

# 15th Annual Irish European Law Forum - Competition Law Enforcement



23 March 2012



UCD School of Law



**The Competition Authority**  
An tÚdarás Iomaíochta

5 CPD HOURS

## **INTRODUCTION**

The Irish European Law Forum is an annual one-day conference run by the UCD School of Law, now in its 15th year. This year, in a new departure, we are co-organising the conference with the Competition Authority on the theme of competition enforcement on Friday March 23rd. The conference explores the question of enforcement in the antitrust sphere looking at the toolkit of enforcement mechanisms that are available across the twin axes of private and public enforcement, and civil and criminal actions. This discussion will be framed by consideration of the complementary concerns of deterrence and compliance. The emphasis given to these and the extent to which they are seen as related or alternatives can shape how the implementation of competition law is approached. While the enforcement of competition law remains a matter of keen interest for practitioners, policy-makers and competition scholars on an ongoing basis, the issue is subject to particular scrutiny at the moment in the European context where the issues of private enforcement and collective actions are part of the European Commission work programme for 2012. In the Irish context, the issue of whether civil remedies should be available to the competition authority in Ireland has been answered negatively in the recent Competition Bill. The question of what is the most appropriate tool for enforcing competition law is addressed here in the context of the debates on deterrence (a debate found mainly in the law and economics literature) and the debate on compliance (found in the regulation literature).

**Venue: Chartered Accountants House, 47-49 Pearse Street, Dublin 2**

**Register and pay online: <http://www.ucd.ie/law/events/title,102957,en.html>**

## FORUM SCHEDULE

Time	Speaker/Panel
8.30-9.15	Registration
9.30-11.00	<p><b>Session I Deterrence and Compliance: The Organisational Dimension of Implementing Competition Law</b></p> <p>Chair: Isolde Goggin, Chair, Competition Authority</p> <p>Morten Hviid, Director, Centre for Competition Policy, University of East Anglia</p> <p>Frédéric Jenny, Chairman, OECD Competition Law and Policy Committee</p> <p>Discussant: Cathal Guimard, Commissioner, Commission for Aviation Regulation</p>
11.00-11.30	Tea/coffee break
11.30-1.00	<p><b>Session II: The Private and the Public</b></p> <p>Chair: Judge Aindrias Ó Caoimh, European Court of Justice</p> <p>Sebastian Peyer, Centre for Competition Policy, University of East Anglia</p> <p>Ewoud Sakkers, Head of Unit of the European Competition Network in the Policy and Strategy Directorate.</p> <p>Discussants: Niamh Hyland BL &amp; Mary Catherine Lucey, Lecturer, UCD School of Law</p>
1-2.00	Lunch
2.00-4.00	<p><b>Session III: The Challenges of Criminalisation</b></p> <p>Chair: Professor Barry Rodger, University of Strathclyde</p> <p>André Andeweg, Head of Unit Agriculture, Industry and Construction Industry, Netherlands Competition Authority</p> <p>Don Baker, Baker and Miller PLLC, Washington DC (former Head of the US Department of Justice Antitrust Division)</p> <p>Professor Colin Scott, UCD Dean of Law and Professor of EU Regulation and Governance</p> <p>Discussant: Michael Collins SC, Adjunct Professor of Law, UCD</p>
4.00-4.15	Tea/coffee break
4.15-5.00	<p><b>Session IV: Understanding Enforcement</b></p> <p>Professor Imelda Maher MRIA, Sutherland Professor of European Law UCD School of Law</p>
5.00	Close

## **BIOGRAPHICAL PROFILES**

### **Session I - Deterrence and Compliance: The Organisational Dimension of Implementing Competition Law**

#### **Isolde Goggin, Chair, Competition Authority**

Isolde Goggin was appointed Chairperson of the Competition Authority in October 2011 and is currently Director of the Advocacy and Strategy Divisions. She was appointed Member of the Competition Authority in July 2010 and was responsible for the Advocacy Division. From 2004 to 2006, she was Chairperson of Ireland's Commission for Communications Regulation, and Commissioner from 2002 to 2004. Before joining ComReg, Isolde was Director of the Regulated Markets Division at the Competition Authority. She began her career in 1980 with Eircom (then Telecom Éireann) as an engineer, and later moved into business management and then regulation, working with Eircom, DG Information Society of the European Commission and Ericsson. Isolde holds a First Class Honours engineering degree, a Masters in Business Administration, and a Postgraduate Diploma in European Competition Law, and is a Fellow of the Institution of Engineers of Ireland.

#### **Morten Hviid, Director, Centre for Competition Policy, University of East Anglia**

Morten Hviid is the Director of the ESRC Centre for Competition Policy (since August 2011) as well as one of its founding members. He joined UEA Law School in September 2004. Prior to that he held posts in the Economics Departments at University of Copenhagen and University of Warwick and in the School of Economic and Social Studies, University of East Anglia. Although trained as an economist, Morten's interest in law is long-standing and he has published in both fields, including papers in *Economic Journal*, *European Competition Journal*, *European Law Review*, *International Journal of Industrial Organization*, *Journal of Industrial Economics*, *Journal of Law and Economics*, *Oxford Journal of Legal Studies* and *World Competition*. Morten researches in the areas of competition law, contract law and tort law. Currently his research focuses on private enforcement of competition law and practices which facilitate collusive behaviour. He has acted as an advisor to the Office of Fair Trading, the Department of Constitutional Affairs (now Ministry of Justice) and Ofcom. He is a former editor of the *Journal of Industrial Economics* and associate editor of the *International Journal of Industrial Organization*. He is also a former member of the Executive Committee of the European Association for Research in Industrial Economics (EARIE).

#### **Frédéric Jenny, Chairman, OECD Competition Law and Policy Committee**

Dr Frédéric Jenny is Professor of Economics at ESSEC Business School in Paris, Judge at the Supreme Court of France (Cour de Cassation) Chairman of the OECD Competition Law and Policy Committee. Dr Frédéric Jenny studied in France and the United States and holds a Doctorat en sciences Economiques (University of Paris) and a Ph.D in economics (Harvard University). He has written extensively on Industrial Organization, Competition law, Trade and Economic Development.

#### **Cathal Guiomard, Commissioner, Commission for Aviation Regulation**

Cathal is an economist and has held the position of Aviation Commissioner since June 2006. From Galway, he studied at UCG and Oxford University. He first worked as an economist for the Central Bank of Ireland and at the forerunner of the European Central Bank, then based in Switzerland. After returning to Ireland, Cathal joined the Economics Department of UCD and taught economics there and at the UCD Business School. While at UCD he completed a PhD and in 1995 published a book whose title was for a period considered quixotic ('The Irish Disease and How to Cure It'). In June 2000 he moved to the Commission for Aviation Regulation as Head of Economics.

## **Session II - The Private and the Public**

### **Judge Aindrias Ó Caoimh, European Court of Justice**

Bachelor in Civil Law (National University of Ireland, University College Dublin, 1971); Barrister (King's Inns, 1972); Diploma in European Law (University College Dublin, 1977); Barrister (Bar of Ireland, 1972-99); Lecturer in European Law (King's Inns, Dublin); Senior Counsel (1994-99); Representative of the Government of Ireland on many occasions before the Court of Justice of the European Communities; Judge at the High Court (from 1999); Bencher of the Honourable Society of King's Inns (since 1999); Vice-President of the Irish Society of European Law; member of the International Law Association (Irish Branch).

### **Sebastian Peyer, Centre for Competition Policy, University of East Anglia**

Sebastian is a Post Doctoral Research Fellow with the CCP. He holds a degree in Law from Potsdam University (2004), an LLM in Competition Policy (2008) and a PhD (2011) from the University of East Anglia. In his PhD thesis Sebastian scrutinised the assumptions which underpin EU private antitrust enforcement policy contrasting them with novel litigation data, a law and economic assessment of the current policy and a comparison of remedies used in antitrust litigation in England and Germany. His main research area is the private enforcement of competition law, the economic analysis of law and comparative law. Sebastian has undertaken empirical work in the field of antitrust enforcement and is currently working with a unique litigation dataset. Other research projects deal with comparative law including European, German, English and US competition law, litigation systems and class actions. He is also interested in the interplay of private and public law enforcement and enforcement institutions. His work is extending into the analysis of Article 102 and consumer protection. For past projects he has worked on merger control and consumer protection laws.

### **Ewoud Sakkers, Head of Unit of the European Competition Network in the Policy and Strategy Directorate.**

Ewoud Sakkers has been with the Directorate-General for Competition of the European Commission since 1997. During his first 3½ years in DG Competition he worked in the so-called Merger Task Force. At the beginning of 2001 he shifted to cartel enforcement, acting as deputy Head of Unit within Directorate F (Cartels). He is currently Head of Unit of the European Competition Network in the Policy and Strategy Directorate. Prior to joining DG Competition, he worked in the trade policy department of the European Commission, on anti-dumping and anti-subsidy issues. Before that, he was in-house legal counsel with KPN, the Dutch telecommunications company. After spending an initial year of (undergraduate) university education in the U.S., he obtained his law degree at the University of Utrecht in the Netherlands in 1990. In 1991 he obtained an LLM degree in European law from the College of Europe in Bruges, Belgium.

### **Niamh Hyland, BL, Bar Council of Ireland**

Niamh Hyland is a practising barrister in Dublin. She practises largely in the areas of competition, regulation, procurement, environmental, administrative and commercial law. Prior to going to the Irish Bar, she was the Jean Monnet Professor in European Community law at Trinity College Dublin and worked as a referendaire at the Court of First Instance.

### **Mary Catherine Lucey, Lecturer, UCD School of Law**

Mary Catherine Lucey BCL, LLM, BL has researched and taught EU Competition law for many years in University College Dublin. Since 2000, she has taught EU competition law on summer programs in Ireland offered by US law schools. In 2006, she was invited to teach EU Competition law in Fordham University, New York. Since 2010 she provides to undergraduate students a module entitled "Competition Law in Practice." She wrote the Annotation of the Competition Act 1996 and Competition Act 2002. Currently, she is the Ireland Rapporteur of an EU wide project entitled "Comparative Competition Law Private Enforcement and Consumer Redress in the EU 1999-2009."

## **Session III - The Challenges of Criminalisation**

### **Barry Rodger, Professor, University of Strathclyde**

Professor Barry Rodger LLB (Hons), BCL, LLM, Dip. L.P, Solicitor joined Strathclyde University Law School in 1993 after qualifying as a solicitor and undertaking postgraduate study at Oxford University and the European University Institute, Florence. He teaches in the areas of competition law, international private law and Obligations. His research interests are principally in the area of competition law and its interface with private law, extending to international private law, with a particular focus on the rules of jurisdiction and choice of law in obligations, and also aspects of the law of obligations, particularly delict.

### **André Andeweg, Head of Unit Agriculture, Industry and Construction Industry, Netherlands Competition Authority**

André Andeweg is currently working as manager Financial Services at the Competition Department of the NMa (Netherlands Competition Authority) and has an ample background in competition enforcement. During the last decade he represented the NMa as project manager of the modernisation of EU-competition enforcement and has been unit manager Agri, Food and Construction Industry.

### **Don Baker, Baker and Miller PLLC, Washington DC (former Head of the US Department of Justice Antitrust Division)**

Donald I. Baker founded in 1995 an independent firm in Washington specialising in antitrust, competition policy and international law issues. Mr. Baker is the only modern member of the career Antitrust Division staff to be appointed Assistant Attorney General in Charge of the Antitrust Division (a post he assumed in 1976, after serving 9 years on the Division staff). Mr. Baker was educated at (i) the Woodrow Wilson School, Princeton University, (ii) Corpus Christi College, University of Cambridge; and (iii) the Harvard Law School. He was Professor of Law at Cornell Law School in the 1970s, where he taught courses on antitrust law, utility regulation, financial services regulation, and international business transactions. He is now an Adjunct Professor of Law at George Washington University Law School, where he co-teaches a course on Comparative International Competition Law. He is the author of many articles and is co-author of two treatises that have been regularly reissued in the new editions—Baker & Brandel, *The Law of Electronic Funds Transfer Systems* and Rowley & Baker, *International Mergers—The Antitrust Process*. He is currently serving as a Non-Governmental Advisor to the International Competition Network, working primarily on merger processes and monopoly enforcement issues. He has also represented the governments of Australia, Switzerland, the Netherlands and the United Kingdom in briefing international jurisdictional issues in a number of cases before the US Supreme Court and Courts of Appeals. Previously he served as special advisor to the Anti-Monopoly Committee of Ukraine and the Government of Mongolia on establishing new rules and enforcement mechanisms.

### **Colin Scott, UCD Dean of Law and Professor of EU Regulation and Governance**

Colin Scott is Dean of Law and Professor of EU Regulation & Governance at UCD. He studied law at the London School of Economics and at Osgoode Hall Law School in Toronto. Prior to his appointment at UCD in April 2006 he lectured at the University of Warwick and at the London School of Economics. Between 2001 and 2003 he was the Senior Research Fellow in Public Law at the Research School of Social Sciences, Australian National University. He is also a research associate of the ESRC Centre for the Analysis of Risk and Regulation (CARR), based at the London School of Economics and with which he had been associated since its creation in 2000. He is Director of the UCD Centre for Regulation and Governance, established in 2010. He is a co-author of the Irish State Administration Database (2010). He was Programme Chair of ECPR Standing Group on Regulatory Governance Biennial Conference, 'Regulation in the Age of Crisis', held in Dublin in June 2010. He is a co-editor of the interdisciplinary journal *Law & Policy*. He was a Professor at the College of Europe, Bruges, from 2006-2009 where he taught on the interdisciplinary masters on European Law and Economic Analysis (ELEA). He was Vice Principal for Research and Innovation for the UCD College of Business and Law between 2006 and 2009 and Associate Dean of the UCD School of Law from 2010-2011.

## **Michael Collins SC, Adjunct Professor of Law, UCD**

Michael Collins is a leading silk in commercial, competition and EU law at the Irish Bar. Holding Masters degrees in economics and law respectively from University College Dublin and an LLM from the University of Pennsylvania, he started his career as an associate with Shearman & Sterling in New York in the early 1980s before commencing practice at the Irish Bar. He appears regularly before the High Court and Supreme Court of Ireland and frequently appears before the European Court of Justice. He also has an extensive practice in commercial arbitration (domestic and international) both as counsel and as arbitrator. He has had appointments as arbitrator from the ICC Court of Arbitration and is one of Ireland's representatives on the ICC Commission on Arbitration. He is also a member of the International Centre for Dispute Resolution (ICDR) Panel of Arbitrators and is President of Arbitration Ireland. Michael is a CEDR accredited mediator and is Chairman of the Irish Anti-Doping Disciplinary Panel (Irish Sports Council). In 1996 Michael was appointed by the Irish Government as Chairman of the Competition and Mergers Review Group the majority of whose recommendations were subsequently implemented into Irish law in the Competition Act 2002. He was elected a Bencher of the Honorable Society of King's Inn in 2007 and the following year was elected as a Fellow of the International Academy of Trial Lawyers in the United States. For two years from 2008 to 2010 Michael was Chairman of the Bar Council of Ireland.

## **Session IV - Understanding Enforcement**

### **Imelda Maher MRJA, Sutherland Professor of European Law UCD School of Law**

Imelda Maher is the Sutherland Chair of European Law having previously worked at the London School of Economics; the Research School of Social Sciences, Australian National University (where she was Director of the Centre for Competition and Consumer Policy); Birkbeck College, University of London; and Warwick University. She has also held Fellowships or visiting appointments at the Institute of Advanced Legal Studies, London; Sydney University School of Law and Lund University, Sweden. She is a member of the Advisory Board of the Economic and Social Research Council Centre for Competition Policy, University of East Anglia. In 2008 she gave the prestigious general course lectures on economic governance at the Academy of European Law, European University Institute, Florence. She is a member of the editorial board of the European Law Journal and of the Irish Yearbook of International Law and is general editor of Legal Studies, the journal of the Society of Legal Scholars of the UK and Ireland. Professor Maher is academic director for the new UCD Sutherland School of Law building and programme coordinator for the LLM and PhD programmes in European Law and Public Affairs. She is a graduate of the UCD School of Law, holds an LLM from Temple University and a Barrister-at-Law degree from the Kings Inns. She was elected a Member of the Royal Irish Academy in 2011 and is a founding member of the European Law Institute.

## **ABSTRACTS**

### **Session I - Deterrence and Compliance: The Organisational Dimension of Implementing Competition Law**

**Morten Hviid, Director, Centre for Competition Policy, University of East Anglia**

#### **Elements of optimal deterrence theory**

Starting from the presumption that the managers of firms consider the benefits as well as likely legal consequences of their competition actions, the paper makes three points: Firstly, firms should be expected to look at the total cost to it from the action being found to violate competition law. Secondly, and following from this observation, focusing on hard-core cartel infringements will distort the policy discussion in ways which are not appropriate. Once we look at the totality of actions potentially covered by competition law, there is a danger of over-deterrence and concerns about this may lead to unintended consequences. Finally, there may be moral objections to managers engaging in explicit cost-benefit analysis when deciding on taking an action which is later found to violate competition law. This may especially be so where some actions have been criminalised.

**Frédéric Jenny, Chairman, OECD Competition Law and Policy Committee**

Abstract to follow

### **Session II - The Private and the Public**

**Sebastian Peyer, Centre for Competition Policy, University of East Anglia**

#### **The public and the private – The German private antitrust enforcement experience**

Private antitrust enforcement in Germany seems to flourish. Litigation data show that harmed individuals and firms bring lawsuits for the violation of German and European competition law before the courts. These lawsuits are not confined to follow-on damages actions against cartels. On the contrary, claimants employ a multitude of remedies against diverse antitrust violations. While many jurisdictions struggle to get private enforcement off the ground, this seems to be a lesser problem in Germany. However, the state of play of private antitrust enforcement in Germany is often ignored when stakeholders assert that the private enforcement is underdeveloped. The purpose of this paper is to identify some of the factors which presumably foster private actions and incentivise victims to bring lawsuits before German courts. I will argue that, based on the German experience, private actions can complement public enforcement if they are cheap to bring, quickly resolved, and not primarily aimed at compensation for cartel violations. In order to appeal to many potential victims private actions do not need to offer full compensation but ought to provide readily-available and flexible remedies more suitable for the small pockets of medium-sized firms and consumers. Thus, the paper implicitly rejects the purported main function of private actions, namely to make victims of cartels whole. It appears that the real impact of private enforcement stems from small cases which are not normally pursued by competition authorities. The paper will show that without a narrow focus on cartel damages actions private enforcement may be less spectacular but also be more useful. In the first part, the paper briefly explores German litigation data on private antitrust cases which were brought between 2005 and 2007. It will provide, *inter alia*, an overview about the number of cases, the remedies being sought, the allegations on which legal actions are based, and the success rate. The data show that private actions are not the primary choice in the fight against cartels but are very useful against anticompetitive vertical restraints and the abuse of dominance. The article will then identify some of the crucial factors which drive antitrust litigation in Germany. It will discuss the substantive provisions, procedural issues, length of proceedings, cost and legal certainty. Finally, the paper will conclude with some potential lessons that can be learned from private antitrust litigation in Germany.

## **Ewoud Sakkers, Head of Unit of the European Competition Network in the Policy and Strategy Directorate.**

Abstract to follow

### **Session III - The Challenges of Criminalisation**

## **André Andeweg, Head of Unit Agriculture, Industry and Construction Industry, Netherlands Competition Authority**

### **The challenges of a dual system in antitrust enforcement**

Next to civil and criminal antitrust enforcement there is a possibility of a dual system which encloses both civil and criminal enforcement. Can such a dual system provide the best of both worlds or does it try to match the unmatchable. What are the consequences in terms of procedures of enforcement, legally admissible evidence and leniency? Can one enforcement bureau carry out both tasks? And last but not least: to what extent will the cultural condemnation of cartels be of influence to the success of a dual system.

## **Don Baker, Baker and Miller PLLC, Washington DC (former Head of the US Department of Justice Antitrust Division)**

### **Deterring cartels - The criminalisation dimension**

The competition enforcement agencies continue to uncover, prosecute and heavily penalise many non-U.S. cartels; and this ongoing reality forces us to question the adequacy of corporation-only remedies for cartel infringements. Thus, this paper asks: how can we deter the kinds of opportunistic individuals who go on conspiring because it serves their interests to do so? How can we get their attention and raise their perceived risks of discovery and personal punishment? The potential use of criminal sanctions against individual cartel participants has many dimensions. The U.S. American experience is important and relevant, because routine use of jail has helped reduce Americans' participation in some big international cartels (such Vitamins and Air Cargo). Even though jail is the most effective deterrent, the American approach probably should not be treated as the only way to deal with cartel conspirators in other countries—because it clearly rests on cultural assumptions and its legal institutions which may not be repeated elsewhere. Other jurisdictions (including Ireland, Canada the U.K., and Australia) have adopted criminal competition laws with strong penalties—but, outside the U.S., criminal prosecutions tend to be fewer in number and incarceration remains virtually unknown. It may even be that the ongoing European dialogue about deterring conspiratorial cartel activity by individuals has been too tightly focused on criminalisation, because criminalisation is the route that the U.S. has successfully pioneered since 1974 and has been publicly advocating in OECD, the ICN, and other international fora. What is necessary is that any anti-cartel remedy must be regularly and visibly enforced in order for it to be perceived as a likely and personally painful risk for would-be co-conspirators. Today, modern governments potentially have available a whole range of administrative processes and remedies which did not exist, even conceptually, when the US Congress decided in 1890 to treat individual Sherman Act violators as criminals. Therefore, because deterrence remains an essential goal in anti-cartel enforcement, the European Commission and the EU Member States ought to be asking: have regulators in other sectors (e.g., banking and securities markets) developed administrative remedies that could be regularly applied to price-fixing executives in ways that they would perceive as personally painful? And how could such administrative remedies be applied on a sufficiently regular basis to be regularly perceived as a serious concern by the target audience? Moreover, the “criminalisation” vs. “administrative remedies” issue need be treated as a binary “either/or” question. Even in Ireland or the U.K., criminal enforcement need not necessarily be the only way to punish individual antitrust violators. Rather, administrative sanctions might be treated as an alternative weapon to be used by the enforcement agency, depending on the circumstances of any particular case. Thus suitably-designed and more widely applied administrative sanction(s) might help enhance the antitrust warning to those who would be willing to take legal risks to further their careers.

## Colin Scott, UCD Dean of Law and Professor of EU Regulation and Governance

### Policing Competition Policy: Crime or Regulation?

The targeting of anti-competitive conduct by legislation involves consideration of which and whose behaviour to address and also how it should be targeted. For some, competition law is a special form of legislative policy which, because of its concern with the market, can be distinguished from both sectoral and general forms of state regulation. For others, competition policy has all the hallmarks of contemporary regulatory governance, with behavioural standards set through legal rules and the empowerment of specialised agencies to monitor and enforce. Seen as a species of regulation, the enforcement of competition policy raises questions about the most appropriate legal instruments to secure the behaviour desired and, just as significantly, the appropriate fit between the deployment of these instruments and softer forms of engagement such as education, advice, warnings and advocacy. The treatment of hard-core cartels through the application of criminal law is sometimes taken to distinguish this corner of competition policy from the more familiar application of administrative sanctions through the courts. However, I suggest in this paper that the ‘crime or regulation?’ dichotomy in the title is a false one and it may be more fruitful to think about enforcement of competition policy as a form of regulation in which, to varying degrees across different forms of conduct, competition authorities are required to make choices as to the most appropriate modes of enforcement from a wide range of soft, civil and criminal forms. Accordingly the policing of my title takes the older meaning of regulating the economy for the promotion of good order. The paper draws both from regulatory theory and on interview data across a range of regulatory fields, including competition policy, to offer some indication of how regulators rise to the challenge of mixing enforcement strategies. I consider how such mixed strategies may be justified by reference to the instrumental concerns of particular policy fields, such as competition policy, while at the same time addressing rule of law concerns that such strategies might involve what, in formal terms, could constitute partial or discriminatory enforcement.

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