



Competition Law Update

February 2010

Executives risk custodial sentences for engaging in price fixing

The first custodial sentence has been handed down for a breach of Irish competition law. On 30 November 2009, the Competition Authority's long running investigation into price fixing in the motor vehicle trade culminated in the imprisonment of James Bursey, a director of one of the car dealerships which was engaged in price fixing. Bursey had previously been given a 15 month prison sentence, suspended for five years and he had also been fined €80,000. He failed to pay his fine and consequently was sentenced to 28 days in prison for non-payment. A number of the other participants in the cartel were also given suspended sentences and fined.

So what are the competition law rules which relate to price fixing in Ireland?

The price fixing prohibition

Arrangements which directly or indirectly fix prices are specifically outlawed under section 4(1)(a) of the Competition Act 2002. The possibility that trade or professional associations may provide a forum for anti-competitive activity is explicitly recognised in the legislation by the proscription of 'decisions of associations' that could be harmful to competition. A breach of the price fixing rules will arise in circumstances where competitors explicitly contrive to coordinate their prices. Any discussion relating to prices between competitors or among trade association members is likely to be regarded as giving rise to a price fixing agreement.

Indirect price fixing

The competition law rules also prohibit indirect price fixing or behaviour which could inadvertently constitute price fixing. Any arrangement, which indirectly assists or is conducive to the suppression of price competition, even if unintentional, may be prohibited.

Collusive tendering

Other forms of cooperation between competitors may also be prohibited, such as collusive tendering, otherwise known as "bid rigging". Collusive tendering involves potential bidders agreeing among themselves to collaborate over their response to invitations to tender. In a case in June 2009, three operators in the domestic waste collection sector in County Mayo were accused of colluding in tendering for Mayo County Council's waste collection service. Although the jury ultimately acquitted the defendants on all counts, this case does highlight the perils of concerting behaviour with respect to tenders.

Penalties

The penalties which may arise in the context of breaches of competition law can be severe (sentences of up to five years and harsh fines on conviction for cartel activity.) A Competition Authority investigation may be an unwelcome consequence of any breach. The Authority has the power to conduct 'dawn raids' on premises, vehicles and even the homes of executives and seize books, documents and records. The Authority has also been known to carry out covert surveillance of those suspected of engaging in anti-competitive activity. While the initial wave of convictions for cartel activity in Ireland attracted suspended sentences, it is clear from recent judgments that errant executives can expect custodial sentences if convicted of cartel offences in future.

Extradition

It should be noted that where the effects of a cartel cross national borders, cartelists may find themselves subject to extradition and prosecution abroad. The US has been particularly active in seeking the extradition of suspects for alleged price fixing activities. In one instance, a Japanese executive who had been indicted in the US for alleged price fixing activity was arrested while attempting to enter India. Although the US authorities' extradition attempt was unsuccessful, the executive was detained in India for several months pending this outcome.



Issues which are relevant in sentencing

In *DPP (prosecutor) v Patrick Duffy and Duffy Motors (Newbridge) Limited* the High Court provides guidance on the issues which are relevant in sentencing convicted cartel participants in Ireland.

The court noted that individuals involved in cartel activity who wish to 'blow the whistle' on the infringing activities may be eligible for full immunity under the Competition Authority's cartel immunity programme if they cooperate with a prosecution. Immunity is generally only available to the first cartel member to come clean to the authorities. However, the court held that those cartel members who do not benefit from the immunity programme may nonetheless be treated more leniently by the courts where they cooperate with the Competition Authority investigation.

Interestingly, the judgment identified various matters which will not be considered to be weighty mitigating factors in the imposition of a sentence, including:

- That the conduct concerned was a first offence;
- That the offender is unlikely to re-offend;
- That the accused has an otherwise unblemished reputation and the offence is out of character; and
- That the offence was committed against a backdrop of a struggle for economic survival.

Finally, it should be noted that the judgment endorses the formulation by businesses of competition compliance manuals as a risk limitation measure.

European Commission carries out inspections in the pharmaceutical sector

The European Commission has confirmed that on 9 December 2009 it carried out surprise inspections at the premises of several companies active in the pharmaceutical industry in several EU member states. The Commission stated that it has reason to believe that EU competition rules may have been infringed. In our November Competition Law Update we examined the European Commission's final report of its pharmaceutical sector inquiry. The Commission warned that it would be stepping up its enforcement activities against pharmaceutical companies engaged in anti-competitive practices. It appears that this warning is now coming to pass.

The importance of training staff

The Commission's activities in this regard provide a timely reminder of the importance of training staff to react appropriately to inspections by competition regulators. Failure to adhere to best practice in these circumstances can have disastrous consequences. In one reported case, a company was fined €38 million for allegedly interfering with the Commission's inspection of its premises in circumstances where it was suspected of involvement in anti-competitive practices. The inspection team had collected a large volume of documents which could not be photocopied on the first day of the inspection. They deposited the documents in a locked and sealed room on the premises overnight. When they returned the following day to take copies, it was evident that the seal had been tampered with. The Commission rejected the company's assertions that a cleaning lady may have inadvertently displaced the seal. Competition Commissioner Neelie Kroes stated that:

"Companies know very well that high fines are at stake in competition cases and some may consider illegal measures to avoid a fine. This decision sends a clear message to all companies that it does not pay to obstruct the Commission's investigations."

The decision is currently being appealed by the company alleged to have obstructed the inspection team.



Ticketmaster and Live Nation merger completes

Competition regulators worldwide have approved the merger between Ticketmaster and Live Nation, which completed at the end of January 2010. Ticketmaster is regarded as being the world's largest ticket broker and it is also involved in artist management. Live Nation is one of the world's leading concert promoters, with acts such as U2 and Madonna on its books. The UK Competition Commission cleared the merger on 22 December 2009, reversing its initial finding that the merger might lead to increased prices for consumers. It also examined concerns that the merger would have an adverse effect on the ability of another large ticketing firm (CTS Eventim) to compete and concluded that these concerns were unfounded.

US competition regulators cleared the merger on the 25 January 2010 subject to certain conditions. Under the terms of the settlement, Ticketmaster must licence its software to Anschutz Entertainment Group Inc., enabling it to become a viable competitor to the merged company on the market for ticketing services. Ticketmaster also agreed to sell one of its subsidiaries which handles tens of millions of tickets a year, a measure which is also intended to strengthen competition in the ticketing services market. In addition, the merged entity will be prohibited from retaliating against venues which contract for ticketing services with its competitors. Canada's competition regulator approved the merger on similar terms.

Making your views known

Consumers and recording artists had mixed views on the merger, with Bruce Springsteen arguing that the merger would create "a near monopoly situation in music ticketing." Over 25,000 music fans wrote to US competition regulators to voice their opposition. Whatever about the merits of their views, this merger highlights the fact that interested parties can formally make their views known on the merger under review.

Under Irish law, the Competition Authority is obliged to publish information on its website relating to mergers which are notified to it for a defined period prior to making its determination as to whether the merger may be put into effect. This enables interested parties to make submissions. This can be a very useful tool for smaller businesses who wish to raise concerns over the lessening of competition that may result from a merger of its larger rivals.

New EU Commissioner for Competition

The President of the European Commission, José Manuel Barosso, has announced that Spain's Joaquín Almunia will replace Neelie Kroes as the next EU Commissioner for Competition. It is expected that he will adopt a more moderate approach than his predecessor to enforcement, in particular, in relation to the level of fines imposed on undertakings which breach competition law. It has also been reported that he favours a more lenient approach to state aid than Commissioner Kroes. It is likely that the European Parliament will vote on the new Commission in February 2010. The new Commission will have a five year term.

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