

PANORAMIC **DOMINANCE**

Ireland



LEXOLOGY

Dominance

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GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Abuse of a dominant position is prohibited by section 5 of the Competition Acts 2002-2022 (the Act) and article 102 of the Treaty on the Functioning of the European Union (the Treaty). Section 5 of the Act mirrors article 102 of the Treaty except that section 5 refers to abuse of a dominant position in trade for any goods or services in the state (ie, Ireland) or in any part of the state.

The Irish national competition authority, the Competition and Consumer Protection Commission (CCPC) (formerly known as the Competition Authority) and the Commission for Communications Regulation (ComReg) can investigate breaches of section 5 and article 102 prohibition. However, only the Irish courts can make a legally binding finding that conduct constitutes an unlawful abuse of a dominant position.

The Act makes abuse of a dominant position (under section 5 or article 102 or both) a criminal offence that can be prosecuted before the Irish courts and is punishable by financial penalties. The Act also includes specific provision for aggrieved persons and the CCPC to take civil proceedings before the Irish courts seeking remedies for an abuse of a dominant position. The remedies available in civil proceedings include a court declaration, damages and an injunction. In particular, section 14(7) of the Act enables an Irish court to take intrusive structural measures to terminate a dominant position that has been abused (as well as to terminate the abuse) by issuing an order.

To date, no penalty or structural remedy for abuse of dominance has been granted by the Irish courts and there have been no significant cases where damages were awarded.

Law stated - 12 January 2024

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

There is no definition of dominance within the Act. As such, the Irish courts and the CCPC have adopted the definition formulated by the Court of Justice of the European Union (CJEU) in case 27/76, *United Brands v Commission* [1978] ECR 207, wherein it was defined as a:

... position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

Section 5(2)(a)–(d) of the Act does, however, set out several examples of what such abuse of dominance may consist of, which include the following:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject of such contract.

Law stated - 12 January 2024

Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The object of the legislation and the underlying standard are strictly economic and do not seek to protect other interests (except for those provisions in the Act dealing with media mergers).

Law stated - 12 January 2024

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are sector-specific regulations in all key regulated sectors (electronic communications, postal services, energy and aviation). In the electronic communications sector the relevant regulatory body, ComReg, can designate operators as having significant market power in accordance with the applicable directive on a common regulatory framework for electronic communications networks and services.

In the electronic communications sector, ComReg concurrently holds the same enforcement powers as the CCPC. The Communications Regulation (Amendment) Act 2007 as amended (the 2007 Act) extended ComReg's functions to include competition powers (concurrent with those of the CCPC) in respect of matters arising under, inter alia, section 5 of the Act concerning electronic communications services, networks or associated facilities. The Competition (Amendment) Act 2022 extended ComReg's powers further (concurrent with those of the CCPC) to allow the regulator impose fines as a method of deterring anti-competitive behavior. ComReg will also have enhanced investigatory and information gathering powers.

A cooperation agreement is in place between the CCPC and ComReg. Pursuant to the 2007 Act, in instances of disagreement between the CCPC and ComReg as to jurisdiction, the decision as to which body shall act in a given instance falls to the Minister for Communications, whose decision is final. To date, in practice, ComReg tends to lead the investigation of competition law issues that affect the markets where it has jurisdiction.

Other sectoral regulators supervise operators in their respective sectors in accordance with the relevant sector-specific legislation. This legislation may enable the regulator to make ex ante rules designed to alleviate the effects of dominance. In addition to its cooperation agreement with ComReg, cooperation agreements are in place between the CCPC and other sectoral regulators with a view to avoiding duplication and ensuring consistency in their enforcement actions. These regulators include the Central Bank of Ireland, the Commission for Regulation of Utilities, the Department of Business, Enterprise and Innovation, the Broadcasting Authority of Ireland, the Commission for Aviation Regulation, the Health Insurance Authority and the National Transport Authority.

Law stated - 12 January 2024

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The prohibition on abuse of dominance applies to 'undertakings'. An undertaking is defined under Part 1 of the Act as 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits shall include an association of undertakings'.

Public bodies that carry on an economic activity, such that they satisfy the definition of an undertaking, are subject to the Act. In 2012 and 2013, the High Court considered allegations of abuse of dominance brought against public authorities responsible for charging for the use of harbour facilities and in both cases it was decided that the defendant was acting as an undertaking subject to competition law (*Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources* [2011] IEHC 388 and *Island Ferries Teoranta v Galway County Council* [2013] IEHC 587). Further, in *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others* [2009] IEHC 588, the High Court found that the fact that the local authorities in the greater Dublin area were responsible for the regulation of waste collection services within their respective areas did not preclude them from being 'undertakings' when the local authorities themselves provided waste collection services. In October 2008, the Competition Authority determined that the Health Service Executive is not an undertaking when it engages in either negotiating with pharmaceutical representatives in respect of the ex-factory price of certain drugs or purchasing community pharmacy services from private sector pharmacy undertakings (Enforcement Decision (ED/01/008)). In *Lifeline Ambulance Services v HSE* [2012] IEHC 432, the High Court held that public authorities such as the HSE can only be considered undertakings in relation to purely economic activities drawing a distinction between tasks assigned to authorities – like the HSE – by statute to secure a public interest benefit, such as provision of emergency ambulance services, and tasks that are more economic in nature, such as ambulance transport of private patients.

Law stated - 12 January 2024

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Section 5 of the Act and article 102 apply *only* to dominant firms.

Law stated - 12 January 2024

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes. Section 5(1) of the Act and article 102 provide that any abuse by 'one or more undertakings' of a dominant position is prohibited. In *A&N Pharmacy v United Drug* [1996] 2 ILRM 42, the High Court recognised that collective dominance may exist in circumstances in which three suppliers controlled 90 per cent of the relevant market.

In *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others*, the High Court found that the local authorities in question were collectively dominant in respect of the provision of waste collection services in the greater Dublin area as well as being dominant individually within each of their respective geographic areas.

Law stated - 12 January 2024

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The legislation is applicable to dominant purchasers, as confirmed by the Competition Authority in rejecting an allegation that Aer Lingus had abused its position on the market for the purchase of travel agents' services (Authority Decision No. E/02/001) and by the High Court in *Blemings v David Patton* [2001] 1 IR 385 and *Lifeline Ambulance Services Limited v Health Service Executive* [2012] IEHC 432.

Section 5(2)(a) of the Act provides that an abuse of a dominant position may involve 'directly or indirectly imposing unfair purchase or selling prices', which confirms that the Act applies to dominant purchasers. Enforcement practice and case law have not provided for any distinction in the application of the law to dominant suppliers as regards dominant purchasers.

Law stated - 12 January 2024

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

There is no test for market definition within the Act. However, the High Court has referred to the test set out in the European Commission's notice on the definition of the relevant product market for purposes of Community law ([1997] OJ L372/5) (the Notice), which states:

A relevant product market comprises all those products and / or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

The Irish courts and the CCPC generally follow the Notice's definition of the relevant geographic market, which states:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

The CCPC's practice on market definition is set out in its guidance in the merger control rules and its Enforcement Decisions. In *Competition Authority v O'Regan & Others* [2004] IEHC 330, the question of the correct market definition was of key importance in the Supreme Court's overruling of the High Court's decision. In October 2004, the Competition Authority obtained a High Court ruling that the Irish League of Credit Unions (ILCU) had abused its dominant position in the market for credit union representation by refusing to supply savings protection insurance to credit unions that were not members of ILCU. The High Court ordered ILCU to share access to its savings protection scheme with credit unions not affiliated to it. The Supreme Court subsequently overruled the High Court's decision, finding that savings protection schemes were not, in fact, a commercially saleable product and that the Competition Authority had failed to provide an economic analysis to substantiate its claim that representation services and savings protection schemes were distinct products in distinct product markets ([2007] IESC 22). The Supreme Court concluded that a specific market for savings protection schemes did not exist as such protection schemes were only ever provided, both nationally and internationally, by leagues of credit unions and only to their own members. Accordingly, such schemes did not constitute a relevant product market. The Competition Authority's case that ILCU's conduct amounted to a tying abuse thus failed.

With regard to market share thresholds, the Irish courts and the CCPC will follow the case law of the CJEU in respect of this issue.

In *Meridian Communications and Cellular Three v Eircell* [2002] 1 IR 17, the High Court held that despite Eircell's relatively high market share (around 60 per cent), the plaintiffs had failed to prove that Eircell was dominant. The High Court held that reliance on the structural aspects of the market was not justified in the circumstances of the particular market in question and that the significance of Eircell's large market share was greatly diminished in light of its dramatic decline (from 100 per cent) over a relatively short period of time. Likewise, in *Blemings v David Patton*, the High Court held that a monopsonist would not be dominant in the absence of barriers to entry and exit in the market.

In its 'Enforcement Decision' on RTE, while the Competition Authority did not reach any final findings on the point, it indicated that its preliminary view was that RTE was likely to hold a dominant position in the market for television advertising airtime in the state, despite the fact that its market share by revenue (55 per cent to 65 per cent) had been in decline and that new players had entered the relevant market.

In *TicketMaster Ireland* (Authority Decision No. E/06/001), the Competition Authority took the view that, although TicketMaster Ireland held 100 per cent of the Irish market for outsourced ticketing services for events of national or international appeal, no dominant position existed owing to the constraint placed on TicketMaster Ireland by large event promoters. In the decision of the Electronic Communications Appeal Panel in the appeal by Three Ireland (Hutchison 3G Ireland) of a designation of significant market power (SMP), reliance was placed on the European Commission's SMP guidelines, which stressed that the existence of a dominant position cannot be established on the sole basis of large market shares and that a thorough overall analysis should be made of the economic characteristics of the relevant market before coming to a conclusion. In that case, despite the appellant's 100 per cent share of the market for voice call termination on its own network, the panel found that there was a failure to properly carry out the analysis required including delay, market saturation, new entrants' issues, alternative buyers, the role of competition and presence of countervailing power; therefore, the SMP designation was overturned.

Law stated - 12 January 2024

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 5(2) of the Competition Acts 2002–2017 (the Act) and article 102 of the Treaty on the Functioning of the European Union (the Treaty) set out the examples of abuse of dominance. Such abuses may consist of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In enforcing the section 5 prohibition, the Competition and Consumer Protection Commission (CCPC) tends to follow an effects-based approach. A good example of such an approach is the Competition Authority's decision in *TicketMaster Ireland*. Writing in a personal capacity, the member of the Competition Authority (as it then was) responsible for that decision subsequently noted that 'the form-based approach strongly supported the allegations of high prices based on exclusive contracts, while the effects-based analysis

found, correctly, that countervailing buyer power, efficiencies and other factors meant that TicketMaster Ireland was neither dominant nor that its conduct was anticompetitive' (Dr Paul Gorecki, *Journal of Competition Law and Economics* 2006 2(3): 533–548).

Whereas formally there are no per se prohibitions of specific conduct under section 5 of the Act or article 102 of the Treaty, the CCPC is influenced by the approach of the European courts and the European Commission, such that certain forms of conduct on the part of dominant undertakings can be presumed to be abusive (although the company always retains the possibility to rebut that presumption or justify its conduct). For example, in its decision in *Drogheda Independent* (Decision No. E/05/002), the Competition Authority noted that its approach towards the identification of unlawful predatory pricing was based on that of the Court of Justice of the European Union (CJEU) in case C-62/86 *Akzo v Commission*, whereby prices below a dominant undertaking's average variable costs are presumed to be predatory. Likewise, in its 'Enforcement Decisions' regarding allegedly unlawful 'loyalty rebates' offered by RTE and An Post respectively, the Competition Authority noted that its approach towards the identification of unlawful 'loyalty rebates' was based on decisions of the CJEU in joined cases C-241/91 P and C-242/91 *RTE and ITP v Commission* and case 5/69 *Volk v Vervaecke*. Accordingly, there is no reason in principle why the Irish Courts and the CCPC should not follow the recent decision of the CJEU in case C-413/14 P *Intel v Commission*, which marks a shift away from the automatic classification of certain types of conduct as a per se abuse (ie, relying solely on a form-based analysis) to adopting a more effects-based approach whereby the CJEU held that Commission are required to examine all the circumstances of a case to determine if the conduct in question is capable of restricting competition. The CJEU recently confirmed this approach in case C-525/16 *MEO*, which applied the effects-based principles in *Intel* to price discrimination, suggesting the Intel reasoning is not limited to cases involving rebates but is applicable to other pricing abuses. This further endorsement of an effects-based assessment is likely to be followed by the Irish courts and the CCPC.

Law stated - 12 January 2024

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, both exploitative and exclusionary practices are covered.

Law stated - 12 January 2024

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Dominance and abuse can take place in the same market or in neighbouring markets. *Donovan and others v Electricity Supply Board* [1997] 3 IR 573 involved a finding of an abuse of ESB's dominant position on the market for the supply of electricity by restricting

competition on the market for the supply of electrical contracting services to low-voltage installations, on which its presence was minimal.

Law stated - 12 January 2024

Defences

What defences may be raised to allegations of abuse of dominance?

When exclusionary intent is shown, are defences an option?

General defences to allegations of abuse of dominance developed under EU law may be raised (eg, the concepts of objective justification and proportionality). Section 7(2) of the Act provides that it shall be a good defence to a criminal prosecution for an alleged abuse of a dominant position to provide that the 'act or acts conceived was or were done pursuant to a determination made or a direction given by a statutory body' (eg, a sectoral regulator). The issue of whether allegedly abusive conduct is imputable to a regulator or a regulated entity was considered in *Shannon LNG Limited v Commission for Energy Regulation & Others* [2013] IEHC 568. The CCPC considered the possibility of an efficiency defence or another objective justification for allegedly unlawful rebates in its investigations of RTE and An Post but took the preliminary view that there was insufficient evidence that the claimed efficiency gains outweighed the likely harm on competition.

It is likely that the CCPC and the Irish courts will take account of the European Commission's guidance on its enforcement priorities in applying article 102 of the Treaty ([2009] OJ C 45/1), paragraph 28 of which provides that a dominant undertaking may justify its conduct on the basis that the conduct in question produces substantial efficiencies that outweigh any anticompetitive effects on consumers. It is also likely that they will follow the judgments of the CJEU in *Intel* and *MEO*, which acknowledge that in cases involving pricing abuses that are found capable of foreclosure, a dominant firm can plead efficiencies as a defence.

Law stated - 12 January 2024

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

There is no specific reference to unlawful rebate schemes in the Act, but these can amount to abuse in breach of section 5 of the Act and article 102. The CCPC and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that rebate schemes can be 'capable' of restricting competition but that it is possible for a dominant firm to rebut that presumption.

The CJEU found in *Irish Sugar* [2001] ECR I-5333 that the system of rebates operated by Irish Sugar plc on Irish sugar markets breached article 102. To date, there are no decided Irish court cases that have dealt with this form of abuse.

The Enforcement Decision on the Competition Authority's investigations of RTE was the first written account of its views on the complex issues surrounding the competition law compliance of rebate schemes offered by dominant undertakings. This decision was

followed a year later by another Enforcement Decision in relation to discounts offered by An Post. The approach taken by the Competition Authority in explaining the nature of its concerns regarding these discount schemes followed closely the previous case law of the CJEU and the structure of European Commission guidance on its enforcement priorities in relation to cases involving article 102.

Law stated - 12 January 2024

Types of conduct

Tying and bundling

Section 5(1)(d) of the Act provides that abuse may, in particular, consist in, 'making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts'.

In the *ILCU* case, the High Court held that ILCU's tying of access to its savings protection scheme to membership of ILCU involved the abuse of its dominant position, but this judgment was overturned on appeal to the Supreme Court.

In the case of *Blemings v David Patton*, the High Court held that a tie-in, whereby chicken farmers were obliged to purchase meal through the chicken processor rather than directly from the suppliers of meal, was not abusive as it was objectively necessary in order to ensure quality control and traceability of the product.

Law stated - 12 January 2024

Types of conduct

Exclusive dealing

There is no specific reference to such conduct in the Act, but it can amount to an abuse of dominance in breach of section 5 of the Act.

This type of conduct was examined in the *Masterfoods v HB* case [1993] ILRM 145, where the High Court considered that the provision of ice cream freezers to retailers for the exclusive storage of a dominant supplier's product did not amount to an abuse by the supplier of its dominant position, even though it recognised that this strategy made it more difficult for new entrants to become established in the market. However, in a related case, T-65/98, *Van den Bergh Foods v Commission* [2003] ECR-II - 4653, the General Court held that the exclusivity clause had the effect of preventing retailers from selling other brands of ice cream and preventing competitors from gaining access to the market, and, therefore, involved the abuse by the supplier of its dominant position (this position was subsequently confirmed by the CJEU).

Law stated - 12 January 2024

Types of conduct

| Predatory pricing

Section 5(1)(a) of the Act refers to 'unfair' prices but there is no specific reference to predatory pricing in the Act. Nonetheless, predatory pricing can amount to abuse in breach of section 5 of the Act and the CCPC, and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that predatory pricing can be unlawful. The following are the most commonly mentioned as possible cost benchmarks: marginal cost, average variable cost, average avoidable cost, average incremental cost and average total cost.

In *Drogheda Independent*, the Competition Authority considered an allegation of predatory pricing in the market for advertising in local newspapers. Although it took the view that the undertaking in question was not dominant, its approach to predation is noteworthy. First, it stated that: predatory pricing refers to a situation whereby a dominant undertaking strategically reacts to the entry or presence of a competitor by pricing so low that it deliberately incurs losses to expel the competition from the market to charge below the competitive level in the future.

Second, it stated that in investigating predatory pricing allegations it follows 'a structured rule of reason approach' to assess whether the alleged predation was plausible, there was any alternative business justification for the conduct other than predation, recoupment was feasible and pricing was below cost.

Law stated - 12 January 2024

| Types of conduct

| Price or margin squeezes

Section 5(1)(a) of the Act refers to 'unfair' prices but there is no specific reference to price or margin squeeze in the Act. Nonetheless, such conduct can amount to abuse in breach of section 5 of the Act and the CCPC and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that price squeeze can be unlawful.

In 2014, ComReg conducted an investigation into an alleged abuse of an alleged dominant position by RTÉ and its wholly owned subsidiary RTÉ Transmission Network Limited, following a complaint by a competitor (TV3). The complaint referred to the market for the supply of wholesale analogue terrestrial television transmission and distribution services and it was alleged, among other things, that RTÉ's prices were unlawful because they discriminated against and price-squeezed its competitor, TV3. Following a detailed investigation, including economic analysis of the alleged price differentiation, ComReg published a decision explaining that there were insufficient grounds for action in respect of this allegation. In particular, ComReg identified no evidence that RTÉ's prices resulted in a material impediment to competition. ComReg did not reach a firm conclusion on market definition or whether RTÉ was dominant because it was not necessary as there was no evidence of an abuse.

Law stated - 12 January 2024

Types of conduct

Refusals to deal and denied access to essential facilities

There is no specific reference to refusal to deal or provide access to essential facilities in the Act. Nonetheless, these types of behaviour may be considered abusive and unlawful under section 5 of the Act. In *A&N Pharmacy v United Drug Wholesale Limited*, the possibility of an unlawful refusal to deal was considered and an injunction was granted that obliged the defendants to continue trading with the plaintiffs pending the full hearing of that case. This case was taken under the predecessor to the Act, which contained a provision similar to section 5 of the Act.

In the *ILCU* case, the Competition Authority suggested that the court consider the practices in question in particular as an unlawful refusal to deal. On appeal, the Supreme Court said that there could be no question of an abusive refusal to supply given its finding that savings protection schemes were not a commercially saleable product. In December 2005, the Competition Authority published a Guidance Note on Refusal to Supply. The leading Irish case on essential facilities is *Meridian Communications v Eircell* [2001] IEHC 195. As part of its case, Meridian (a mobile virtual network operator) claimed that the mobile network owned by the licensed operator Eircell constituted an essential facility and that refusal by Eircell to give access to its network was, therefore, an abuse of Eircell's dominant position. However, the High Court took the view that Eircell had no facility that could not be replicated and that, accordingly, no essential facility existed.

Law stated - 12 January 2024

Types of conduct

Predatory product design or a failure to disclose new technology

There are no decided Irish cases that have dealt with this form of abuse under section 5 of the Act. Section 5(1)(b) of the Act provides that abuse can consist of 'limiting production, markets or technical development to the prejudice of consumers', which may possibly be utilised by the CCPC or Irish courts to allege abusive failure to disclose new technology.

Law stated - 12 January 2024

Types of conduct

Price discrimination

Section 5(1)(c) of the Act provides that 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' is an example of abuse. This provision is wide enough to cover discriminatory pricing or other discriminatory trading terms where there is no objective justification for the different terms offered by the dominant undertaking.

Two Irish cases, both brought by the same plaintiff company, addressed allegations of discriminatory and unlawful charges by a dominant undertaking.

In *Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources*, the High Court took the view that an order by the Minister that imposed differential harbour charges on ferries with capacity to hold more than 100 passengers would amount to an unlawful abuse of dominance 'in the absence of an objective justification for the amount of the charge and for its differential basis of treatment'. Conversely, it was held in *Island Ferries Teoranta v Galway County Council* that a harbour charge was not discriminatory or abusive as the per-passenger charge applied equally in respect of all passengers arriving on all ferries.

Law stated - 12 January 2024

Types of conduct

Exploitative prices or terms of supply

Section 5(1)(a) of the Act states that 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' is an example of abuse.

In *Donovan v ESB*, the monopoly supplier of electricity was held to have abused its dominant position because it refused, without objective justification, to give members of an association of electrical contractors certain advantages that it had granted to other electrical contractors. In *Shannon LNG Limited v Commission for Energy Regulation & Others* [2013] IEHC 568, the High Court briefly considered and rejected a claim that a tariff regime to be imposed by a regulator would give rise to unfair and unlawful pricing by a dominant market player, by enabling the incumbent gas operator, Bord Gais Éireann (BGE), to 'abuse the dominant position it occupies in the market in the state for the transmission of natural gas'. The High Court rejected the allegation of abuse of dominance on the basis that the proposed tariff regime would not 'necessarily bring about abusive conduct on the part of BGE'.

The CJEU has also recently confirmed in case C-177/16 AKKA/LAA that when identifying unfair prices, comparisons with prices in neighbouring member states may, in certain circumstances, be appropriate. It remains to be seen whether the Irish courts will adopt this approach in practice.

In *Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources*, the court seemed to hold that the charges imposed on the ferry operator were unlawful for being exploitative (as well as discriminatory). The court took the view that the objective of the increase in charges was not to charge a fee based on the value or cost of the service provided, but to exploit the passenger traffic as a new source of revenue.

In ComReg's 2014 decision on a complaint of abuse of dominance against RTÉ Transmission Network Limited by a competitor (TV3), an allegation of excessive pricing was dismissed following an investigation. This decision was based, in particular, on an economic assessment of the allegedly unlawful prices against benchmarks based on cost, profitability and the economic and market value of the relevant services.

In *Greenstar* (Authority Decision No. E/05/002), the Competition Authority rejected allegations of excessive pricing in the provision of household waste collection services by Greenstar, as its prices were not shown to be excessive in light of either the cost or economic value of the relevant service and compared with prices charged by private operators in other markets. The Competition Authority also expressed concerns about the issue of an

appropriate remedy if excessive prices were found and appeared to suggest that, except in exceptional circumstances, it would not bring excessive pricing cases. This appears in line with the approach of the CJEU, which confirmed in case C-177/16 AKKA/LAA that for excessive pricing to be established, the prices must be appreciably higher than the benchmark (ie, there must be a significant and persistent difference in price).

Law stated - 12 January 2024

Types of conduct

Abuse of administrative or government process

There is no reference in the Act to abuse of process or abusive litigation, nor are there any court judgments or Competition Authority or CCPC decisions that consider such matters in the context of the abuse of a dominant position. However, such conduct may possibly be considered to be abusive.

Law stated - 12 January 2024

Types of conduct

Mergers and acquisitions as exclusionary practices

A merger or acquisition that has been cleared by the CCPC in accordance with the merger control provisions set out in Part 3 of the Act may not be challenged on the basis of section 5(1) of the Act. A merger or acquisition that is not required to be notified to the CCPC on a mandatory basis (ie, where the financial thresholds for mandatory notification are not satisfied) may also benefit from the immunity from challenge under section 5(1) of the Act if it is notified to the CCPC on a voluntary basis and the CCPC decides to clear it. If a merger or acquisition is not notified to and cleared by the CCPC, it may be challenged on the basis of section 5(1) of the Act at any time. However, to date, no merger or acquisition has been formally challenged on the basis of section 5 of the Act. However, the CCPC has investigated non-notifiable mergers where it has concerns about a possible breach of section 5 (see, for example, Competition Authority Decision No. E/04/001, *Monaghan Mushrooms*, and the press release on the proposed merger by Easons and Argosy). The Competition (Amendment) Act 2022 (the 2022 Act), empowers the CCPC to compel notification of a transaction, even if the undertakings involved fall below the financial thresholds, on the basis of section 18(A). The 2022 Act also provides for voluntary notification of mergers by undertakings, after they have been put into effect (section 18(3A) and 18(3B)).

Law stated - 12 January 2024

Types of conduct

Other abuses

The examples of abuse contained in section 5 of the Act are indicative and not exhaustive. Conduct that constitutes an abuse contrary to article 102 of the Treaty is also likely to fall within the scope of the prohibition contained in section 5 of the Act.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Both section 5 of the Competition Acts 2002–2017 (the Act) and article 102 can be enforced by private parties in the Irish courts as well as by the Competition and Consumer Protection Commission (CCPC).

Under the provisions of the Act, any person who is aggrieved in consequence of any abuse that is prohibited under section 5 of the Act or article 102 has a right of action for relief against any undertaking or any director, manager or other officer of an undertaking that commits an abuse. The relief that can be granted to the plaintiff could be in the form of an injunction, a declaration or damages. Under the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, exemplary damages are no longer available for a breach of the Act.

Under the provisions of the Act, the CCPC has the right to seek an injunction or declaration (but not damages) in respect of a breach of section 5 of the Act or article 102 of the Treaty and the CCPC can apply for a court order making legally binding any settlement terms given to it by a private party following an investigation.

The Competition (Amendment) Bill 2022 was signed into law on 29 June 2022, transposing Directive EU 2019/1 (the ECN+ Directive). The ECN+ Directive ensures that national competition authorities across the EU have similar powers of enforcement.

The 2022 Act introduces a new civil enforcement process under which the CCPC can investigate competition law breaches. Following an investigation, the CCPC can issue a Statement of Objections that sets out their preliminary views regarding the alleged breach of competition law. The undertaking involved will then have the opportunity to make written submissions in response to the Statement of Objections. The CCPC can thereafter either continue the investigation, close the investigation, agree legally binding commitments with the relevant undertaking(s) or refer the matter to an Adjudication Officer.

Adjudication Officers are established by section 150 of the 2022 Act and have responsibility for determining matters such as the imposition of civil sanctions. Adjudication Officers are nominated by the CCPC for appointment by the relevant Minister and have the same powers as a High Court judge when hearing civil proceedings. Once a matter is referred to an Adjudication Officer, they have a range of powers such as conducting oral hearings and summoning witnesses.

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The 2022 Act gives the CCPC new powers to oversee and enforce competition law, in the form of civil financial sanctions, prohibition notices, periodic penalty payments and a leniency programme. Fines can now be imposed on undertakings in breach of competition law without the need for a criminal conviction. In Ireland, since the commencement of the Competition (Amendment) Act 2022, the CCPC has the power to impose administrative fines on persons it believes to have breached competition law. An undertaking may be fixed with a fine of up to €10 million or 10 per cent of the undertaking's annual turnover, whichever is greater.

Civil administrative fines

The CCPC is conferred with a role in the imposition of sanctions for the first time by way of a new system of civil financial sanctions for breaches of competition law in Ireland. The 2022 Act provides for the process to be followed before a sanction is imposed. Previously, the CCPC had to refer serious competition law offences to be tried by the DPP. Under the new regime, the CCPC can instigate the process by which a fine is levied on an undertaking, with the ultimate decision on whether to levy a fine resting with an Adjudication Officer.

Prohibition notices

The 2022 Act also provides the CCPC with the power to issue a prohibition notice to an undertaking during an investigation if it believes there is a risk of conduct that 'will cause serious and irreparable harm to competition'. The notice can include directions from the CCPC as to measures to be taken such as remedying any suspected infringement of competition law, avoiding or limiting serious and irreparable harm to competition or directing the undertaking to otherwise comply with the notice.

Periodic penalty payments

Periodic penalty payments may be imposed on an undertaking by an Adjudication Officer to compel them to comply with searches, provide information, attend interviews, comply with a prohibition notice, comply with commitments or comply with structural or behavioural remedies. The maximum periodic penalty payment which can be imposed per day is capped at 5 per cent of the average daily total worldwide turnover of the undertaking concerned in the preceding financial year.

Leniency Programme

As required by the ECN+ Directive, the 2022 Act introduces a leniency programme under the new civil enforcement regime. This programme is aimed to supplement the current Cartel Immunity Programme in respect of the Irish criminal competition regime. The CCPC can grant immunity from financial sanctions to the first undertaking to come forward with information regarding cartel infringements. Subsequent applicants that provide evidence of

'significant added value' may be granted a reduction of up to 50 per cent of any civil fine. This reduction reduces for each subsequent leniency applicant.

The courts can also grant injunctions or declarations and award damages to private litigants in civil cases.

In addition, both the CCPC and the Office of the Director of Public Prosecutions (DPP) can initiate criminal prosecutions. However, only the DPP can prosecute serious infringements (prosecutions on indictment for jury trial) of the Act. The maximum penalty that can be imposed for a breach of section 5 of the Act or article 102 of the Treaty is a fine of €5 million or 10 per cent of turnover, whichever is the greater. There is no provision within the Act for imprisonment in cases involving the abuse of a dominant position.

Structural remedies are also provided for. Under section 14(7) of the Act, where a court has decided that an undertaking has abused a dominant position contrary to section 5 or article 102, it may order either that the dominant position be discontinued unless conditions specified in the order are complied with, or that the dominant position be adjusted (by a sale of assets or as otherwise specified) within a period specified by the court.

To date, the Irish courts have not imposed any penalty or structural remedy for abuse of dominance and there have been no significant cases where damages were awarded.

Law stated - 12 January 2024

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

As outlined above, one of the key features of the new regime under the 2022 Act is the introduction of administrative fining powers whereby the CCPC can impose civil fines for breaches of section 5 and article 102. Fines can be imposed up to a maximum of €10 million or 10 per cent of an undertaking's worldwide turnover for the preceding financial year. The 2022 Act also allows the CCPC to impose civil fines for breach of a procedural requirement up to a maximum of €1 million or 1 per cent of worldwide turnover for the preceding financial year. Any civil fines which are imposed by the CCPC must be confirmed by the High Court.

The 2022 Act increases the potential court-imposed fines in criminal proceedings to €50 million or 20 per cent of an undertaking's turnover in the preceding financial year.

Prior to the implementation of the 2022 Act, only the courts could impose sanctions for breaches of sections 4 and 5 of the Act and articles 101 and 102. The implementation of the ECN+ Directive by the 2022 Act has given the CCPC a role in the imposition of non-criminal fines for breaches of section 5 and article 102.

Law stated - 12 January 2024

Enforcement record

What is the recent enforcement record in your jurisdiction?

Complaints regarding alleged abuse of dominance are regularly made to the CCPC.

The most recent investigation by the CCPC into suspected anticompetitive practices in breach of section 5 of the Act and article 101 was the 2017–2020 investigation into Ticketmaster which, according to the CCPC holds a very significant market share in the supply of ticketing services for live events (the CCPC reviewed the activities in question under both section 5 and section 4/article 101 involving restrictive agreements). The CCPC was concerned that Ticketmaster may have abused a dominant position in this market by negotiating contracts to supply ticketing services to live event organisers and venues on an exclusive basis. While Ticketmaster denied that its agreements breached competition law in November 2020, it nonetheless agreed to give undertakings to the CCPC, such undertakings forming part of a court order requiring it to desist from certain practices in future. Failure to comply with a court order amounts to a contempt of court, which is punishable with fines and in appropriate cases, imprisonment. In summary, Ticketmaster's agreement has committed Ticketmaster to remove exclusivity clauses with respect to venues in relation to the supply of outsourced primary ticketing services, and limit the time period of exclusivity clauses to three years in contracts with live event organisers. Overall contract duration will be capped at five years, and there will be no automatic contract renewals in relation to the provision of tickets and the operation of ticketing services for live events. The CCPC agreement with Ticketmaster Ireland was made an order of the High Court under section 14B of the Competition Act 2002 on 15 December 2020 and the order came into effect on 29 January 2021. On 21 November 2021, the CCPC published its report into the ticketing investigation.

Other settlements by the CCPC as regards section 5 investigations have included the following:

- In March 2015, the CCPC published a press release on a settlement concluding its investigation into an alleged abuse of dominance by the Glasnevin Trust, the largest provider of funeral and burial services in Ireland. The settlement terms included requirements to facilitate price transparency and to prevent price discrimination against customers who are also competitors.
- In August 2014, the Competition Authority published a press release on a settlement concluding its investigation into an allegedly unlawful refusal to supply by a school uniform manufacturer. The settlement terms included a commitment to supply the complainant whom the manufacturer had originally refused to supply.
- In October 2014, the Competition Authority published an Enforcement Decision on its investigation of the compliance of certain discounts offered by the universal postal service provider, An Post, with the section 5 prohibition on unlawful 'loyalty rebates'. The decision identified competition concerns regarding the discounts but stated that its investigation was closed because An Post had amended its discount procedures in a manner that addressed the CCPC's concerns.

The above case involving An Post was the second recent investigation into allegedly unlawful 'loyalty rebates'. In January 2012, the Competition Authority published an Enforcement Decision in respect of its investigation into certain discounts offered by the national public service broadcaster, RTE. The decision identified competition concerns regarding the discounts and stated that its investigation was closed because RTE made a binding commitment to cease offering 'share deal' discounts that were conditional on a share of the advertiser's television advertising budget being committed to RTE.

In early 2006 the Competition Authority published details of an investigation of a computerised reservation system (operated by Galileo Ireland) used by most travel agents in Ireland that resulted in a non-discriminatory manner (press release, 11 January 2006).

The courts have been asked to consider in a number of cases whether or not an abuse of a dominant position has occurred. Of the cases considered to date, damages have been found to be payable in only one case involving abuse of dominance (*Donovan and others v Electricity Supply Board*), where it was held that the defendant had abused its dominant position by imposing unfair trading conditions. In *A&N Pharmacy v United Drug*, an injunction was granted that obliged the defendants to continue trading with the plaintiffs pending the full hearing of that case. Both cases were taken under the predecessor to the Act, which contained a provision similar to section 5.

In *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others*, the High Court heard a challenge by Panda Waste, a domestic waste collector, to a decision taken by the four local authorities responsible for Dublin City and County to introduce a 'variation' to their joint waste management plan for 2005 to 2010, which would permit each local authority to reserve to itself responsibility for waste collection services in areas in which that local authority had previously competed with private operators (subject to the right of each local authority to put waste collection services in any given area out to tender on an exclusive basis). Panda Waste alleged, inter alia, that this 'variation' amounted to an abuse of a dominant position (held either individually or collectively) by the local authorities, as it amounted to an unfair trading condition influencing or seeking to strengthen their position in the market for the collection of waste in the greater Dublin area in which competition had previously existed. In his judgment delivered on 21 December 2009, Mr Justice Liam McKechnie overturned the variation on the basis, inter alia, that each local authority was dominant in its respective area and that the local authorities were collectively dominant in the greater Dublin area in the market for the collection of household waste and that the 'variation' amounted to an abuse of a dominant position (held either individually or collectively) by the local authorities as it was an agreement in breach of Section 4 of the Act (which prohibits anticompetitive agreements between undertakings), it would substantially influence the structure of the market to the detriment of competition and it would significantly strengthen the position of the local authorities on the market.

In *Shannon LNG Ltd and Anor v Commission for Energy Regulation and others*, the High Court heard a judicial review challenge by Shannon LNG, an importer of liquefied natural gas (LNG), to a decision taken by the Commission for Energy Regulation (CER) relating to new methodologies for the calculation of tariffs relating to the use of and access to the transmission system and pipeline network for transport and delivery of natural gas in the Irish state-owned and operated by BGE. Among other claims, Shannon LNG claimed that the decision taken by the CER would enable or compel BGE to abuse the dominant position it occupied in the market in the Irish state for the transmission of natural gas contrary to article 102 of the Treaty as the contested decision would have the effect of applying charges for access to the onshore transmission system based on both the costs of operating and maintaining that system and the costs of the interconnectors, which the Shannon LNG would not be using. Shannon LNG also claimed a margin squeeze because the tariffs would have the effect of reducing the costs of using the interconnectors while increasing access costs at the other entry points to the transmission system, thereby making it economically more attractive for importers to use the interconnectors. Mr Justice John Cooke rejected Shannon LNG's claims under article 102 of the Treaty as premature, as the actual tariffs had not yet

been set and no entry or exit charges had been calculated. Mr Justice Cooke stated that some level of cross-subsidisation within the transmission system was likely inevitable. The judge also found that the margin squeeze claim was unfounded as it was not possible to identify separate defined markets for the provision of services for transmission.

Thus far, there has been only one civil prosecution in respect of an alleged breach of section 5 (the *ILCU* case) and this case was unsuccessful on appeal to the Supreme Court.

In practice, criminal prosecutions for abuse of dominance are rare and thus far, there has been no criminal prosecution in respect of an alleged breach of section 5.

Law stated - 12 January 2024

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

There is no express provision in the Act to deal with this situation. Under the general relief provisions in section 14(5) of the Act; however, a contract could be declared void and unenforceable by a court.

Law stated - 12 January 2024

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Section 14(1) of the Act provides that any person who is aggrieved in consequence of any abuse that is prohibited under section 5 of the Act or article 102 of the Treaty shall have a right of action for relief against any undertaking or any director, manager or other officer of an undertaking that commits an abuse. It is possible to seek a mandatory injunction under which a dominant undertaking may be obliged to grant access to infrastructure or technology or to trade with the plaintiff seeking the relief. In *ILCU*, ILCU was ordered by the High Court to share access to its savings protection scheme with credit unions not affiliated to ILCU on the basis that access to the scheme was unlawfully tied to membership of ILCU. This order was subsequently overturned by the Supreme Court. Also, in *A&N Pharmacy v United Drug Wholesale*, the High Court granted an interlocutory injunction that obliged the defendant to supply the plaintiff with pharmaceutical products on terms of cash on delivery.

Further, the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017 (the Damages Regulations), transposed Directive No. 2014/104 EU (the Damages Directive) into Irish law on 17 February 2017, which governs follow-on actions for damages.

Law stated - 12 January 2024

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Section 14(1) of the Act provides that an aggrieved person may bring an action in the courts seeking damages. To date, there have been no significant cases where damages were awarded.

Prior to the transposition of the Damages Directive into Irish law, in late 2008/early 2009, two private damages actions arising from the European Commission decision in *Irish Sugar (Gem Pack Foods v Irish Sugar plc and ASI v Greencore plc)* were settled part-way through their respective hearings before the High Court. As both cases were settled prior to judgment, the Irish courts have yet to have an opportunity to establish their approach to quantifying damages in such cases.

Regulation 8 of the Damages Regulations now provides that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed irrefutably established for the purposes of an action for damages. Further, the final decision taken in another EU member state may be presented as prima facie evidence that an infringement of competition law occurred.

Regulation 4 of the Damages Regulations provides that where a person has suffered harm caused by an infringement of competition law, the person shall be able to claim and obtain in any actions for damages under section 14 of the Competition Act 2002, full compensation for that harm. The Damages Regulations amends section 14 of the Competition Act 2002 to remove the provision for exemplary damages. Further, Regulation 15 states that where quantification of harm is practically impossible or excessively difficult to quantify, an Irish court may estimate such harm. The CCPC may, upon request by an Irish court, assist the court with this determination.

Law stated - 12 January 2024

Appeals

To what court may authority decisions finding an abuse be appealed?

Where the CCPC takes a view that conduct breaches section 5 of the Act or article 102, it may initiate civil or criminal proceedings before the Irish courts. Civil proceedings are more likely to be initiated for alleged breaches of section 5 or article 102 (eg, the *ILCU* case). In that case, civil proceedings were initiated in the High Court, whose judgment was appealed to (and overturned by) the Supreme Court. Section 5 or article 102 investigations most frequently result in negotiated settlements between the CCPC and the relevant undertaking.

Law stated - 12 January 2024

UNILATERAL CONDUCT

Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

As a result of the Competition (Amendment) Act 2006, the following types of unilateral conduct on the part of both dominant and non-dominant 'grocery goods undertakings' are prohibited (provided that such conduct has the object or effect of restricting, distorting or preventing competition):

- the unilateral application by grocery goods undertakings of dissimilar conditions to equivalent transactions with other grocery goods undertakings;
- any attempt by retailers to compel or coerce the payment of allowances from wholesalers or suppliers in return for advertising particular grocery products in stores; and
- any attempt by retailers to compel or coerce the payment of allowances from wholesalers or suppliers in return for the provision of retail space in newly opened, newly expanded or newly managed stores (a practice referred to in Ireland as 'hello money').

A 'grocery goods undertaking' means any undertaking (other than in the restaurant and catering sector) engaged for gain in the production, supply or distribution of food or drink for human consumption.

In addition to the regime for grocery goods undertakings under the Competition (Amendment) Act 2006, the Consumer Protection Act (Grocery Goods Undertakings) Regulations 2016 (the Regulations) came into effect on 30 April 2016 and apply to contracts entered on or after this date and contracts entered into before 30 April 2016 but renewed after this date. The Regulations impose new obligations on retailers or wholesalers who, either alone or as part of a group, have an annual worldwide turnover in excess of €50 million. The Regulations apply to these parties' arrangements with suppliers for the purchase of 'grocery goods'.

The Regulations impose new obligations on grocery goods undertakings to do the following in particular:

- have a written signed contract in place;
- not vary, terminate or renew a grocery goods contract unless this is expressly provided for and the relevant contract provides for a reasonable notice period;
- provide (on request from a supplier) a forecast of the grocery goods likely to be required in respect of a given future period;
- unless expressly provided for by written contract, pay suppliers within the later of: 30 days of the date of receipt of any invoice; and the date of delivery; and
- not compel a supplier to pay for stocking, promotions, marketing, retention, increased allocation or positioning, advertising or display, wastage or shrinkage.

Breach of the Regulations (including failure to comply with any contravention notice issued by the Competition and Consumer Protection Commission (CCPC) (formerly known as the Competition Authority) under the Consumer Protection Act 2007) may result in prosecution of a non-compliant 'grocery goods undertaking', either by summary or indictment with

a maximum potential penalty of a fine of up to €100,000. Failure to comply can also result in criminal prosecutions of individuals including the imposition of fines and terms of imprisonment for relevant directors and officers of the companies concerned.

The CCPC also has powers to investigate compliance with the Regulations and to 'name and shame' offenders and statute also provides a legal basis for civil damages actions for breach of the Regulations. In 2018, the CCPC announced that it had begun inspections of relevant grocery goods undertakings to monitor compliance with the Regulations. The CCPC has also called for the introduction of a dedicated Grocery Regulator to enforce the Regulations and any further legislation that may be forthcoming in this sector.

Law stated - 12 January 2024

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

The Competition (Amendment) Bill 2022 was signed into law on 29 June 2022, transposing the ECN+ Directive, and entered into force on 27 September 2023. The 2022 Act gives the Competition and Consumer Protection Commission (CCPC) a role in the imposition of sanctions with one of the key features of the new regime being the CCPC's new administrative fining powers with a level of court oversight (similar to the current Central Bank and Data Protection Commission regimes).

The CCPC approach of making undertakings in respect of suspected section 5 or article 102 breaches a formal order of the court with the consent of the relevant party so that any breach can be treated as contempt of court could, if adopted more widely, make the enforcement of settlements with the CCPC more straightforward to enforce.

In the wider European context, the Court of Justice of the EU's ruling on preliminary questions in case C-252/21 *Meta Platforms Inc v Bundeskartellamt* highlighted that the largest companies can be found to have abused their dominant market position by conducting unlawful data processing. The area of abuse of dominance in relation to data processing may continue to be an important area in the future due to ever-increasing focus on the tech industry, particularly in Ireland, where a large number of tech companies operate.

Law stated - 12 January 2024