ICLG

The International Comparative Legal Guide to:

Competition Litigation 2018

10th Edition

A practical cross-border insight into competition litigation work

Published by Global Legal Group, in association with CDR, with contributions from:

ACCURA Advokatpartnerselskab
Albuquerque & Associados
Arnold Bloch Leibler
Arthur Cox
Ashurst LLP
Berkeley Research Group
Blake, Cassels & Graydon LLP
bpv Hügel Rechtsanwälte GmbH
DALDEWOLF
Dittmar & Indrenius
Economic Insight Limited
Fieldfisher - Studio Associato Servizi Professionali Integrati
GANADO Advocates
Hansberry Tomkiel
Hausfeld & Co LLP
Haver & Mailänder Rechtsanwälte Partnerschaft mbB

INFRALEX
King & Wood Mallesons
Luthra & Luthra Law Offices
MinterEllisonRuddWatts
Müggenburg, Gorchés y Peñalosa, S.C.
Nagashima Ohno & Tsunematsu
Nedelka Kubáč advokáti
Nicholas Ngumbi Advocates
Osborne Clarke
Pels Rijcken & Droogleever Fortuijn
Selçuk Attorneys At Law
Skadden, Arps, Slate, Meagher & Flom LLP
Stavropoulos & Partners Law Office
Stewarts
Wilson Sonsini Goodrich & Rosati
Zhong Lun Law Firm
Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.
Welcome to the tenth edition of The International Comparative Legal Guide to: Competition Litigation.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 29 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Euan Burrows of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk
Chapter 20

Ireland

Arthur Cox

1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The Competition Act 2002 as amended (the “Competition Act”) contains two main prohibitions:

- **Prohibition on anti-competitive arrangements between undertakings:** Section 4(1) of the Competition Act prohibits and renders void all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State, including those which:
  - fix prices;
  - limit or control production or markets;
  - share markets or sources of supply;
  - apply dissimilar conditions to equivalent transactions with other trading parties; and
  - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts (e.g. tying).

- **Prohibition on abuse of dominance:** Section 5 of the Competition Act prohibits the abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Such abuse may, in particular, consist in:
  - 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 which by their nature or according to commercial usage have no connection with the subject of such contracts.

These prohibitions are broadly similar to, and are modelled on, the prohibitions contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”).

As regards civil proceedings, sections 14(1) and 14A(1) of the Competition Act provide that aggrieved persons and the Competition and Consumer Protection Commission (the “CCPC”) (or the Commission for Communications Regulation, hereafter “ComReg”) respectively have a right of action against:

- any undertaking which is/was a party to behaviour prohibited by sections 4 or 5 of the Competition Act or Article 101 or 102 TFEU; and
- any director, manager or other officer of any such undertaking, or any person who purported to act in such capacity, who authorised or consented to such behaviour.

The range of remedies available is set out in Section 14 of the Competition Act and includes:

- declarations;
- injunctions;
- damages (for aggrieved persons but not for the CCPC/ComReg);
- orders requiring a dominant position to be discontinued; and
- orders requiring the undertaking to adopt such measures for the purpose of it ceasing to be in a dominant position or securing an adjustment of that position, including the sale of assets.

As regards criminal proceedings, sections 6 and 7 of the Competition Act make it an offence to breach section 4 or 5 of the Competition Act or Article 101 or 102 TFEU. The CCPC investigates alleged breaches of the Competition Act and can either itself bring a summary prosecution before the District Court or, in more serious cases, refer a case to the Director of Public Prosecutions (the “DPP”) for prosecution on indictment. Section 8 of the Competition Act sets out the penalties for those found guilty of offences under sections 6 or 7 of the Competition Act.

The responses below are limited to a consideration of civil aspects of competition litigation.

1.2 What is the legal basis for bringing an action for breach of competition law?

Sections 14 and 14A of the Competition Act. Follow-on actions for damages are also governed by the European Union (Acts for Damages for Infringements of Competition Law) Regulations 2017 (the “Damages Regulations”), which transpose Directive 2014/104/EU on Antitrust Damages Actions into Irish national law. However, the Damages Regulations do not apply to infringements of competition law that occurred before 27 December 2016.
1.3 Is the legal basis for competition law claims derived from international, national or regional law?

National law: sections 14 and 14A of the Competition Act allow for the bringing of claims for breaches of sections 4 or 5 of the Competition Act and/or breaches of Articles 101 or 102 TFEU.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There is no specialist competition court in Ireland. Civil competition cases are heard before the Circuit Court or the High Court. However, a statutory instrument, Statutory Instrument 130/2005 The Rules of the Superior Courts (Competition Proceedings) 2005 (“SI 130/2005”), has amended the Rules of the Superior Courts by introducing a High Court Competition List and providing for procedures that apply to the Competition List. As a result, a Judge of the High Court is designated to hear competition law cases and there are specific procedural rules which apply to cases entered into the High Court Competition List.

Proceedings that may be entered into the Competition List include:

- proceedings in exercise of a right of action conferred by the Competition Act on a person aggrieved in consequence of any behaviour prohibited by sections 4 or 5 of the Competition Act;
- proceedings in exercise of a right of action conferred by the Competition Act on the CCPC/ComReg in respect of any behaviour prohibited by sections 4 or 5 of the Competition Act or by Articles 101 or 102 TFEU;
- an appeal against the making of a declaration by the CCPC under section 4(3) of the Competition Act (such declarations are similar to European Commission block exemption regulations);
- an appeal against any determination of the CCPC under Irish merger control rules to either block a transaction or close it subject to conditions (other than in the case of media mergers);
- proceedings for judicial review of a decision of the CCPC;
- proceedings for an injunction to enforce compliance with the terms of a commitment or determination, or of an order made by the Minister for Jobs, Enterprise & Innovation under section 23(4) of the Competition Act (relating to media mergers);
- proceedings seeking the application of Articles 101 or 102 TFEU;
- proceedings for relief at common law in respect of a condition or covenant in any agreement alleged to be unreasonably in restraint of trade; and
- any other proceedings which concern the application of a provision of the Competition Act, of Regulation (EC) 1/2003 or of Articles 101, 102, 106, 107 or 108 TFEU.

The procedural rules for the Competition List are intended to expedite competition proceedings and provide for enhanced case management. Matters covered by those procedural rules include:

- the appointment of experts to assist the court, particularly in relation to economic matters.
- Competition issues may also be raised in cases not entered in the Competition List. In Ski Apparel Revolution Workwear et al. [2013] IEHC 289, for instance, which concerned a dispute involving an Irish distributor of Ski Apparel’s products (clothing) and in which it was argued that a non-compete was anti-competitive, Judge Laffoy said “application of competition law, both at European and at national level, is a specialised discipline and, understandably, there is a special Competition Case List in the High Court. Notwithstanding that, competition law issues find their way into cases listed elsewhere in the High Court”.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an “opt-in” or “opt-out” basis?

Section 14(1) of the Competition Act provides that “any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5, or by Article 101 or 102 of the Treaty on the Functioning of the European Union, shall have a right of action under this subsection for relief”. “Aggrieved persons” include natural and legal persons.

Section 14A (1) of the Competition Act provides a right of action to the CCPC (or ComReg) in respect of behaviour prohibited by sections 4 or 5 of the Competition Act or by Articles 101 or 102 TFEU.

Follow-on actions are facilitated by the Damages Regulations. Regulation 8 provides that an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action for damages, while the final decision of a competition authority in another Member State may be presented as at least prima facie evidence that an infringement has occurred.

Prior to the transposition of Directive 2014/104/EU on Antitrust Damages Actions, a provision in the Competition (Amendment) Act 2012 already provided that a finding by an Irish court of a breach of sections 4 or 5 of the Competition Act, or Articles 101 or 102 TFEU, will be regarded as res judicata (i.e. already adjudicated and unnecessary to be considered again) in any subsequent civil proceedings. Accordingly, a plaintiff in a follow-on action does not have to prove the infringement of competition law occurred and only has to prove causation, loss and the quantum of damages that they are entitled to if successful.

There is currently no procedure in Ireland for the taking of class actions seeking damages, as evidenced by the large volume of individual cases taken in the Irish courts on foot of the European Commission’s decision in the Trucks cartel. In practice, parties involved in related actions may agree to one action proceeding as a “pathfinder case” and the other parties (including defendants) may agree to be bound by the outcome of the “pathfinder case”, although there is no obligation on the parties to take such an approach. There have been calls for reform to facilitate the taking of collective/related actions in Ireland, including in a report by the Law Reform Commission published in 2005. However, there are no imminent proposals to introduce such a system.

Representative bodies may bring representative actions on behalf of their members seeking injunctive or declaratory relief, but not damages.
1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The jurisdiction of certain types of civil claims involving defendants who are domiciled in an EU Member State (apart from Denmark) is governed by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (“Brussels Regulation”) (which replaced the previous version, Regulation (EU) 44/2001, with effect from 10 January 2015).

In summary, in such cases, a defendant may be sued before an Irish court if it is domiciled in Ireland. Alternatively, a defendant may also be sued in an Irish court if the anti-competitive behaviour, which is the subject of the complaint, is alleged to have occurred there. A defendant may be sued in an Irish court if the relevant damage occurred, or will occur there. If these criteria are met then it is likely that the Irish courts will have jurisdiction. In addition, where the parties have agreed that the courts of Ireland are to have jurisdiction to settle any disputes arising in connection with a particular legal relationship, those courts have jurisdiction, unless the agreement is null and void.

Ireland is a party to the Brussels Convention between EU Member States and Denmark, and to the Lugano Convention between EU Member States and the members of EFTA, Switzerland, Iceland and Norway. Those Conventions apply similar rules which govern the jurisdiction of certain civil claims involving defendants in those countries.

Where the rules of the Brussels Regulation, the Brussels Convention and the Lugano Convention do not apply, Irish common law jurisdictional rules are applicable. In summary, Irish courts can have jurisdiction under common law rules in the following situations:

- where the defendant has been duly served in Ireland;
- where the parties agree to the jurisdiction of the Irish courts;
- where a defendant submits to the jurisdiction of the Irish courts; or
- where service outside of Ireland has been performed in accordance with Order 11 of the Rules of the Superior Courts.

Order 11 applies to cases where a defendant is not present in Ireland but the case is so closely connected to Ireland or with Irish law that there is ample justification for it being tried in Ireland. Under Order 11, it is necessary to apply for leave of the High Court before documents can be served outside the jurisdiction. This ensures that service on defendants outside the jurisdiction is limited to cases where the court is of the view that it has jurisdiction to consider the particular dispute. The burden of proof is on the applicant to establish that it is a proper case for service under Order 11.

Civil competition law claims can be brought in Ireland before the Circuit Court or the High Court. In general, the Circuit Court has jurisdiction to hear claims having a monetary value not exceeding €75,000. The High Court has original jurisdiction to hear virtually all matters irrespective of amount. However, if a claim is brought in the High Court and the award falls within the jurisdiction of the Circuit Court (i.e. up to €75,000), the plaintiff may only be awarded costs applicable to an action before the Circuit Court.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

We are not aware of Ireland having a reputation for attracting claimant or defendant applications from other jurisdictions, although the ongoing litigation arising from the European Commission’s decision in the Trucks cartel shows that Ireland continues to be an attractive venue for competition litigation generally.

1.8 Is the judicial process adversarial or inquisitorial?

Ireland is a common law jurisdiction and has an adversarial judicial process.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

The range of remedies available before Irish courts is set out in Sections 14 and 14A of the Competition Act. They include interim measures.

2.2 What interim remedies are available and under what conditions will a court grant them?

The courts may grant interim relief in respect of private antitrust litigation in certain circumstances. Sections 14(1) and 14A(1) of the Competition Act provide for the grant of interim injunctions, interlocutory injunctions and injunctions of definite or indefinite duration. Interim injunctions can be granted for very limited periods of time and may be granted on an ex parte basis, while interlocutory injunctions can last until the full hearing of a case. Applicants are required to provide an undertaking to ensure that the defendant will be properly compensated should they lose their case.

The grant of injunctions is at the discretion of the court. An injunction may be granted by the courts where:

- there is a fair question to be tried;
- damages would not be an adequate remedy; and
- the balance of convenience favours the award of the injunction.

The types of interim/interlocutory injunction available in Ireland include:

- prohibitory injunctions restraining a person from carrying out an act;
- mandatory injunctions to require a person to carry out an act; and
- quia timet injunctions which are granted to prevent an anticipated breach of legal rights.

It is more difficult to secure a mandatory injunction at an interlocutory stage than a prohibitory injunction. In Lingham v Health Service Executive [2005] IESC 89, [2006] 17 E.L.R. 137, which concerned an application for an interlocutory mandatory injunction, the Supreme Court stated that in such a case it is necessary for the applicant to show at least that he has a strong case and that he is likely to succeed at the hearing of the action.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Section 14 of the Competition Act provides for the following possible remedies:
declarations;
- injunctions;
- damages (for aggrieved persons but not for the CCPC/ComReg);
- orders requiring a dominant position to be discontinued; and
- orders requiring the undertaking to adopt such measures for the purpose of it ceasing to be in a dominant position or securing an adjustment of that position including the sale of assets.

In addition, section 14B of the Competition Act, which was introduced by the Competition (Amendment) Act 2012, enables the CCPC or ComReg, following an investigation, to apply to the High Court to have commitments entered into by an undertaking made an order of court. A breach of those commitments would then constitute contempt of court by the undertaking. This provides the CCPC and ComReg with the option of bringing an investigation to a close by agreeing not to issue proceedings in consideration of the undertakings involved agreeing to do, or refrain from doing, such things as are specified in the commitments.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Regulation 4 of the Damages Regulations provides that persons who have suffered harm caused by an infringement of competition law have a right to full compensation for that harm, including the right to compensation for actual loss and for loss of profit, plus the payment of interest. The Damages Regulations deleted references to an entitlement to claim exemplary damages from Section 14 of the Competition Act. We are not aware of any Irish competition cases in the public domain where exemplary damages were previously awarded under Section 14.

The general principle underlying the award of ordinary damages is to compensate the injured party for the loss suffered as a result of the breach of competition law in question. As regards the intention of the defendant, in Donovan v ESB [1997] 3 IR 573 (SC), the Supreme Court held that “the court is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises”.

Section 14(4) of the Competition Act provides that, where an action is brought in the Circuit Court, any relief by way of damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of the jurisdiction of the Circuit Court in an action founded on tort. This arises because the Circuit Court’s maximum jurisdiction in terms of damages to be awarded is €75,000. The jurisdiction of the High Court is unlimited.

Regulation 15 of the Damages Regulations provides that, if it proves practically impossible or excessively difficult to quantify the harm suffered on the basis of the evidence available, a court may estimate the amount of such harm. A national competition authority may, upon request of the court, assist that court in determining the quantum of damages. Regulation 15 also introduces a rebuttable presumption that cartel infringements cause harm for the purpose of actions for damages.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The CCPC does not have the power to impose fines.

The calculation of damages is based on the loss suffered by a plaintiff. Therefore, an Irish court is unlikely to take into account fines imposed by other competition authorities in the calculation of ordinary damages.

We are not aware of an Irish competition case in which a redress scheme was offered by the defendant to the plaintiff in respect of the infringement concerned in advance of determination of the proceedings. However, given that the general principle applicable to the calculation of damages is one of compensation for loss suffered, it is conceivable that a court could take into account if a redress scheme had been offered by the defendant and accepted by the plaintiff in determining the damages to be awarded in respect of the same matter.
authorised officer’s knowledge and belief, the material is material which relates to any trade, profession, or, as the case may be, other activity, carried on by that person, the material shall be presumed, unless the contrary is proved, to be material which relates to that trade, profession, or, as the case may be, other activity, carried on by that person.

In addition, in the context of criminal proceedings, the following presumption applies in respect of directors, managers or other similar officers, or persons who purport to act in any such capacity:

- where an offence under section 6 or 7 of the Competition Act has been committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as any other person engaged in an undertaking which was guilty of the offence concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, shall be presumed to be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence. Where a person is proceeded against for such an offence and it is proved that, at the material time, he or she was a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that that person consented to the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under sections 6 or 7.

### 4.2 Who bears the evidential burden of proof?

The plaintiff bears the evidential burden of proof. The plaintiff must establish that he has suffered harm by reason of the wrong complained of. The courts favour the “but for” test in determining factual causation.

See question 5.2 below for a discussion of the burden of proof in the context of passing on.

### 4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Competition Act provides for a number of rebuttable presumptions in relation to evidence that apply in proceedings brought under the Competition Act. Please see question 4.1 above for further details.

Regulation 15(3) of the Damages Regulations provides for a rebuttable presumption that cartel infringements cause harm for the purpose of an action for damages. We are not aware of the concept of presumption of loss being raised in cartel cases in Ireland before the introduction of the Damages Regulations.

### 4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The following forms of evidence are generally accepted by the courts:

- oral evidence: the primary form of evidence in trials in Ireland is oral evidence where witnesses are examined by their own lawyers and cross-examined by the opposing party’s lawyers;
- written evidence: evidence may also be admissible in the form of sworn affidavits;
- documentary evidence: documents must be proved through witnesses to be admissible as evidence, unless otherwise agreed by the parties; and
- expert evidence.

An expert witness is entitled to give an opinion on facts which are admitted or proven by himself/herself or other witnesses, or matters of common knowledge, or upon a hypothesis based upon assumed facts. An expert is entitled to refer to materials such as reference works, studies and other information acquired in the course of his or her profession. The weight that is given to expert evidence is ultimately a matter for the judge to decide on. Expert witnesses have been involved in a number of competition cases to date, including in *Mars v HB Ice Cream Limited*, which was a follow-on action for damages relating to the European Commission’s freezer exclusivity decision. In *Competition Authority v Beef Industry Development Society Limited*, in addition to the parties using expert witnesses, the High Court appointed an expert witness to assist it with economics issues arising in the case.

SI 130/2005, which establishes the High Court Competition List, provides that the competition judge may, at an initial directions hearing, give any of a number of listed directions to facilitate the determination of the proceedings, including directing any expert witnesses to consult with each other for the purposes of:

1. identifying the issues in respect of which they intend to give evidence;
2. where possible, reaching agreement on the evidence that they intend to give in respect of those issues; and
3. considering any matter which the judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted by them to the registrar and delivered by them to the parties, particulars of the outcome of their consultations provided that any such outcome shall not be in any way binding on the parties.

### 4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

The rules on disclosure in competition law cases in Ireland are founded on the traditional rules of discovery, a process whereby a litigant in civil proceedings may obtain prior to the trial disclosure of documents in the possession, custody or power of another party, or occasionally from a non-party, which are both relevant to the matters in dispute and necessary to dispose fairly of the case or to save costs. While there is no definition of “document” set out in court rules, the term “document” is broadly defined in case law as meaning anything which contains information; see *McCarthy v O’Flynn* [1979] IR 127.

The Damages Regulations introduced a principle of proportionality in relation to the disclosure of evidence in follow-on actions for damages. “Evidence” is defined in this context as “all types of means of proof admissible before the court seized and, in particular, documents and all other objects containing information, irrespective of the medium on which the information is stored”.

The discovery process takes place pre-trial and will usually commence after the close of the exchange of pleadings. Discovery can be made on a voluntary basis where the parties consent, or by order of the court where a party refuses the other party’s request and the requesting party makes an application for an order for discovery. Requests for discovery in High Court cases must list the precise categories of documents sought and in each case the reasons why discovery of the category of documents are relevant to the matters...
in dispute and necessary to dispose fairly of the case or to save costs. At Circuit Court level, documents may be requested in more general terms. Discovery can be sought from non-parties (including competition authorities), although additional criteria apply in such a case, including that the documents in question are not otherwise available to the applicant. The Damages Regulations place certain limitations on access to and use of material in competition authority files and prohibit the disclosure of leniency statements and settlement submissions in follow-on actions for damages. Legal privilege may be asserted over certain types of documents including confidential communications passing between a lawyer and client created for the purpose of providing legal advice, and documents produced in contemplation of or during legal proceedings for the sole or dominant purpose of those proceedings. In Ireland, the concept of legal privilege is broader than the concept under EU law as defined by the General Court in C-550/07 P Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v The European Commission. In particular, under Irish law legal privilege applies to in-house legal counsel as well as external legal counsel.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Where a witness is present in Ireland, he or she may be forced to appear to give evidence at trial by service of a subpoena by either party. Any witness, properly served with a subpoena, who fails to attend, can be attached for contempt of court, since a subpoena is an order from the court to attend the hearing for the purpose of giving evidence.

There are two types of subpoena:

- one which requires a witness to attend court to give oral evidence; and
- one which requires a witness not only to attend for the purpose of giving evidence, but also to bring certain documents specified in the subpoena.

Cross-examination of witnesses is a normal part of the trial process in Ireland.

Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters provides for rules governing the calling of witnesses located in other EU Member States.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The case law of the Court of Justice of the European Union (“CJEU”) and Council Regulation (EC) 1/2003 (“Regulation 1/2003”) confirms that in proceedings before EU national courts, including in Ireland, a European Commission decision finding an infringement of EU competition law constitutes proof that the behaviour took place and was illegal.

As noted in response to question 1.5 above, the Damages Regulations provide that an infringement of competition law found by a final decision of a national competition authority or a review court is prima facie evidence that an infringement has occurred. Follow-on damages actions in Ireland are also facilitated by a provision in the Competition (Amendment) Act 2012 whereby a finding by an Irish court of a breach of section 4 or 5 of the Competition Act, or Articles 101 or 102 TFEU, will be regarded as res judicata (i.e. already adjudicated and unnecessary to be considered again) in any subsequent civil proceedings. Accordingly, a plaintiff in a follow-on action does not have to prove the infringement of competition law occurred and only has to prove causation, loss and the quantum of damages that they are entitled to if successful.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Article 34.1 of the Constitution of Ireland provides justice shall be administered in courts established by law by judges appointed in the manner provided by the Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public. As a result, Irish civil proceedings are generally heard in public. In certain limited circumstances, such as in family law cases, cases can be heard in camera, i.e. in private.

Third parties do not have access to documents used in a case. The issue of commercial confidentiality of documents used in a case is largely covered by the rules on discovery. In particular, there is an implied undertaking that discovered documents can only be used for the purpose of the proceedings in which they were discovered. Courts may refuse requests for discovery if, as a result of producing them, the person requested to produce documents would be prejudiced in a manner that could not be adequately compensated in monetary terms as a result of producing them. However, Regulation 5(2) of the Damages Regulations provides that a court may order the disclosure of evidence containing confidential information where it considers it relevant to an action for damages.

An application can be made to court for directions to maintain the confidentiality of commercially sensitive information in affidavits, exhibits to affidavits or other documents. For example, such directions may provide for the use of redacted versions of affidavits and exhibits to affidavits or may provide for procedures to be followed for the handling of evidence in open court in a manner that protects the confidentiality of commercially sensitive information.

In Competition Authority O’Regan & Others [2007] IESC 22, which involved input from the European Commission pursuant to Article 11(4) of Regulation 1/2003, the High Court required an undertaking from the European Commission regarding confidentiality.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

Part III of SI 130 of 2005 implements Article 15(3) of Regulation 1/2003 by enabling the CCPC and/or the European Commission to make observations on matters that are before the High Court. The CCPC and the European Commission can make written observations to the court. However, if they wish to submit oral observations, they must seek leave of the court to do so. The rules also provide that the CCPC may be invited to make written or oral submissions on the judge’s own motion or on the application of any of the parties to the proceedings. The rules provide that parties have an opportunity to review and respond to observations made by the CCPC or the European Commission.
In the context of follow-on actions for damages, Regulation 15(4) of the Damages Regulations provides that a national competition authority may, upon request of the court, assist the court with respect to the determination of the quantum of damages where the national competition authority considers such assistance to be appropriate. If disclosure is sought of evidence included in the file of a national competition authority, Regulation 6(9) of the Damages Regulations provides that, to the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to a court before which a disclosure order is sought.

The Competition Authority made an application to appear as amicus curiae in Calor Teoranta v Tervas Limited and others, High Court Record 2003 No. 5034 P. However, before the application could be heard, the parties agreed to a stay of the proceedings pending the outcome of the Competition Authority’s review of competition in the market for bulk liquid petroleum gas. The case did not subsequently go to trial.

In 2010, the European Commission submitted amicus curiae observations to the High Court in Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd, which was a case that concerned a rationalisation plan for the Irish beef processor sector to address structural long-term overcapacity. The observations related to the European Commission’s views on the application of Article 101(3) TFEU.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

A public interest defence arising from the general principles of law may be raised, but there have been no cases to date in which this has been successful.

5.2 Is the “passing on defence” available and do indirect purchasers have legal standing to sue?

Part 4 of the Damages Regulations makes specific provision, for the first time in Irish competition law, for the concept of passing on. Regulation 12 provides that a defendant in an action for damages can invoke the passing on defence. It is for the defendant to prove that an overcharge was passed on.

Regulation 11 of the Damages Regulations provides that indirect purchasers are entitled to claim compensation. Compensation for actual loss shall not exceed the overcharge harm suffered at the relevant level of the supply chain. This is without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing on of the overcharge. It is for the court to decide the share of any overcharge that was passed on.

Regulation 13 provides that, in the case of an indirect purchaser, it is for the claimant to prove whether and the extent to which an overcharge was passed on to them. However, there is a rebuttable presumption that an indirect purchaser has proven that passing on occurred if the indirect purchaser has shown that:

- the defendant has committed an infringement of competition law;
- the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- the indirect purchaser has purchased goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The applicable limitation period in Ireland is six years from the date of accrual of the cause of action.

In the case of follow-on actions for damages, the Damages Regulations amend the Statute of Limitations 1957 by introducing a new section specifically on competition damages actions, which provides that the six-year limitation period shall not begin to run before the latest of the following:

- the date on which the infringement ceased; and
- the date on which the claimant knows, or can reasonably be expected to know of: (a) the behaviour and the fact that it constitutes an infringement; (b) the fact that the behaviour caused harm; and (c) the identity of the infringer.
In practice, a potential claimant may only become aware of all of these aspects after a finding of infringement by a competition authority.

For the purpose of the limitation period, time does not run during the following periods:

- periods during which an investigation is being conducted by the Competition and Consumer Protection Commission, the Commission for Communications Regulation or the European Commission;
- periods during which domestic or European court proceedings relating to an infringement of competition law are pending; and
- periods during which a consensual dispute resolution process relating to an infringement of competition law is being conducted.

The effect of these suspensory provisions is that the window for issuing competition damages actions in Ireland is longer than is generally the case for other types of actions.

### 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

A civil claim typically takes between one and three years, but timing will vary depending on the complexity of the case.

As noted above, SI 130/2005 introduced a High Court Competition List and has provided for procedures that are intended to expedite the hearing of competition proceedings and enhance the case management of such a case.

### 7 Settlement

#### 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No such permission is required.

#### 7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Representative bodies may bring representative actions on behalf of their members. Representative bodies may seek injunctions or declaratory relief but may not sue for damages on behalf of their members, since damages must be assessed from the point of view of the loss of the plaintiff.

Settlement agreements may be reached between parties to a competition action. Permission from the court is not required to reach such an agreement.

### 8 Costs

#### 8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Parties initially bear their own legal costs for proceedings, but may obtain a court order for costs subsequently. The general principle is that “costs follow the event”, which means that a successful party is usually awarded its reasonable costs, although the courts have a level of discretion in determining the award of costs.

Costs are recoverable pursuant to an order for costs measured under either one of three categories:

(a) “party to party” (payable by one party to an action to another);
(b) “solicitor and client” (payable by one party to an action to another but on a more generous scale); and
(c) “solicitor and own client” (payable to the client’s own solicitor as a matter of contract).

There may be certain elements of costs which are not recoverable by a successful party.

#### 8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers are not permitted to act on a contingency fee basis.

#### 8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

As a general rule, third party funding of litigation is currently not permitted in Ireland due to the prohibition under Irish law of the practices known as “maintenance” and “champery”. Maintenance is the funding of litigation by someone with no legitimate interest in the litigation. Champery is the funding of litigation in return for a share in the proceeds of the litigation. It is therefore unlawful for a party without a legitimate interest to fund the litigation of another, or to fund litigation in return for a share of the proceeds. This position was recently confirmed by the Irish Supreme Court in *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2017] IESC 27.

### 9 Appeal

#### 9.1 Can decisions of the court be appealed?

District Court decisions may be appealed to the Circuit Court or, on a point of law, to the High Court.

Circuit Court decisions may be appealed to the High Court or, on a point of law, to the Court of Appeal.

High Court decisions about whether or not a law is constitutional may be appealed to the Court of Appeal. High Court decisions may be appealed on a point of law to the Supreme Court if it is satisfied that there are exceptional circumstances warranting a direct or “leapfrog” appeal to it.

Decisions of the Court of Appeal may be appealed to the Supreme Court if it is satisfied that the decision involves a matter of general public importance or, in the interests of justice, it is necessary that there be an appeal to the Supreme Court.

### 10 Leniency

#### 10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

The Irish Cartel Immunity Programme (“Immunity Programme”) outlines the policy of both the CCPC and the DPP in considering
applications for immunity from prosecution for criminal cartel offences under the Competition Act. The latest version of the Immunity Programme came into force on 22 January 2015.

The CCPC and the DPP both play a role in considering applications for immunity under the Immunity Programme. The CCPC manages immunity applications and makes recommendations on granting conditional immunity to applicants to the DPP in appropriate cases. If the DPP grants conditional immunity, the CCPC will remain as the intermediary between the applicant and the DPP.

The Immunity Programme offers full immunity from prosecution to the first successful applicant to provide the CCPC with sufficient evidence of the cartel, on condition that the applicant fulfils all the requirements of the Immunity Programme. There is no leniency available to any individual or undertaking under the Immunity Programme other than full immunity for the first successful applicant only.

The key requirements that must be satisfied if immunity is to be granted are the following:

- the applicant must not have coerced any other party to participate in the illegal cartel activity;
- the applicant must do nothing to alert its associates in the cartel that it has applied for immunity and must not comment publicly on the activities of the cartel;
- the applicant must not have destroyed, hidden, made unusable or falsified any evidence from the time it first considered applying for immunity;
- an applicant in an ongoing cartel must take effective steps, to be agreed with the CCPC, to ensure it does not engage in any further cartel activity after making its application for immunity;
- the applicant must provide comprehensive, prompt and continuous co-operation throughout the investigation and any subsequent prosecution; and
- the applicant (including any individuals who require personal immunity) has a positive duty to:
  - reveal any and all cartel offences under the Competition Act in which the applicant was involved and of which it is aware;
  - provide full, frank and truthful disclosure of all evidence and information relating to the offences in the possession, control or knowledge of the applicant, including all electronic records;
  - preserve and not tamper with any evidence that is capable of being under the applicant’s control;
  - ensure that current and former directors, officers and employees fully co-operate with the investigation and any subsequent prosecution;
  - not disclose to third parties any dealings with the CCPC without the CCPC’s prior written consent, except where required to do so by law (except where such disclosure is made to another competition authority, or to an external lawyer for the purposes of obtaining legal advice);
  - disclose to the CCPC, unless otherwise prohibited, all applications for immunity made in other jurisdictions;
  - co-operate fully with the CCPC on a continuing basis, expeditiously and at no expense to the CCPC; and
  - provide individuals to give clear and comprehensive statements of evidence that will be recorded by the CCPC and used in any ensuing prosecutions.

If the applicant fails to comply with the requirements set out in the Immunity Programme, the DPP can revoke the grant of conditional immunity.

### 10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An immunity applicant’s identity will be kept confidential as long as is permissible under Irish and EU law.

Information disclosed under the Immunity Programme will not be disclosed by the CCPC to any third party other than in accordance with normal practices and procedures relating to criminal investigations and prosecutions. In particular, information may be disclosed under the Immunity Programme where:

- disclosure is required by law;
- disclosure is used to administer and enforce the Competition Act;
- disclosure is necessary to prevent the commission of a criminal offence;
- disclosure is required as part of an investigation or prosecution; or
- an applicant signs a waiver on disclosure permitting the CCPC to share information with another competition authority in a jurisdiction where the applicant has also applied for immunity.

The initial contact with the CCPC and the information required to perfect the marker can be communicated orally through a legal representative in an attempt to preserve the anonymity of the applicant and the confidentiality of the information provided.

Regulation 6(4) of the Damages Regulations provides that, for the purpose of actions for damages, a court cannot at any time order a party or a third party involved in an action for damages to disclose leniency statements.

The question of whether information submitted in an immunity application could be made subject to discovery orders in foreign courts has not arisen (to our knowledge) but would likely be resisted by the CCPC and DPP on the basis that disclosure could undermine the effectiveness of the Immunity Programme by discouraging future use of the programme.

### 11 Anticipated Reforms

#### 11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

The EU Directive on Antitrust Damages Actions was implemented into Irish law by Statutory Instrument in the form of the Damages Regulations. The Damages Regulations also contain a number of amendments to primary legislation relating to competition law.

#### 11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in your jurisdiction?

The EU Directive on Antitrust Damages Actions was implemented into Irish law by the Damages Regulations. The Damages Regulations came into operation on 27 December 2016 and do not apply to infringements of competition law that occurred before that date.
Arthur Cox is one of Ireland’s leading law firms. For over 90 years, it has been at the forefront of developments in the legal profession in Ireland. An international firm encompassing all aspects of corporate and business law, the firm has 350 lawyers and a total staff of almost 750 in offices in Dublin, Belfast, London, New York and Silicon Valley.

The firm provides a comprehensive service to a diverse international and domestic client base. Clients include multinational organisations, banks and financial institutions, government departments, State entities and new players in emerging industry sectors.

The firm’s highly regarded Competition and Regulated Markets Group is widely recognised as one of Ireland’s leading competition law practices and has been involved in a large proportion of the high-profile competition, merger control and State aid cases in Ireland in recent years. The Group advises on all aspects of EU and Irish competition law, including investigations, litigation, merger control compliance and EU State aid law. The Group also advises on regulated markets, including telecommunications and broadcasting, energy and aviation.

In 2016, Arthur Cox was named Ireland Law Firm of the Year at the IFLR Europe Awards, Ireland Law Firm by Who’s Who Legal and Best Firm in Ireland at the Europe Women in Business Law Awards.

Richard Ryan is Head of the 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”), competition law litigation, securing EU and Irish merger control approval for transactions, competition law aspects of commercial agreements, competition law compliance programmes, EU State aid law and regulated markets.

Richard has significant sectoral experience, including in banking and financial services, energy, health, pharmaceuticals, food and drink, agriculture, building materials, real estate, waste, telecommunications, news and media and information technology.

He combines strong commercial awareness with a solution-focused approach. His priority is to understand his client’s business and how its industry operates and deliver practical solutions that achieve its commercial objectives. He has been involved in many of the leading competition, merger control and State aid cases in Ireland in recent years.

Patrick Horan is a senior associate in Arthur Cox’s Competition and Regulated Markets Group. Patrick specialises in all aspects of Irish and EU competition law, and has experience in dealing with merger control and antitrust cases before the European Commission, the Irish Competition and Consumer Protection Commission, and the competition agencies of other jurisdictions. Prior to joining Arthur Cox in 2016, Patrick was a senior associate in the London and Brussels offices of Slaughter and May. Patrick was recently named among Who’s Who Legal’s Future Leaders in Competition Law for 2017.

It now seems possible that it might be passed into law before the end of 2017, depending on the results of the general election in September 2017.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

As far as we are aware, no other proposed reforms are currently under consideration.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?
Other titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

www.iclg.com