Competition (Amendment) Bill 2021

Public consultation by the Department of Enterprise, Trade and Employment

Submission of the Competition and Consumer Protection Commission (CCPC)

CCPC

Table Of Contents

1. Introduction

1.1 We refer to the public consultation launched by the Department of Enterprise, Trade and Employment on 11 January 2021. The consultation invited submissions from interested parties on certain aspects of the Competition (Amendment) Bill 2021 (the "Bill"). The Bill will transpose Directive (EU) 2019/1 (the "ECN+ Directive") into Irish law. In addition, the Bill includes amendments to existing competition legislation, which are outside the scope of the ECN+ Directive. The purpose of these amendments is to further bolster the CCPC's powers in the enforcement of EU and Irish competition law and the statutory merger review regime. The Department's public consultation invites views on these additional legislative amendments.

1.2 The CCPC very much welcomes the opportunity to provide its views on the aspects of the Bill identified in the Department's public consultation and is very strongly supportive of the Department's proposals in this regard. In the CCPC's view, the adoption of these proposals would greatly enhance the CCPC's powers in the enforcement of EU and Irish competition law and the statutory merger review regime.

1.3 The CCPC's submissions in relation to the aspects of the Bill identified in the Department's public consultation are set out below. The CCPC is continuing to engage with the Department as to its views on these, and other, aspects of the Bill.

2. A specific offence of "bid rigging"

2.1 The CCPC is an independent statutory body with a dual mandate to enforce competition law and consumer protection law in Ireland. The CCPC was established on 31 October 2014 following the amalgamation of the Competition Authority and the National Consumer Agency. Our mission is to make markets work better for consumers and businesses. Our enforcement powers enable us to identify, detect, investigate and where appropriate take enforcement action to address breaches of the law. The CCPC also has regulatory functions in the areas of credit intermediaries, grocery goods and alternative dispute resolution. As well as our enforcement responsibilities, we have a responsibility to promote competition and consumer welfare.

2.2 Competition benefits everyone: businesses, consumers and the economy as a whole. It encourages businesses to compete for customers. Buyers of goods and services, from individual consumers to businesses, benefit by paying less and having more choice and better quality. Competition results in open, dynamic markets, featuring increased productivity, innovation and better value.

2.3 Irish and EU competition law forbid two broad types of behaviour: (i) anti-competitive agreements between two or more independent firms (including cartel-type agreements between competitors to fix prices, share markets, restrict output, or share commercially sensitive information)[1]; and (ii) "abusive" practices by a firm which holds a dominant market position e.g. predatory pricing or refusal to supply.[2]

2.4 Anti-competitive behaviour, and in particular cartel-type agreements, can cause very significant harm to competition and consumers. One of the most common and serious forms of anti-competitive cartel involves "bid-rigging" which occurs when a number of suppliers agree not to compete against one-another for a tender or contract. In choosing to run a competitive tender process, the procurer

[1] See section 4 of the Competition Act 2002 and Article 101 of the Treaty on the Functioning of the European Union.
[2] See section 5 of the Competition Act 2002 and Article 102 of the Treaty on the Functioning of the European Union.

is using competition in the bidding process to get bidders to reveal the lowest amount they are willing to provide the good or service for. A bid-rigging conspiracy completely frustrates this as the firms involved agree amongst themselves who will win this particular contract and hence set a much higher price than would have been obtained if the firms had submitted independent competitive bids.

2.5 The first conviction for bid-rigging in the State was secured in 2017 following an investigation by the CCPC. The case concerned a cartel in the procurement of flooring contracts relating to the fit out of buildings for major international companies in the Leinster area that was in existence between 2011 and 2013. The CCPC submitted a full investigation file to the Director of Public Prosecutions ("DPP") in 2014 who directed that charges in the case be preferred. In 2017, a company and a former director of that company were convicted by the Central Criminal Court in respect of their engagement in illegal cartel activity.[3]

2.6 The CCPC strongly supports the Department's proposal to introduce a specific offence of bid-rigging. Although the CCPC considers that bid-rigging agreements are already prohibited by the more general provisions of section 4 of the Competition Act 2002, as amended (the "2002 Act"), the CCPC believes that introducing a specific bid-rigging offence would make it easier to bring criminal prosecutions in these types of cases and would assist the courts and others to better understand the criminal nature of bid-rigging. The CCPC also notes that the law in many other countries provides specifically for a criminal offence of bid-rigging.[4]

2.7 We suggest that section 4(1) of the 2002 Act could be amended to include a specific reference to bid-rigging in the list of prohibited practices. In the CCPC's view, the offence of bid-rigging should be defined as involving two or more undertakings agreeing amongst themselves in a competitive tender process as to what bids they would make or agreeing not to make a bid. This would clearly make

[3] For more information, please see https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/commercial-flooring-cartel-conviction/.
[4] These include the United Kingdom, the United States, Canada, Germany, Austria, Italy, Poland, Hungary and Japan.

it a crime for a bidder to submit a bid that is not independent of the bid of another competitor in a manner that is hidden from the procurer.

2.8 The CCPC believes that inserting a specific offence of bid-rigging in section 4(1) of the 2002 Act would provide welcome clarity that bid-rigging agreements and arrangements are prohibited anti-competitive practices.

3. Prosecuting "gun-jumping"

3.1 Part 3 of the 2002 Act establishes a merger review system whereby certain proposed mergers and acquisitions (i.e. media mergers and those that meet specified financial thresholds) must be notified to the CCPC for clearance before they are put into effect.[5] This ensures that the CCPC can review the merger or acquisition to determine if it would give rise to a substantial lessening of competition and is potentially detrimental to consumer welfare.

3.2 Putting a merger or acquisition which is required to be notified to the CCPC into effect before receiving clearance from the CCPC is referred to as "gun-jumping". The term "gun-jumping" may be used to cover a variety of scenarios, including where the undertakings involved in a proposed merger or acquisition which is required to be notified to the CCPC:

(a) do not submit a notification to the CCPC at all and proceed to put the merger or acquisition into effect;

(b) take steps towards putting the merger or acquisition into effect (either fully or partially) and then submit a notification to the CCPC; or

(c) submit a notification to the CCPC but proceed to put the merger or acquisition into effect (either fully or partially) before receiving the CCPC's final decision approving or clearing the merger or acquisition.

3.3 In Ireland, gun-jumping is a criminal offence, which is punishable by the imposition of fines following a criminal conviction.[6] Currently, gun-jumping offences may be prosecuted on a summary basis or on indictment by the DPP only. The CCPC does not have any power to bring summary prosecutions in respect of these offences. The first (and only) criminal prosecutions in Ireland in respect of gun-jumping were brought by the DPP before the District Court in 2019 following a CCPC investigation.[7]

[5] Section 18(1) of the 2002 Act requires the undertakings involved in certain proposed mergers or acquisitions to notify the CCPC of the proposal to put such merger or acquisition into effect. Section 18(1A)(a) of the 2002 Act provides that, where a proposed merger or acquisition is required to be notified to the CCPC, the notification to the CCPC must be made before the proposed merger or acquisition is put into effect.

[6] See sections 18(9) and 18(10) of the 2002 Act.

[7] For more information, please see https://www.ccpc.ie/business/guilty-plea-made-in-irelands-first-criminal-prosecution-involving-gun-jumping-in-a-merger/ and

3.4 The CCPC strongly supports the Department's proposal to confer on the CCPC the power to bring summary prosecutions in respect of gun-jumping offences. The CCPC's view is that the current regime in Ireland does not provide adequate flexibility on how incidents of gun-jumping are enforced and prosecuted. The current approach is quite burdensome in the level of resources required to investigate and deter a potential offence. The impact of this is that there is a risk that the current arrangements decrease the likelihood that sanctions will be applied to those who commit gun-jumping offences, reducing the deterrent effect and significantly weakening the merger regime.

3.5 We note that the CCPC has a power of summary prosecution in respect of certain other offences in the 2002 Act.[8] In these circumstances, the CCPC considers that it would be appropriate for the 2002 Act to be amended to give the CCPC the power to bring summary prosecutions in respect of gun-jumping offences.

3.6 We suggest that Part 3 of the 2002 Act could be amended by inserting a new provision which gives the CCPC (rather than the DPP) the power to bring summary prosecutions for gun-jumping offences under section 18(9) of the 2002 Act. This may involve replicating the type of wording that currently appears in section 8(9) of the 2002 Act.[9]

https://www.ccpc.ie/business/second-guilty-plea-made-in-irelands-first-criminal-prosecution-involving-gun-jumping-in-a-merger/.

[8] See, for example, sections 8(9) and 26(8) of the 2002 Act.

[9] We note that section 8(9) of the 2002 Act refers to the "competent authority" having the power to bring a summary prosecution in the circumstances set out in that provision. In the case of a new provision for bringing summary prosecutions for gun-jumping offences, we consider that the appropriate reference should be to the CCPC rather than to the "competent authority", given that the CCPC is responsible for operating the merger review regime under Part 3 of the 2002 Act.

4. Surveillance and interception powers

4.1 Cartels are a serious form of anti-competitive behaviour, which occur when competitors agree to fix prices, share markets, restrict output or share commercially sensitive information with each other. In Ireland, engaging in prohibited cartel activity is a criminal offence, which is punishable by fines, and for individuals a term of imprisonment of up to 10 years, following a criminal conviction by the courts. In contrast to other common law jurisdictions with criminal penalties for cartels, Ireland does not have the powers to carry out video and audio surveillance or intercept electronic communications.[10]

4.2 Cartels, by their nature, involve a secret conspiracy, the parties to which make considerable efforts to hide their involvement from their customers and indeed from the CCPC. However, the cartel offence requires a degree of co-ordination between competitors that can only be facilitated by meetings or other forms of communications (and sometimes a series of both). Such communications are normally sent by electronic means or by mobile phone between members of the cartel. While early cartels may have involved written notes or agreements, international experience has shown that cartelists have become more sophisticated in using electronic communications technology and social media apps to co-ordinate their behaviour. Indeed, many cartelists work assiduously to avoid leaving a paper trail so do not take minutes of meetings and only communicate verbally on their mobile phones.

4.3 The CCPC has real case experiences of knowing where and when cartel meetings are being held but is not allowed currently to obtain evidence of what is happening during these meetings. Some of these cases have nonetheless resulted in files being sent to the DPP, whilst other cases could not be progressed on the basis of the evidence the CCPC was able to collect through our other powers. In other cases, we have been aware that the conspirators were organising their cartel

[10] The use of surveillance/intercept powers in investigating cartels is the norm in common law countries when persons convicted face a substantial term in jail under their national laws. These powers are at the disposal of the entities investigating cartels in the US, UK, Israel, Canada and Australia. In terms of EU countries, France, Romania and Greece prosecute certain types of cartels under fraud laws. Germany, Austria, Italy, Poland and Hungary treat bid-rigging in public procurement as a crime to be investigated by the domestic police authorities.

through the use of mobile phones but, unlike other common law jurisdictions, we were unable to gather (i) intelligence as to how this was happening, or (ii) evidence that might be used subsequently during enforcement proceedings.

4.4 At present, the CCPC has no power to (i) carry out video and audio surveillance of suspects or (ii) to require interception and recording of electronic communications. The CCPC's current powers permit us to seek access to certain communications data (often referred to as 'metadata') from a communications service provider for the purposes of investigating, detecting and prosecuting serious criminal offences.[11] Such metadata only shows when individuals have been communicating and does not show the content of the underlying communications. Due to the inherent aspect of mass surveillance involved in these laws they have been subject to litigation in the EU and in Ireland. This has raised considerable uncertainty surrounding the use of these powers as set out in existing legislation. The CCPC has not used these powers since they were granted under the Competition and Consumer Protection Act 2014.

4.5 The CCPC considers that the absence of powers to access the content of communications poses a particular challenge in cartel investigations. Accordingly, the CCPC welcomes the Department's proposal to provide for the CCPC, when investigating serious criminal breaches of competition law and under specific conditions, to have powers to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications attached to such powers. We consider that such powers would boost the CCPC's efforts to detect, investigate and seek enforcement action against prohibited cartel activity in the State.

4.6 The Department's public consultation invites views as to what safeguards should be put in place to protect rights under the Charter of Fundamental Rights of the European Union (the "Charter") and the European Convention on Human Rights (the "ECHR"). The CCPC considers that, if it were granted the powers proposed in the Department's public consultation, the exercise of those powers should be

[11] Section 6(3A) of the Communications (Retention of Data) Act 2011, as amended, which was extended to the CCPC insofar as cartel offences are concerned by section 89 of the Competition and Consumer Protection Act 2014.

subject to appropriate, effective and proportionate safeguards, primarily judicial oversight, to protect rights under the Charter and the ECHR. The CCPC considers that it would be appropriate to apply in advance for a warrant from a District Court Judge (at a normal Court sitting or on short notice) to exercise these powers and to allow judicial oversight on the scope of the use of the powers and the time over which such powers can be used (with the right for the CCPC to ask a Judge for an extension where this is warranted).

5. The statutory merger review regime

5.1 The Department's public consultation proposes a number of amendments to the merger review regime under Part 3 of the 2002 Act, as detailed further below.

Power to review voluntary merger notifications

5.2 Where a merger or acquisition, as defined in section 16 of the 2002 Act, does not meet the turnover thresholds for a mandatory notification to the CCPC set out in section 18(1) of the 2002 Act, a notification to the CCPC is not required. The parties involved may therefore proceed to put the merger or acquisition into effect without obtaining prior clearance from the CCPC.

5.3 The CCPC may nevertheless wish to examine a "below threshold" merger or acquisition if it has concerns that such merger or acquisition could potentially give rise to a substantial lessening of competition in any markets for goods or services in the State. In these circumstances, section 18(3) of the 2002 Act provides that parties to a proposed merger or acquisition which does not meet the turnover thresholds for a mandatory notification to the CCPC under section 18(1) of the 2002 Act may nevertheless submit a notification to the CCPC on a voluntary basis before they put the proposed merger or acquisition into effect.

5.4 However, there does not appear to be any equivalent provision in the 2002 Act which allows parties to submit a notification to the CCPC on a voluntary basis, and which allows the CCPC to review such notification, in circumstances where the parties have already (partially or fully) put a merger into effect. The CCPC has accepted voluntary notifications by parties in such circumstances but, in the absence of an express power to do so, there is a risk that the CCPC's jurisdiction to review such notifications could be challenged in future.

5.5 In light of this perceived gap in the existing legislation, the CCPC welcomes the Department's proposal to clarify that the CCPC has the power to accept, and to review, notifications in respect of mergers and acquisitions that have been put into effect which are notified to the CCPC on a voluntary basis. We suggest that Part 3 of the 2002 Act could be amended by inserting a new provision which

provides that any of the parties involved in a merger that is not required to be notified under section 18(1) of the 2002 Act may notify the CCPC, and that the CCPC may review such merger notified to it, even in circumstances where the parties have (partially or fully) put the merger into effect.

5.6 One further complication with these types of mergers and acquisitions is that, if the parties have already begun to put the merger or acquisition into effect at the time a voluntary notification to the CCPC is made, the CCPC has no power to stop the parties from taking further steps to put the merger or acquisition into effect. There is currently no provision under the 2002 Act which requires the parties to a merger or acquisition which has been partially put into effect to "suspend" any further integration pending receipt of clearance from the CCPC. For these reasons, the CCPC also strongly supports the Department's proposal to confer on the CCPC the power to make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its review of a notification made on a voluntary basis, until the merger or acquisition is cleared or remedial action is taken. We consider that this amendment is required to ensure the effectiveness of the abovementioned power of the CCPC to review such mergers.

Power to unwind already implemented mergers

5.7 Currently, where a merger or acquisition that has been notified to the CCPC has already been put into effect, there would be very little, if anything, that the CCPC could do in practice under the existing framework if, at the end of its investigation, the CCPC were to find that it gives rise to a substantial lessening of competition.

5.8 The CCPC can accept a notification of a merger or acquisition which is required to be notified to the CCPC but which has already been put into effect without having been notified.[12] Similarly, as discussed above, the Department's public consultation states that the Bill will clarify that the CCPC has the power to accept,

[12] Section 18(12A) of the 2002 Act provides that, notwithstanding section 19(2) of the 2002 Act, the CCPC may request or accept notification of a merger or acquisition which meets the thresholds set out in section 18(1) of the 2002 Act but which was purported to have been put into effect without having been notified in accordance with that subsection.

and review, notifications in respect of mergers or acquisitions that have been put into effect which are notified to the CCPC on a voluntary basis.

5.9 However, there is currently no provision of the 2002 Act which stipulates the types of determination the CCPC may make at the end of its review of an already implemented merger or acquisition that has been notified to the CCPC.[13] If, at the end of a full Phase 2 investigation, the CCPC finds that an already implemented merger or acquisition gives rise to a substantial lessening of competition in any market, it may determine that the merger or acquisition "*may not be put into effect*"[14] or "*may be put into effect subject to conditions specified by it being complied with*".[15] The CCPC currently has no power under the 2002 Act to unwind (or to apply to court for an order to unwind) such a merger or acquisition. This is problematic because a determination that such merger or acquisition may not be put into effect would have no practical impact where such merger or acquisition had already been implemented and the CCPC can take no steps to unwind it.

5.10 The CCPC therefore strongly supports the Department's proposal to confer on the CCPC the power to require that an already implemented merger or acquisition must be unwound and the pre-merger status quo be restored where the CCPC finds that such merger or acquisition gives rise to a substantial lessening of competition in any market. The CCPC considers that the power to unwind an already implemented merger or acquisition should apply both to (i) mergers or acquisitions which are required to be notified to the CCPC but which have already been put into effect without having been notified (i.e. mandatorily notifiable mergers or acquisitions), and (ii) already implemented mergers or acquisitions which do not meet the notification thresholds set out in section 18(1) of the 2002 Act and which have been notified to the CCPC on a voluntary basis pursuant to section 18(3) of the 2002 Act.

5.11 In circumstances where the CCPC finds that an already implemented merger or acquisition that has been notified to it (either on a mandatory or voluntary basis)

[13] Section 21(2) of the 2002 Act specifies the types of determination that may be made by the CCPC at the end of its Phase 1 review, while section 22(3) of the 2002 Act specifies the types of determination that may be made by the CCPC at the end of a full Phase 2 investigation.
[14] Pursuant to section 22(3)(b) of the 2002 Act.
[15] Pursuant to section 22(3)(c) of the 2002 Act.

gives rise to a substantial lessening of competition in any market, the CCPC considers that it should have the power to require that the undertakings involved must unwind the merger or acquisition. This may involve ordering that the acquirer disposes of its shareholding in the acquired undertaking or disposes of specified assets. If this cannot be achieved, we consider that the CCPC should be empowered to impose other measures designed to restore the pre-merger (or pre-acquisition) status quo. This would result in greater clarity for the undertakings involved, and for third parties, as the CCPC would mandate the steps that must be taken by the undertakings involved to implement its decision. It would also allow the CCPC to assess the extent to which any harm to competition and consumers has occurred as a result of the merger or acquisition being put into effect and to impose measures with the aim of remedying any such harm.

Power to require information from third parties

5.12 Section 20(2) of the 2002 Act provides that the CCPC has the power to issue a requirement for information (referred to as an "RFI") from "undertakings concerned" for the purposes of its review of a notified merger or acquisition. As explained in the Department's public consultation, the term "undertakings concerned" is not currently defined in the 2002 Act.

5.13 The CCPC welcomes the Department's proposal to clarify in Part 3 of the 2002 Act that the CCPC can seek (or receive voluntarily) information from parties which are not directly part of the merger review process but which may hold information that is relevant to the CCPC's review of a notified merger or acquisition. The CCPC considers that such an amendment would provide much-needed clarity as to the scope of the CCPC's powers to require the provision of information from parties for the purposes of its review of mergers and acquisitions that have been notified to it.

Clarifications as to RFI responses

5.14 As noted above, section 20(2) of the 2002 Act provides for the CCPC to issue an RFI during its review of a merger or acquisition that has been notified to it. Issuing an RFI stops the statutory time frame the CCPC has to review the merger or acquisition, i.e. it "stops the clock". When a party responds in full to an RFI issued

to it, the merger review clock will restart from the date that the RFI is complied with.[16] In practice, the CCPC informs the party in writing that it has complied with the requirements of the RFI and that the merger review clock has restarted.

5.15 However, the 2002 Act currently does not provide a specified period for CCPC to determine whether or not a party has complied in full with the requirements of the RFI. This results in uncertainty as to when the clock restarts, as the party concerned may assume that the clock restarts as soon as the RFI response is received by the CCPC, but the CCPC may subsequently consider that such party has not complied in full with the requirements of the RFI. In practice, the CCPC takes time to conduct a detailed review of the information received in response to an RFI and to decide as to whether the party concerned has complied in full with the requirements of the RFI.

5.16 The CCPC strongly welcomes the Department's proposal to provide for clarification in Part 3 of the 2002 Act as to the circumstances when the merger review clock restarts following receipt of a response to an RFI and for specified periods for the CCPC to determine whether such response complies in full with the requirements of the RFI. The CCPC considers that these amendments are necessary in order to provide the CCPC with sufficient time to assess compliance with an RFI without impinging on the time it has to review a notified merger or acquisition and to remove any doubt as to when the merger review period will restart.

5.17 We suggest that Part 3 of the 2002 Act could be amended in order to provide that:

(a) the merger review clock restarts only at the time when the CCPC is satisfied that the party concerned has complied in full with the requirements of the RFI;

(b) the merger review clock will not restart if the party concerned has not complied in full with the requirements of the RFI; and

(c) the CCPC is provided with a specified time frame (for example, 5 working days) to determine whether the party concerned has complied in full with the requirements of the RFI.

[16] Please see section 19(6)(b) of the 2002 Act in relation to RFIs issued by the CCPC during the examination (phase 1) stage of a merger review. Please see section 22(4A) of the 2002 Act in relation to RFIs issued by the CCPC during the full investigation (phase 2) stage of a merger review.

6. Transposition of the ECN+ Directive

6.1 In an appendix to the Department's consultation document, the Department has set out, for information purposes, the main objectives of the ECN+ Directive and the Department's policy direction regarding the ECN+ Directive's transposition.

6.2 The purpose of the ECN+ Directive is to empower the national competition authorities of the EU Member States, such as the CCPC, to be more effective enforcers of EU competition law and to ensure the proper functioning of the internal market. The ECN+ Directive provides for minimum guarantees and standards to empower national competition authorities, and ensure that they have the appropriate tools, to enforce EU competition law in a harmonised manner. In particular, the ECN+ Directive requires Ireland to introduce non-criminal financial sanctions for breaches of EU competition law.[17]

6.3 The CCPC's strong preference is for the introduction of an administrative enforcement regime in Ireland, in which the CCPC would be the primary national administrative competition authority. In such an administrative enforcement regime, the CCPC considers that it would require powers to adopt infringement decisions, to make orders, to grant remedies (procedural or structural) including interim relief, and to impose fines in respect of breaches of competition law, subject to appropriate judicial oversight. The CCPC considers that an effective administrative enforcement regime would also require the CCPC to have the power to grant immunity from and reductions in fines as part of the leniency programme required by the ECN+ Directive.

6.4 The CCPC is very strongly supportive of the aims of the ECN+ Directive. In particular, the CCPC considers that the requirement to introduce non-criminal financial sanctions will fill a significant gap in the existing competition law enforcement regime in Ireland and is of critical importance for the effective enforcement of competition law in Ireland. The current absence in Ireland of civil or administrative fines for breaches of competition law very significantly

[17] Article 13(1) of the ECN+ Directive.

undermines the CCPC's ability to combat anti-competitive conduct.[18] We consider that an administrative enforcement regime – accompanied by an attractive leniency system – would be more effective, efficient and predictable than the current system, have a greater deterrent effect and increase the incentives for businesses to cooperate with investigations conducted by the CCPC.

[18] For more information on the CCPC's views in this regard, please see the following link: https://www.ccpc.ie/business/opening-statement-isolde-goggin-joint-oireachtas-committee-business-enterprise-innovation/

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