

The International Comparative Legal Guide to:

Cartels & Leniency 2010

A practical insight to cross-border Cartels & Leniency



Published by Global Legal Group with contributions from:

Advokatfirman Lindahl

Banning N.V.

BCM Hanby Wallace

bpv Braun Haškvcová s.r.o.

Černejová & Hrbek, s.r.o.

Cleary Gottlieb Steen & Hamilton LLP

D.N. Tzouganatos & Partners

De Dios & Goyena

Dhall Law Chambers

ELIG, Attorneys-at-Law

Elvinger, Hoss & Prussen

Fraser Milner Casgrain LLP

Goodrich, Riquelme y Asociados

Grandall Legal Group

Grau Garcia Hernandez & Monaco

HopgoodGanim Lawyers

Hunton & Williams

Kvale Advokatfirma DA

Law Firm Alrud

Lellos P. Demetriades Law Office, LLC

Liedekerke Wolters Waelbroeck Kirkpatrick

LMR Attorneys Ltd.

Loze, Tamberga & Partners

Magalhães, Nery e Dias Advocacia

Marques Mendes & Associados

Nagashima Ohno & Tsunematsu

Odvetniki Šelih & partnerj, o.p., d.n.o.

Pachiu & Associates

Penkov, Markov & Partners

Plesner

Preslmayr Rechtsanwälte OG

Schellenberg Wittmer

SJ Berwin LLP

Sutkiene, Pilkauskas & Partners

Szecskey Attorneys at Law

Urenda Rencoret Orrego y Dörr

Varul Vilgerts Smaliukas

Webber Wentzel Attorneys

WKB Wierciński, Kwieciński, Baehr

Yoon Yang Kim Shin & Yu

Ireland

BCM Hanby Wallace Solicitors

David Hourihane



1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is contained in the Competition Act 2002, as amended (**Act**). The cartel regime is both civil and criminal and applies to individuals as well as companies.

1.2 What are the specific substantive provisions for the cartel prohibition?

The general prohibition in relation to anti-competitive agreements, modelled upon Article 81(1) of the EC Treaty, is contained in Section 4(1) of the Act, which provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void.

The specific cartel prohibition is contained in Sections 6(1) and 6(2) of the Act. According to Section 6(1), an undertaking which:

- enters into or implements an agreement;
- makes or implements a decision; or
- engages in a concerted practice,

that is prohibited by Section 4(1) of the Act or by Article 81(1) of the EC Treaty, is guilty of an offence.

Under Section 6(2) of the Act, it shall be presumed that an agreement between competing undertakings, a decision made by an association of undertakings, or a concerted practice engaged in by competing undertakings the purpose of which is to:

- directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice;
- limit output or sales; or
- share markets or customers,

has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or any part of the State. See statement of Justice McKechnie in *DPP v. Duffy* at question 9.1 below, as to the “object” offence under Section 6(2).

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the Irish Competition Authority (**Authority**), in particular the cartels division in

association with the Director of Public Prosecutions (**DPP**). The enforcement process is conducted through the Irish Court system and is usually a criminal one with the possibility of bringing civil actions for damages (follow-on cases) in the Irish Courts for cartel activities. The Authority does not enjoy the power to make any legally binding decision as to a breach of the cartel provisions of the Act nor can it impose any criminal sanctions or fines on parties for engaging in cartel behaviour. As such, the Authority must elect to bring any criminal or civil prosecutions before the Irish courts. The DPP has jurisdiction as to whether or not the parties should be prosecuted. Where the Authority elects to bring such criminal prosecution, it can either:

- bring a summary prosecution for a minor offence before the District Court; or
- seek a prosecution on indictment for serious offences which are usually tried before a jury.

In the case of civil actions, where the Authority elects to prosecute a case, it does so through the High Court. Under the Act, the Authority cannot obtain damages and must rely upon the court to impose fines. In terms of reliefs, the Authority can obtain either injunctive or declaratory relief from the High Court.

The Authority enjoys significant investigatory under the Act. The Authority will investigate a cartel either on its own initiative, or arising from a complaint by a third party to the Authority, or following an application for leniency by a party. As part of its investigation the Authority may carry out a dawn raid to obtain evidence of cartel behaviour and/or summon witnesses before it in order to examine such witnesses under oath and require such witnesses to formally produce documents in their power or control. Such witnesses enjoy the same immunities and privileges as if they were witnesses before the High Court. In terms of the Authority’s dawn raid procedure, it must first obtain a warrant from the District Court. The Authority’s Authorised Officers must then produce the warrant in order to allow them entry, if necessary by force, to the relevant premises, which can include directors’ homes and vehicles. The Authority enjoys significant powers in relation to the ability to copy and retain relevant documents. Persons may be questioned on-site or arrested for further questioning. At present, it is unclear under the Act whether Authorised Officers from the Authority can participate in such further questioning (aside from the Gardai (Irish Police force members) that are seconded to the Authority and acting as Authorised Officers).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

See response to question 1.3 above. The Authority will investigate the cartel whether on its own initiative; as a result of a complaint

from a third party; or on foot of a leniency application from a relevant party. In circumstances where the Authority receives a complaint, the Authority operates a “Complaints Screening System”, which comprises three steps, namely:

1. preliminary screening;
2. detailed evaluation; and
3. investigation.

Of the 386 complaints received by the Authority in 2008, 3 led to a full investigation. (Source: Competition Authority Annual Report 2008, February 2009.)

1.5 Are there any sector-specific offences or exemptions?

There are no sector specific offences or exemptions under the Act in relation to cartels.

1.6 Is cartel conduct outside Ireland covered by the prohibition?

Yes, where cartel conduct outside Ireland has an effect on competition within Ireland or any part of it, this is covered by the cartel prohibition under the Act.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes*	Yes*
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes*	Yes*
■ Right to retain original documents	Yes*	Yes*
■ Right to require an explanation of documents or information supplied	Yes*	Yes*
■ Right to secure premises overnight (e.g. by seal)	Yes*	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

Not applicable

2.3 Are there general surveillance powers (e.g. bugging)?

No, Authorised Officers have no general surveillance powers but it

may be possible for members of the Gardaí to exercise general surveillance powers under Irish law.

2.4 Are there any other significant powers of investigation?

The Authority does not have the power to prosecute for cartel activities or to issue a legally binding decision on undertakings under the Act. That said, the Authority has developed a system whereby it issues an “enforcement decision” which, in effect, amounts to a settlement of potentially anti-competitive activities with the parties concerned. The Authority has, to date, issued 14 enforcement decisions, a number of which relate to alleged anti-competitive agreements. Under such settlement decisions, parties agree to offer undertakings to the Authority, while making no admission of any wrongdoing or liability, in exchange for which the Authority agrees to drop the case against them.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Authorised officers can enter, if necessary by force, and search businesses, vehicles and/or residential premises within the State under the Act. Authorised officers are not required to wait for the legal advisors to arrive when conducting a dawn raid, and tend not to wait.

2.6 Is in-house legal advice protected by the rules of privilege?

Yes, under Irish law in-house legal advice is regarded as being protected by the rules of privilege although this would not affect the application of EC law to in-house legal advice.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The Authority has the power to summon witnesses to attend before it, compel the production of documents in the possession of those witnesses and examine them under oath. In terms of rights of defence, those witnesses have the same immunities and privileges as any witness before the High Court including the privilege against self incrimination.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

Yes, such sanctions exist. Any person who fails to attend as a witness before the Authority; refuses to take an oath or produce a document in their power or control; or refuses to answer questions given by the Authority, which it may legally be required to answer, will be guilty of an offence and liable to a fine of up to €3,000 and/or imprisonment for up to six months. In addition, any person who obstructs or impedes an Authorised Officer in exercise of their dawn raid powers is guilty of an offence and liable to a similar conviction as above.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Any company found guilty of a cartel offence under Section 6 of the Act is liable:

- on summary conviction to a fine of up to €3,000; or

- on conviction on indictment to a fine not exceeding up to €4m or 10% of its turnover in its previous financial year (whichever is the greater).

There are also daily fines for each day of the offence committed after the day on which the initial offence is committed (€300 on summary conviction and €40,000 for conviction on indictment).

3.2 What are the sanctions for individuals?

Under the Act, where the alleged offence is committed by an undertaking and the act that constituted the offence is authorised or consented to by a director, manager or other officer of the undertaking then such person is guilty of an offence.

Such an individual is liable on summary conviction to a fine of up to €3,000 and/or imprisonment of up to six months. The individual is liable on conviction on indictment to a fine of up to €4m or 10% of the turnover of the individual in the financial year ending in the 12 months previous to the conviction and/or imprisonment of up to five years. Daily fines will also be levied for the offence where it is committed the day after the initial offence is committed (€300 on summary conviction and €40,000 for conviction on indictment).

3.3 What are the applicable limitation periods?

There are no statutory limitations within which a criminal prosecution for cartel conduct can be commenced. In the event that a severe delay prejudices the rights of defence of the accused, natural and constitutional justice may require that the action is dismissed. The limitation period for a civil action is six years from date the cause of action accrued.

3.4 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes, it can.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Authority operates a leniency programme called the Cartel Immunity Programme (CIP). Although the programme is not legally binding, it outlines the procedures available for companies and individuals to apply for immunity from prosecution under the Act (the immunity provisions are not simply limited to cartel offences but all anti-competitive activities). Whilst the Authority operates the programme in conjunction with the DPP, ultimately the sole discretion as to whether or not immunity is granted rests with the DPP and for prosecuting cartel offences on indictment before the Central Criminal Court.

Initial applications for leniency are made to the Authority’s designated officer. Contact may be made in person, orally or in writing.

Conditions for Immunity:

According to the Authority’s programme the following pre-conditions must be complied with under the CIP to qualify for immunity from prosecution:

- Applicant is first to come forward to approach the Authority before it has gathered sufficient evidence of its own to warrant a referral to the DPP;
- Applicant takes effective steps, as agreed with the Authority, to terminate its participation in the illegal activity;

- Applicant does nothing to alert former associates or cartel members that it has applied for immunity;
- Applicant has not coerced another party to participate in the cartel and has not acted as instigator or had lead role in the illegal activity;
- during the Authority’s investigation and any follow-on prosecutions, Applicant must provide complete and timely co-operation including provision of full, frank and truthful disclosure of all evidence and information known and available to it and under its control; and
- Applicant must co-operate fully on a continuing basis with the Authority, and reveal any and all offences in which it may have been involved.

There are then four delineated steps involved in the immunity application process under the CIP:

Step 1 - apply to designated officer whether by phone, in person or through legal representatives. Applicant presents outline of the facts of the case, which may initially be done through its legal advisers on a no-names basis. Any application for immunity is queued by the Authority and dealt with in order of time of receipt. Applicant is then allowed to place a “marker” with the designated officer for a period of time to be determined by that officer in order to retain the applicants place in the queue for immunity, so that the applicant may complete its application.

Step 2 - in the event the Applicant decides to proceed with the immunity application, Applicant must further show details of the illegal activity to the Authority. When the Authority forms the view that the case falls within the CIP, the matter will be referred to the DPP seeking a written qualified agreement to grant immunity from the DPP.

Step 3 - on receipt by the Applicant of the written qualified agreement, both the DPP and the Authority must be informed with sufficient detail and certainty as to what evidence can be provided by the Applicant. Full disclosure is then required at this stage and is conducted with the understanding that none of the information furnished by the Applicant will be used by either the Authority or the DPP against it, unless there is a failure to comply by the Applicant.

Step 4 - once the terms within the written qualified agreement have been satisfied, the DPP will execute an Immunity Agreement.

Where a company makes an application under the CIP, it must be in relation to a corporate act. Whilst applications from individual directors or executives are considered, they will not be regarded as being made on behalf of the company in the absence of a corporate act. Therefore, companies must take all lawful measures to promote continuing co-operation of the directors and staff throughout any investigation by the Authority.

Where a company qualifies for a recommendation for immunity, all existing and past directors, officers and employees who admit their involvement in the cartel as part of the corporate admission will qualify for immunity. Those directors and other staff members must provide full, frank and truthful disclosure of all evidence and information known or available to them or under their control.

4.2 Is there a ‘marker’ system and, if so, what is required to obtain a marker?

Yes there is a marker system under the CIP (see question 4.1 above).

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes, initial applications may be made orally to the Authority’s designated officer.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The information that is provided under the CIP to the Authority and the DPP will not be disclosed other than in accordance with the normal practices and procedures relating to criminal investigations and prosecutions in Ireland. In particular, such information may be disclosed:

- where there has been public disclosure by the Applicant;
- where disclosure is required by law;
- when disclosure is for the purpose of the administration and enforcement of the Act;
- when disclosure is necessary for the prevention of the commission of a criminal offence; and/or
- when disclosure is made in the course of an investigation or subsequent proceedings.

4.5 At what point does the ‘continuous cooperation’ requirement cease to apply?

The continuous co-operation requirement ceases to apply at the conclusion of the Authority’s investigation and the conclusion of any subsequent prosecution. The Applicant must complete a timely co-operation throughout the course of the Authority’s investigation and any subsequent prosecution by the DPP. Failure to comply with any of these requirements as set out in the CIP could result in the DPP revoking the immunity agreement made with the Applicant. In the case of such a revocation, the Authority will continue its investigation using the information provided by the Applicant and may bring the Applicant into the investigation where it has failed to meet its obligations under Immunity Agreement.

4.6 Is there a ‘leniency plus’ or ‘penalty plus’ policy?

Not applicable.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes. Individual employees may apply for immunity to the Authority even where their employer does not apply. Where a company qualifies for full immunity, all past and present directors, officers and employees who admit their involvement in the cartel (as part of the corporate act in applying for immunity- see question 4.1 above), and comply with all requirements of the immunity application, will qualify. Given the Authority operates a strict “first-in” system for immunity, a successful application by the individual employee may necessarily restrict the ability of its employer undertaking from applying for immunity, where such an undertaking was not “first-in”.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

Not Applicable.

7 Appeal Process

7.1 What is the appeal process?

A civil action initiated in the Circuit Court can be appealed to the High Court for a *de novo* hearing, subject to being bound by the lower court’s jurisdiction as to a damages award, or can be appealed on a point of law. Where the case is heard in the first instance by the High Court, only an appeal on a point of law to the Supreme Court is permissible.

For criminal cases, a right of appeal for a summary trial heard by the District Court, exists to the Circuit Court, whilst trials on indictment may be appealed from the Circuit Criminal Court to the Court of Criminal Appeal (CCA).

7.2 Does the appeal process allow for the cross-examination of witnesses?

No. For criminal cases, a transcript from the trial is available to the CCA should any issues of fact arise. Where witnesses are not cross-examined on an issue at trial, the appellant cannot then argue at the appeal that a matter of significance was not considered by the Trial Judge.

The CCA will not re-open an issue of fact that has been subject to a ruling by a judge or a finding by a jury unless the ruling was tainted by an error of law or was manifestly incorrect. If they so held, or if the appellant was denied the right to cross-examine at trial by an error on the part of the judge, the conviction might be quashed and a re-trial might be ordered.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Under the Act, third parties, including companies and individuals, may bring civil damages actions for losses suffered as a result of a cartel under the Act. An individual may bring an action against both the company involved and against any director/manager or any other officer of that company who purports to act in any such capacity in authorising or consenting to the cartel. Section 14(5)(b) of the Act also allows for a claim of exemplary damages, in the case of civil actions.

8.2 Do your procedural rules allow for class-action or representative claims?

No, Irish procedural rules do not currently allow for class action claims. It is, however, possible to bring a representative action where there are numerous persons having the same interest in relation to a cartel. A test case may also be brought by one litigant which, if successful, could be relied upon by other potential litigants.

8.3 What are the applicable limitation periods?

The applicable limitation period is 6 years within which to initiate a civil follow-on case, which begins to run from the date upon which the cause of action accrued. In circumstances where the action is based on, or concealed by, the fraud of the defendant, the applicable time period will commence from the date the plaintiff

discovers the fraud, or could, with reasonable diligence, have discovered it.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

The general rule under Irish procedural law is that costs will follow the event with the losing party bearing the legal costs in civil actions. In Ireland however, the judge retains full discretion in relation to the matter of costs. That said, only costs reasonably incurred in defending the action are recoverable. The onus of proving the costs were reasonably incurred rest with the party in favour of whom the award is made.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

To date there have been no reported successful follow-on or stand-alone civil damages claims for cartel conduct. However, two follow-on claims arising from the European Commission’s decision in *Irish Sugar COMP/34.621*, did come before the High Court between 2008/9, both of which were settled (*ASI Ltd v. Greencore* and *Gem Pack Ltd v. Irish Sugar*).

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

In its response to the Irish Government’s consultation on the implementation of the Act, the Authority suggested a number of additional statutory powers that it required for conducting and enforcing investigations. A number of these are of particular interest to cartel investigations, namely:

- The Authority’s recommendation that the Act makes explicit reference to Authorised Officers seizing, in addition to materials described in the search warrant, any other material reflecting a violation of the Act.
- The Authority’s recommendation that the Act be amended to clarify that Authorised Officers may also be present and participate in the questioning of suspects detained by the Irish Gardai relating to an investigation of competition offences. At present, it is unclear under the legislation whether the Authorised Officers conducting the investigation have a right to be present and participate in questioning of suspects in detention.
- Proposal by the Authority, based on European and Irish case law, as to the factors that judges should take into account when sentencing or fining in competition cases. The Authority makes specific reference to the European Commission guidelines concerning fines in cartel cases, including having regard to: the value of the undertaking’s sales; the degree of gravity of the infringements; the number of years of infringements; the nature of the infringement - whether horizontal price fixing, market sharing and output-

limitation agreements which would generally incur a higher penalty; market share of all undertakings concerned; geographic scope of infringement and whether or not infringement has been implemented. The Authority also points to the Director of Public Prosecutions’ Guidelines for Prosecutors which refer to instances of aggravating and mitigating circumstances as influencing the increase or decrease in the basic penalty.

Object vs Effect: Justice McKechnie’s (specialist High Court competition judge) observations in the recent case of *DPP v. Duffy & Anor*, relating to the criminal charges brought by the DPP where the prohibited conduct comprised a by “object” offence, as opposed to “effect”. McKechnie J observed, at para 51, that: “With such offences (entering and implementing) I would suggest that whether or not that enterprise was successful, or beneficial or profitable, or otherwise, cannot have any relevance to the issue of guilt. If the end result would decriminalise the conduct, then this type of offence would lack utility and be redundant. In addition, if the situation was otherwise, the distinction between object and effect would be obliterated.”

9.2 Please mention any other issues of particular interest in Ireland not covered by the above.

Prior to November 2009, all custodial sentences imposed on individuals for cartel offences in Ireland have been suspended. For example, there were 17 criminal convictions obtained by the Authority/DPP in respect of the Galway home heating-oil cartel, with 7 convictions obtained, more recently, in respect of the Citroen motor dealers cartel, all of which were suspended. However, the first individual in Ireland to be jailed for anti-competitive offences was sentenced to 28 days in prison on 30 November 2009. The individual had been given a suspended sentence of nine months in April 2009, coupled with a fine totalling €80,000, following a lengthy investigation by the Authority into price fixing by certain Citroen motor dealerships.

In this particular case, the individual failed to pay the earlier fine imposed by the Central Criminal Court, from which the issue arose as to whether he would face the nine-month sentence, previously suspended by the Competition Judge, or a 28-day sentence, which is a normal condition under Irish criminal law for failure to pay fines of this nature. The Judge imposed a period of 28 days on the basis of the particular facts of the case (there had been some procedural ambiguity arising from the novelty of sentencing in competition cases with serious financial penalties and in circumstances where the accused pleads guilty to the offence but fails to pay his fine), but Justice McKechnie also indicated to another accused in a more recent case, that where the convicted defaults on payment of his fine, the Judge will require him to serve the entire jail sentence of nine months.

In July 2009, the DPP brought charges against directors of three waste management firms in the west of Ireland, for allegedly entering into agreements to allocate waste collection markets and share customers. Each accused company and the directors concerned were acquitted by the jury.



David Hourihane

BCM Hanby Wallace Solicitors
 88 Harcourt Street
 Dublin 2
 Ireland

Tel: + 353 1 418 6819
Fax: + 353 1 418 6901
Email: dhourihane@bcmhw.com
URL: www.bcmhw.com

David is head of the EU, Competition and Regulatory Law Unit at BCM Hanby Wallace, advising on all aspects of EU and Irish competition law, including merger control, cartel and abuse of dominance investigations, and competition litigation before the Irish and European Courts. In advising clients on the application of EU State aid rules, David works closely with both aid beneficiaries and granting authorities, with a specialisation in R&D, regional and environmental aid, and a particular focus on the cleantech and life sciences sectors. David's regulatory law focus extends to the transport, energy, broadcasting, and pharmaceutical sectors. He is at the forefront of advising renewable energy and other cleantech clients on regulatory and compliance issues, including EU legislative developments and the opportunities such legislation may create for clients' business. In addition, David advises on all aspects of EU law, in particular focusing on the free movement provisions (services, capital, workers and goods) and on EU law litigation, having represented clients before both the Irish High Court and the European General Court.



BCM Hanby Wallace is one of Ireland's largest law firms. We are recognised within Ireland and internationally as a leading service provider to public and private enterprises across all key industry sectors. Our scale and experience ensures that we provide our clients with top quality legal advice and assistance in a timely, efficient and cost-effective manner without losing essential personal contact. We look to devise solutions and uncover opportunities, not just point to problems. Our job is to understand our clients, their markets and their business goals and objectives - and to tailor our services accordingly. In addition to first-rate legal expertise, we apply commercial knowledge, insight and a practical understanding of the totality of the issues to all our client work.