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Opportunism by Competition Authorities in Ireland, Portugal and Greece in the Wake of Economic Crisis

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Draft Preliminary version- do not quote without author permission[2].

ABSTRACT: Greece, Ireland and Portugal experienced an economic crisis which resulted in bailout programmes negotiated by each Member State with the Troika. This paper offers some observations on how the Programmes sought to reform some aspects of the domestic competition law regime other than those which fell directly within the roots of the crisis (e.g. fiscal policy and the regulation and supervision of financial sector) but were in line with the general reform aspirations of the domestic competition authorities. After describing the programmes in general, this paper examines selected provisions which sought to reform the enforcement of EU (and domestic) competition law by aligning national provisions more closely with the EU model (for example civil fines and settlement mechanism). Next, it highlights how the MoUs sought to enhance the resources and independence of the authorities. Finally, it considers the attention paid to the liberal professions as an example of MoU conditions which were not really linked with the causes of the economic crisis. The title of this paper refers to the *opportunism* of the competition authorities in three Member States following an economic crisis. Here, however, the term is not intended to connote any moral judgment but to convey how when they found themselves regrettably holding lemons grasped the opportunity to make lemonade.

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[2] This paper draws on material which will be published in (2016) 27-28 Revista de Concorrncia e Regulação

1. INTRODUCTION

A number of EU Member States have experienced an economic crisis in recent years which resulted in so-called bailout packages. [3] These arrangements were contained in Economic Adjustment Programmes which were negotiated by each Member State with the Troika, comprising the European Commission, European Central Bank (ECB) and the International Monetary Fund (IMF). These extensive documents contained wide ranging provisions, including competition law provisions. This paper offers some observations on how the Programmes entered into by Ireland, Portugal and Greece sought to reform some aspects of the domestic competition law regime which did not fall directly within the roots of the crisis but were in line with the general reform aspirations of the domestic competition authorities.
It takes the view that the competition authorities regarded the remedies to the economic crisis as presenting an opportunity to seek reform of national competition law even in areas which did not directly contribute to the causes of the economic crisis.

This paper firstly describes the salient features of the Economic Adjustment Programmes in general. It examines selected provisions in the Programmes which sought to reform the enforcement of EU (and domestic) competition law in Ireland, Portugal and Greece. A number of the provisions are interesting for their ambition to align the national provisions more closely with the enforcement regime of the EU. For example, one commitment of the Greek government entailed amending national laws to i) abolish notifications and ii) to grant the Hellenic Competition Commission (HCC) the right to reject complaints.[4] Another interesting enforcement tool which found legislative expression in Irish and Portuguese competition law following the Programmes is the settlement type mechanism. Then it examines how the MoUs sougt to enhance the resources and independence of the authorities. Finally, it highlights the attention paid to the liberal professions as an example of MoU conditions which were not really linked with the causes of the economic crisis. This demonstrates how the authorities found a silver lining to the cloud of the economic crisis

2. ECONOMIC ADJUSTMENT PROGRAMMES

The Economic Adjustment Programmes follow a general schema which may be explained in simple[5] terms as follows: In exchange for the promise of financial aid, a State 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).[6] Essentially, the finance is payable in instalments depending on the extent of compliance by the recipient State with the agreed conditions. The characteristics and procedural steps of the relevant financial assistance packages have been neatly summarised as follows:[7] Firstly, an adjustment programme is negotiated between national authorities and officials from the Troika comprising the European Commission, European Central Bank and the International Monetary Fund (IMF); secondly, when agreement is

[3] In alphabetical order the Member States comprised Cyprus, Greece, Ireland and Portugal.

[4] Annex IV EAP Conditionality Requirements

[5] For more detailed discussion of this process see M.C Lucey, " So-called 'Soft Law' Attempts to Achieve Convergent Public Enforcement Tools: Identifying the Achilles' Heel' of the European Adjustment Programmes in Ireland" (2017) 5 (1) Journal Antitrust Enforcement 150

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

[7], M. Ioannidis, "EU Financial Assistance Conditionality after 'Two-Pack'" (2014) 74 Zao RV 611

achieved the national authorities of the Member State submit three MoUs;[8] thirdly, a formal decision to approve is taken by the competent authority at EU level and, finally, an EU Council Implementing Decision is issued.[9]Finally it is important to appreciate that actual compliance with the agreed conditions is monitored on an ongoing basis according to an agreed schedule of disbursements.

3. INSTITTIONAL REFORM

The MoUs with Ireland, Portugal and Greece specifically addressed the role and competences of the competition agencies with a view to improving public enforcement of EU competition law and national competition law. The EU Commission's Communication "*Ten Years of Anti-trust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*" notes that some reforms to NCAs in Ireland, Cyprus, Greece and Portugal were "underpinned" by the Economic Adjustment Programmes. [10] For example, the Portuguese MoU stipulated that the "the speed and effectiveness of competition rules enforcement" would be improved.[11]

3.1 Civil Fines

For 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 (CCPC). [12] Splitting the NCA role among judicial and administrative institutions is not the usual model followed in EU Member States.[13] The CCPC[14] may investigate suspected infringements of (EU and/or Irish) competition law. It 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 of serious crimes. 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. The absence of civil/administrative fines has long been regarded by the Competition

[8] A Memorandum of Economic and Financial Policies contains the aims and generals measure: A Memorandum of Understanding on Specific Economic Policy Conditionality details the measures and the Technical Memorandum of Understanding sets out key definitions.

[9] In the case of Ireland, the relevant decision is Council Implementing Decisions 2011/77/EU of 7.12.2010 (2011) OJ L 30/34

[10] COM (2014) 453, footnote 6

[11] Memorandum of Understanding on Specific Economic Policy Conditionality fro Granting Finacial Assistance to Portugal, May 03, 2011, p 32.

[12] For an explanation as to why this institutional arrangement was designed see M C Lucey, "Application of EC Competition Law- Some Implications of Bunreacht na hEireann" in M C Lucey and C Keville (eds), *Irish Perspectives on EC Law* (Thomsons, 2003)

[13] See Communication from European Commission *Ten Years of Anti-trust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*," COM (2014) 453

[14] Formed by the amalgamation of the Competition Authority and the National Consumer Agency on October 2014or a discussion of the motivations supporting the amalgamation see M.C. Lucey "The New Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog with Real Teeth' Powerful Enough?" (2015) 6 JECLAP 185

Authority as problematic. Over several years, its Members and associated staff authored papers which discussed various options and made suggestions for legislative change.[15] However, these conventional efforts from the agency (and from others) did not succeed in achieving the introduction of civil fines for competition law infringements. This is the relevant background which informs the approach taken by the Irish authority and explains why and how this quite precise aspect 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.[16] However, by 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.[17] The most plausible explanation for this change is a concern to avoid the possibility of challenges to competition legislation under the Irish Constitution. 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.[18]

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. .[19] Notably, competence to impose civil/administrative fines was not bestowed on either the courts or the administrative agency (then the Competition Authority).[20].

3.2 Settlements

The reforms to competition law enacted in Ireland and Portugal in 2012 address another

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[15] N Mackey "Expanding Civil Penalties Constitutionally: Punishment without Crime? A Reflection on the Constitutional Issues Surrounding the Concept of Civil Crimes" 2006 http://www.tca.ie/images/uploaded/documents/2006-09-28%20Competition%20Press%20Conferance.pdf
G. FitzGerald and D McFadden " Filling a Gap in Irish Competition Law Enforcement: The Need for a Civil Fines Sanction" June 2011 available at www.ccpc.ie/sites/default/files/2011-06-09%20Filling%20a%20gap%20in%20Irish%20competition%20law%20enforcement%20-%20the%20need%20for%20a%20civil%20fines%20sanction_0.pdf

[16] www.imf.org/external/country/

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

[18] N Mackey "Expanding Civil Penalties Constitutionally: Punishment without Crime? A Reflection on the Constitutional Issues Surrounding the Concept of Civil Crimes" 2006 http://www.tca.ie/images/uploaded/documents/2006-09-28%20Competition%20Press%20Conferance.pdf
G. FitzGerald and D McFadden " Filling a Gap in Irish Competition Law Enforcement: The Need for a Civil Fines Sanction" June 2011 available at www.ccpc.ie/sites/default/files/2011-06-09%20Filling%20a%20gap%20in%20Irish%20competition%20law%20enforcement%20-%20the%20need%20for%20a%20civil%20fines%20sanction_0.pdf

[19] V. Power, "Ireland' Competition (Amendment) Act 2012: A By-Product of the Troika Deal but Legislation with Long-Term Consequences" (2012) Commercial law Practitioner 180, P Whelan, 'Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012' (2013) 4(2) JECLAP 175

[20] For a more detailed analysis of the divergence from the EU enforcement template see M.C. Lucey "Public Enforcement of EU Competition Law in Ireland: Appraising Divergence" (2016) 1 Competition Law Review, 17

aspect of enforcement namely settlements 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* 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.[21] In summary, the legislation requires 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 and, thus, carries serious penalties. On paper, it represents a potentially mighty tool but whether it will be effective in practice is far less certain. Indeed this mechanism was not used by the CCPC in the recent booking.com case where closure by means of agreed undertakings took a different

[21] 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.".

format outside this statutory mechanism.[22]

3.3 Resources

The MoUs exhorted that the independence of the authorities be safeguarded and, in this regard, the importance of adequate resources was highlighted. In the pursuit of its commitment in the MoU to ensure that national regulator authorities enjoy independence and resources the Portuguese government commissioned an independent report to be used as a benchmark of international best practice for the resourcing and responsibilities of national authorities. OECD Report 2011 notes that the Greek Competition Act which entered into force in mid-2011 enabled the HCC " to modernize its operations and enhance its effectiveness. During this process, the HCC maintained a consistent level of core enforcement action and ..expanded its advisory/consultative functions in order to promote much needed structural reforms in *the context of Greece's Economic Adjustment Program … The HCC seized the latter opportunity to diversify its activities and increase its overall visibility, thereby raising further its stats and reputation as an independent authority*" [23]

4 LIBERAL PROFESSIONS

Another common thread throughout the MoUs of Greece, Portugal and Ireland is the attention paid to professions. The Greek MoU February 2012 contained the commitment of the Greek government to pass legislation by end of June in relation to particular liberal professionals having consulted the HCC as an independent authority (and later the Troika staff teams). This development is closely in line with the focus of the HCC in the preceding months and years on attempting to achieve reform of liberal professions. By 2011, its Task Force on Liberal Professionals considered 45 regulated professions and issued 8 Formal Opinions (including in relation to lawyers, notaries, chartered accountants and engineers). The Task Force on Liberal Professions completed in 2012 its review of regulatory restrictions on the entry and exercise of many regulated professions and in 2012 alone issued 17 Formal Opinions. It is interesting to note that the HCC Taskforce used the OECD toolkit in its work. Indeed its links with the OECD included formal cooperation partnerships in relation to competition issues.[24]

The Portuguese authority had issued several recommendations attempting to make regulated professions more competitive, for example in relation to notaries.[25] The MoU obliged the Portuguese government to reduce the number of regulated professions and to prohibit widespread restrictions on competition among professionals such as limitations on advertising and the reduction of barriers to entry faced by EU qualified professionals. It additionally obliged the government to make improvements to the laws surrounding the recognition of professional qualifications.

In Ireland, restrictions on entry to professions and the restrictions on how the professionals operate have been of long standing concern the Irish competition authorities.[26] Following discussions, the Irish government made commitments in the MoU to remove by end of third

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[22] See www.ccpc.ie

[23] OECD 2011 Annual Report on Competiton Policy in Greece. DAF/COM/AR (2012) 16 pt 3-5.(emphasis added)

[24] For example December 2012 OECD Competition Partnership

[25] Tavares & J E.Gata "The Memorandum of Understanding on Specific Economic and Competition Policy Conditionality for granting Financial Assistance: Portuguese Point of View" e Competitions No 37518 available at www.concurrence.com

[26] Studies of different professions including engineers and legal profession .available at ww.ccpc.ie

quarter of 2011 restrictions to competition in so-called sheltered sectors. Particular commitments in relation to the legal profession include the establishment of an independent regulator for the legal profession and the implementation of the unimplemented recommendations of the Competition Authority to reduce legal costs.[27] Other commitments in the Irish MoU in relation to medical services[28] "mirror precisely the restrictions that were identified in reports by the Competition Authority into competition in general medical practice published in 2010."[29]

Thus, there is no doubt about the direct link between the authority's work/agenda and the conditions in the MoU. The interesting point is that these, admittedly important competition law issues, really were somewhat removed from the causes or roots of the economic crisis.

5.CONCLUSION

The conditions in the MoUs with Ireland, Portugal and Greece were wide ranging and extended beyond the issues which were central or core to the economic crises in these Member States. The MoUs were not confined to matters such as fiscal policy and the regulation and supervision of financial sector. The discussion above give a flavour of a few selected competition law issues which were tackled by the MoUs in three Member States with the support and guidance of the national competition authorities.

At first glance, the inclusion of competition law in the detailed MoUs is unexpected. One Irish commentator has remarked:" [F]rankly it was an odd commitment. The Irish competition regime is not perfect but there was no sense that the causes of Ireland's problems included a defective competition regime." [30] However, the inclusion of competition issues is not so surprising when one realises that the competition agencies in Ireland, Portugal and Greece were not remote and disinterested observers. In practice, the authorities became players in the process. Many if not most of the MoU's provisions on amending the Portuguese competition regime had already been identified by the Portuguese Competition Authority as being important topics for reform.[31] That the Programme made a positive contribution to the reform of competition law in Portugal has been asserted by the former President of the Portuguese Competition Authority as follows: "the law would in no way been so good without the revisions made as part of the adjustment programme for Portugal and the support of the three multilateral institutions."[32] The Irish Competition Authority has been 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."[33] Similarly the involvement of the Greek authority in the reform process has been described by the OECD as follows: " Overall, the Authority's commitment and sustained efforts to turn the crisis into an opportunity, by adopting swiftly to the situation and further solidify its role in promoting a

[27] The Competition Authority recommended that an independent Legal Services Commission be established.
[28] Eliminating restrictions on the quantity of general practitioners qualifying
[29] C. Hanley , D. Purcell "The MoU on Specific economic and Competition policy conditionality for Granting financial assistance: Irish point of view " e Competitions No 37521
[30] "V. Power "Some Reflections on Competition Law and Practice in Ireland" 2013 (1) Competition Policy International Antitrust Chronicle p 4
[31] Tavares & J E.Gata "The Memorandum of Understanding on Specific Economic and Competition Policy Conditionality for granting Financial Assistance: Portuguese Point of View" e Competitions No 37518 available at www.concurrence.com
[32] Manuel Sebastiao in Raffaelli (ed) Tenth Conference on Antitrust Between EU law and National Law in Treviso on May 17-18 2012 (European lawyers Union).
[33] A. Murtagh "Irish Competition Policy Under the EU/IMF Spotlight " [2012] Competition Law Review 62, 66

genuine competition culture in Greece."[34]

The title of this paper refers to the *opportunism* of the competition authorities in three Member States following an economic crisis. In some contexts, the term 'opportunism 'is deployed or understood somewhat pejoratively. Here, however, the term is not intended to connote any moral judgment or criticism. Instead, it is intended, here, to convey how the authorities when they found themselves regrettably holding lemons grasped the opportunity to make lemonade.

[34] 2012 OECDA Re Annual Report on Cmpetition Policy Develeopment in Greece 2012 pt 7 and 2013 at pt 10