

Kluwer Competition Law Blog

Competition Law and Policy Developments 2023 – Ireland

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2023 was a watershed moment in competition law in Ireland with the start of a new civil fines regime. A further wave of EU and Irish rules enhanced powers for the CCPC and ComReg, created two new Irish regulators and is expected to bring a radical change to enforcement across multiple sectors, such as Tech, Telecoms, Life Sciences, Agri-Food and Media. On the other hand, competition litigation was unremarkable, and Irish merger control returned to more traditional levels of activity after the high of 2022 – but the CCPC continued to focus on practical, local market issues. In this update, we gather key competition law and policy developments in Ireland from 1 January – 31 December 2023.

Antitrust: Big Bang As New Irish Competition Powers Begin

In September 2023, a new enforcement era began in Ireland when the Competition (Amendment) Act (**2022 Act**) entered into force (for our previous discussion of six key changes [see here](#)). To recap, most notably, the 2022 Act provides the Competition and Consumer Protection Commission (**CCPC**) with – for the first time – powers to impose significant *civil* financial sanctions for competition infringements, subject to Irish Court approval. Previously, fines could only be imposed directly by the Irish Courts. To date, only very modest sanctions (less than €100,000) have been imposed after a *criminal* conviction. Now, the CCPC will have the capacity to adopt fines up to €10 million through a new administrative procedure allowing a lower evidentiary burden. The CCPC also now has a new power to impose interim measures (called “prohibition orders”) as a behavioural remedy. The existing criminal enforcement regime, requiring the Irish Director of Public Prosecutions (**DPP**) to initiate proceedings, will remain in place – but now potential fines of up to €50 million (or 20% of turnover) may apply on indictment.

In August 2023, following a period of consultations in advance of the new regime commencing, the CCPC published guidance notes on a series of policies and procedures on the operation of the administrative enforcement regime:

- *Administrative Leniency Procedure*: This [guidance](#) explains how the CCPC alone will operate the new administrative leniency programme (**ALP**) alongside the existing criminal leniency programme (**CLP**). Reflecting key themes from the EU Leniency Notice, the first cartel or RPM infringement participant to make an application can benefit from immunity from administrative financial sanctions, but the second or subsequent participant in the same cartel that applies for leniency may still benefit from a possible reduction of up to 50% of any administrative financial

sanctions.

- *Choice of enforcement regime:* This [guidance](#) outlines the CCPC’s principles and procedures to consider when choosing to follow a *civil* or *criminal* enforcement route.
- *Fining guidelines:* This [guidance](#) sets out the CCPC’s principles and methodology followed when imposing and determining the levels of administrative fines or periodic penalty payments.
- *Access to file procedures:* This [guidance](#) sets out the CCPC’s policy and practice in relation to access by undertakings to the investigation file, both in the context of merger control and antitrust investigation.

Mergers: Business As Usual for the CCPC

After an intense period of CCPC merger control activity in 2022 – largely attributable to the exit of two major banks and the first prohibition decision in 14 years – activity levels returned to a more stable pattern in 2023, reflecting wider trends in the Irish economy. Notably, 68 deals in total were notified to the CCPC in 2023. Around half of cases received clearance through the simplified merger procedure (i.e., within 3 weeks). Across 2023, zero deals were blocked, two Assessments were issued by the CCPC (equivalent to an EU SO), four deals cleared with remedies, and five Phase II mergers were opened (two related to transactions notified in 2022). Looking back across 2023, we pick out key deals which merit mention:

Thorntons Recycling / City Bin Co:

This waste collection sector deal was [cleared](#) conditionally in July 2023 after Thorntons Recycling committed to divest a series of nine waste collection routes in Dublin. The divestment relates to 7,960 customers along specific parts of routes which overlapped with The City Bin Co. According to the CCPC, it was concerned that some Dublin households “could have less choice, increased prices and diminished quality of domestic waste collection services” in the overlapping areas. The case raises a degree of uncertainty around the CCPC’s precise approach to the role of identifying catchment areas as a means to define a local market in light of the revised EU Market Definition Notice (finally [published](#) in February 2024). In the commitments (as in an earlier case in *Panda/Exomex*), the CCPC appears to have analysed the geographic market for domestic waste across a local authority / county council area but the divestment remedy relates to individual bin routes or a portion of a postcode in the Dublin area (e.g., 92 customers in Dublin 15). As far as we are aware, a purchaser for the divestment package has not yet been confirmed.

Q-Park / Tazbell Services:

This deal between two car park management undertakings was [cleared](#) in August 2023 following a year-long review – including four RFIs, an Assessment and a Consumer Survey looking at car parking habits among 1,300 customers in Dublin and 200 in Galway. Both parties overlapped in the provision of off-street parking services across Ireland, particularly in Dublin and Galway. Ultimately, the clearance involved a novel commitment to lease the top level of a specific car park in Galway and to cease operations at a Dublin site following the expiry of a current contract.

Of technical interest, a central issue concerned the extent to which on-street parking competed with off-street parking. The CCPC took a view that on-street parking was *not* part of a market for the provision of off-street parking to the public, in part, due to capacity constraints. While the merging parties had argued that the “willingness” of customers to switch from on-street to off-street parking was itself indicative of an overall market, the CCPC disagreed, noting that “even though on-street and off-street parking spaces may in principle be substitutable from the perspective of users, their willingness to switch in response to an increase in the price of off-street parking would be limited by their ability to carry out such a switch”. In the end, the CCPC assessed the effects of the deal on a market limited to off-street parking in various local areas (while also dismissing a broader claim that public transport formed part of the same market as off-street parking).

Uniphar / LVX Remedies (Sam McCauley):

This retail pharmacy transaction was conditionally **cleared** in January 2023 after a 5-month extended Phase I CCPC review. Uniphar, a leading operator, proposed to acquire a chain of 37 retail pharmacies. Consistent with its traditional definitional practice in this sector, the CCPC analysed a narrow local geographic market (i.e., a 2 km radius of a target outlet) and considered branches and brand fascia in its analysis. The parties submitted a divestment proposal in Phase I – and the CCPC approved the deal based on a commitment to divest three retail pharmacies to approved buyers in different counties, where the analysis indicated a combined post-transaction market share exceeding 40% in each local market.

This was the fifth transaction in the retail pharmacy sector notified to the CCPC since 2015, indicating continued M&A activity in the sector, yet this was the first deal in the sector cleared based on a branch divestment commitment. Notably, in this deal and another Uniphar **acquisition** in 2018, the CCPC has shown willingness to allow flexibility applying a 2 km radius where geographic realities merited wider catchment areas being considered, such as the presence of large towns within driving distance or, in the 2023 case, a large shopping centre attracting customers from beyond the immediate area.

Two notable Phase II deals cleared unconditionally:

It is worth flagging two transactions in the Irish agri-food supply chain which were cleared following Phase II reviews. First, the CCPC unconditionally **cleared** *Aurivo / Arrabawn* after a 7-month review. Both agri-cooperatives were primarily active in the sale of dairy ingredients and products and operated agri-retail outlets. The CCPC defined relevant product markets as the production and/or supply of three outputs: milk, cream and butter. Interestingly, although the CCPC’s analysis indicated concentration in the relevant markets based on HHI (milk combined 30% share, butter combined 20% share, and cream combined 15% share), the CCPC determined that other operators exercised sufficient competitive constraints and, importantly, that countervailing buyer power in the sector provided sufficient resistance to price increases. This observation is timely as Ireland also introduced new unfair trading legislation in the agri-food sector during 2023 (discussed below) – with new rules attempting to play a role in intermediating the negotiation power between producers and key retailers in Ireland. Second, the CCPC unconditionally **cleared** *Dawn Meats / Kildare Chilling* after a 7 month review. The CCPC

considered a national geographic market for the meat production and processing supply chain. This may have contributed to the CCPC finding that sufficient competitors were present to constrain the merged entity.

Limited Investigative Activity by the CCPC

Based on public sources, the CCPC opened a limited number of antitrust investigations in 2023:

- In May, the CCPC initiated [proceedings](#) in the Irish High Court against the Irish Bookmakers Association (**IBA**), a trade association for the Irish gaming industry. Apparently, the proceedings seek disclosure of material by the IBA (argued to be potentially privileged) and indicates an ongoing investigation into alleged anti-competitive behaviour by the IBA, which included searches being carried out by the CCPC and Gardaí at the home of the IBA's chairperson. The CCPC is yet to make a formal announcement on the investigation and few details have been published about the nature of the alleged breach or outcome of the searches.
- In December, the CCPC closed an [investigation](#) into the exclusive arrangement between the Athletics Association of Ireland (**AAI**), Ireland's national governing body for athletics, and EventMaster, an online race registration platform, under which race organisers were required to use EventMaster to register their events and receive event permits from the AAI. The CCPC received complaints alleging that the arrangement was anti-competitive due to the AAI's dominant position as the sport's governing body. Ultimately, the CCPC made five recommendations to the AAI including running a robust tender process, recording stakeholder feedback and not restricting AAI members from participating in non-AAI affiliated races. Interestingly, the CCPC case closure occurred on the same day as the Court of Justice gave judgment in the high-profile *ISU* and *Super League*. Those judgments also emphasise the need for bodies to maintain transparent, objective, non-discriminatory and proportionate rules in relation to the organisation of events.
- In December, the CCPC carried out unannounced [searches](#), supported by detective members of the Gardaí, at several sites in the publicly funded transport sector in the Cork area. A criminal investigation is ongoing. Separately, long-running criminal proceedings into bid-rigging for school bus transport in Cork saw the Irish Criminal Court finally set a trial date for two cases against 13 individuals to occur in January 2025.

Policy and Advocacy in 2023

Across 2023, the CCPC issued notable market analysis and policy statements:

- In February, following a 10-day public consultation, the CCPC adopted a new vertical [declaration](#) and revised [notice](#), reflecting the revamped 2022 EU Vertical Agreement Block Exemption Regulation. These largely reflect the updated EU regime and continue to disapply the *de minimis* exemption in Irish law.
- In March, the CCPC voiced [support](#) for recommended reforms in the Irish legal services sector and judiciary, citing longer-term issues with cost transparency for consumers impacting access to justice.
- In May, the CCPC launched a [partnership](#) with the Irish Research Council to fund research projects into the competitive structure of the electric vehicle charging market in Ireland, focusing

on potential barriers to entry or effective operation.

- In June, the CCPC published the [findings](#) of a high-level analysis of the grocery retail sector. This analysis, which acknowledged the importance of the grocery sector for Irish consumers, coincided with new agri-food legislation and the establishment of a sectoral regulator.
- In November, the CCPC published an updated [strategy](#) statement for 2024-2026, indicating an overall intention to increase enforcement activity and communication. This intent is reflected in an increased headcount to a total staff of 185 (up from 115 in 2020), and an increase of the existing budget by EUR 4.9 million for the coming year.

Quiet in Competition Litigation in 2023

Unlike the ferociously active competition bar in the UK and certain EU jurisdictions, Irish competition litigation has been muted. Despite the first *Trucks* follow-on damages claim in the EU having been initiated in Ireland, it appears that those claims continue to drag on. Other notable case developments include:

- In March, the Irish Court of Appeal issued [judgment](#) in *Muldoon & Ors v The Minister for Environment & Local Government & Ors*. This concerned a long-running taxi-licensing dispute and hinged on whether a local authority was an “undertaking” in the market for the allocation of taxi licenses. The High Court defined the licensing of taxis as a regulatory activity in the exercise of official authority, *rather* than an economic activity. In the Court of Appeal, the claimants contended that the transferable nature of the licenses (lucratively traded on the secondary market) changed the character of the activity to economic rather than merely regulatory. In the end, the Court of Appeal maintained that the local authorities were not undertakings and held that the *existence* of a secondary market was not relevant to the proceedings – as it would not impact the conduct of the local authorities as they did not compete on a (primary) market for taxi licenses.
- In November, competition litigation proceedings dating back to 1996 made a [reappearance](#) at the Court of Appeal. In *Framus Limited & Ors v C.R.H Plc & Ors*, claims of collusion in the Irish cement and concrete market had originated in the early 1990s. The initial High Court claims were dismissed in 2012. Although an appeal was lodged, these were not progressed. As a result, the defendants sought to strike out the claims on the grounds of delay and failure to prosecute in the intervening years. The Court of Appeal granted the applications to strike out. The judgment draws attention to the obvious need to act rapidly in cases relying on oral evidence, and the inherent difficulty (and potential for injustice) in conducting competitive analysis of a market many years after the alleged events took place.

Looking Ahead: Wider Regulatory Revolution

Alongside an enhanced competition law regime, regulation in Ireland developed across various sectors in 2023, creating new responsibilities for both the CCPC and new regulators established in the media and agri-food sectors.

- **Coimisiún na Meán**, Ireland’s Media Commission, has been designated as Ireland’s Digital Services Coordinator with competence to monitor and enforce the DSA. Ireland’s Digital Services Act co-designates the CCPC as the national authority for DSA provisions regarding

online trading.

- A new Agri-Food Regulator (**An Rialálaí Agraibhia**) was set up to enforce Ireland's new Agri-Food Act, completing the Irish transposition of the EU's Unfair Trading Practices Directive. Alongside newly developed powers, the Agri-Food Regulator also takes over competences previously exercised by the CCPC, with additional market surveillance powers. Tasked with monitoring conduct on that market and investigating unfair trading practices, the Agri-Food Regulator is likely to play a key role in what is an important sector of the Irish economy.
- Ireland's telecommunications regulator, **ComReg**, exercises co-competition competence in the electronic communications sector. In June 2023, ComReg **gained** significant enhanced enforcement powers, with the commencement of the European Electronic Communications Code.

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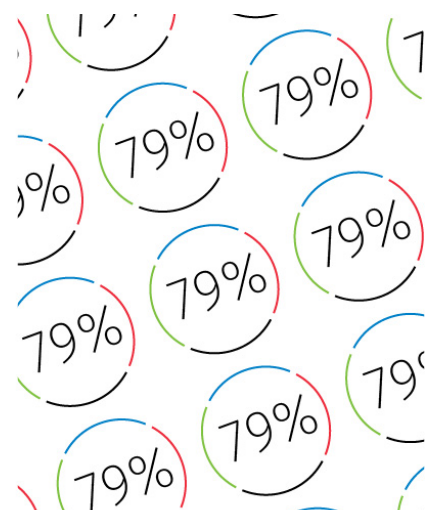
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