

Ireland: recent developments in merger control and antitrust enforcement

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Ireland is one of the best countries in the world for ease of doing business, according to Forbes. The Irish regulatory environment is business focused and pragmatic. Companies deal with smaller regulatory teams, giving them and their advisers greater access to senior personnel. Competition is no exception. Matheson is the law firm of choice for internationally-focused companies and financial institutions doing business in and from Ireland. We are currently advising a number of UK companies, including those in the banking, insurance, media, pharma, tech and telecoms industries, that are looking to make a move to Ireland or expand their operations here.

Merger control

Merger activity in Ireland has rebounded in recent years and 2018 is continuing this trend, notwithstanding the uncertainty around Brexit. The Competition and Consumer Protection Commission (CCPC) is the Irish agency responsible for reviewing mergers where each of the acquirer and target's turnover in Ireland exceeds €3m and the parties together have turnover of €50m or more. That low bar makes for a high volume of 'no issue' mandatory notifications both for domestic and international transactions. One of the challenges for the CCPC is to clear these quickly and efficiently and, while it has up to six weeks to do so, we would expect to receive clearance for no issue cases well in advance of that deadline, in line with the practice of other European jurisdictions. In 2017, of the 72 notifications made to the CCPC, 68 were cleared

unconditionally and the average time for a no issue phase one investigation was 24 working days, with the shortest clearance achieved in 12 working days. With merger control thresholds expected to be revised upwards in 2018 (to €10m for each of the acquirer and target and €60m for the two businesses together) the overall number of mergers requiring mandatory notification is expected to taper.

Where potential competition concerns are identified, the CCPC can extend its initial phase one investigation by requesting additional information. In 2017, nine notifications involved extended phase one investigations, with an average overall investigation time of around 70 working days. Four of those notifications resulted in some form of phase one commitment, including behavioural and quasi-structural. For example, in Applegreen/JFT, the buyer was required to commit to using a part of its share of the Joint Fuel Terminal at Dublin Port to support third parties seeking to enter the aviation fuel business at Dublin Airport. In Kantar Media/NewsAccess, Kantar was required to divest fixed assets and commit to release a number of contracted customers from the remaining term of their fixed-term contracts. The latter case was of particular interest given that it fell below the financial thresholds triggering a mandatory filing but was nonetheless 'called-in' by the CCPC due to concerns that it would restrict competition.

Antitrust enforcement

On the enforcement side, the CCPC has been relatively quiet since an Irish Supreme Court

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judgment in *CRH v CCPC* last summer struck down the regulator's use of dawn raid powers as disproportionate and in breach of CRH's right to privacy under Irish and EU law. In that case, the CCPC had raided CRH's offices and seized hundreds of thousands of emails, without agreeing a post-search protocol to determine which of those emails would be relevant to its investigation. In a landmark judgment the Irish Supreme Court found this to contravene the company's fundamental right to privacy under Article 8 of the European Convention on Human Rights. The outcome of that case has served as a wakeup call – not just to the CCPC but regulators in the UK and the EU – that their search powers are not limitless. That is important for a company to bear in mind should it find itself at the sharp end of a warrant.

The CCPC does not have civil enforcement powers and must go to court to prosecute alleged anti-competitive infringements, leading businesses to negotiate commitments that avoid financial sanctions. For example, Nursing Homes Ireland (a representative body of nursing homes in Ireland) recently offered commitments to notify its members in writing about their competition law obligations and to organise compliance training. The CCPC also agreed commitments from universities to run regular procurement exercises for gown hire.

For the most serious allegations, the CCPC has not shied away from taking

companies and individuals to court although the sanctions obtained have been small by international standards. In 2017, in *CCPC v Aston Carpets & Flooring*, a company was fined €10,000 for engaging in bid-rigging and the company director was handed down a three-month custodial sentence, suspended for two years, for obstructing the investigation. The CCPC has also been investigating potential price signalling in the private motor vehicle insurance market, issuing numerous written summonses to market participants.

Looking ahead

2018 is already a bumper year for merger control in Ireland, with almost 30 notifications submitted to the CCPC since 1 January (a 40% increase on this time last year). With Brexit looming, Irish authorities are readying themselves for a potential influx of new businesses, some of which may establish by acquisition as well as those that will seek to re-domicile here. Companies involved in the acquisition of a significant stake in an Irish company should check whether that triggers mandatory notification or is at risk of being 'called in' by the CCPC on the grounds that it could restrict competition. The CCPC has recently opened an investigation into a company for failure to notify a change of control in 2015, which carries a maximum fine of €250,000 (and criminal penalties for officers

of the company who knowingly and wilfully authorised the breach).

2018 could also be the year when the CCPC is finally bestowed with civil enforcement powers, a possibility that came one step closer to reality when a private members bill was introduced into the Irish Parliament earlier this year. This is in line with a wider European-level initiative to make it easier for national competition authorities to take enforcement action. However, previous attempts have stalled in the absence of strong government support and for now the bill remains at committee stage.

One area to watch is the increased proliferation of agencies authorised to conduct dawn raids, with the Central Bank, Data Protection Commission and the Office of the Director of Corporate Enforcement now holding these powers alongside the CCPC. This has caused companies in Ireland to revisit their existing dawn raid protocols and consider their level of exposure. As always, a proactive approach to compliance and a constructive relationship with the relevant regulator remains of paramount importance to mitigating the risk of unwelcome enforcement action. ■

Ronan Scanlan recently joined Matheson from the Competition and Markets Authority in London, where he was deputy director of mergers. Helen Kelly heads the EU, competition and regulatory group.