In the crosshairs – ‘consumer industries’

Hengeler Mueller leads a global interview panel analysing key economies and private damages actions
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Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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CARTELS IN IRELAND

Richard Ryan is head of Arthur Cox’s competition and regulated markets group. His practice focuses on all aspects of competition law, including investigations and dawn raids by the European Commission and the Competition and Consumer Protection Commission of Ireland (CCPC), as well as competition litigation before the Irish and EU courts. Highlights include advising clients on various high-profile CCPC investigations, including in the areas of motor insurance and event ticketing. Richard is also advising on the CCPC investigation into the bagged-cement sector and on related proceedings challenging the scope of material seized during the CCPC dawn raids. He is advising one of the defendants in the follow-on claims before the Irish High Court arising from the European Commission’s decision in the trucks cartel.

Florence Loric is a partner in the competition and regulated markets group, with extensive experience of commercial litigation in regulated markets involving EU law and public and administrative law. Notable recent cases include advising in relation to the CCPC bagged-cement investigation and in the related proceedings challenging the scope of material seized in the CCPC’s initial dawn raids.

Patrick Horan is a senior associate in the competition and regulated markets group. He specialises in all aspects of Irish and EU competition law of other jurisdictions and is currently part of the Arthur Cox teams advising clients in the CCPC motor insurance investigation and in follow-on actions arising from the trucks cartel decision.
Richard Ryan, Florence Loric & Patrick Horan: It is fair to say that the Irish Competition and Consumer Protection Commission (CCPC) has been very active on the investigation and enforcement front since the Competition Authority and Consumer Agency were amalgamated in October 2014. Since then, resources have increased and there is a clear consumer focus to the CCPC’s investigations. For example, the CCPC is currently investigating a number of different sectors, notably private motor insurance, concert and event ticketing, bagged cement and, most recently, procurement for publicly funded transport services, where a series of 20 coordinated dawn raids were carried out earlier this year.

In terms of ‘hot topic’ issues, price signalling and information exchange appear to be areas of particular interest for the CCPC. The private motor insurance investigation, which was launched in September 2016, is primarily focused on whether there was price coordination between insurers in that sector either through public announcements or other forms of information exchange. The issue of rising motor insurance premiums has been the subject of scrutiny and policy proposals by the Irish Department of Finance and the Finance Committee of the Irish parliament, and the CCPC’s investigation is focused on establishing whether any competition issues arise. The chairperson of the CCPC, Isolde Goggin, has also targeted alleged bid-rigging in procurement – as far back as August 2016, she had indicated that the CCPC planned to take action in this area – and we have seen that with the dawn raids conducted in February in relation to the transport services sector.

Also in February of this year, the CCPC opened a public consultation on the Irish mortgage market, an area where the after-effects of the financial crisis are still being worked out. The proposal for a consultation was included in the current Programme for Government, which contains a request that the CCPC work with the Central Bank of Ireland to set out options for the government around mortgage market structure, legislation and regulation to lower costs and improve the degree of competition and consumer protection. This is obviously a wide-ranging remit, and it will be interesting to see how the CCPC recommends tackling these issues.

GTDT: What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

RR, FL & PH: We can tell a lot from the investigations the CCPC has taken on since its inception. According to its most recent annual report, the CCPC received 74 allegations of competition breaches in 2015 (the most recent year for which there is data available) and, as we have seen, the CCPC has initiated a number of investigations across a number of different industry sectors. More recently, the CCPC has tended to use its power of witness summons to require individuals to appear before it for questioning under oath and to produce documentation and information to gather evidence in relation to the investigation of alleged
infringements – dawn raids have generally been used sparingly in the past 12–18 months. This may be because of a challenge brought before the High Court in November 2015 by CRH plc and others to the exercise of the CCPC’s dawn raid powers during a dawn raid at the premises of Irish Cement Limited (ICL) in May 2015. The challenge was successful before the High Court and was appealed by the CCPC to the Supreme Court. We are awaiting judgment in that case. What is clear from the investigations is that the CCPC sees itself as having an active and important role in the protection of consumer welfare through competition, and that the CCPC is not slow to intervene in circumstances where it becomes aware of practices that it is concerned about, irrespective of the size of the market or the identity of the companies concerned.

GTDT: How is the leniency system developing, and which factors should clients consider before applying for leniency?

RR, FL & PH: The CCPC operates the Cartel Immunity Programme (CIP) in conjunction with the Irish Director of Public Prosecutions (DPP). The dual role arises because the CCPC’s role is to investigate alleged cartel conduct and then, in serious cases to recommend prosecution to the DPP, who then decides whether to institute criminal proceedings against the parties concerned before the courts. Under Irish law, only the courts may impose sanctions for breaches of competition law; the CCPC does not have those powers. The DPP is responsible for prosecuting serious criminal cases, including in relation to alleged cartels, before the courts.

The CIP provides a mechanism by which a member of a cartel may avoid prosecution and sanctions, including potentially significant fines and imprisonment, if they are the first member of the cartel to come forward. The application must be made before the CCPC has completed any investigation and referred the matter to the DPP. The immunity applicant is required to cooperate fully with the CCPC. Under the CIP, the CCPC effectively acts as an intermediary between the immunity applicant and the DPP in seeking immunity from prosecution in return for providing evidence in a criminal trial. The ultimate decision to grant immunity rests with the DPP.

The CIP was most recently revised in January 2015, lifting a prohibition that previously prevented instigator companies from qualifying for immunity. An instigator company can now apply for immunity, provided it did not coerce others into joining or remaining in the cartel. This reform was designed to provide greater certainty to applicants for immunity from prosecution and improve the overall effectiveness of the CIP.

The CIP is available only to the first cartel member to blow the whistle on the cartel. Given the nature of the enforcement regime in Ireland, the CIP does not provide for a reduction in the scope of fines to subsequent applicants, as is the case with leniency programmes in other countries. This is obviously an important factor to be taken into account when deciding whether or not to come forward, as is the fact that, as we mentioned already, immunity is not available to a party that coerced other parties to participate in the illegal cartel activity. A further factor is the requirement to reveal any and all cartel offences in which the applicant may have been involved and of which it is aware and not just the activity that it is blowing the whistle on.

Regarding internal investigations, labour law and data protection law considerations need to be taken into account and the extent to which data can be accessed, and employees questioned, for these purposes will depend on the terms of employment contracts and policies on the use of business IT (including emails) that are in place.

GTDT: What means exist in your jurisdiction to speed up or streamline the authority’s decision-making, and what are your experiences in this regard?

RR, FL & PH: Unlike many other competition authorities across the EU, the CCPC does not have the power to impose sanctions (such as fines or other measures) for infringements of competition law – this power is reserved to the Irish courts. Even then, sanctions can only be imposed following successful criminal prosecution; civil fines are not available in Ireland. The CCPC has lobbied for some time for legislative reform in this area, but there does not appear to be any imminent prospect of that position changing.
An alternative option to going to court is for the CCPC to seek undertakings or commitments from parties that address the CCPC’s concerns. This has the benefit, from the CCPC’s perspective, of addressing market behaviour without having to go to court and has been used relatively frequently by the CCPC, in particular where the conduct under investigation does not involve alleged cartel behaviour. To take a recent example, in December 2016, the CCPC initiated an investigation on foot of a press release issued by the Irish Property Owners Association (IPOA), outlining a coordinated response to government legislation introducing rent controls (among other initiatives in the private rental sector). The statement indicated that the IPOA was considering a number of measures, such as imposing new charges on tenants and withdrawing from state-sponsored rental schemes. On 20 January 2017, the CCPC announced that the IPOA had agreed undertakings with the CCPC, under which the IPOA undertook to retract the press statement and introduce a competition law compliance training programme. While the timetable in that case was unusually fast, it is a good example of the CCPC’s approach to intervention and settlement to address potential concerns.

**GTDT: Tell us about the authority’s most important decisions over the year. What made them so significant?**

**RR, FL & PH:** Most of the CCPC’s key investigations, including in the motor insurance, ticketing, bagged cement and transport services sectors, remain ongoing. However, in August 2016, the CCPC concluded its investigation into alleged sharing of commercially sensitive information among a number of insurers via a third-party software system. The CCPC accepted undertakings from five insurers setting out restrictions in relation to their access to the commercially sensitive information of competing insurance companies via intermediary software systems. The terms of the undertakings were published by the CCPC and compliance is being monitored. The investigation was closed in August 2016.

**GTDT: What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority’s decisions in the courts over the past year?**

**RR, FL & PH:** Given the CCPC cannot impose fines or other penalties, the courts play an active and important role in competition enforcement in Ireland. In terms of judicial review, one of the most significant challenges to the CCPC has concerned its powers of search and seizure of documents during a dawn raid. The case relates to the CCPC’s investigation of the bagged cement sector, which was initiated by a series of dawn raids in May 2015. During the course of the inspection at ICL (a subsidiary of CRH plc), the CCPC seized the entire email account and hard drive from the home computer of a senior CRH executive. The individual, ICL and CRH brought a challenge to this seizure before the High Court on the basis that the vast majority of the information seized (which included private, personal information) was irrelevant to the scope of the CCPC’s investigation into bagged cement in Ireland. The High Court found in favour of ICL and held that the CCPC was prohibited from accessing or reviewing the data concerned. The CCPC appealed to the Supreme Court, where the appeal was heard on 25 and 26 January 2017. The Supreme Court’s decision is expected very shortly.

The outcome of this case is likely to have significant implications in relation to the CCPC’s conduct of dawn raids. While it is the first time the Irish courts have considered the scope of the CCPC’s investigatory powers, the issues are obviously topical, given the General Court is currently considering very similar issues in T-449/14 Nexans v Commission.

**GTDT: How is private cartel enforcement developing in your jurisdiction?**

**RR, FL & PH:** There are a number of factors that make Ireland an attractive forum for follow-on damages actions, including its relatively generous disclosure regime in litigation. In the past 12 months, we have seen a significant increase in the number of private enforcement actions being taken, notably arising from the European Commission’s decision in relation to the trucks cartel. To date, over 50 claims have been issued in the Irish High Court in connection with that decision, with the possibility that more will follow. The proceedings are at an early stage but raise a number of interesting questions from a procedural and jurisdictional perspective. These issues are likely to be worked through over the course of the coming year.

A second major development is the transposition of the EU Damages Directive into Irish law, which was implemented on 17 February 2017. Overall, the impact of the implementation of the Damages Directive is likely to be relatively limited, as many of the aspects of the Directive were already in place under Irish law. However, the implementing regulations in Ireland only apply to infringements occurring after 27 December 2016, which is likely to mean that it will be several years before their provisions begin to apply to cases in practice. That said, the regulations are likely to provide additional clarity around access to, and use of, material in competition authority files, as well as leniency and settlement materials. Disclosure of this material had previously not been specifically addressed as a matter of Irish law.
RR, FL & PH: The CCPC has certainly maintained a high profile in recent years, and given clear notice about areas where it is focusing its enforcement attention. A good example of this is in relation to procurement – the CCPC’s chairperson had signalled as early as August 2016 that the CCPC was looking carefully at the procurement sector, and dawn raids were conducted in relation to procurement of transport services in February of 2017. This investigation also showed the importance for small and medium-sized companies of having in place appropriate dawn raid preparedness procedures – the CCPC has shown that it does not focus only on large companies in high-value industries, but also in addressing competition concerns on a more local or regional level.

More generally, it remains very important for companies of all sizes and across all sectors to have an effective and tailored competition compliance programme in place, which focuses on the areas of highest risk for the company (eg, sales personnel who are involved in pricing or personnel who interact on a regular basis with competitors) and sets out in clear practical terms what employees can and cannot do in relation to competition. Regular training sessions for relevant staff that are tailored to how the rules apply in practice to their day-to-day activities are also an important means of maintaining awareness of the relevance of competition law to the business and, overall, to nurturing a culture of competition law compliance.

Having an effective compliance policy is also important for trade associations, particularly given the CCPC’s current focus on the areas of pricing announcements and information exchange.

Internal investigations and audits are a very effective way for a business to ‘look under the bonnet’ and check whether the business is operating in a manner that does not give rise to antitrust risk. It gives businesses an opportunity to make corrections to business practice as required in advance of any potential investigation by a competition authority. Similarly, simulation dawn raids provide an insight into how the business would cope with a real dawn raid and allows the business to test run its procedures in practice. We see increasing use of these compliance tools by clients.

GTDT: What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

RR, FL & PH: We expect the CCPC to remain active on the investigations and enforcement front during the next 12 months. It already has a number of significant investigations ongoing and recent comments by the CCPC chairperson indicate that it intends to keep up this high work rate. We would also expect the focus of the CCPC’s attention to remain on consumer-related issues. Given the level of activity, it is important for clients to ensure they have robust compliance programmes in place and continue to remain vigilant in respect of compliance issues.

On the investigations side, the Supreme Court’s decision in the ICL case is likely to have implications (whatever the outcome) for the way in which the CCPC exercises its powers of search and seizure in the context of a dawn raid. Following the decision, we would expect to see some form of additional guidance from the CCPC in setting out its approach to the exercise of those powers.

Finally, in the area of public procurement, the CCPC has announced that the state’s leading procurement body will look into introducing a new system of data analytics during the course of 2017 to assist the CCPC in detecting and deterring bid-rigging on public tenders. While this development will not impact suppliers to the state directly, it does show the increasingly sophisticated approach being taken by the CCPC to competition enforcement in Ireland.

GTDT: What developments do you see in antitrust compliance?

RR, FL & PH: The CCPC has certainly maintained a high profile in recent years, and given clear notice about areas where it is focusing its enforcement attention. A good example of this is in relation to procurement – the CCPC’s chairperson had signalled as early as August 2016 that the CCPC was looking carefully at the procurement sector, and dawn raids were conducted in relation to procurement of transport services in February of 2017. This investigation also showed the importance for small and medium-sized companies of having in place appropriate dawn raid preparedness procedures – the CCPC has shown that it does not focus only on large companies in high-value industries, but also in addressing competition concerns on a more local or regional level.

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