ECONOMIC CRISIS AND COMPETITION LAW IN IRELAND AND PORTUGAL

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Abstract: *This paper offers an examination of the contribution of the Economic Adjustment Programmes in Ireland and Portugal to shaping the regime for enforcing competition law in these Member States. After sketching the main features of the Programmes, it examines provisions which sought to reform the enforcement of EU (and domestic) competition law in Ireland and Portugal. Some of the provisions relating to Ireland are interesting because, if they had been enacted, they would have brought the Irish enforcement regime into line with the EU enforcement model where civil/administrative fines are available. Another interesting enforcement tool which found legislative expression in Irish and Portuguese competition law following the Programmes is the settlement type mechanism. These areas of shared interest are discussed in this paper.*

1. INTRODUCTION

Ireland, like Portugal, experienced an economic crisis to such an extent that it attracted the involvement of the so-called Troika, comprising the European Commission, European Central Bank (ECB) and the International Monetary Fund (IMF). Each State participated (separately) in a Troika Economic Adjustment Programme. Interestingly, competition law provisions formed part of the Programmes entered into by Ireland and Portugal.[1] This paper offers an examination of the Programmes' contribution to shaping the regime for enforcing competition law in these Member States.

1 For a discussion of this process see Lucey, 2016a.

This paper sets the scene by sketching the main features of the Economic Adjustment Programmes. It examines, in particular, provisions in the Programmes which sought to reform the enforcement of EU (and domestic) competition law in Ireland and Portugal. Some of the provisions relating to Ireland are interesting because, if they had been enacted, they would have brought the Irish enforcement regime into line with the EU enforcement model where civil/administrative fines are available. Another interesting enforcement tool which found legislative expression in Irish and Portuguese competition law following the Programmes is the settlement type mechanism. These areas of shared interest are discussed in this paper.

2. ECONOMIC ADJUSTMENT PROGRAMMES

The schema of the Economic Adjustment Programmes may be explained in simple terms as follows: In exchange for granted financial aid, a State[2] agrees to binding terms in Economic Adjustment Programmes which are detailed in *Memoranda of Understanding of Specific Economic Policy Conditionality to Benefit from Financial Assistance* (MoUs).[3] The finance is payable in instalments according to compliance by the recipient State with the agreed conditions which is monitored according to a schedule.[4]

3. ENFORCEMENT

The MoUs with Ireland and with Portugal specifically addressed the enforcement of competition law at national level. The Portuguese MoU stipulated that the "the speed and effectiveness of competition rules enforcement" would be improved.[5] In the case of Ireland, the most contentious enforcement issue tackled by the MoUs was the national competition authority's (NCA) lack of competence to impose civil/administrative fines. The NCA in Ireland comprises Irish courts and the Competition and Consumer Protection Commission

2 Other EU Member States which received analogous financial assistance include Greece and Cyprus.

3 A Memorandum of Economic and Financial Policies contains the aims and general measure. A Memorandum of Understanding on Specific Economic Policy Conditionality details the measures and the Technical Memorandum of Understanding sets out key definitions.

4 For a more detailed description of the process see Ioannidis, 2014.

5 Memorandum of Understanding on Specific Economic Policy Conditionality for Granting Financial Assistance to Portugal, May 3, 2011, p. 32.

(CCPC).[6] Such a split of the NCA role among judicial and administrative institutions is not the usual model followed in EU Member States.[7]

The Competition and Consumer Protection Commission (CCPC) was formed by the amalgamation of the Competition Authority and the National Consumer Agency on October 2014.[8] It has competence to investigate suspected infringements of (EU and/or Irish) competition law. It may decide to commence a civil case before the courts and seek either an injunction and/or a declaration. In addition, it has power to refer its file to the Director of Public Prosecutions (DPP) who has sole discretion as to whether to start criminal proceedings in serious cases. Under Irish law, only courts have the competence to make a determination as to the existence of Arts 101-102 TFEU and/or domestic equivalent. Courts adjudicate on competition law matters in civil cases and in criminal cases. Fines (and/or prison sentences) are imposable only by courts in criminal cases.

4. CIVIL FINES

The absence of civil/administrative fines has long been regarded by the Competition Authority as problematic. Over several years, its Members and associated staff authored papers which discussed various options and made suggestions for legislative change.[9] However, these efforts from the agency (and from others) did not suceed in achieving the introduction of civil fines for competition law infringements.

In light of this background, it is understandable (even if not predictable) that the topic of competition law enforcement made its way onto the agenda of the negotiations with the Troika. The Irish MoU of December 2010 expressly committed Ireland to enacting to legislation granting judges power to fine and to impose other deterrent sanctions.[10] However, this provision was relatively short-lived. As noted above, a recipient State's compliance with conditions is monitored over time. This timetabled process has the merit of creating an opportunity to deal with particular compliance difficulties which may arise. By

6 For an explanation as to why this institutional arrangement was designed, see Lucey, 2003.

7 See Communication from European Commission *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*," COM (2014) 453.

8 For a discussion of the motivations supporting the amalgamation see Lucey, 2015.

9 Mackey, 2006; FitzGerald & McFadden, 2011.

10 www.imf.org/external/country/

April 2011 the MoU had been revised and contained a more loosely phrased promise which was drafted in terms of creating effective sanctions and, crucially, made no specific mention of competence to impose fines.[11] The most plausible explanation for this change is a concern to avoid the possibility of challenges to competition legislation under the Irish Constitution. It is not possible in this paper to present fully the Constitutional issues and a very short synopsis must suffice. The Irish Constitution stipulates that justice (and more broadly judicial power) must be administered by courts and also provides protection for accused persons in criminal trials. It is important to appreciate that there is debate on the precise implications of the Constitution for the enforcement of competition law.[12]

In any event, following the MoUs, the legislature enacted a relatively cautious piece of amending legislation. The *Competition (Amendment) Act 2012 Act* was enacted to fulfil the conditions of the MoUs. Notably, competence to impose civil/administrative fines was not bestowed on either the courts or the administrative agency (then the Competition Authority). Instead, the main reforms relating to sanctions enacted by the legislation related to increasing the maximum terms of prison sentences and in the maximum fines for criminal convictions and, in addition, provision for dis-qualifying directors involved in competition law infringements.[13] Thus, the Irish enforcement model was not reframed radically and remains significantly divergent from the EU norm.[14] As to whether the Irish reforms satisfy the EU obligation to provide for 'effective' enforcement of EU competition law is a challenging question that has been explored elsewhere.[15]

5. SETTLEMENTS

The reforms to competition law enacted in Ireland and Portugal in 2012 address another aspect of enforcement namely settlement type agreements. The Portuguese *Competition Act 2012* allows the PCA to close a file without imposing sanctions or reduce fine. The Irish *Competition (Amendment) Act 2012*

11 Attachment V MoU (First Update) April 28th, 2011, p 73, available at http://www.imf.org/external/pubs/ft/scr/2011/cr11109.pdf.

12 Mackey, 2006; FitzGerald & McFadden, 2011.

13 Power, 2012; Whelan, 2013.

14 For a more detailed analysis of the divergence from the EU enforcement template see Lucey, 2016b.

15 Lucey, 2015.

introduced a mechanism which gives formal legal foundation to settlement type arrangements concluded between the CCPC and undertaking(s). The mechanism, as enacted, is remarkable for its intricacy and the inevitable lengthiness of complying with its many steps.[16] In summary, the legislation requires

16 S5 of Competition (amt) Act 20102 amended the Principal Act (Competition Act 2002) by inserting S.14B. "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— [2012.] [Competition (Amendment) Act 2012. No. 18.] (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. 7 S.5 S.5 Amendment of section 30 of Principal Act. Amendment of section 45 of Principal Act. 8 [No. 18.] [2012.] Competition (Amendment) Act 2012. (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.".

the agency to make an application to Court for an Order in the terms of the 'settlement' concluded with the undertakings. A breach of the Order may be regarded as contempt of court an, thus, carries serious penalties. On paper, it represents a potentially mighty tool but whether it will be effective in practice is far less certain.

6. CONCLUSION

The conditions in the MoUs with Ireland and Portugal were wide ranging and extended beyond the predictable areas such as banking. At first glance, the inclusion of competition law in the detailed MoUs is unexpected. However, their inclusion is not so surprising when one realises that the competition agencies in Ireland and Portugal were not distant and disinterested parties. Many if not most of the MoU's provisions on amending the Portuguese competition regime had already been identified by the Portuguese Competition Authority.[17] That the Programme made a positive contribution to the reform of competition law in Portugal has been asserted.[18] As for the Irish Competition Authority, it was described by one commentator as "... an important stakeholder...in a gifted position to pursue a reform agenda and to influence the terms of the EU/IMF agreement."[19] However, as shown above, the Irish agency did not get to rejoice in seeing its ideal reforms being enacted by the Irish legislature which instead declined to take a radical route of introducing civil/administrative fines which would have aligned the Irish regime more closely with the EU template.

17 Tavares & Gata, 2011.

18 Sebastião, 2012: "the law would in no way have been so good without the revisions made as part of the adjustment programme for Portugal and the support of the three multilateral institutions".

19 Murtagh, 2012: 66.

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