Dominance

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little

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GETTING THE DEAL THROUGH

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Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

Ireland

Helen Kelly and Liam Heylin
Matheson

General questions

1 Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Abuse of a dominant position is prohibited by section 5 of the Competition Acts 2002–2017 (the Act) and article 102 of the Treaty on the Functioning of the European Union (the Treaty). Section 5 of the Act mirrors article 102 of the Treaty except that section 5 refers to abuse of a dominant position in trade for any goods or services in the state (ie, Ireland) or in any part of the state.

The Irish national competition authority, the Competition and Consumer Protection Commission (CCPC) (formerly known as the Competition Authority) and the Commission for Communications Regulation (ComReg) (see question 4) can investigate breaches of section 5 and article 102 prohibition. However, only the Irish courts can make a legally binding finding that conduct constitutes an unlawful abuse of a dominant position.

The Act makes abuse of a dominant position (under section 5 or article 102 or both) a criminal offence that can be prosecuted before the Irish courts and is punishable by financial penalties. The Act also includes specific provision for aggrieved persons and the CCPC to take civil proceedings before the Irish courts seeking remedies for an abuse of a dominant position. The remedies available in civil proceedings include a court declaration, damages and an injunction. In particular, section 14(7) of the Act enables an Irish court to take intrusive structural measures to terminate a dominant position that has been abused (as well as to terminate the abuse) by issuing an order either:

> *(a) to require the undertaking to discontinue the abuse, or (b) require the undertaking to adopt such measures for the purpose of (i) it ceasing to be in a dominant position, or (ii) securing an adjustment of that position, as may be specified in the order (including measures consisting of the sale of assets of the undertaking) within such period as may be so specified*

To date, no penalty or structural remedy for abuse of dominance has been granted by the Irish courts and there have been no significant cases where damages were awarded.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

There is no definition of dominance within the Act. The Irish courts and the CCPC have adopted the definition formulated by the Court of Justice of the European Union (CJEU) in case 27/76, *United Brands v Commission* [1978] ECR 207:

> *(a) position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The object of the legislation and the underlying standard are strictly economic and do not seek to protect other interests (except for those provisions in the Act dealing with media mergers).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are sector-specific regulations in all key regulated sectors (electronic communications, postal services, energy and aviation). In the electronic communications sector the relevant regulatory body, ComReg, can designate operators as having significant market power in accordance with the 'Framework Directive' (2002/21/EU) on a common regulatory framework for electronic communications networks and services.

In the electronic communications sector, ComReg concurrently holds the same enforcement powers as the CCPC. The Communications Regulation (Amendment) Act 2007 as amended (the 2007 Act) extended ComReg's functions to include competition powers (concurrent with those of the CCPC) in respect of matters arising under, inter alia, section 5 of the Act concerning electronic communications services, networks or associated facilities.

A cooperation agreement is in place between the CCPC and ComReg. Pursuant to the 2007 Act, in instances of disagreement between the CCPC and ComReg as to jurisdiction, the decision as to which body shall act in a given instance falls to the Minister for Communications, whose decision is final. To date, in practice, ComReg tends to lead the investigation of competition law issues that affect the markets where it has jurisdiction.

Other sectoral regulators supervise operators in their respective sectors in accordance with the relevant sector-specific legislation. This legislation may enable the regulator to make ex ante rules designed to alleviate the effects of dominance. In addition to its cooperation agreement with ComReg, cooperation agreements are in place between the CCPC and eight other sectoral regulators with a view to avoiding duplication and ensuring consistency in their enforcement actions.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The prohibition on abuse of dominance applies to 'undertakings'. An undertaking is defined as 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits shall include an association of undertakings'.

Public bodies that carry on an economic activity, such that they satisfy the definition of an undertaking, are subject to the Act. In 2012 and 2013 the High Court considered allegations of abuse of dominance brought against public authorities responsible for charging for the use

of harbour facilities and in both cases it was decided that the defendant was acting as an undertaking subject to competition law (*Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources* [2011] IEHC 388 and *Island Ferries Teoranta v Galway County Council* [2013] IEHC 587). Further, in *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others* [2009] IEHC 588, the High Court found that the fact that the local authorities in the greater Dublin area were responsible for the regulation of waste collection services within their respective areas did not preclude them from being 'undertakings' when the local authorities themselves provided waste collection services. In October 2008 the Competition Authority determined that the Health Service Executive is not an undertaking when it engages in either negotiating with pharmaceutical representatives in respect of the ex-factory price of certain drugs or purchasing community pharmacy services from private sector pharmacy undertakings (Enforcement Decision (ED/01/008)). In the *Lifeline Ambulance Services v HSE* [2012] IEHC 432, the High Court held that public authorities such as the HSE can only be considered undertakings in relation to purely economic activities drawing a distinction between tasks assigned to authorities like the HSE by statute to secure a public interest benefit, such as provision of emergency ambulance services, and tasks that are more economic in nature, such as ambulance transport of private patients.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Section 5 of the Act and article 102 apply only to dominant firms.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes. Section 5(1) of the Act and article 102 provide that any abuse by 'one or more undertakings' of a dominant position is prohibited. In *A&N Pharmacy v United Drug* [1996] 2 ILRM 42, the High Court recognised that collective dominance may exist in circumstances in which three suppliers controlled 90 per cent of the relevant market.

In *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others*, the High Court found that the local authorities in question were collectively dominant in respect of the provision of waste collection services in the greater Dublin area as well as being dominant individually within each of their respective geographic areas.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The legislation is applicable to dominant purchasers, as confirmed by the Competition Authority in rejecting an allegation that Aer Lingus had abused its position on the market for the purchase of travel agents' services (Authority Decision No. E/02/001) and by the High Court in *Blemings v David Patton* [2001] 1 IR 385 and *Lifeline Ambulance Services Limited v Health Service Executive* [2012] IEHC 432.

Section 5(2)(a) of the Act provides that an abuse of a dominant position may involve 'directly or indirectly imposing unfair purchase or selling prices', which confirms that the Act applies to dominant purchasers. Enforcement practice and case law has not provided for any distinction in the application of the law to dominant suppliers as regards dominant purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

There is no test for market definition within the Act. However, the High Court has referred to the test set out in the European Commission's notice on the definition of the relevant product market for purposes of Community law ([1997] OJ L372/5) (the Notice), which states:

> *A relevant product market comprises all those products and / or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.*

The Irish courts and the CCPC generally follow the Notice's definition of the relevant geographic market, which states:

> *The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.*

The CCPC's practice on market definition is set out in its guidance in the merger control rules and its 'Enforcement Decisions'. In *Competition Authority v O'Regan & Others* [2004] IEHC 330 the question of the correct market definition was of key importance in the Supreme Court's overruling of the High Court's decision. In October 2004, the Competition Authority obtained a High Court ruling that the Irish League of Credit Unions (ILCU) had abused its dominant position in the market for credit union representation by refusing to supply savings protection insurance to credit unions that were not members of ILCU. The High Court ordered ILCU to share access to its savings protection scheme with credit unions not affiliated to it. The Supreme Court subsequently overruled the High Court's decision, finding that savings protection schemes were not, in fact, a commercially saleable product and that the Competition Authority had failed to provide an economic analysis to substantiate its claim that representation services and savings protection schemes were distinct products in distinct product markets ([2007] IESC 22). The Supreme Court concluded that a specific market for savings protection schemes did not exist as such protection schemes were only ever provided, both nationally and internationally, by leagues of credit unions and only to their own members. Accordingly, such schemes did not constitute a relevant product market. The Competition Authority's case that ILCU's conduct amounted to a tying abuse thus failed.

With regard to market share thresholds, the Irish courts and the CCPC will follow the case law of the CJEU in respect of this issue.

In *Meridian Communications and Cellular Three v Eircell* [2002] 1 IR 17, the High Court held that despite Eircell's relatively high market share (around 60 per cent), the plaintiffs had failed to prove that Eircell was dominant. The High Court held that reliance on the structural aspects of the market was not justified in the circumstances of the particular market in question and that the significance of Eircell's large market share was greatly diminished in light of its dramatic decline (from 100 per cent) over a relatively short period of time. Likewise, in *Blemings v David Patton* the High Court held that a monopsonist would not be dominant in the absence of barriers to entry and exit in the market.

In its 'Enforcement Decision' on RTÉ, while the Competition Authority did not reach any final findings on the point, it indicated that its preliminary view was that RTÉ was likely to hold a dominant position in the market for television advertising airtime in the state, despite the fact that its market share by revenue (55 per cent to 65 per cent) had been in decline and that new players had entered the relevant market.

In *TicketMaster Ireland* (Authority Decision No. E/06/001) the Competition Authority took the view that, although TicketMaster Ireland held 100 per cent of the Irish market for outsourced ticketing services for events of national or international appeal, no dominant position existed owing to the constraint placed on TicketMaster Ireland by large event promoters.

In the decision of the Electronic Communications Appeal Panel in the appeal by Three Ireland (Hutchison 3G Ireland) of a designation of significant market power (SMP), reliance was placed on the European Commission's SMP guidelines, which stressed that the existence of a dominant position cannot be established on the sole basis of large market shares and that a thorough overall analysis should be made of the economic characteristics of the relevant market before coming to a conclusion. In that case, despite the appellant's 100 per cent share of the market for voice call termination on its own network, the panel found that there was a failure to properly carry out the analysis required

including delay, market saturation, new entrants' issues, alternative buyers, the role of competition and presence of countervailing power; therefore, the SMP designation was overturned.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 5(2) of the Act or article 102 of the Treaty set out the examples of abuse of dominance. Such abuses may consist of:

- 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; or
- 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.

In enforcing the section 5 prohibition the CCPC tends to follow an effects-based approach. A good example of such an approach is the Competition Authority's decision in *TicketMaster Ireland* (referred to in question 9). Writing in a personal capacity, the member of the Competition Authority responsible for that decision subsequently noted that 'the form-based approach strongly supported the allegations of high prices based on exclusive contracts, while the effects-based analysis found, correctly, that countervailing buyer power, efficiencies and other factors meant that TicketMaster Ireland was neither dominant nor that its conduct was anticompetitive' (Dr Paul Gorecki, *Journal of Competition Law and Economics* 2006 2(3): 533-548).

Whereas formally there are no per se prohibitions of specific conduct under section 5 of the Act or article 102 of the Treaty, the CCPC is influenced by the approach of the European courts and the European Commission, such that certain forms of conduct on the part of dominant undertakings can be presumed to be abusive (although the company always retains the possibility to rebut that presumption or justify its conduct, see question 13). For example, in its decision in *Drogheda Independent* (Decision No. E/05/002), the Competition Authority noted that its approach towards the identification of unlawful predatory pricing was based on that of the CJEU in case C-62/86 *Akzo v Commission*, whereby prices below a dominant undertaking's average variable costs are presumed to be predatory. Likewise, in its 'Enforcement Decisions' regarding allegedly unlawful 'loyalty rebates' offered by RTE and An Post respectively (see question 29), the Competition Authority noted that its approach towards the identification of unlawful 'loyalty rebates' was based on decisions of the CJEU in joined Cases C-241/91 P and C-242/91 *RTÉ and ITP v Commission* and Case 5/69 *Volk v Vervaecke*. Accordingly there is no reason in principle why the Irish Courts and the CCPC should not follow the recent decision of the CJEU in case C-413/14 P *Intel v Commission*, which marks a shift away from the automatic classification of certain types of conduct as a per se abuse (ie, relying solely on a form-based analysis) to adopting a more effects-based approach whereby the CJEU held that Commission are required to examine all the circumstances of a case to determine if the conduct in question is capable of restricting competition.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, both are covered.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Dominance and abuse can take place in the same market or in neighbouring markets. *Donovan and others v Electricity Supply Board* [1997] 3 IR 573 involved a finding of an abuse of ESB's dominant position on the market for the supply of electricity by restricting competition on the market for the supply of electrical contracting services to low-voltage installations, on which its presence was minimal.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

General defences to allegations of abuse of dominance developed under EU law may be raised (eg, the concepts of objective justification and proportionality). Section 7(2) of the Act provides that it shall be a good defence to a criminal prosecution for an alleged abuse of a dominant position to provide that the 'act or acts conceived was or were done pursuant to a determination made or a direction given by a statutory body' (eg, a sectoral regulator). The issue of whether allegedly abusive conduct is imputable to a regulator or a regulated entity was considered in the recent case of *Shannon LNG Limited v Commission for Energy Regulation & Others* (see questions 22 and 29).

It is likely that the CCPC and the Irish courts will take account of the European Commission's guidance on its enforcement priorities in applying article 102 of the Treaty ([2009] OJ C 45/1), paragraph 28 of which provides that a dominant undertaking may justify its conduct on the basis that the conduct in question produces substantial efficiencies that outweigh any anticompetitive effects on consumers.

The CCPC considered the possibility of an efficiency defence or another objective justification for allegedly unlawful rebates in its investigations of RTE and An Post (see question 29) but took the preliminary view that there was insufficient evidence that the claimed efficiency gains outweighed the likely harm on competition.

Specific forms of abuse

14 Rebate schemes

There is no specific reference to unlawful rebate schemes in the Act but these can amount to abuse in breach of section 5 of the Act and article 102. The CCPC and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that rebate schemes can be 'capable' of restricting competition but that it is possible for a dominant firm to rebut that presumption (see question 10).

The CJEU found in *Irish Sugar* [2001] ECR I-5333 that the system of rebates operated by Irish Sugar plc on Irish sugar markets breached article 102 of the Treaty. To date, there are no decided Irish court cases that have dealt with this form of abuse.

The 'Enforcement Decision' on the Competition Authority's investigations of RTÉ (see question 29) was the first written account of its views on the complex issues surrounding the competition law compliance of rebate schemes offered by dominant undertakings. This decision was followed a year later by another 'Enforcement Decision' in relation to discounts offered by An Post. The approach taken by the Competition Authority in explaining the nature of its concerns regarding these discounts schemes followed closely the previous case law of the CJEU and the structure of European Commission guidance on its enforcement priorities in relation to cases involving article 102.

15 Tying and bundling

Section 5(1)(d) of the Act provides that abuse may, in particular, consist in, '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'.

In the *ILCU* case, discussed in question 9, the High Court held that ILCU's tying of access to its savings protection scheme to membership of ILCU involved the abuse of its dominant position, but this judgment was overturned on appeal to the Supreme Court.

In the case of *Blemings v David Patton*, the High Court held that a tie-in, whereby chicken farmers were obliged to purchase meal through the chicken processor rather than directly from the suppliers of meal, was not abusive as it was objectively necessary in order to ensure quality control and traceability of the product.

16 Exclusive dealing

There is no specific reference to such conduct in the Act, but it can amount to an abuse of dominance in breach of section 5 of the Act.

This type of conduct was examined in the *Masterfoods v HB* case [1993] ILRM 145, where the High Court considered that the provision of ice cream freezers to retailers for the exclusive storage of a dominant supplier's product did not amount to an abuse by the supplier of its dominant position, even though it recognised that this strategy made it more difficult for new entrants to become established in the market. However, in a related case, T-65/98, *Van den Bergh Foods v Commission* [2003] ECR-II – 4653, the General Court held that the exclusivity clause had the effect of preventing retailers from selling other brands of ice cream and preventing competitors from gaining access to the market, and, therefore, involved the abuse by the supplier of its dominant position (this position was subsequently confirmed by the CJEU).

17 Predatory pricing

Section 5(1)(a) of the Act refers to 'unfair' prices but there is no specific reference to predatory pricing in the Act. Nonetheless, predatory pricing can amount to abuse in breach of section 5 of the Act and the CCPC, and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that predatory pricing can be unlawful.

In *Drogheda Independent* (referred to in question 10) the Competition Authority considered an allegation of predatory pricing in the market for advertising in local newspapers. Although it took the view that the undertaking in question was not dominant, its approach to predation is noteworthy. First, it stated that:

> *predatory pricing refers to a situation whereby a dominant undertaking strategically reacts to the entry or presence of a competitor by pricing so low that it deliberately incurs losses so as to expel the competition from the market in order to charge below the competitive level in the future.*

Second, it stated that in investigating predatory pricing allegations it follows 'a structured rule of reason approach' in order to assess whether the alleged predation was plausible, there was any alternative business justification for the conduct other than predation, recoupment was feasible and pricing was below cost.

18 Price or margin squeezes

Section 5(1)(a) of the Act refers to 'unfair' prices but there is no specific reference to price or margin squeeze in the Act. Nonetheless, such conduct can amount to abuse in breach of section 5 of the Act and the CCPC and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that price squeeze can be unlawful.

In 2014, ComReg conducted an investigation into an alleged abuse of an alleged dominant position by RTÉ and its wholly owned subsidiary RTÉ Transmission Network Limited, following a complaint by a competitor (TV3). The complaint referred to the market for the supply of wholesale analogue terrestrial television transmission and distribution services and it was alleged, among other things (see question 22), that RTÉ's prices were unlawful because they discriminated against and price-squeezed its competitor, TV3. Following a detailed investigation, including economic analysis of the alleged price differentiation, ComReg published a decision explaining that there were insufficient grounds for action in respect of this allegation. In particular, ComReg identified no evidence that RTÉ's prices resulted in a material impediment to competition. ComReg did not reach a firm conclusion on market definition or whether RTÉ was dominant because it was not necessary as there was no evidence of an abuse.

19 Refusals to deal and denied access to essential facilities

There is no specific reference to refusal to deal or provide access to essential facilities in the Act. Nonetheless, these types of behaviour may be considered abusive and unlawful under section 5 of the Act.

In *A&N Pharmacy v United Drug*, the possibility of an unlawful refusal to deal was considered and an injunction was granted that obliged the defendants to continue trading with the plaintiffs pending the full hearing of that case. This case was taken under the predecessor to the Act, which contained a provision similar to section 5.

In the *ILCU* case, discussed in question 9, the Competition Authority suggested that the court consider the practices in question in particular as an unlawful refusal to deal. On appeal, the Supreme Court said that there could be no question of an abusive refusal to supply given its finding that savings protection schemes were not a commercially saleable product.

In December 2005, the Competition Authority published a Guidance Note on Refusal to Supply.

The leading Irish case on essential facilities is *Meridian Communications v Eircell* [2001] IEHC 195. As part of its case, Meridian (a mobile virtual network operator) claimed that the mobile network owned by the licensed operator Eircell constituted an essential facility and that refusal by Eircell to give access to its network was, therefore, an abuse of Eircell's dominant position. However, the High Court took the view that Eircell had no facility that could not be replicated and that, accordingly, no essential facility existed.

20 Predatory product design or a failure to disclose new technology

There are no decided Irish cases that have dealt with this form of abuse under section 5 of the Act. Section 5(1)(b) of the Act provides that abuse can consist of 'limiting production, markets or technical development to the prejudice of consumers', which may possibly be utilised by the CCPC or Irish courts to allege abusive failure to disclose new technology.

21 Price discrimination

Section 5(1)(c) of the Act provides that 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' is an example of abuse. This provision is wide enough to cover discriminatory pricing or other discriminatory trading terms where there is no objective justification for the different terms offered by the dominant undertaking.

Two recent Irish cases, both brought by the same plaintiff company and discussed in question 5, addressed allegations of discriminatory and unlawful charges by a dominant undertaking.

In *Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources*, the High Court took the view that an order by the Minister that imposed differential harbour charges on ferries with capacity to hold more than 100 passengers would amount to an unlawful abuse of dominance 'in the absence of an objective justification for the amount of the charge and for its differential basis of treatment'. Conversely, it was held in *Island Ferries Teoranta v Galway County Council* that a harbour charge was not discriminatory or abusive as the per passenger charge applied equally in respect of all passengers arriving on all ferries.

22 Exploitative prices or terms of supply

Section 5(1)(a) of the Act states that 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' is an example of abuse.

In *Donovan v ESB* (see questions 12 and 29), the monopoly supplier of electricity was held to have abused its dominant position because it refused, without objective justification, to give members of an association of electrical contractors certain advantages that it had granted to other electrical contractors.

In a more recent Irish court decision on *Shannon LNG Limited v Commission for Energy Regulation & Others* [2013] IEHC 568, the High Court briefly considered and rejected a claim that a tariff regime to be imposed by a regulator would give rise to unfair and unlawful pricing by a dominant market player, in breach of section 5 of the Act. This case related to the proposed imposition of a tariff regime by the defendant energy sector regulator as a result of which the applicant was to be charged tariffs for the use of interconnecting gas infrastructure from which it would not benefit. The applicant alleged that the proposed tariff regime would enable or compel the incumbent gas operator, Bord Gais Éireann (BGE), to 'abuse the dominant position it occupies in the market in the state for the transmission of natural gas'. The High Court considered that the essential question to be asked was 'whether the conduct in question and its effects are attributable to the commercial choice of the operator or to its compliance with a binding direction on the part of the regulator'. The High Court rejected the allegation of abuse of dominance on the basis that the proposed tariff regime would

not 'necessarily bring about abusive conduct on the part of BGE'. The High Court also found that the decision as to whether or not the gas interconnectors were integrated with the onshore transmission network was exclusively one taken by the regulator and not a commercial choice attributable to BGE. The cost regime was therefore not attributable to any autonomous commercial choice on the part of BGE, but would be imposed upon it by the sector regulator.

In *Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources*, mentioned in questions 5 and 21, the court seemed to hold that the charges imposed on the ferry operator were unlawful for being exploitative (as well as discriminatory). The court took the view that the objective of the increase in charges was not to charge a fee based on the value or cost of the service provided, but to exploit the passenger traffic as a new source of revenue.

In ComReg's 2014 decision on a complaint of abuse of dominance against RTÉ Transmission Network Limited by a competitor (TV3) (see question 18), an allegation of excessive pricing was dismissed following an investigation. This decision was based, in particular, on an economic assessment of the allegedly unlawful prices against benchmarks based on cost, profitability and the economic and market value of the relevant services.

In *Greenstar* (Authority Decision No. E/05/002), the Competition Authority rejected allegations of excessive pricing in the provision of household waste collection services by Greenstar, as its prices were not shown to be excessive in light of either the cost or economic value of the relevant service and compared with prices charged by private operators in other markets. The Competition Authority also expressed concerns about the issue of an appropriate remedy if excessive prices were found and appeared to suggest that, except in exceptional circumstances, it would not bring excessive pricing cases.

23 Abuse of administrative or government process

There is no reference in the Act to abuse of process or abusive litigation, nor are there any court judgments or Competition Authority or CCPC decisions that consider such matters in the context of the abuse of a dominant position. However, such conduct may possibly be considered to be abusive.

24 Mergers and acquisitions as exclusionary practices

A merger or acquisition that has been cleared by the CCPC in accordance with the merger control provisions set out in Part 3 of the Act may not be challenged on the basis of section 5(1) of the Act. A merger or acquisition that is not required to be notified to the CCPC on a mandatory basis (ie, where the financial thresholds for mandatory notification are not satisfied) may also benefit from the immunity from challenge under section 5(1) of the Act if it is notified to the CCPC on a voluntary basis and the CCPC decides to clear it.

If a merger or acquisition is not notified to and cleared by the CCPC, it may be challenged on the basis of section 5(1) of the Act at any time. However, to date, no merger or acquisition has been formally challenged on the basis of section 5 of the Act. However, the CCPC has investigated non-notifiable mergers where it has concerns about a possible breach of section 5 (see, for example, Competition Authority Decision No. E/04/001, *Monaghan Mushrooms*, and the press release on the proposed merger by Easons and Argosy).

25 Other abuses

The examples of abuse contained in section 5 of the Act are indicative and not exhaustive. Conduct that constitutes an abuse contrary to article 102 of the Treaty is also likely to fall within the prohibition contained in section 5 of the Act.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Both section 5 of the Act and article 102 of the Treaty can be enforced by private parties in the Irish courts.

Under the provisions of the Act, any person who is aggrieved in consequence of any abuse that is prohibited under section 5 of the Act or article 102 of the Treaty has a right of action for relief against any undertaking or any director, manager or other officer of an undertaking that commits an abuse. The relief that can be granted to the plaintiff could be in the form of an injunction, a declaration or damages (including exemplary damages).

Under the provisions of the Act, the CCPC has the right to seek an injunction or declaration (but not damages) in respect of a breach of section 5 of the Act or article 102 of the Treaty and the CCPC can apply for a court order making legally binding any settlement terms given to it by a private party following an investigation.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The CCPC has not been conferred with the power to impose sanctions. The courts can grant injunctions or declarations and award damages to private litigants in civil cases.

In addition, both the CCPC and the DPP can initiate criminal prosecutions. However, only the DPP can prosecute serious infringements (prosecutions on indictment for jury trial) of the Act. The maximum penalty that can be imposed for a breach of section 5 of the Act or article 102 of the Treaty is a fine of €5 million or 10 per cent of turnover, whichever is the greater. There is no provision within the Act for imprisonment in cases involving the abuse of a dominant position.

As explained in question 1, structural remedies are also provided for. Under section 14(7) of the Act, where a court has decided that an undertaking has abused a dominant position contrary to section 5 or article 102, it may order either that the dominant position be discontinued unless conditions specified in the order are complied with, or that the dominant position be adjusted (by a sale of assets or as otherwise specified) within a period specified by the court.

To date, the Irish courts have not imposed any penalty or structural remedy for abuse of dominance and there have been no significant cases where damages were awarded.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

As noted above in question 27, the CCPC has not been conferred with the power to impose sanctions due to provisions of the Irish constitution. Only the courts can impose sanctions for breaches of sections 4 and 5 of the Act.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Complaints regarding alleged abuse of dominance are regularly made to the CCPC. The CCPC does not report figures for dominance complaints separately from complaints relating to cartels and anticompetitive agreements. Its most recent annual report (for the period 1 January 2016 to 31 December 2016) states that the CCPC reviewed 80 complaints relating to suspected breaches of competition laws during this period.

The public enforcement powers provided for in the Act have rarely been used in respect of abuse of dominance.

Thus far, there has been only one civil prosecution in respect of an alleged breach of section 5 (the *ILCU* case discussed at question 9) and this case was unsuccessful on appeal to the Supreme Court.

Thus far, there has been no criminal prosecution in respect of an alleged breach of section 5.

In recent years, section 5 investigations have most frequently resulted in negotiated settlements and the CCPC and ComReg published details of these investigations on its website in the form of 'Enforcement Decisions' or press releases.

In March 2015, the CCPC published a press release on a settlement concluding its investigation into an alleged abuse of dominance by the Glasnevin Trust, the largest provider of funeral and burial services in Ireland. The settlement terms included requirements to facilitate price transparency and to prevent price discrimination against customers who are also competitors.

In August 2014, the Competition Authority published a press release on a settlement concluding its investigation into an allegedly

unlawful refusal to supply by a school uniform manufacturer. The settlement terms included a commitment to supply the complainant whom the manufacturer had originally refused to supply.

In October 2014, the Competition Authority published an 'Enforcement Decision' on its investigation of the compliance of certain discounts offered by the universal postal service provider, An Post, with the section 5 prohibition on unlawful 'loyalty rebates'. The decision identified competition concerns regarding the discounts but stated that its investigation was closed because An Post had amended its discount procedures in a manner that addressed the CCPC's concerns.

The above case involving An Post was the second recent investigation into allegedly unlawful 'loyalty rebates'. In January 2012, the Competition Authority published an 'Enforcement Decision' in respect of its investigation into certain discounts offered by the national public service broadcaster, RTÉ. The decision identified competition concerns regarding the discounts and stated that its investigation was closed because RTÉ made a binding commitment to cease offering 'share deal' discounts that were conditional on a share of the advertiser's television advertising budget being committed to RTÉ.

In early 2006 the Competition Authority published details of an investigation of a computerised reservation system (operated by Galileo Ireland) used by most travel agents in Ireland that resulted in a non-discriminatory manner (press release, 11 January 2006).

The courts have been asked to consider in a number of cases whether or not an abuse of a dominant position has occurred. Of the cases considered to date, damages have been found to be payable in only one case involving abuse of dominance (*Donovan and others v Electricity Supply Board*), where it was held that the defendant had abused its dominant position by imposing unfair trading conditions. In *A&N Pharmacy v United Drug*, an injunction was granted that obliged the defendants to continue trading with the plaintiffs pending the full hearing of that case. Both cases were taken under the predecessor to the Act, which contained a provision similar to section 5.

In *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others* the High Court heard a challenge by Panda Waste, a domestic waste collector, to a decision taken by the four local authorities responsible for Dublin City and County to introduce a 'variation' to their joint waste management plan for 2005 to 2010, which would permit each local authority to reserve to itself responsibility for waste collection services in areas in which that local authority had previously competed with private operators (subject to the right of each local authority to put waste collection services in any given area out to tender on an exclusive basis). Panda Waste alleged, inter alia, that this 'variation' amounted to an abuse of a dominant position (held either individually or collectively) by the local authorities, as it amounted to an unfair trading condition influencing or seeking to strengthen their position in the market for the collection of waste in the greater Dublin area in which competition had previously existed. In his judgment delivered on 21 December 2009, Mr Justice Liam McKechnie overturned the variation on the basis, inter alia, that each local authority was dominant in its respective area and that the local authorities were collectively dominant in the greater Dublin area in the market for the collection of household waste and that the 'variation' amounted to an abuse of a dominant position (held either individually or collectively) by the local authorities as it was an agreement in breach of section 4 of the Act (which prohibits anticompetitive agreements between undertakings), it would substantially influence the structure of the market to the detriment of competition and it would significantly strengthen the position of the local authorities on the market.

More recently, in *Shannon LNG Ltd and Anor v Commission for Energy Regulation and others* (mentioned at question 22), the High Court heard a judicial review challenge by Shannon LNG, an importer of liquefied natural gas (LNG), to a decision taken by the Commission for Energy Regulation (CER) relating to new methodologies for the calculation of tariffs relating to the use of and access to the transmission system and pipeline network for transport and delivery of natural gas in the Irish state-owned and operated by BGE. Among other claims, Shannon LNG claimed that the decision taken by the CER would enable or compel BGE to abuse the dominant position it occupied in the market in the Irish state for the transmission of natural gas contrary to article 102 of the Treaty as the contested decision would have the effect of applying charges for access to the onshore transmission system based on both the costs of operating and maintaining that system and the costs of the interconnectors, which the Shannon LNG would not be using. Shannon LNG also claimed a margin squeeze because the tariffs would have the effect of reducing the costs of using the interconnectors while increasing access costs at the other entry points to the transmission system, thereby making it economically more attractive for importers to use the interconnectors. Mr Justice John Cooke rejected Shannon LNG's claims under article 102 of the Treaty as premature, as the actual tariffs had not yet been set and no entry or exit charges had been calculated. Mr Justice Cooke stated that some level of cross-subsidisation within the transmission system was likely inevitable. The judge also found that the margin squeeze claim was unfounded as it was not possible to identify separate defined markets for the provision of services for transport of gas to Ireland, and a market for transmission services onshore within the state.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

There is no express provision in the Act to deal with this situation. Under the general relief provisions in section 14(5) of the Act, however, a contract could be declared void and unenforceable by a court.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Section 14(1) of the Act provides that any person who is aggrieved in consequence of any abuse that is prohibited under section 5 of the Act or article 102 of the Treaty shall have a right of action for relief against any undertaking or any director, manager or other officer of an undertaking that commits an abuse. It is possible to seek a mandatory injunction under which a dominant undertaking may be obliged to grant access to infrastructure or technology or to trade with the plaintiff seeking the relief. In *ILCU*, discussed in questions 9 and 29 above, ILCU was ordered by the High Court to share access to its savings protection scheme with credit unions not affiliated to ILCU on the basis that access to the scheme was unlawfully tied to membership of ILCU. This order was subsequently overturned by the Supreme Court. Also, in *A&N Pharmacy v United Drug Wholesale*, discussed in questions 7 and 19, the High Court granted an interlocutory injunction that obliged the defendant to supply the plaintiff with pharmaceutical products on terms of cash on delivery.

Further, the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017 (the Damages Regulations), transposed Directive No. 2014/104 EU (the Damages Directive) into Irish law on 17 February 2017, which governs follow-on actions for damages.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Section 14(1) of the Act provides that an aggrieved person may bring an action in the courts seeking damages, including exemplary damages. To date, there have been no significant cases where damages were awarded.

Prior to the transposition of the Damages Directive into Irish law, in late 2008/early 2009, two private damages actions arising from the European Commission decision in *Irish Sugar (Gem Pack Foods v Irish Sugar plc and ASI v Greencore plc)* were settled part-way through their respective hearings before the High Court. As both cases were settled prior to judgment, the Irish courts have yet to have an opportunity to establish their approach to quantifying damages in such cases.

Regulation 8 of the Damages Regulations now provides that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed irrefutably established for the purposes of an action for damages. Further the final decision taken in another EU member state may be presented as prima facie evidence that an infringement of competition law occurred.

Regulation 4 of the Damages Regulations provides that where a person has suffered harm caused by an infringement of competition law, the person shall be able to claim and obtain in any actions for damages under section 14 of the Competition Act 2002, full compensation for that harm. The Damages Regulations amends section 14 of the Competition Act 2002 to remove the provision for exemplary damages. Further, Regulation 15 states that where quantification of harm is practically impossible or excessively difficult to quantify, an Irish court may estimate such harm. The CCPC may, upon request by an Irish court, assist the court with this determination.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Where the CCPC takes a view that conduct breaches section 5 of the Act or article 102 of the Treaty, it may initiate civil or criminal proceedings before the Irish courts. Civil proceedings are more likely to be initiated for alleged breaches of section 5 or article 102 (eg, the *ILCU* case referred to above in questions 9 and 29). In that case, civil proceedings were initiated in the High Court, whose judgment was appealed to (and overturned by) the Supreme Court. As stated in question 29, section 5 or article 102 investigations most frequently result in negotiated settlements between the CCPC and the relevant undertaking.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

As a result of the Competition (Amendment) Act 2006, the following types of unilateral conduct on the part of both dominant and non-dominant 'grocery goods undertakings' are prohibited (provided that such conduct has the object or effect of restricting, distorting or preventing competition):

- the unilateral application by grocery goods undertakings of dissimilar conditions to equivalent transactions with other grocery goods undertakings;
- any attempt by retailers to compel or coerce the payment of allowances from wholesalers or suppliers in return for advertising particular grocery products in stores; and
- any attempt by retailers to compel or coerce the payment of allowances from wholesalers or suppliers in return for the provision of retail space in newly opened, newly expanded or newly managed stores (a practice referred to in Ireland as 'hello money').

A 'grocery goods undertaking' means any undertaking (other than in the restaurant and catering sector) engaged for gain in the production, supply or distribution of food or drink for human consumption.

In addition to the regime for grocery goods undertakings under the Competition (Amendment) Act 2006, the Consumer Protection Act (Grocery Goods Undertakings) Regulations 2016 (the Regulations) came into effect on 30 April 2016 and apply to contracts entered on or after this date and contracts entered into before 30 April 2016 but renewed after this date. The Regulations impose new obligations on retailers or wholesalers who, either alone or as part of a group, have an annual worldwide turnover in excess of €50 million. The Regulations apply to these parties' arrangements with suppliers for the purchase of 'grocery goods'.

The Regulations impose new obligations on grocery goods undertakings to do the following in particular:

- have a written signed contract in place;
- not vary, terminate or renew a grocery goods contract unless this is expressly provided for and the relevant contract provides for a reasonable notice period;
- provide (on request from a supplier) a forecast of the grocery goods likely to be required in respect of a given future period;
- unless expressly provided for by written contract, pay suppliers within the later of: 30 days of the date of receipt of any invoice; and the date of delivery; and
- not compel a supplier to pay for stocking; promotions; marketing; retention, increased allocation or positioning; advertising or display; wastage; or shrinkage.

Breach of the Regulations (including failure to comply with any contravention notice issued by the CCPC under the Consumer Protection Act 2007) may result in prosecution of a non-compliant 'grocery goods undertaking', either by summary or indictment with a maximum potential penalty of a fine of up to €100,000. Failure to comply can also result in criminal prosecutions of individuals including the imposition of fines and terms of imprisonment for relevant directors and officers of the companies concerned.

The CCPC also has powers to investigate compliance with the Regulations and to 'name and shame' offenders and statute also provides a legal basis for civil damages actions for breach of the Regulations.

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