

# market intelligence

Volume 4 • Issue 3

GETTING THE  
DEAL THROUGH 

## Cartels

In the crosshairs –  
'consumer industries'

*Hengeler Mueller leads a global interview  
panel analysing key economies and  
private damages actions*

North America • Asia-Pacific • Europe • Latin America  
Enforcement trends • Judicial review • Compliance developments • 2017/2018 forecast

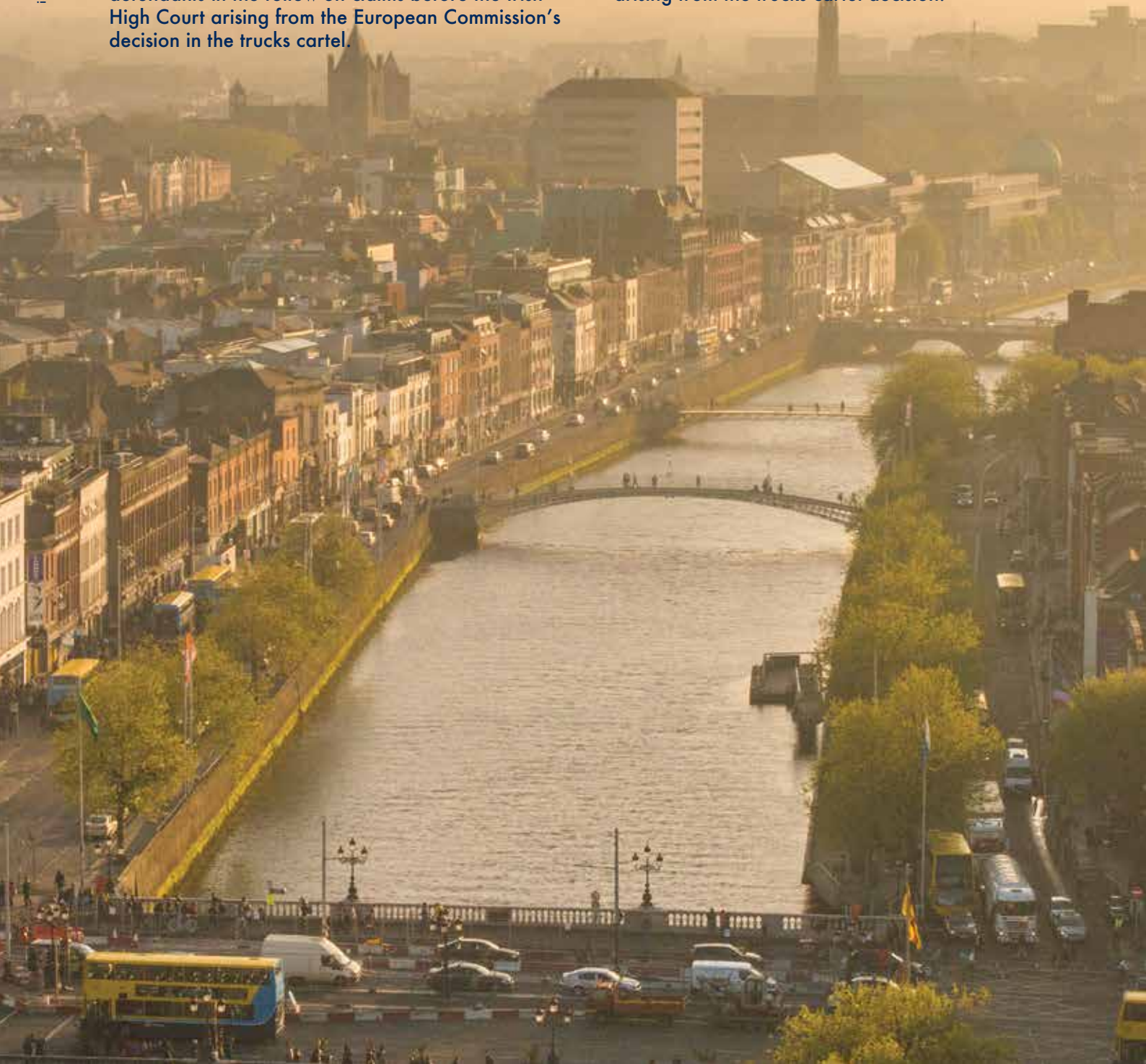


# CARTELS IN IRELAND

Richard Ryan is a partner and 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 partner in the competition and regulated markets group. He specialises in all aspects of Irish and EU competition law 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

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

**Richard Ryan, Florence Loric and Patrick Horan:** We continue to see the Irish Competition and Consumer Protection Commission (CCPC) being very active on the investigation and enforcement front – this has been the case 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. The CCPC is currently investigating a number of different sectors, including private motor insurance, concert and event ticketing, bagged cement and procurement for publicly funded transport services.

In terms of ‘hot topic’ issues, price signalling and information exchange appear to be areas of current focus 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 CCPC has also targeted alleged bid rigging in a number of recent cases. In addition to its investigation into the transport services sector, the CCPC secured the first conviction in Ireland for bid rigging in May 2017. Following a cartel investigation in the flooring sector, Mr Brendan Smith and Aston Carpets & Flooring were convicted by the Central Criminal Court for engaging in bid rigging in the procurement of flooring contracts for major international companies between 2012 and 2013. Aston Carpets & Flooring received a fine of €10,000, while Mr Smith received a three-month suspended sentence and a fine of €7,500 and was disqualified from acting as a company director for a period of five years.

In February 2018, the CCPC opened a public consultation seeking views on the Irish household waste collection market. The consultation forms part of the CCPC’s ongoing study of this market, following a request to the CCPC from the government in September 2017 to examine the sector.

**GTDT: What do recent investigations in your jurisdiction teach us?**

**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 80 complaints relating to suspected competition breaches in 2016 (the most recent year for which there





Patrick Horan

*“Dawn raids have generally been used sparingly by the CCPC in the past 12–18 months.”*

are data available) and, as we have seen, it 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 by the CCPC in the past 12–18 months, which may, in part, be owing to 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 a subsequent appeal by the CCPC was unanimously dismissed by the Supreme Court in May 2017 in a landmark decision on the scope of dawn raid powers and the right to privacy.

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 it 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.

We have also recently seen, for the first time in a number of years, unannounced inspections being carried out by the European Commission in Ireland. In July 2017, the Commission conducted a

number of dawn raids as part of investigations into the private motor insurance sector in Ireland. The European Commission was assisted in carrying out these inspections by officials from the CCPC.

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

**RR, FL & PH:** The CCPC operates a 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, which 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 such powers. The DPP is responsible for prosecuting serious criminal cases, including relating 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 that 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 we mentioned already that 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.

An alternative option to going to court is for the CCPC to seek undertakings and commitments from parties that address its 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 January 2018, the CCPC secured commitments from Nursing Homes Ireland, a representative

body, following an investigation into potential anticompetitive conduct at a meeting of the body where collective action against the Fair Deal Scheme was allegedly discussed. The commitments included that Nursing Homes Ireland would write to its members reminding them of their obligations under competition law and introduce a competition law compliance programme for its senior management and board of directors.

**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. The conviction secured by the CCPC in May 2017 in relation to the flooring sector was significant as bid rigging is a key area of focus for the CCPC. The investigation and conviction followed information received from a complainant and an application made under the CIP.

**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 that 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 of a senior CRH executive. The individual, ICL and CRH brought a challenge before the High Court to this seizure on the basis that the vast majority of the information seized was unrelated to the scope of the CCPC's investigation into bagged cement in Ireland. The High Court found in favour of the plaintiffs and granted an injunction preventing the CCPC from accessing, reviewing or making use of the data concerned. The CCPC appealed the High Court decision to the Supreme Court, where the appeal was heard on 25 and 26 January 2017. In May 2017, the Supreme Court unanimously dismissed the CCPC's appeal. It found that were the CCPC to access the unrelated documents this would result in a breach of the plaintiffs' right to privacy under article 8 of the European Convention on Human Rights (ECHR). The Supreme Court ordered that the CCPC be restrained from accessing, reviewing or making any use whatsoever of the unrelated electronic documents seized during the dawn

## *“It remains very important for companies of all sizes and across all sectors to have an effective and tailored competition compliance programme in place.”*

raid other than in accordance with an agreement with the plaintiffs in accordance with the right to privacy under article 8 of the ECHR.

This was a landmark decision, and it is likely to have significant implications in relation to the CCPC’s conduct of dawn raids (and provides guidance to other regulatory authorities in Ireland with similar powers of search and seizure). While it is the first time the Irish courts have considered the scope of the CCPC’s investigatory powers, the issue is obviously topical, given that the General Court is currently considering very similar issues in *Nexans v Commission*. In addition, given that the case was ultimately decided on the basis of the right to privacy under article 8 ECHR, the decision is arguably also of relevance to competition authorities in other countries that are signatories to the ECHR.

### ***GTD: 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. 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 settlements materials. Disclosure of this material had previously not been specifically addressed as a matter of Irish law.

### ***GTD: What developments do you see in antitrust compliance?***

**RR, FL & PH:** The CCPC has certainly maintained a high profile in recent years, and has given clear notice about areas where it is focusing its enforcement attention. A good example of this is in relation to procurement and, in particular, the dawn raids conducted by the CCPC in relation to procurement of transport services in July 2016. This investigation shows 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 on 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 that 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.

## THE INSIDE TRACK

*What was the most interesting case you worked on recently?*

We acted for CRH plc and others in bringing a High Court challenge to the exercise by the CCPC of its powers of search and seizure during a dawn raid at Irish Cement Limited in May 2015. We also acted for CRH and others in successfully defending the CCPC's appeal, which was unanimously dismissed by the Supreme Court in May 2017. This was a very interesting case. In particular, it raised important questions as to what the CCPC can and cannot do during the course of a dawn raid, in particular with regard to the search and seizure of electronic data, and the Supreme Court's decision will have a significant impact on the way in which the CCPC approaches investigations in the future.

*If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?*

We would change the design of the Cartel Immunity Programme (CIP). In its current form, it is relatively unattractive to potential applicants. For example, the requirement to reveal any and all cartel offences in which the applicant may have been involved and of which it is aware, rather than just the activity that it is blowing the whistle on, is a potentially onerous obligation that could well deter potential applicants. In addition, the unavailability of leniency for parties that are not 'first in' reduces its scope of application and effectiveness. This is also out of line with leniency programmes in other jurisdictions. The CIP was revised in 2015, but in our view the CCPC and the DPP missed an opportunity at that time to bring the CIP in line with other more effective leniency programmes.

**Richard Ryan, Florence Loric  
and Patrick Horan**  
Arthur Cox  
Dublin  
[www.arthurcox.com](http://www.arthurcox.com)

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. They already have a number of significant investigations ongoing and recent comments by the chairperson of the CCPC 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 significant implications 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 expect to see some form of guidance from the CCPC in setting out its approach to the exercise of those powers. Any protocol that it adopts will have to take account of the Supreme Court's findings regarding the requirement to exercise powers of search and seizure proportionately and the need to engage with parties that are the subject of a dawn raid in a manner that respects their right to privacy under article 8 of the ECHR. In addition, search warrants or authorisations that do not contain sufficient information on the subject matter and scope of the investigation for the parties concerned to be able to determine their rights would appear to be open to challenge.