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A Recent Development in Civil Enforcement of Competition Law in Ireland: Section 14B Court Orders

By

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Abstract

A new more effective civil enforcement tool – a Section 14B Court Order – was introduced in 2012 to enhance Ireland’s competition law. Breaching such an order is contempt of court. Fines can be imposed by the courts for contempt, but not for civil breaches of competition law. Notwithstanding the advantages of Section 14B Court Orders, since 2012 the Competition and Consumer Protection Commission, Ireland’s competition agency, has only used such orders on only one occasion – in 2012. There have, however, been a number of other cases where the evidence, albeit limited, suggests that such orders would have been a credible option.

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JEL Codes: K21; K42; L41.

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1. Introduction

Civil infringements of Ireland's competition law are not subject to effective sanctions. There are no civil fines.¹ Such fines are considered unconstitutional. The matter is currently being considered by the Law Reform Commission (2016, pp. 19-27). No change in the law, however, is expected in the near to medium term.

The only sanction available under competition law in the event that the Competition and Consumer Protection Commission (CCPC), Ireland's competition agency,² successfully demonstrates in Court that there has been a civil breach of competition law is either for the Court to grant an injunction³ and/or declaration.⁴

Breaching an injunction and/or declaration is contempt of Court. Should the CCPC be successful in demonstrating such a breach, this can result in unlimited fines and/or jail time and/or sequestration of assets. There have been no recent instances of the CCPC obtaining an injunction and/or declaration pursuant to a civil Court action.⁵

In four instances the CCPC has concluded such legal proceedings, however, by accepting commitments, which in turn are memorialized in a Court order.⁶ Breaching such a Court order constitutes contempt. The CCPC was successful in demonstrating contempt in one instance, but the sanction was not fines and/or jail time, but rather behavioural undertakings.⁷

¹ On the issue of civil fines see Andrews, Gorecki & McFadden (2015, pp. 176-178), CCPC (2017) and FitzGerald & McFadden (2011). This may be about to change with the introduction of measures by the European Commission to make national competition authorities more effective enforcers of competition law. For details see: <http://ec.europa.eu/competition/antitrust/nca.html>.

² The CCPC came into existence in October 2014. It was a merger of the Competition Authority and the National Consumer Agency. We use the term CCPC to include competition enforcement activities of the Competition Authority.

³ I.e. a court ruling requiring a particular arrangement or behaviour to be terminated.

⁴ I.e. a court ruling that a particular arrangement or behaviour is unlawful.

⁵ Based on the CCPC's listing civil court cases, which dates back to the early 2000s. For details see <https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/>. Not included is an Interim Court Order that the CCPC obtained against participants blocking a dairy in Convoy, Co Donegal. For details see Competition Authority (2001, pp. 16-17).

⁶ Two are detailed in Table 1, the third concerns legal proceedings against the Irish Dental Association (IDA) and the fourth involves retail milk. It is not clear if the commitments in the case of the IDA involved a Court order. For further details of all four cases see the link in the previous footnote.

⁷ In this case, the High Court in 2009 found two trade associations representing publicans guilty of contempt for breaching the terms of earlier Court commitments. It appears that the CCPC only sought behavioural remedies. For details see Andrews, Gorecki & McFadden (2015, p. 223) and <https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/licensed-vintners-association-vintners-association-of-ireland/>. There were no unsuccessful attempts to demonstrate contempt with respect to commitments given in the Court cases cited in footnote 6.

It has been the CCPC practice instead of initiating legal proceedings when it suspects a civil breach of competition law to conclude an investigation through a settlement with the undertaking(s) concerned.⁸ Such a settlement is referred to as an Agreement and Undertaking (A&U).

If the undertaking(s) 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(s) do not admit a breach of competition law.⁹ If CCPC is successful in its Court action, then the Court may grant an injunction and/or declaration, but not impose a fine.

The rationale for a preference for A&Us as opposed to initiating legal proceedings has been set out by the Chairperson of the CCPC as follows:

*... court cases are large and expensive and if we can achieve a result without going to court we would do that. We're trying to change behaviour, so if we're sure that the behaviour has changed we will always seek to avoid unnecessary legal action.*¹⁰

The CCPC's settlement options changed, however, with the passage of the Competition (Amendment) Act 2012 (the 2012 Act), which was commenced on 3 July 2012. A new enforcement tool was added to the CCPC's civil enforcement toolbox. The CCPC can now apply to have a modified A&U made an order of the High Court – a Section 14B Court Order.

A breach of such an order is contempt of Court. All the CCPC is required to show is that the terms of the Section 14B Court Order have been breached. The merits of the alleged anti-competitive behaviour are not at issue before the Court. Compared with an A&U, enforcement of a Section 14B Court Order requires a lower evidentiary burden (i.e. demonstrating a breach of the Order as compared to an examination on the merits of the alleged anti-competitive behaviour) and the possibility of more effective sanctions (i.e. fine and/or jail as compared to an injunction and/or declaration).

The Section 14B Court Order has been welcomed as a measure to strengthen civil law enforcement in Ireland of competition policy by the European Commission, legal practitioners and the CCPC.¹¹

The sixth anniversary of the availability of a Section 14B Court Order is an appropriate time to assess its use and effectiveness: Section 2 sets out the background; Section 3 details and analyzes the pattern the use of such Orders; while Section 4 concludes.

⁸ For background see Andrews, Gorecki & McFadden (2015, pp. 171-172).

⁹ Hence they are sometimes referred to as “no-fault settlements” (Andrews, Gorecki & McFadden, 2015, p. 171, fn 17).

¹⁰ Stanley (2014, p. 207).

¹¹ For details see Sections 2.2 and 3.1.

2. Agreements & Undertakings (A&U) and Section 14B Court Orders

2.1 Agreement & Undertakings

An A&U consists of an agreement between the CCPC and an undertaking(s) or association of undertakings under which:

- the CCPC *agrees* to conclude its investigation and refrain from commencing civil proceedings; and,
- the undertaking(s) subject to the investigation *undertake* not to breach competition law and inform themselves of competition law.

A representative of the CCPC and the undertaking(s) concerned sign the A&U.

The typical A&U is brief, often running to no more than two or three pages. The role of the CCPC is set out, followed by a description of the organization subject to the investigation and the conclusion that it is subject to competition law. The grounds upon which the CCPC considers that there might have been a breach of competition law are detailed. However, the undertaking subject to the A&U does not typically admit that it breached competition law.

A set of conditions are then set out to which the undertaking(s) agrees. These conditions cure any competitive harm that the CCPC thinks may, or is likely to, have arisen. Such conditions might include, *inter alia*: a competition compliance programme; not to breach competition law; and in the case of an association of undertakings, not to organize discussions in relation to collective action or make pricing and similar recommendations that would breach competition law and/or to write to its members informing them that pricing and other such decisions are to be taken unilaterally, not collectively.

Annex A reproduces the most recent A&U between the CCPC and an association of undertakings involved in nursing homes.

So far as we are aware the CCPC has never taken an undertaking or association of undertakings to Court for breaching an A&U.¹²

2.2 Legislative Background to Section 14B Court Orders

As part of the EU-IMF Programme of Financial Support for Ireland following the financial crisis of 2008 and the subsequent need for financial assistance, certain structural reforms were agreed to by Ireland. Initially the EU-IMF Programme of Financial Support for Ireland included the legislative provision “*to empower judges to impose fines and other sanctions in competition cases in order to generate more credible deterrence.*”¹³ However, due to the constitutional constraints mentioned in Section 1, it proved

¹² Based on the author’s experience as a member of the CCPC between 2000 and 2008 and a review of CCPC *Annual Reports*, Enforcement Decisions and press releases.

¹³ EU-IMF (2010, p. 24), see also para.27.

impractical to introduce civil fines. Nevertheless, the 2012 Act did introduce a series of other measures to strengthen competition enforcement one of which was Section 14B Court Orders.¹⁴

The rationale for Section 14B Court Orders was set out by the Minister of State of Jobs, Enterprise and Innovation when he introduced the relevant amendment to the Competition (Amendment) Bill 2011 on 8 February 2012 at the Report Stage,

Since Committee Stage, officials in my Department, the Competition Authority [which became the CCPC in October 2014] and the Office of the Attorney General have been working on a proposal whereby the High Court can make a court order in respect of an agreement entered into by the authority [i.e. CCPC] with an undertaking. I am pleased to move this amendment, which will further strengthen company [competition?] law. Where the authority carries out an investigation into an alleged breach of the Competition Act, it can enter into commitments or agreements with the undertaking under investigation [i.e. an A&U]. This undertaking, without an admission of liability, would agree to cease and desist from certain behaviour or to act in a particular manner. In return for this agreement, the authority agrees not to initiate proceedings under the Competition Act, thus avoiding the significant legal fees and the deployment of resources that a criminal or civil prosecution entails.

Such agreements are enforceable as a matter of contract law. However, should an undertaking renege on its agreement, the authority is required to go to court to enforce compliance. This involves an examination of the alleged anti-competitive behaviour, which can involve complex economic evidence and so on.

The amendment proposes a statutory mechanism that will permit the authority to apply to the High Court for an order to give court backing or support to the agreement. If the undertaking breaches the order, such breach will constitute a contempt of court. In such circumstances, the authority could apply to court to have the undertaking penalised for the breach. Breach of a court order can ultimately be punished as a contempt of court, with remedies such as committal and attachment for persons or the sequestration of assets. Rather than being a hearing on the merits of the competition and economic aspects, a contempt hearing would relate to the breach of the terms of the order.¹⁵

Essentially the same arguments were repeated by the Minister for Jobs, Enterprise and Innovation at the Second Stage on 8 March 2012.¹⁶

In commenting on the passage of the 2012 Act the European Commission (2012, p. 31) singled out Section 14B Court Orders,

The Competition (Amendment) Act 2012 came into effect on 3 July 2012. Among various provisions aiming at strengthening enforcement of the competition law, the act notably provides for commitments by an undertaking to be made a rule of court.

¹⁴ For a detailed discussion of the provisions of the 2012 Act, including Section 14B, see Power (2012).

¹⁵ <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2012020800006>

¹⁶ <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad201203080000>

Power (2012, p. 184) comments on Section 14B Court Orders that it is “*a very welcome procedure. ... It is also a better alternative to civil fines;*” Little and Lynam (2012) argue that this “*new provision, while procedurally complex, should ultimately assist the [CCPC] ... in imposing enforceable obligations on undertakings that breach competition law.*”

2.3 Section 14B Court Order

Section 14B of the 2012 Act amends the Competition Act 2002 (the 2002 Act) by inserting Section 14B. The relevant legislative provisions are included in Annex B.

A Section 14B Court Order applies to an Agreement that the CCPC has entered with an undertaking following an investigation by the CCPC under competition law and “*that requires the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the ... [CCPC] agreeing not to bring proceedings ... in relation to any matter to which that investigation related or any findings resulting from that investigation.*”¹⁷

The Agreement referred to is similar to the A&Us discussed in Section 2.1.¹⁸

The High Court can award a Section 14B Court Order if the High Court is satisfied if the undertaking(s) subject to the Order:¹⁹

- consents to the order;
- takes legal advice prior to agreeing;
- the agreement is “*clear and unambiguous and capable of being complied with;*” and,
- the undertaking is aware that failure to comply with the agreement “*would constitute contempt of court.*”

The CCPC is required to publish the order.²⁰ The duration of the order is seven years with the possibility of extension for another three.²¹

As noted above breaching a Section 14B Court Order is contempt of Court. However, the Agreement is with the undertaking and not the executives or directors of the undertaking. Hence only the former can be found in contempt of Court for breaching a Section 14B Court Order.

¹⁷ Section 14B(1)(a) of the 2012 Act.

¹⁸ There has only been such Agreement which may be found at Competition Authority (2013b, Annex 1, pp. 9-11), while the Court Order may be found at *ibid*, Annex 2, pp. 12-13.

¹⁹ Section 14B(2) of the 2012 Act.

²⁰ Section 14B(3) of the 2012 Act.

²¹ Sections 14B(8) and (9) of the 2012 Act.

3. The Record of Usage of Section 14B Court Orders: 2012-2018.

3.1 CCPC Enforcement Options in Civil Court Investigations

If the CCPC undertakes an investigation into an alleged civil law breach of competition law and comes to the conclusion, based on the evidence gathered, that there is a breach of the Competition Act 2002, as amended, then it has three options:

- an A&U;
- a Section 14B Court Order; or
- a High Court injunction and/or declaration.

These are not necessarily mutually exclusive options. Indeed, they are to some degree complementary. In particular, the CCPC might credibly threaten to initiate legal proceedings to obtain an injunction and/or declaration, unless the undertakings agree to a settlement, whether it is an A&U or a Section 14B Court Order. However, once legal proceedings are initiated then Section 14B Court Orders cannot come into play.

Prior 2012 the default settlement option was an A&U. However, with the passage of the 2012 Act, the CCPC might be expected to use Section 14B Court Orders as the favoured or default settlement option. Such a preference would reflect – as outlined in Section 1 – the greater enforceability of a Section 14B Court Order combined with the possibility of a fine. This is consistent with the CCPC’s view that the 2012 Act “*strengthens the enforcement of competition law in Ireland.*”²²

To test these inferences with respect to the use of Section 14B Court Orders, we divide civil enforcement options where the CCPC has come to the view that a civil breach of competition law has occurred as follows: prior to 3 July 2012 into an A&U or a High Court injunction and/or declaration; since 3 July 2012 into the three options set out above. Table 1 presents the CCPC’s use of these options for the six years before and after the coming into force of the 2012 Act on 3 July 2012.

In characterizing the options we divide A&U into two categories; ‘Hard’ A&Us, where the CCPC has usually published the A&U, signed by the CCPC and a representative of the undertaking(s); and, ‘Soft’ A&Us, where the CCPC – judging from its *Annual Report* and/or press releases – considers that there may have been a breach of competition law, but there is no specific mention of an A&U, although in some cases there was reference to ‘Commitments’ or ‘Undertakings’ which, on occasion, were listed.

The record of civil enforcement presented in Table 1 is consistent with the CCPC’s declared preference for settlement as opposed to initiation of High Court proceedings seeking an injunction and/or declaration. This conclusion holds for both pre and post the coming into force of the 2012 Act.

Since 3 July 2012, for example, there was only one High Court case but 10 settlements. The High Court case only came about after the undertaking(s) concerned refused to adhere to certain demands of the

²² Competition Authority (2013a, p. 7).

CCPC.²³ However, the undertaking(s) provided commitments, memorialized in a Court order, to meet the CCPC's competition concerns.

Table 1

Use of Section 14B Orders of the Court, Agreement & Undertakings, Initiation of High Court Proceedings, Competition and Consumer Protection Commission, Ireland, 2006-2018^a

Year	Hard A&U ^b	Soft A&U ^c	Section 14B Order	High Court Proceedings ^d
Panel A: 2006-2012				
2006	N=0	N=2, JC Bamford, TEAMS	n.a.	N=0
2007	N=0	N=0	n.a.	N=1, IMO
2008	N=1, Retail Pharmacy	N=1, JNRR/Metro	n.a.	N=0
2009	N=0	N=1, Building Management	n.a.	N=0
2010	N=0	N=1, Digigate	n.a.	N=0
2011	N=2, RTE, MTS	N=3, RPM ^e	n.a.	N=0
2012 ^f	N=0	N=0	n.a.	N=0
2006-12	N=3	N=8	n.a.	N=1
Panel B: 2012-2018				
2012 ^g	N=0	N=1, Shellac Nail Polish	N=1, Fitflops	N=0
2013	N=0	N=0	N=0	N=0
2014 ^h	N=0	N=2, An Post, School Uniforms	N=0	N=1, IMO
2015 ⁱ	N=1, Booking.com	N=1, Glasnevin Trust	N=0	N=0
2016	N=1, Relay	N=1, Associated Tour Guides of Ireland	N=0	N=0
2017	N=1, IPOA	N=1, Graduation Gowns	N=0	N=0
2018 ^k	N=1, Nursing Homes	N=0	N=0	N=0
2012-18	N=4	N=6	N=1	N=1

- a. Dated by when A&U or Section 14B signed or when commitments/agreement by undertakings given or when the High Court orders were dated.
- b. There is evidence of an A&U. In all cases the A&U is published by the CCPC. However, retail pharmacy is an exception. The Competition Authority (2009, p. 18) states that it "concluded an 'Agreement and Undertakings' with four pharmacy contractors" but details are not provided. A similar comment applies concerning MTS (Competition Authority, 2012, p. 25).
- c. These are instances where the CCPC considers there may have been a breach, but there was no mention or other evidence of an A&U, although in some cases there was reference to 'Commitments,' which were listed. The undertakings concerned may have, for example, agreed to revise or remove the offending parts of a vertical agreement, agreed to supply and so on.
- d. In these two cases the CCPC initiated legal proceedings to secure an injunction and/or declaration, but accepted commitments from the undertakings that in turn became orders of the Court.
- e. The CCPC is unclear on exactly how many undertakings offered commitments concerning RPM. Competition Authority (2012, pp. 25-26).
- f. 1 January 2012-2 July 2012
- g. 3 July-31 December 2012. The Competition (Amendment) Act 2012 commenced on 3 July 2012.
- h. 1 January-30 October 2014. The Competition Authority was merged with the National Consumer Agency to form the Competition & Consumer Protection Commission, which become effective on 31 October 2014.
- i. 31 October 2014-31 December 2015.
- j. 1 January-30 September 2018.

²³ For further details see Andrews, McFadden & Gorecki (2015, pp. 220-222) and <https://www.ccpic.ie/business/enforcement/civil-competition-enforcement/civil-court-cases/irish-medical-organisation-high-court/>

Source: Competition Authority, *Annual Report*, various issues, Competition & Consumer Protection Commission, *Annual Report*, various issues, CCPC website, www.ccpc.ie, ('Press Releases,' 'Closed Investigation').

Within the settlement category there has been no discernible movement towards the Section 14B Court Orders as the settlement norm. Of the 11 instances of settlement since July 2012, only one or 9 per cent involved a Section 14B Court Order. If Soft A&Us are excluded from the settlement category, then the respective numbers are five, one and 20 per cent. Furthermore, the only instance of a Section 14B Court Order occurred shortly after the coming into force of the 2012 Act; since that date – December 2012 – there have been no instances of the use by the CCPC of Section 14B Court Orders as a civil enforcement mechanism.

3.2 The Lack of Use of Section 14B Court Orders: Why?

The lack of use of Section 14B Court Orders is puzzling. While the CCPC has long argued for civil fines,²⁴ Section 14B Court Orders provide a useful staging point on the way to achieving it, while at the same time strengthening the enforcement of competition law for reasons set out above. Nevertheless, there may be good reasons for the lack of use of Section 14B Court Orders.

An obvious first port of call is cases where the CCPC has preferred an A&U as opposed to a Section 14B Court Order. Here we confine our attention to Hard A&Us and consider whether or not they would be likely candidates for Section 14B Court Orders. There is far less information available on Soft A&Us where one suspects the evidence in support of seeking a High Court declaration and/or injunction would be less. Such a threshold is needed to credibly threaten Court proceedings such that the undertaking(s) concerned are persuaded of the merits of agreeing a Section 14B Court Order. Inevitably because one is not in possession of all the relevant information, any judgment may need to be revised if such information became available.

There were four Hard A&Us between 2012 and the present (Table 1).

In the booking.com case the CCPC secured an A&U which paralleled action taken by a number of other European Union competition agencies, suggesting that there was a reasonably strong *a priori* case that an infringement of competition law had taken place.²⁵

The Relay A&U involved the sharing of future pricing information between competitors in private motor insurance. Sharing such information is considered to be a 'by object' breach of competition law. The CCPC secured an undertaking that such information sharing would cease.²⁶

The 2016 case of the Irish Property Owners Association (IPOA) involved collective action by the IPOA in recommending – via a press release - the setting various charges by landlords. The CCPC had

²⁴ See, for example, CCPC (2017) and FitzGerald & McFadden (2011).

²⁵ For details of the CCPC's A&U see <https://www.ccpc.ie/business/commission-secures-5-year-commitments-booking-com/>; for details of other competition agencies response see European Commission (2017).

²⁶ For details of the CCPC's A&U see <https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/closed-investigations/relay-investigation/>. Whish & Bailey (2015, pp. 578-79) discuss the by object nature of such information sharing.

investigated the IPOA for similar behaviour in 2011, at which point the IPOA withdrew its recommendations. Furthermore there is evidence that the IPOA was aware of competition law as far back as 2009.²⁷

In the 2017/18 nursing homes A&U there was evidence, in the minutes of a meeting, that at a gathering of the nursing home representative association that there may have been a discussion of matters, *inter alia*, relating to pricing and/or other trading/business terms and conditions.²⁸ However, there was no evidence that the recommendations had been acted upon, while the behaviour had occurred two years earlier.

In the first three cases (but especially in the IPOA case), if not the fourth, there were prima facie grounds for believing that a breach of competition law had likely occurred and that the appropriate settlement option was a Section 14B Court Order.

Furthermore, it should be noted, that in the cases that the CCPC has initiated legal proceedings and accepted Court orders are instances similar to the facts of several of the four cases cited above i.e. collective action by trade associations in breach competition law. Such conduct is towards the hardcore end of the spectrum of competition policy breaches. Hence the CCPC can credibly threaten legal proceedings.

A second possible source of insight is the record – *Annual Reports*, speeches, submissions, press releases and so on - of the CCPC. There is, however, no discussion of the CCPC's decision-making process in deciding to settle via an A&U as opposed to a Section 14B Court Order in any of the above four cases. Nevertheless, in a number of recent documents in relation to civil fines there is some discussion of Section 14B Court Orders.

In particular in response to the Law Reform Commission's current examination of civil fines noted in the opening paragraph of the paper, the CCPC (2017, pp. 25-26)'s response stated in part,

3.3 The CCPC has entered into an agreement under section 14B of the Competition Act 2002 in only one case. In several other cases, the CCPC has adopted a non-statutory approach by accepting contractual commitments from parties under investigation outside of the section 14B process – these contractual commitments have been accepted by the CCPC either as an alternative to enforcement action (i.e. without any involvement of the courts) or as a means of settling existing court actions. ...

²⁷ For details CCPC's A&U see <https://www.ccpc.ie/business/ccpc-concludes-investigation-ipoa-following-retraction-signed-undertaking/>, while Gorecki (2017a) provides a commentary on the case. In Section 1 reference is made to the CCPC's preference for settlement as compared to legal proceedings since the former is a much less expensive method of changing behaviour. However, in the case of the IPOA it repeated similar alleged anticompetitive behaviour within five years of signing an A&U, raising the issue of whether behaviour had in fact been changed.

²⁸ For details of the CCPC's A&U see <https://www.ccpc.ie/business/ccpc-secures-undertakings-commitments-nursing-homes-ireland/> and CCPC (2018, p. 11). It is reproduced in Annex A to this paper.

3.4 *In the CCPC's view, both statutory settlement agreements (such as those provided for under section 14B of the Competition Act 2002 ...) and non-statutory contractual commitments constitute an important and effective part of a regulatory or enforcement agency's toolkit. This is particularly so in cases where the agency's primary objective is to resolve the underlying non-compliance and bring about a change in behaviour. However, the CCPC would emphasise that it is difficult for an agency to obtain acceptable commitments unless the alternatives facing the parties under investigation include an efficient decision-making regime with the risk of substantial fines and other remedies being imposed by the decision-maker. The CCPC believes that the absence of civil financial sanctions for breach of Irish or EU competition law ... significantly reduces the incentives for parties to provide commitments to the CCPC (either using a statutory or non-statutory approach) and therefore makes it difficult in practice for the CCPC to operate this mechanism.*

However, this response does not address the CCPC's preference for A&Us as compared to Section 14B Court Orders.

While it is true that the prospect of *substantial* civil fines would increase the incentives for undertakings to accept Section 14B Court Orders and/or an A&U, this should not take away from the fact that under the existing arrangements undertakings have incentives to accept a settlement, whether statutory or non-statutory compared to the alternative of the CCPC instituting legal proceedings: legal and other expenses (e.g. expert witness statement) of a Court case that might last a week or more; media and other coverage that might inflict reputational damage; and top management's time being devoted to managing the case. While the possibility of substantial fines would undoubtedly increase the incentives to settle the case without going to Court, the record of fines imposed by Irish Courts in criminal cartel cases gives little or no reason to suppose that they would impose substantial fines in civil cases.²⁹

²⁹ See, for example, Gorecki (2013, 2017b).

4. Conclusion

In 2012 the CCPC was given a new enforcement tool, Section 14B Court Orders, to add to its arsenal for addressing civil breaches of competition law. While unlikely to be as effective as civil fines, Section 14B Court Orders were nevertheless more effective than the alternative existing settlement mechanism, an A&U. More effective in terms of the lower evidentiary burden of proof in demonstrating non-compliance by the undertaking(s) concerned and the greater sanctions available to the Court since contempt carries with it the possibility of fines.

However, bar one case in 2012, the CCPC has not used Section 14B Court Orders over the past six years, notwithstanding several instances where the facts of a particular case would suggest that a Section 14B Court Order would likely have been a suitable response. The more routine use of Section 14B Court Orders would have served as a greater deterrent to undertakings not to breach competition law than the alternative of an A&U.

Furthermore, the CCPC's case for civil fines would have been strengthened if it had a record of using Section 14B Court Orders. Such a record would demonstrate willingness to use all the tools at the CCPC's disposal. If some of the orders had been breached and, for example, the Courts proved reluctant to impose fines for contempt then this would strengthen the CCPC's case for civil fines.

Annex A: An Illustrative Example of an Agreement and Undertakings

The Competition and Consumer Protection Commission

-and-

Independent Nursing Home Ireland Company Limited by Guarantee trading as Nursing Homes Ireland

AGREEMENT AND UNDERTAKINGS

This Agreement and Undertakings (the "Agreement") is made by and between the Competition and Consumer Protection Commission ("CCPC") and Independent Nursing Home Ireland Company Limited by Guarantee (incorporated in Ireland under Company Number 447347) trading as Nursing Homes Ireland ("NHI"), on the date set forth below. The CCPC and NHI are referred to collectively herein as the "Parties".

WHEREAS:

- i. The CCPC is a statutory body and one of its functions pursuant to the Competition and Consumer Protection Act 2014 (the "2014 Act") is to enforce the Competition Act 2002 as amended (the "2002 Act") and Articles 101 and 102 of the Treaty on the Functioning of the European Union (the "TFEU"). Section 4 of the 2002 Act and Article 101 of the TFEU prohibit anti-competitive arrangements between undertakings, and section 5 of the 2002 Act and Article 102 of the TFEU prohibit the abuse of a dominant position by one or more undertakings.
- ii. The CCPC's role is to investigate suspected breaches of provisions of the 2002 Act and/or Articles 101 or 102 of the TFEU and to take appropriate enforcement action to deter such breaches and encourage on-going compliance with provisions of the 2002 Act and/or Articles 101 and 102 of the TFEU.
- iii. NHI is a company limited by guarantee incorporated under the laws of Ireland which has the company registration number 447347. NHI has its registered office at Unit 2051, Block A, Castle Drive, Citywest Road, Dublin 24. NHI is a representative organisation for operators of private and voluntary nursing homes in the State.
- iv. The CCPC is of the view that private nursing home operators are undertakings within the meaning of section 3 of the 2002 Act and under EU competition law. As such, NHI is an association of undertakings and therefore its actions also fall within the scope of competition law.
- v. The CCPC became aware of a meeting organised by NHI which was held in the Clarion Hotel, Liffey Valley on 23 October 2015 (the "Meeting"). The CCPC has in its possession a written attendance note of the Meeting (the "Attendance Note"). The CCPC has been assessing whether the matters discussed at the Meeting and recorded in the Attendance Note could potentially contravene section 4 of the 2002 Act and/or Article 101 of the TFEU.
- vi. In particular, the CCPC had concerns that, during the Meeting, NHI may have:
(i) advised, recommended or suggested to its members pricing and/or terms and conditions for the supply of services; (ii) attempted to coordinate the

actions of its members in relation to the supply of services; and/or (iii) encouraged and/or facilitated the exchange of competitively sensitive information between its members. The CCPC had concerns that the suspected conduct of NHI at the Meeting could potentially infringe section 4 of the 2002 Act and/or Article 101 of the TFEU (the "CCPC's Competition Concerns").

- vii. NHI has cooperated fully with the CCPC's enquiries.
- viii. In order to address the CCPC's Competition Concerns with respect to the suspected conduct of NHI at the Meeting and to assist the CCPC with bringing its inquiries to a close, NHI has agreed to enter into this Agreement and to give the confirmation set out in paragraph 1 and the undertakings set out in paragraph 2 below.

NOW NHI AND THE CCPC HEREBY AGREE AS FOLLOWS:

1. NHI hereby confirms that NHI and, to the best of its knowledge, its members did not at any stage implement any collective actions in relation to the supply of services in the nursing home sector in the State which would constitute a breach of section 4 of the 2002 Act and/or Article 101 of the TFEU and which may have been discussed during the Meeting.
2. NHI hereby undertakes:
 - (i) not to organise or engage in any discussions or convene any meetings in relation to collective actions by NHI and/or members of NHI which would constitute a breach of section 4 of the 2002 Act and/or Article 101 of the TFEU;
 - (ii) not to seek to influence the pricing decisions of members of NHI or decisions on the terms and/or conditions under which members of NHI provide services to consumers of nursing home services in any of NHI's future communications whether by way of advice, recommendation or suggestion;
 - (iii) to inform members of NHI in writing within 21 calendar days from the date of this Agreement that they are obliged under competition law to decide individually the terms and conditions, including pricing, on which they are willing to provide nursing home services to consumers and to provide the CCPC with a copy of this correspondence;
 - (iv) to inform members of NHI in writing within 21 calendar days from the date of this Agreement that collective boycotts or collective negotiations could potentially breach section 4 of the 2002 Act and/or Article 101 of the TFEU and to provide the CCPC with a copy of this correspondence; and
 - (v) to introduce a competition law compliance programme for the senior management and the Board of Directors of NHI and to report to the CCPC on the implementation of such competition law compliance programme within 6 months from the date of execution of this Agreement and Undertaking.
3. In consideration of NHI entering into this Agreement, the CCPC undertakes that it shall conclude its inquiries and shall refrain from instituting proceedings

or taking any further action against NHI in relation to the CCPC's Competition Concerns with respect to the suspected conduct of NHI at the Meeting for so long as the NHI remains in compliance with the Agreement.

4. This Agreement shall be and is intended by the Parties to be a binding and enforceable agreement which may be enforced by the Parties by an action in any court of competent jurisdiction in the State.
5. This Agreement shall be binding on the NHI and on the successors and assigns of NHI and its employees, servants and agents and on the CCPC.
6. The Agreement is without prejudice to NHI's position in any other judicial or administrative proceedings in any jurisdiction. Nothing in the Agreement may be construed as implying that NHI has infringed competition law in relation to the matters at issue in the CCPC's inquiry.
7. This Agreement will take effect upon the execution of same by both Parties.

EXECUTED BY:

For and on Behalf of the Competition and Consumer Protection Commission



Name BRIAN Mc HUGH
Title MEMBER
Date 19th JANUARY 2018

EXECUTED BY:

For and on behalf of Independent Nursing Home Ireland Company Limited by Guarantee trading as Nursing Homes Ireland



Name TADHO DALY
Title Chief Executive Officer
Date 19th JANUARY 2018

Annex B: Section 14B of the Competition (Amendment) Act 2012

5.— The Principal Act is amended by the insertion of the following section:

“14B.— (1) This section applies to an agreement entered into by the competent authority with an undertaking—

- (a) following an investigation referred to in paragraph (b) of subsection (1) of section 30, and
- (b) that requires the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the competent authority agreeing not to bring proceedings under section 14A (inserted by [section 4](#) of the *Competition (Amendment) Act 2012*) in relation to any matter to which that investigation related or any findings resulting from that investigation.

(2) The High Court may, upon the application of the competent authority, make an order in the terms of an agreement to which this section applies if it is satisfied that—

- (a) the undertaking that is a party to that agreement consents to the making of the order,
- (b) that undertaking obtained legal advice before so consenting,
- (c) the agreement is clear and unambiguous and capable of being complied with,
- (d) that undertaking is aware that failure to comply with any order so made would constitute contempt of court, and
- (e) the competent authority has complied with subsection (3).

(3) Where the competent authority proposes to make an application for an order under subsection (2) in respect of an agreement to which this section applies, it shall, not later than 14 days before the making of the application—

- (a) publish the terms of that agreement on a website maintained by the competent authority, and
- (b) publish a notice, in not fewer than 2 daily newspapers circulating throughout the State—
 - (i) stating that it intends to make such application,
 - (ii) specifying the date on which such application will be made, and
 - (iii) stating—
 - (I) that the agreement to which the proposed application relates is published, in accordance with paragraph (a), on a website maintained by it, and

(II) the address of that website.

(4) An order under subsection (2) shall not have effect—

(a) until the expiration of the period of 45 days from the making of the order, or

(b) where an application is made to the High Court under subsection (5) in respect of the order, until the making of a final determination in relation to that application.

(5) The High Court may, upon the application of any person (other than the competent authority or the undertaking to which an order under this section applies) made during the period referred to in paragraph (a) of subsection (4), make an order varying or annulling an order under subsection (2) if it is satisfied that the agreement in respect of which the order was made requires the undertaking to which the order applies to do or refrain from doing anything that would result in a breach of any contract between the undertaking concerned and the applicant or that would render a term of that contract not capable of being performed.

(6) The High Court shall not make an order under subsection (5) if it is satisfied that the contract or term of the contract to which the application for such order relates contravenes section 4 or 5, or Article 101 or 102 of the Treaty on the Functioning of the European Union.

(7) The High Court may, upon the application of the competent authority or an undertaking to which an order under subsection (2) applies, make an order varying or annulling the first-mentioned order if—

(a) the party (other than the applicant for the order) to the agreement to which the first-mentioned order applies consents to the application,

(b) the first-mentioned order contains a material error,

(c) there has been a material change in circumstances since the making of the first-mentioned order that warrants the court varying or annulling the order, or

(d) the court is satisfied that, in the interests of justice, the first-mentioned order should be varied or annulled.

(8) Subject to any order under subsection (9), an order under subsection (2) shall cease to have effect upon the expiration of 7 years from the making of the second-mentioned order.

(9) The High Court may, upon the application of the competent authority made not earlier than 3 months before the expiration of an order under subsection (2), make an order extending the period of the first-mentioned order (whether or not previously extended under this subsection) for a further period not exceeding 3 years.

(10) Paragraphs (a), (b), (c) and (d) of subsection (2) shall apply in respect of the determination of an application referred to in subsection (9) as they apply in respect of the determination of an application referred to in subsection (2).

(11) In this section ‘undertaking’ includes an association of undertakings.”

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