# Abuse of Dominance / Monopolization in Ireland

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Why is Ireland interesting and relevant for antitrust lawyers globally in the context of dominance and monopolization? There are at least five cogent reasons. Many lawyers advising U.S. clients may be surprised to know that the value of U.S. foreign direct investment (FDI) in Ireland is greater than the value of U.S. FDI in Brazil, Russia, India and China (the BRICs) combined so their U.S. clients could well be affected by the Irish regime. Ireland is part of the European Union (EU) and therefore has both the EU and Irish abuse of dominance regimes. Ireland imposes some, but limited, criminal liability in some instances for abuse of dominance. Ireland has also generated various interesting dominance cases including the litigation relating to *HB/Mars/Ice-cream*[1] (on ice cream cabinet and outlet exclusivity) and *Magill*[2] (on the interplay between competition/antitrust law and intellectual property rights) before the EU institutions. There have also been some interesting Irish cases on the topic over the 27 years of Ireland's modern competition law regime which was enacted in 1991[3] and amended several times since. Ireland is a relatively small economy and country so there is, all other things being equal, a higher likelihood of fewer and stronger competitors being present in a smaller, rather than a larger, setting which would lead one to believe that there ought to be more interesting dominance cases than there would be in a larger economy.

Even before the modern regime, Ireland has long had abuse of dominance or monopoly rules—these were contained in the so-called Restrictive Practices Acts which were largely repealed in 1991. The current rules on abuse of dominance are embodied primarily in Section 5 of the Competition Act 2002 (as amended) (the 2002 Act).

Section 5 does not outlaw dominance (or a dominant position) as such; instead the section outlaws the "abuse" of the dominance in the State (i.e., the Republic of Ireland) or any part of the State. The section refers to trade in goods or services in the State, but this could include international trade where there is an effect on trade in any part of the State because the section is not confined to Irish businesses or nationals.

Section 5(1) of the 2002 Act provides that "[a]ny abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited." It is notable that section 5 relates to "any part of the State" and not a "substantial part" of the State which would be the equivalent provision in EU law (i.e., Article 102 of the Treaty on the Functioning of the European Union (TFEU) which refers to the EU internal market or a substantial part of that market).

There are five key ingredients to Section 5: i) the defendant must be an undertaking (i.e., the "undertaking" element);[4] ii) the defendant's activities operate in a particular product, geographical and temporal market (i.e., the "market" element);[5] iii) the defendant must have a dominant position in that market (i.e., the "dominance" element); iv) the dominance must exist in trade in goods or services in the State or in any part of the State (i.e., the "trade" element); and v) there must be an abuse of that dominance which is not objectively justified (i.e., the "abuse" element). The section applies both the conduct of sellers (which is the norm) but also the conduct of buyers/purchasers as well.[6]

Section 5 does not define dominance or a "dominant position." In regard to the definition of dominance, it is likely that the Irish courts and competition agencies will continue to follow the EU approach in *United Brands v. Commission*[7] that dominance involves 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. Market share is an important—but only one—step in the analysis. The Irish Supreme Court stated in *Competition Authority v. O'Regan and others*[8] that:

> 89. . . .the first, principal and potentially determinative issue on the appeal is the identification of the relevant product market. If there are truly distinct markets for the supply of the two services identified by the Authority, then it is not in dispute that [the undertaking alleged by the then Competition Authority to be dominant in this case] enjoys an exceptionally large market share in each of them. According to the learned trial judge, that share is 80 to 85% of the market for representation services and 100% of the market. . . . In principle, that may not be decisive. A very high market share may, in certain circumstances, exist without the seller having that market power which is the essential characteristic of a dominant position. However, it is clear that a large market share is always regarded as strongly indicative of dominance. Assuming that [the undertaking alleged to be dominant] enjoys that position of dominance in a distinct product market. . ., it is probably inescapable that it is engaged in abusive tying activity.

The Irish institutions look to more than market shares in determining whether dominance exists;[9] instead, they examine factors such as: the market power of the undertakings; the power of other undertakings in the market; trends over time; barriers to entry, expansion and exit in the market; countervailing buyer power; legislative barriers; intellectual property rights; and any other relevant factor. Irrespective of how dominance is defined, dominance (i.e., a dominant position) must exist otherwise section 5 is simply inapplicable.

Section 5(2) of the 2002 Act does not define "abuse" of dominance but instead gives a non-exhaustive list of four examples of abuse:

> Without prejudice to the generality of subsection (1),[10] such abuse may, in particular, consist in—
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
> (b) limiting production, markets or technical development to the prejudice of consumers,
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
> (d) 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 terms of abuse, the Irish institutions would be likely to adopt the same approach to "abuse" as the EU ones have taken. Ultimately, the Irish institutions will be influenced by thinking as it evolves in both legal and economic circles. The Irish courts and agencies have not yet had a cause to consider the concepts of "dominance" or "abuse" in depth but when they do, they would be unlikely to depart easily or lightly from the EU jurisprudence. In essence, a good rule of thumb is that for "abuse" to exist, there ought to be a theory of harm consistent with the dominant position being misused in a way which causes harm to consumer welfare.

Abuse has been alleged (but not always found) to exist in regard to issues such as discriminatory pricing,[11] excessive pricing,[12] margin squeeze,[13] predatory pricing,[14] rebates,[15] refusal to supply[16] and tying.[17] Unfortunately from the perspective of enforcement and the development of the law in Ireland, many of the enforcement cases relating to the alleged abuse of dominance are quite old and the competition agency does not have a published record of taking many abuse of dominance cases in recent years (preferring to focus on anti-competitive arrangements and other issues).

For completeness, there is a connection between the rules on abuse of dominance and merger control. It is possible that section 5 of the 2002 Act could be used to control mergers and acquisitions (or, in EU parlance, concentrations).[18] So, section 5(3) provides that transactions which are notified under the merger control provisions of the 2002 Act are immune from challenge under section 5.[19]

From the concepts of a "dominant position" and "abuse," it is useful to turn to considering the institutional structure involved in applying the abuse of dominance rules in Ireland.

There are four agencies or institutions which are most relevant in terms of enforcement of the abuse of dominance rules in Ireland.

First, the primary agency responsible for investigating possible breaches of Section 5 is the Competition and Consumer Protection Commission (CCPC). The CCPC is a non-political agency with members and staff who cover competition (i.e., antitrust but including merger control) and consumer protection issues. The CCPC has cooperation agreements with various other agencies. The CCPC is the successor of the Competition Authority (which dealt with competition issues since 1991) and the National Consumer Agency (which dealt with consumer protection issues since 1987).

Second, in the area of communications, the Commission for Communications Regulation (ComReg) may also investigate possible breaches of abuse of dominance in the communications sphere (principally, postal and telecommunication services) and has concurrent powers with the CCPC by virtue of the Communications Regulation (Amendment) Act 2007 in regard to certain matters relating to mainly electronic communications.[20] There is a cooperation agreement between the CCPC and ComReg. If there is a dispute as to which agency should investigate, the dispute is decided by the Minister for Communications (who is the sponsoring minister for ComReg) but such disputes would be rare with ComReg usually operating in the communications field rather than the CCPC doing so.

Third, the Irish courts however are the only institution which may adopt a legally binding finding that there has been a breach of Section 5. Interestingly, the civil cases instituted in the Irish courts, whether as part of public or private enforcement, are more likely to be about abuse of dominance than anti-competitive arrangements.[21] This may be because it is easier to institute proceedings against one defendant (as in a dominance case) than several defendants (as in a cartel case) and/or because the CCPC (and the Competition Authority) has shown more willingness to address anti-competitive arrangements than abuse of dominance. However, it is more likely that businesses have a greater and often more immediate concern about abuse of dominance than cartel behaviour.

Fourth, the EU institutions are also relevant, namely, the European Commission (principally, the Directorate General for Competition (DG COMP)) and the courts (i.e., the General Court and the Court of Justice of the European Union) are also relevant for abuse of dominance in Ireland in so far as the EU rules (i.e., Article 102 of the TFEU in particular) are concerned; the EU institutions do not apply Irish competition law. (It is worth noting that the Irish institutions may apply Article 102 of the TFEU in so far as the EU institutions are not applying it.)

In reality, there is no political dimension or influence on the enforcement by the Irish public or private parties of the abuse of dominance provisions. Virtually every case relating to Section 5 is taken by private plaintiffs, the CCPC or ComReg.

In practice, the primary force for enforcement in regard to abuse of dominance has not been the CCPC but rather private plaintiffs. A plaintiff is able to obtain injunctions, declarations and, importantly, damages. (Exemplary damages may also be available but only in limited circumstances and there are some doubts about their availability.)

The Irish regime renders the abuse of dominance a civil wrong. Aggrieved persons (who do not need to be undertakings or fulfil any nationality requirements) may sue for various civil remedies under the 2002 Act. This explicit right of action for damages goes back to Section 14 of the Competition Act 1991 and therefore long pre-dates the EU's Damages Directive.[22] The remedies include a declaration that there has been (or is) an abuse of dominance, an injunction to stop the abuse of dominance and damages to compensate for the loss.[23] Exemplary damages may be possible in certain circumstances—namely, at least where the EU damages directive does not apply.[24] However, there is an additional remedy (which has never been tested in the Irish courts) which is very interesting; Section 14(7) of the 2002 Act allows for the *dominant position* itself (and not just the *abuse*) to be adjusted and unravelled. This subsection provides:

> Without prejudice to subsection (5), where in an action under subsection (1) it is finally decided by the Court that an undertaking has, contrary to section 5, or Article 102 of the Treaty on the Functioning of the European Union, abused a dominant position, the Court may, by order, either–
> (a) require the undertaking to discontinue the abuse, or
> (b) require the undertaking to adopt such measures for the purpose of–
> (i) its 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, this provision has not been used by the Irish authorities. It may well be that its use could be controversial where the exercise of the power involved tackling the dominance itself (which is not outlawed) and not simply the abuse of the dominance. There may be issues under, for example, property rights under the Irish Constitution and the European Convention on Human Rights where something which is lawful (i.e., the dominance) is ended because there was an unlawful activity (i.e., the abuse). The matter has not yet arisen in practice, but it would be interesting to see how a court would decide the matter.

Damages have been paid in out of court settlements but there has not been a rash of cases where damages have been paid whether inside or outside the court even after over almost three decades of modern Irish competition law.

Curiously, the Irish regime also renders an abuse of dominance not only a civil wrong but also a criminal wrong. While one could understand that Ireland would criminalise a breach of Section 5, Ireland goes one step further: Ireland criminalises conduct which is a breach of Article 102 of the TFEU where there is an effect on trade in Ireland. In practice, criminal prosecutions for abuse of dominance are rare and it is unlikely that there would be a prosecution in relation to Article 102 on its own without a material connection to Ireland (and more than just the requisite minimum connection to trigger the application of the Irish regime (i.e., an effect on trade in Ireland)). The penalties for a criminal breach of the abuse of dominance rules are financial only (i.e., not custodial and financial as is the case with cartel conduct). Section 6 of the 2002 Act provides:

> *Offence in respect of breach of section 5(1) or Article [102][25] of the Treaty.*
> 7.- (1) An undertaking that acts in a manner prohibited by section 5 (1) or by Article [102] of the Treaty shall be guilty of an offence.
> (2) In proceedings for an offence under subsection (1), it shall be a good defence to prove that the act or acts concerned was or were done pursuant to a determination made or a direction given by a statutory body.
> (3) For the purpose of determining liability for an offence under subsection (1), any act done by an officer or an employee of an undertaking for the purposes of, or in connection with, the business or affairs of the undertaking shall be regarded as an act done by the undertaking.

It is notable that unlike the anti-competitive arrangements rule in section 4 of the 2002 Act (i.e., the rule on anti-competitive arrangements and cartels), section 5 only imposes criminal liability on undertakings but not the directors, managers and others involving in anti-competitive behaviour. As it happens, the Irish authorities appear to have never brought a prosecution under section 7 of the 2002 Act. It would be unlikely that they would do so in respect of a matter which involved a breach of Article 102 of the TFEU but did not have a material Irish connection.

It is useful to turn to the area of possible defences for the application of the regime. A plaintiff or agency would have to prove that the defendant or respondent is an undertaking, the undertaking has a dominant position, the dominance exists in respect of the State or a part of the State and that there has been an abuse of the dominance. An undertaking is defined as meaning “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.” Apart from the plaintiff not proving that the usual ingredients are missing, there are some defences available. As already mentioned, there is a defence in section 7(2) of the 2002 Act which provides that notwithstanding that section 7(1) provides that an undertaking that acts in a manner prohibited by section 5(1) of the 2002 Act or by Article 102 of the TFEU shall be guilty of an offence,[26] section 7(2) provides that in proceedings for an offence under subsection (1), it “shall be a good defence to prove that the act or acts concerned was or were done pursuant to a determination made or a direction given by a statutory body.”[27] Other defences are probably the usual ones in abuse of dominance claims in most jurisdictions such as objective justification, no adverse economic effects, proportionality etc. The main doubt about whether these defences work in an Irish context stems from the absence of sufficient Irish case law on the topic.

The Irish regime does not take into account non-economic factors (or, more specifically, non-competition factors) (e.g., public policies favouring preservation of multiple market participants or protection of small businesses). This is in keeping with Irish competition law generally which is pure competition-focussed legislation and is not influenced by other considerations (except in the case of media mergers where a limited number of non-competition criteria are relevant). (There are also sector specific rules in regard to sectors such as aviation, communications, energy and postal services but they are not relevant for present purposes.) The Irish regime is very much a pure competition-driven one.

The Irish regime differs from the EU abuse of dominance / monopolization regime in some respects. Section 5 of the 2002 Act is comparable to, but not identical with, Article 102 of the TFEU. While there are some substantive differences, the main differences are procedural. It is useful to consider the main substantive and procedural differences. First, the EU regime requires undertakings to have a dominant position in the EU or in a *substantial* part of the EU while the Irish regime refers to dominance in the State or in any part of the State (i.e., in the Irish case, it need not be a “substantial part” of the State). Secondly, the European Commission may impose fines and other sanctions for an abuse of dominance but the Irish CCPC may not do so as such a function is reserved by the Irish Constitution to the courts in Ireland. Thirdly, the European Commission may order interim measures while the CCPC may not grant injunctions or interim measures as such a function is confined to the courts. Fourthly, the jurisprudence is much more developed at an EU level than at a national level, but it is likely that the Irish courts and the national agencies (principally, the CCPC) would follow the EU jurisprudence.

The Irish regime is even more different from the U.S. monopolization regime than the EU regime. Indeed, the differences between the Irish and U.S. regimes are so great in some respects that it is best to see the two regimes as similar but quite different. The Irish rules do not explicitly use the concepts of monopoly and monopolization. Unlike Section 2 of the Sherman Act, the Irish rules do not deal explicitly with issues such as conspiracy to monopolise or attempted monopolisation so Irish law does not have concepts such as “dangerous probability” and so on. Unlike Section 5 of the Federal Trade Commission Act, the Irish abuse of dominance legislation does not prohibit “unfair methods of competition” as such but only does so where they amount to an abuse of dominance. Ireland does not have the system of exemptions from statute that one finds with the McCarran-Ferguson Act, for example. However, there are some similarities. For example, the approach of the Irish Supreme Court in *ILCU* to consumer welfare would not be too dissimilar, in a general way, to the approach of U.S. Federal Trade Commission in the August 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition under Section 5.

In time, one can see abuse of dominance becoming more central to Irish competition debate and enforcement. For now, however, the level of enforcement (both public and private enforcement) has been disappointing. The Irish rules on abuse of dominance have not been utilised very much. They are therefore underdeveloped in an Irish context.[28] There have been relatively few cases over an almost three decade stretch of the rules being in existence—many of the cases have related to alleged dominance (sometimes not found) in the case of State entities.[29] This is regrettable because not only would consumers but also businesses (whether competitors or customers) benefit from greater control of the abuse of dominance. While there may be some private actions on the issue, if the CCPC is keen to see more private enforcement then first having public enforcement—and therefore jurisprudence established on the issues—would help to lay the pathway for more private enforcement.[30] The very fact that the first major case about dominance taken by the (now) CCPC did not succeed (the *Competition Authority v. O'Regan and others* case[31]) would not give very much encouragement to private litigants to bring cases so more public enforcement is needed so as to encourage private enforcement. While tax payers' money should not be put at risk lightly or easily in public enforcement, it is often the case in many areas of the law that without early and successful *public* enforcement, *private* enforcement may not easily follow, so too it is in this area where a path needs to be laid if there is to be more private enforcement. As we all know, often the most expensive words which a plaintiff can hear are the words "this case will make new law"—without the law on this area being clearer, private enforcement is not very likely in the Irish courts.

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1 This litigation started in Ireland and culminated in the Court of Justice of the European Union (CJEU) judgment in Case C-344/98, Masterfoods Ltd. v. HB Ice Cream Ltd., 2000 E.C.R. I-11369.

2 This litigation culminated in the CJEU judgment in Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Eireann (RTE) & Indep. Television Publ'n Ltd. (ITP) v. Comm'n, 1995 E.C.R. I-00743.

3 The Competition Act 1991 (which was repealed in 2002) represented a major departure from the traditional model to regulate competition in the Irish economy. The 1991 Act regime adopted, with some modifications, the substantive rules which are currently embodied in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). However, the Irish regime did not then (and still does not) have the same procedural regime as the EU one; the EU regime involves the European Commission imposing fines for breaches of competition law but the Irish regime does not involve the Irish competition agency imposing a fine (or other penalty) because the imposition of penalties is, under Irish constitutional law, reserved to courts (and not administrative agencies).

4 This is no different than is the case of the rule on anti-competitive arrangements (i.e., s.4 of the 2002 Act).

5 This is again the same as is the position under s.4 of the 2002 Act. In the context of s.5, see, for example, the approach of the then-Competition Authority (now the Competition and Consumer Protection Commission (CCPC)) in its investigation into exclusivity discounts by An Post. Case COM/13/005—An Post, Enforcement Decision E14/001, part 5 (Oct. 30, 2014), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/E-14-001-An-Post-Enforcement-Decision.pdf.

6 See s.5(2)(a). See also, e.g., Blemings v. David Patton [2001] 1 IR 385 (Ir.); and Lifeline Ambulance Serv. Ltd. v. Health Serv. Exec. [2012] IEHC 432 (Ir.). See also Case COM/15/02—Aer Lingus plc, Enforcement Decision E/02/001 (Mar. 21, 2002), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_02_001-Aer-Lingus-travel-agent-commissions.pdf.

7 Case 27/76, United Brands Co. v. Comm'n, 1978 E.C.R. 207.

8 [2007] IESC 22, para.89.

9 See, e.g., the Irish High Court in Meridian Communications and Cellular Three v. Eircell [2002] 1 IR 17 where a market share of around 60% was not conclusive of dominance. For an extreme example of this, see the approach of the then-Competition Authority (now the CCPC) in TicketMaster Ireland where a share of nearly 100% was, in the circumstances, believed to be not dominant because of countervailing buyer power, efficiencies and other factors. Case COM/107/02—TicketMaster Ireland, Enforcement Decision E/06/001 (Sept. 26, 2005), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_06_001-Ticketmaster-Enforcement-Decision.pdf.

10 Ed., subsection (1) refers to s.5(1) which is the general prohibition in the 2002 Act on abuse of dominance.

11 See e.g., Island Ferries Teoranta v. Minister for Commc'n, Marine & Nat. Res. [2011] IEHC 388.

12 See e.g., Case COM/107/02—TicketMaster Ireland, Enforcement Decision E/06/001 (Sept. 26, 2005), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_06_001-Ticketmaster-Enforcement-Decision.pdf.

13 See e.g., Case COM/15/02—Aer Lingus plc, Enforcement Decision E/02/001 (Mar. 21, 2002), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_02_001-Aer-Lingus-travel-agent-commissions.pdf (the then-Authority decided that the unilateral reduction in commissions by an airline to travel agents did not breach competition law because, and this was somewhat unusual, it was not clear to the Authority that the airline was dominant (i.e., the Authority did not find that it was or was not dominant but took a negative-approach and that the airline's conduct did not "appear" to constitute an abuse); and Case COM/118/02—Vodafone Ireland Ltd., Enforcement Decision E/002/002 (Oct. 25, 2002), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_02_002-Vodafone-Topup-wholesale-price.pdf.

14 See e.g., Case COM/005/03—Drogheda Indep. Co. Ltd., Enforcement Decision E/05/001 (Dec. 7, 2004), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_05_001-Drogheda-Independent-Company-Limited-Enforcement-Decision.pdf.

15 See e.g., Case COM/13/005—An Post, Enforcement Decision E14/001, part 5 (Oct. 30, 2014), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/E-14-001-An-Post-Enforcement-Decision.pdf. See also C-497/99 P, Irish Sugar plc v. Comm'n, 2001 E.C.R. I-5333.

16 See e.g., The Competition Authority, Competition Authority Guidance Note: Refusal to Supply (Dec. 2005), available at www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/Refusal-to-Supply-Guidance-Note.pdf.

17 See e.g., Competition Auth. v. O'Regan [2007] IESC 22 (Supreme Court); and Blemings v. David Patton [2001] 1 IR 385 (High Court).

18 See Case 6/72, Europemballage Corp. & Cont'l Can Co. Inc. v. Comm'n, 1973 E.C.R. 215.

19 Section 5(3) of the 2002 Act provides that "[t]he putting into effect of a merger or acquisition in accordance with the provisions of Part 3 of this Act [ed., which contains the merger control provisions of the 2002 Act], together with any arrangements constituting restrictions which are directly related and necessary to the implementation of the merger or acquisition and are referred to in the notification of the merger or acquisition under subsection (1) or (3) of section 18 , shall not be prohibited under subsection (1) [ed., i.e., section 5(1) of the 2002 Act]."

20 In passing, but for completeness, ComReg may designate an operator as having "significant market power" (or SMP) for the purposes of the Framework Directive (i.e., Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) 2002 O.J. (L 108) 33–50, http://data.europa.eu/eli/dir/2002/21/oj).

21 See e.g., Donovan v. Elec. Supply Bd. [1997] 3 IR 573 is an example of a private action on alleged abuse of dominance being taken in the Irish courts. And while such dominance cases are rare, cases against cartels are even rarer.

22 See i.e., Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1–19, https://eur-lex.europa.eu/eli/dir/2014/104/oj.

23 Section 14(5) of the 2002 Act provides that the "following reliefs, or any of them, may be granted to the plaintiff in an action under [section 14 (1)]: (a) relief by way of injunction or declaration (including a declaration in respect of a contravention of section 4 or 5 or Article 101 or 102 of the Treaty on the Functioning of the European Union that has ceased), [and] (b) damages."

[24] See Ireland's European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, Iris Oifigiúl, Number 14, Feb. 17 , 2017, page 241. There is some doubt as to whether exemplary damages could be claimed in respect of damages actions which do not fall under the EU Damages Directive because of the way in which s.14 of the 2002 Act (primary legislation) was amended by a statutory instrument (secondary legislation) implementing an EU directive because an Irish statutory instrument could not amend an Act unless it was for the purposes of implementing an EU directive but, in this case, the Irish statutory instrument purported to amend the Act for all purposes and not just for the purposes of implementing the EU directive hence the doubt about its ability to amend the instrument for extraneous purposes.

[25] The original text of the 2002 Act refers to "Article 82" of the then Treaty establishing the European Community (the TEC), but this is now Article 102 of the TFEU hence the change made here for convenience and updating purposes.

[26] Section 7(3) of the Act provides that "[f]or the purpose of determining liability for an offence under subsection (1), any act done by an officer or an employee of an undertaking for the purposes of, or in connection with, the business or affairs of the undertaking shall be regarded as an act done by the undertaking."

[27] A defendant would not be likely to succeed simply because it did something which might be looked on favourably by a statutory body, there ought to be a determination made or a direction given by a statutory body.

[28] See e.g., topics such as collective dominance are largely undeveloped with only passing marginal references or analysis (e.g., A&N Pharmacy v. United Drug [1996] ILRM 42; and Nurendale Ltd (trading as Panda Waste Services) v. Dublin City Council [2009] IEHC 588).

[29] See e.g., Island Ferries Teoranta v. Minister for Commc'n, Marine & Nat. Res. [2011] IEHC 388; Island Ferries Teoranta v. Galway County Council [2013] IEHC 587; and Nurendale Ltd (trading as Panda Waste Services) v. Dublin City Council [2009] IEHC 588.

[30] See e.g., issues such as collective dominance are not very well developed in Irish competition law, so it would be easier to have cases brought by the public authorities which would help give sufficient clarity to make private actions more likely.

[31] [2007] IESC 22 (Supreme Court).

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