

BOOK REVIEW:
“IRISH COMPETITION LAW: THE
COMPETITION ACT, 2002”
(LEXIS NEXIS BUTTERWORTHS)

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In this new book, *Irish Competition Law: The Competition Act, 2002*, the authors examine the impact of the Competition Act, 2002 on the competition regime in force in Ireland. They carry out a detailed analysis of this legislation, focusing on the changes that it introduces to both the substantive and procedural aspects of competition enforcement in this jurisdiction. One of the major strengths of the book is that the authors incorporate an examination of European competition law throughout the text and dedicate a chapter to this particular topic, concentrating on Regulation 1/2003, which came into force on 1 May 2004 and changes the enforcement regime of European competition law. The overall result of this text is a very comprehensive and practical commentary on Irish and indeed European competition law – a text that will prove very valuable to practitioners and students. While a standalone text in its own right, offering an up-to-date account of the modernisation of Irish competition law in particular and European competition law, this book is also very much the sister text to Power’s text on Competition Law and Practice and references are made to the main text for further information throughout the text.

The Competition Act, 2002 is now the keystone of Irish competition law as it replaces the Competition Act 1991, the Competition Amendment Act 1996 and the Mergers and Takeovers (Control) Act 1978. Some provisions of the Restrictive Practices (Amendment) Act, 1987 are repealed (sections 24-26). The Restrictive Practices (Groceries) Order, 1987 remains in place. In spite of this, for the first time in the history of Irish competition law, there is an umbrella, all-encompassing piece of legislation to deal

with all aspects of competition regulation. The authors trace the development of this act and examine how it modernises and strengthens competition law in Ireland.

In the introductory chapter, the authors address some basic issues of competition law, such as the sources of Irish competition law and purposes of competition law, setting the scene for the rest of the book. All competition regimes are designed to deal with similar problematic behaviour in the marketplace – anti-competitive arrangements, abuse of dominance, control of mergers and state aids (which are not dealt with in the book as state aids are not covered by the Competition Act, 2002). The authors point out initially the provisions of the Competition Act, 2002 that deal with each type of behaviour before devoting separate chapters to each of these issues. The equivalent European treaty provisions and applicable secondary legislation are also dealt with at an early stage by means of background information. The importance of the economic dimension to competition law is stressed in this chapter. The Competition Act, 2002 itself places a strong emphasis on economic analysis and the authors discuss the issue of market definition to highlight how central economic analysis is to competition law and policy. In fact, a strong point of this chapter is that the authors present practical every-day examples on many occasions, making the topic very understandable to the reader. Finally, the chapter gives a very detailed overview of the Competition Act, 2002.

McCarthy and Power explore the institutional framework of Irish competition law in Chapter 2. This chapter examines the institutions and bodies involved in the application and enforcement of competition law in Ireland. The Competition Authority, set up by the Competition Act, 1991 is conferred with a more important function in the administration and enforcement of European competition law under Regulation 1/2003. The Competition Act, 2002 attempted to pre-empt some of the changes anticipated by Regulation 1/2003 by abolishing the notification regime and by increasing the enforcement powers of the Competition Authority. The authors also consider the relationship of the Competition Authority and foreign competition bodies, a matter that is important under Regulation 1/2003. Cross-border co-operation is allowed

under the Competition Act, 2002 although it appears the ministerial consent is required before such co-operation can be initiated. The Competition Authority may provide information and other assistance to foreign competition bodies to facilitate their investigations. However, at all times, conditions for the disclosure of information, particularly confidential information, must be complied with. The same applies under Regulation 1/2003.

Chapter 3 offers an extensive analysis of the regulation of anti-competitive behaviour. In this regard, the provisions of the Competition Acts 1991-1996 remain to a large extent unchanged in terms of substance. Section 4 of the Competition Act, 2002 places a general prohibition on anti-competitive behaviour, subject to exception where certain pro-competitive conditions are fulfilled under section 4(5). In terms of enforcement, significant change is introduced as the notification system has been abolished, in tandem with similar changes in European competition law. The reasons for abolishing the notification system at both Irish and European level are largely similar; the authorities were overburdened with an administrative process that did not bring to light serious breaches of competition. The authors comment that the abolition of the notification system will lead to uncertainty for undertakings, as there is no longer a formal safety net procedure for undertakings to ensure that their agreements are not caught by section 4.

The authors go through the various elements that must be proven in order to prove a breach of section 4 such as whether an 'undertaking' is involved, whether or not there is an 'agreement' or 'concerted practice' *etc.* Interestingly, given the parallels between Irish and European competition law in this area, the authors, while including relevant Irish case law, rely on eminent European case law to explain certain issues, which proves to be very useful. They also incorporate United States antitrust legislation and case law in places.

Abuses of dominance are dealt with in detail in Chapter 4. The authors draw the distinction between section 4 and section 5. Essentially, under section 4 at least two undertakings must be involved but section 5 covers the unilateral conduct of undertakings. The authors express the view that equal attention should be given to abusive dominant behaviour as to cartels due to the nature of many

markets in Ireland. This view is important and one that needs to be borne in mind at all times. While the European Commission intends to focus on the investigation of cartels, it is important that abusive conduct continues to be regulated intensively as such conduct can be equally detrimental to the market as cartel activity.

As with the previous chapter, the authors address the various elements of section 5, engaging in an assessment of Irish and European case law to highlight certain issues. They include an examination of the emerging concept of collective dominance, recently clarified at European level in the *Airtours* case by the Court of First Instance (CFI). The CFI ruled that in addition to the market structures or conditions that may exist in a situation of collective dominance, the undertakings concerned must be interested in parallel or common behaviour as opposed to competitive behaviour. As well as this type of co-ordination, the undertakings must devise a monitoring system to ensure that the parties involved do not deviate from the agreed co-ordination. The market must be transparent so that the undertakings can ensure they all behave in the same fashion. Essentially, for the concept of collective dominance to work effectively in a concentrated market, there must be the possibility of sanctioning non-compliant parties.

At various stages in the book, the authors look to European competition law to compare and contrast the operation of competition law in Ireland. Indeed, as a member of the European Union, all Community law legal force in Ireland and also has supremacy over Irish law in the case of conflict. This means that there are two systems of competition law in Ireland, both of which are mutually applicable, with the exception of merger control law, where either or will apply according to jurisdictional issues. The Competition Act, 2002 states that it is to be construed by analogy with Articles 81 and 82 EC. In this regard, an issue raised by the authors is that while the Competition Act, 1996 criminalised breaches of Irish competition law, there is no reference to breaches of Article 81 and 82 EC being offences in the long title to the 2002 Act. The authors comment that this is strange given that the direct incorporation of Articles 81 and 82 EC into Irish law is one of the most important amendments introduced by the Competition Act,

2002.

Given the status of European law in Ireland and the role that Irish Competition Authority and courts play in the enforcement of European competition law, an entire chapter is set aside to examine the impact of European competition law in Ireland. Chapter 5 deals with the application of Articles 81 and 82 in this jurisdiction and it examines the reforms that Regulation 1/2003 proposed at the time of writing the book. Those changes have since been brought into force since the book was published. The section dealing with the modernisation of competition enforcement is nonetheless all-embracing and very informative. Given the issues involved, the chapter is somewhat technical and can be difficult to read in places. It tends towards repetition in places, but the purpose of this may be to clarify certain matters for the reader. The chapter also leads to some confusion in relation to the issue of civil and criminal offences, but further explanation on the matter is available in chapters 6-8, which deal with enforcement, civil litigation and criminal litigation.

The commentary by the authors on the new mergers and acquisitions regime under Part 3 of the Competition Act, 2002 in chapter 9 is very extensive. The Competition Act, 2002 puts in place a system whereby the Competition Authority and not the Minister for Enterprise, Trade and Employment will take decisions. The authors are critical of this system because it combines several functions in the Competition Authority.

This new regime also focuses on the actual competitive effect of mergers on the market so there is no longer a mixed competition and industrial policy 'common good' test. The new test, which mirrors that of the United States, is whether the merger or acquisition will lead to a substantial lessening of competition. Section 4 and 5 of the Competition Act, 2002 will not apply to mergers unless the turnover threshold required to examine mergers under Part 3 of the Act is not met.

The authors, as in previous chapters, rely on European merger control law to explain certain substantive issues. In this instance however, they note that there is a reason for this – a limited experience of merger control in Ireland. The authors provide a very practical and useful guide to both the procedural aspects of merger

notification and general procedural matters in this chapter – a ‘must-read’ for any undertaking involved in such a process.

The text finishes with a chapter on media mergers and acquisitions, dealing with issues of notification, definitions and procedures.

One criticism of the text is that it can be repetitive in places – not only in terms of general content but indeed some sentences tend to be duplicated in places. Otherwise, the authors succeed in creating a very informative all-encompassing clear and guide to competition law in Ireland. ‘A thoroughly enjoyable read’ is a not a phrase normally associated with books of academic work, and yet it is one that I would attach without hesitation to McCarthy and Power’s *Irish Competition Law: The Competition Act, 2002*. The authors’ style excels in simplicity, rendering a very complex subject matter very accessible and readable. The approach that the authors take in encompassing Irish competition law and the European equivalent wherever appropriate makes for an interesting read and offers a wonderful insight into the workings of competition law at both levels.

“Irish Competition Law: The Competition Act, 2002” by Alan W.J. McCarthy and Vincent J.G. Power (Lexis Nexis Butterworths 2003), 469 pages.