ireland (2021, p. 7) in reforming the insurance market.

⁸⁷ On the repeal and replacement of Section 14B Court Orders under the 2022 Act see Doherty (2022b).

the civil competition enforcement regime was akin to that envisaged by the ECN+ Directive, with, for example, civil fines.⁸⁸

Third, the Courts in Ireland have shown little, if any, curial deference to the CCPC when it has made decisions under the 2002 Act. In the *Kerry/Breeo* merger case, for example, where the CCPC was, in effect, the court of first instance, on appeal the High Court overturned the CCPC's prohibition of the merger on, inter alia, the grounds that the CCPC had erred in its interpretation of the economic evidence concerning countervailing buyer power.⁸⁹ There seems little reason to assume that any appeals from the administrative procedures under the 2022 Act would be treated differently.

Fourth, and perhaps related to the last point, questions can be raised concerning the quality of Court decisions in Ireland concerning anticompetitive practices. In the most recent criminal cartel case, *Commercial Flooring*, the courts found that a bid rigging cartel, where the accused had pleaded guilty, was not really a cartel.⁹⁰ If the Courts have difficulty characterising such a hard core agreement as a cartel, then that does not augur well if the Courts were to hear an appeal from an adverse administrative finding concerning the much more subtle practice of a concerted agreement reached through price signalling in PMI premiums.⁹¹

Nonetheless, under the administrative procedures and provisions of the 2022 Act an independent Adjudication Officer (AO) "hears both sides [i.e. the CCPC and the undertakings subject to the allegations of breaching competition law], using procedures similar to a court. The AO can decide that the undertaking should pay a fine, or other sanctions."⁹² The fines are set according to criteria set out in the 2022 Act including gravity and duration of the infringement. The sanctions must be approved by the High Court. Given the underpinning of the AO's determination the High Court may be more reluctant to overturn or significantly vary its determination.

Fifth, while a number of commentators (e.g. FitzGerald & McFadden, 2011) have argued that the absence of civil fines severely undermines civil enforcement others (e.g. Massey, 2004, pp. 33-36) are more sceptical. Sixth, when the CCPC employs the new civil powers under the 2022 Act it is likely, at the beginning at least, to select cases that are relatively straightforward in demonstrating a breach of competition law has taken place. Price signalling cases such as PMI, where it is likely to be more difficult to establish a breach of competition law, are unlikely to be high on the CCPC's priority list.

⁸⁸ The administrative procedure for levelling fines in Ireland under the 2022 Act is, according to Doherty (2022a) "very complex." At the EU level, for example, the European Commission conducts the investigation, determines whether a breach of competition law has taken place and imposes an appropriate fine subject to its out fining guidelines. Under the administrative procedures in the 2022 Act instead of one agency (e.g. the CCPC), three are involved: the CCPC, an adjudication officer and the High Court.

⁸⁹ The case discussed further in Gorecki (2009; 2021, pp. 145-151) which argues that the High Court misunderstood the nature of countervailing power and thus incorrectly overturned the CCPC decision to prohibit the merger.

⁹⁰ This was the finding by the trial court and was not overturned on appeal. For a discussion of these decisions in the *Commercial Flooring* case see Gorecki (2017; 2019b).

⁹¹ It is perhaps for this reason that the 2022 Act includes bid rigging together with a definition as one of the specific examples, along with, for example, price fixing, of anticompetitive agreements. For details see Amendment to section 4 of the Principal Act (i.e. the 2002 Act).

⁹² Doherty (2022b).

VIII. Price Signalling: A Step Too far for Competition Law?

The price signalling that was at the heart of the CCPC's PMI premium investigation is at, if not beyond, the outer limit, for reasons set out in Section VI (particularly Section 6.5.3), of what might be considered tacit collusion amounting to a concerted practice that breaches competition law. In particular, the PMI premium price signalling did not have, inter alia, the precision and specificity concerning future intended price rises that characterised the price signalling cases referred to in the paper (i.e. *Wood Pulp*, *Container Shipping* and *MNO*).⁹³ In other words, it is difficult to see the price signalling in PMI premiums in 2015 and 2016, based on publicly available information, acting as a focal point.

In contrast to *Wood Pulp* in which the European Commission was unsuccessful in establishing a concerted practice before the European Courts, the CCPC's PMI price signaling case, like European Commission's *Container Shipping* case and ACM's *MNO* case, did result in binding legal commitments. However, as argued in Sections III and IV, the form and content of the binding legal commitments obtained by the CCPC for PMI in relation to price signaling fell well short of what the CCPC expected as well as those obtained in *Container Shipping* and *MNO*.

The commitments obtained by the CCPC from six of the seven parties (i.e. excluding Brokers Ireland) only refer to these parties each undertaking enhanced compliance programmes. Compared to *Container Shipping* and *MNO* and the decisional practice of the CCPC up until this point, there were no commitments which set out the type of public price announcements that are acceptable/unacceptable to the CCPC.

A clue to the CCPC's thinking with regard to the type of public price announcements that the CCPC considers acceptable can be found in its *Investigation Report & Outcome*. Here the CCPC (2022, para. 3.20) took the view that "[E]ffective competition is possible only if each competitor can keep its intentions and future actions secret." In other words, the CCPC position seems to be of the view that there should be no public PMI premium announcements by the parties, irrespective of whether or not the public price announcements are intended or binding, a point estimate or a range and so on.

In contrast, the European Commission (2011, para. 63) in its *Guidelines on Horizontal Agreements* states that a unilateral public price announcement "does not generally constitute a concerted practice within the meaning of Article 101(1)." Such a position is consistent with the commitments in *Container Shipping* and *MNO*. There is a danger that absent clarity from the CCPC that businesses will be reluctant to make any public price announcements concerning future prices, even if they are binding, which is likely to chill competition.

Price signaling appears to be a difficult practice to successfully bring before the Courts and subject to competition law. However, this does not mean that competition authorities need to sit idly by and ignore such practices. In particular, where there is strong evidence of price signalling with respect to individualised future intended (as opposed to binding) prices as in *Container Shipping* and *MNO*, combined with no plausible alternative explanation, then action is warranted. The case for such action

⁹³ A similar statement applies to the US price signalling cases referred to in the paper.

is reinforced if there is evidence of so-called facilitating practices which complement the price signalling.⁹⁴

Successful price signalling implies that the market is not working well for consumers. If competition agencies consider that bringing such cases is too challenging or difficult then they can put on their advocacy hat and argue for reforms that will lead to greater competition, through, for example, empowering consumers and/or lowering barriers to entry. Alternatively the competition authorities can carefully examine the conduct of the market of concern to see if there are other anticompetitive market practices that might be better suited to the scrutiny of competition law than price signalling.

In the case of PMI premiums in Ireland both the advocacy and enforcement tools have been used. As noted at several points in this paper, the Competition Authority – the predecessor of the CCPC – undertook in the early 2000s an extensive market study into competition issues in non-life insurance that resulted in a series of recommendations, which were subsequently implemented.⁹⁵ In 2021 the European Commission (2021) issued a Statement of Objections concerning the restriction by Insurance Ireland – the representative body of insurers in Ireland – for restricting access to a data sharing platform, Insurance Link, that may have inhibited entry into the PMI market.⁹⁶ In 2022 Insurance Ireland made a series of proposals, which were subsequently revised, accepted by the European Commission (2022a; 2022c) and made binding commitments. Access to such data sets had been identified by the Competition Authority (2005, Vol I, paras 8.50-8.76)⁹⁷ in its earlier report as promoting competition thus demonstrating how research and market studies can complement antitrust investigations.

⁹⁴ See Hay (1999; 2000) and the *Chiquita* case discussed in Section 6.9.2.

⁹⁵ See, for example, Competition Authority (2009, p. 53; 2010, p. 49).

⁹⁶ According to the European Commission (2021), “Insurance Ireland administers and sets the conditions of access to Insurance Link, which comprises a non-life insurance claims data pool and a facility for Insurance Link users to request certain data about such claims. Insurance Link enables its users – companies offering motor vehicle insurance - to better assess risk and to detect and defend themselves against potential fraud.”

⁹⁷ Although not to the specific data set that was the subject of the European Commission concerns.

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