Kluwer Competition Law Blog

Ireland adopts major changes to competition rules

Darach Connolly (DLA Piper Ireland) · Friday, July 1st, 2022

On 29 June 2022, Ireland enacted major reforms to its Competition Act. These changes will impact on all sectors across the Irish economy, with potential target industries such as Life Sciences, Energy, Technology and Consumer Goods facing increased scrutiny – particularly as Ireland is a key HQ location for EMEA operations. While the reforms belatedly implement the 2019 ECN+ Directive, the Irish legislature has taken the opportunity to adopt a range of new powers for Ireland's NCAs, namely the Competition and Consumer Protection Commission (**CCPC**) and the Commission for Communications Regulation (**ComReg**). Six key changes in the new Competition Act include:

- **New power to adopt civil fines**: Far and away, the most radical change is a power for the CCPC to seek "administrative financial sanctions" for firms that breach Irish competition law. While many of Ireland's EU neighbours enjoy well-established civil fining powers, an Irish Constitutional protection to ensure that justice is administered by the Irish Courts was long perceived as fettering the ability of the CCPC to impose civil sanctions – although in the Irish financial sector, the Central Bank was permitted to impose civil fines under its licensing regime, and indeed fined certain firms over €20 million in past cases. Until now, however, the CCPC had no fining power and only the Irish Courts could impose a fine following a *criminal* The new power will rely on a novel mechanism to "outsource" certain limited decision-making functions to an Adjudication Officer – who will review a "full investigation report" of the CCPC or ComReg. Neither the CCPC or ComReg may give any recommendation or view as to the level of any fine. After a review, and potentially an oral hearing, the Adjudication Officer can impose an administrative financial sanction on firms – up to EUR 10 million or 10% of that firm's turnover. This novel mechanism is designed to meet Ireland's obligations in Article 13 of the ECN+ Directive, while also staying within the parameters of Irish Constitutional case law.
- **New leniency regime adopted**: An entirely new leniency regime is now in place for *civil* During 2022, the CCPC consulted on three guidance documents which will underpin the operation of the new leniency regime and, together with the revised Competition Act, draws extensively from the existing practice under the EU's 2006 Leniency Notice. The new rules seek to encourage the well-understood 'race for marker' dilemma – with the incentive that the CCPC and ComReg may now grant immunity from fines to the "first in line", a reduction of up to 50% for the "second in line", and a reduction of up to 30% for the "third in line". Other later in line firms may obtain a fine reduction of up to 20%. Notwithstanding these innovations, the existing (under used) Irish cartel immunity programme for *criminal* sanctions will remain in place – which may well raise operational complexities both for the CCPC and for firms assessing the merits of voluntary cooperation.

- **New power to "call in" below thresholds mergers and impose interim measures**: The CCPC is now empowered to *require* merging parties to notify below threshold deals where a perceived *effect* on competition in an Irish market occurs. The current thresholds only capture deals where two firms generate over €10 million in Ireland, and a combined turnover of €60 million in Ireland (and media mergers). Call in may occur within 60 working days of completion. For merging parties with any Irish activities, this introduces a heightened level of execution risk – and will require careful consideration in deal documents. It is not clear that the loss of legal certainty imposed by this measure will be outweighed by savings resulting from intervention. In the past, the CCPC relied on its residual powers under the national equivalent of Article 101 / Article 102 TFEU and intervened in only a few below-threshold deals (e.g., *Eason/Argosy* in 2010, *Kantar Media/News Access* in 2017, and *Citylink/GoBus* in 2021). Yet, the new power fits with a wider interventionist trend in the EU and the UK driven by an apparent perception that regulators miss out on reviewing harmful deals. Indeed, the Commission has recently intervened in a case which fell below national thresholds across the *entire* EU (i.e., *Illumina/Grail*) and the UK Competition and Market Authority has successfully established jurisdiction in a series of cases where the target has little or no UK revenue, (e.g., *Sabre/Farelogix*, *Roche/Spark* and *Meta/Giphy*).
- **New power to initiate proceedings for gun-jumping activity:** The CCPC will be empowered to bring summary proceedings in respect of firms that complete a deal after notification but prior to clearance. At present, failure to notify a deal to the CCPC is a criminal offence and may be prosecuted with the imposition of a fine of up to €3,000 on summary conviction, and a maximum of €250,000 on indictment. However, there has been limited prosecution of gun jumping in Ireland. In April and May 2019, the Director of Public Prosecutions (**DPP**) secured the first two guilty pleas for a "failure to file" in *Armalou Holdings Limited* and *Airfield Villas Limited*. Since introduction of the Irish merger regime in 2002, the CCPC has now and again published critical public statements to indicate that the merging parties prematurely completed – so deeming the transaction void as a matter of Irish law. With these new rules in place, merging parties in Ireland will face greater levels of scrutiny in respect of any pre-closing activity.
- **New increase in criminal fines**: Another significant change is the marked increase in the maximum level of criminal fines for cartel offences. Following prosecution by the DPP, an Irish Court may now fine a firm or individual up to €50 million or 20% of turnover – indicating that Ireland will have on its books some of the highest sanctions in Europe. Further, the CCPC will be faced with a choice of *civil* or *criminal* enforcement route. In draft guidance, the CCPC has indicated certain criteria that will influence this decision such as the nature of the breach, likelihood of successful action, and/or its prioritisation principles. Given the difficulties encountered in enforcement to date, retaining the existing *criminal* regime alongside a highly engineered *civil* regime risks becoming overly complex.
- **New power of surveillance**: The new legislation provides for the extension of the surveillance powers of the CCPC. In a similar vein to the Revenue Commissioners, these new powers will allow the CCPC to monitor and record the activities and communications of a person or group. To do so, the CCPC will need to demonstrate to the Irish High Court that it has reasonable grounds to believe that covert surveillance is needed to investigate a case – but it is expected to add firepower to its armoury.

When soon commenced, the new legislation and draft CCPC guidance documents will have a profound impact on how the CCPC and ComReg investigate and sanction infringements of Irish competition law. Notably, one critical issue to determine the success of the new rules is whether the CCPC will have available to it the resources necessary to judiciously implement these wide-ranging powers. Similar resourcing constraints have been raised in respect of other Irish regulators (e.g., the DPC). While the CCPC is generally well regarded for its Irish merger control activity, in recent years, the CCPC has been subject to criticism for its limited enforcement case load. During the Bill's passage, amendments were proposed to better resource the CCPC. Yet, these were rejected. According to the Irish Government, the CCPC's budget has increased by more than 30% in the past two years, with plans to increase staff to over 200 by the end of 2022 (currently 146 staff). It remains to be seen whether this will suffice in light of the above ambitious new powers.

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