An Roinn Fiontar, Trádála agus Fostaíochta
Department of Enterprise, Trade and Employment

Report on the Public Consultation on Aspects of the Competition (Amendment) Bill

January 2023

Prepared by the Department of Enterprise, Trade and Employment
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Contents

Introduction

SUBJECT OF THE PUBLIC CONSULTATION

The Competition (Amendment) Act 2022 transposes, *inter alia*, Directive (EU) 2019/1 (known as the ECN+ Directive). The Act also makes amendments to existing legislation unrelated to the Directive but increasing other powers of the Competition and Consumer Protection Commission (CCPC).

In January 2021, prior to enactment, the Department of Enterprise, Trade and Employment ('the Department') undertook a public consultation to obtain views on the amendments that are not related to the ECN+ Directive. The Department received 16 submissions (4 of which were from Beef Plan Movement). These submissions were given careful consideration when finalising the provisions contained within the Competition (Amendment) Bill which was brought before the Houses of the Oireachtas.

BACKGROUND

In addition to transposing the ECN+ Directive, the Department sought opinions on the introduction of a number of proposed provisions which would strengthen the powers of the CCPC. These provisions centred around four main themes. These four themes created the structure for the consultation document, with respondents being asked to give feedback on these areas. The themes were:

- Providing for the offence of 'bid-rigging'
- The power of the competent body to prosecute "gun jumping" offences on a summary basis
- Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications
- Other amendments relating to the operation of merger control

The Department received responses from the following stakeholders:

- A&L Goodbody
- CCPC
- Compecon
- DLA Piper
- Paul K Gorecki
- Law Society of Ireland

- Matheson
- McCann Fitzgerald
- McMillan, on behalf of the Merger Streamlining Group
- William Fry
- Beef Plan Movement
- Maurice Fitzgerald

We thank respondents for their views and the time taken to prepare a submission.

Submissions received in response to the public consultation are reproduced in full in this report, along with an executive summary.

Executive Summary

2.1 Providing for the offence of 'bid-rigging'

Responses varied in response to this provision. Some respondents felt that there was a clear need to provide for a specific offence of bid-rigging and that it would provide clarity. Other respondents expressed concerns that it could raise issues dealing with anti-competitive activity that doesn't come within the definition of bid-rigging, and may create issues surrounding alignment with EU legislation and practises in other jurisdictions.

It was suggested that guidance / education on bid-rigging should be developed both for public and private sectors, and for the courts.

2.2 The power of the competent body to prosecute "gun jumping" offences on a summary basis

While some respondents questioned the rationale for legislating for gun-jumping, the majority of submissions welcomed the proposals to provide the CCPC with the ability to take summary prosecutions for gun jumping offences.

It was noted that Ireland is somewhat out of line with the EU at present, particularly in respect of the issuing of financial penalties, and the proposed measures would go some way to remedy this.

It was further noted however that Ireland should be mindful of the impact of the legislation on commercial decisions, with the potential for increased administrative burden, arising out of an abundance of caution.

2.3 Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications

The majority of submissions received stressed that providing powers of surveillance and interception raises important questions regarding human rights and how to balance objectives.

Strong transparency measures would need to be maintained to independently justify and safeguard any actions taken under these provisions.

It was suggested that the Department should consider the following:

- how the Irish Courts would exercise prior oversight and authorisation in relation to approving such surveillance and interception measures,
- how the CCPC would demonstrate that the evidence could not be gathered in some other way,
- how after-the-fact review would be possible for individuals or firms subject to surveillance or investigation,
- how non-relevant information would be excluded,
- how legally privileged material would be handled,
- how an individual or firm's right to a fair trial may be affected.

2.4 Other amendments relating to the operation of merger control

The responses to the public consultation were broadly supportive of granting additional powers to review voluntary mergers and acquisitions.

The submissions received also noted the merit of the power to make interim orders but stressed that this is a highly significant step which could have commercial impacts and requires a right of response / appeal.

Concerns were raised regarding the impact on Ireland's competitiveness that may occur from the power to unwind mergers and the uncertainty that this could present to investors.

Finally, the powers to compel responses and clarifications to requests for information were considered necessary in some cases but may cause significant administrative burdens for companies if not used judiciously.

Consultation Paper

This Consultation Paper was released on the Department website on 11th January 2021.

1. Consultation

1.1 Purpose of Consultation

The Competition Policy Unit of the Department of Enterprise, Trade and Employment now invite submissions from representative bodies, Government Departments, Agencies, and other interested parties to a public consultation to review certain aspects of Competition Law in Ireland. The forthcoming Competition (Amendment) Bill 2021 will transpose Directive (EU) 2019/1 into law. The Bill also includes amendments to existing legislation unrelated to the Directive but increasing other powers of the CCPC. This consultation is inviting views on those additional elements only.

Submissions will only be accepted when submitted by email to conspol@enterprise.gov.ie by 5pm, Friday 29th January 2021. Please have "ECN+ Consultation" in the subject of your email.

You are invited to make a submission with your observations in relation to the questions in this document. The submission process is an opportunity for stakeholders to provide information and experiences and different perspectives on the issues involved in preventing infringements and properly enforcing competition law in Ireland. Stakeholder submissions are a vital source of information and views, helping inform the Department's final drafting of the amendments proposed.

1.2 Publication of Submissions and Freedom of Information

Any personal information, which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 and 2003. However, please note the following:

- The information provided in the submission form will be shared with relevant Government Departments and State organisations during the review process.

- The Department may publish the outcome of the reviews and the submissions received under this consultation on its website, and
- as information received by the Department is subject to the Freedom of Information Act, such information may be considered for possible release under the FOI Act. The Department will consult with you regarding such information before making a decision should it be required to disclose it.
- If you wish to submit information that you consider commercially sensitive, please identify that information in your submission and give reasons for considering it commercially sensitive.

2. Competition Enforcement Reform

In addition to the cross application of the measures contained in the ECN+ Directive to Irish competition law (see separate appendix), the Department is also including further provisions in the General Scheme of the draft legislation. These provisions include:

2.1 Providing for the offence of 'bid-rigging'

The recently published report of the Hamilton Review of the Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption contains a recommendation that Irish competition law be amended to create a specific offence of bid-rigging. This proposal also has significance in relation to public procurement fraud.

Bid-rigging is a form of cartel behaviour in which the firms that bid in a particular procurement process agree amongst themselves which firm submits the most advantageous tender. This enables firms to extract a higher price for the work as the bidders that agree to lose in the process submit inflated bids or do not submit a bid.

There are a number of types of bid-rigging:

bid rotation – bidders take turns at being the winning bidder, a form of market allocation;

bid suppression – some bidders sit out of a bidding process so another party can win a bid; and

complementary bidding – uncompetitive bids are made to ensure that a certain bidder is selected.

In Ireland, the practice to date has been to regard bid-rigging as a form of price fixing or market sharing. Price fixing and market sharing are specifically prohibited by sections 4(1)(a) and 4(1)(c) of the 2002 Act. However, this approach has led to some difficulties with Court cases, where bid-rigging as a specific concept was considered to be beyond the existing scope of anti-competitive practises outlined in the Act.

The express provision for bid-rigging (in general) is intended to make it clearer that such concerted behaviour during the tender process is unlawful as it distorts competition.

The intention of this provision is to ensure that bid-rigging is a specific anti-competitive practice under section 2 of the Competition Act 2002 (as amended) and also that the CCPC may have sufficient powers to review any competitive tendering process (including public tendering processes) to ascertain if such bid-rigging has taken place.

Question: You are invited to submit your views on this proposed provision.

2.2 The power of the competent body to prosecute "gun jumping" offences on a summary basis

Under Irish competition law, mergers or acquisitions which reach certain financial thresholds in the State, must be notified to the CCPC. Such notifiable mergers or acquisitions cannot be put into effect without obtaining clearance from the CCPC. Failure to notify any such merger or acquisition or putting it into effect before clearance by the CCPC, is referred to as "gun-jumping".

Currently, the offence of gun-jumping under section 18(9) of the 2002 Act can be prosecuted on a summary basis or on indictment by the DPP only. The CCPC does not have the power to bring a summary prosecution in respect of this offence.

Internationally, including in Europe, competition authorities are increasing their efforts to combat instances of "gun-jumping" in an attempt to deter early, unlawful implementation of transactions requiring prior merger control clearance. Competition authorities have become more vigilant by increasing their enforcement actions and imposing substantial financial penalties in an attempt to ensure that undertakings comply with the merger review rules.

The intention of this provision is to allow the CCPC to take summary prosecutions for gun jumping offences to reduce the burden on the DPP and to increase the enforcement of the gun-jumping provision generally.

Question: You are invited to submit your views of this proposed provision.

2.3 Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications.

The Department's General Scheme contains a provision that allows a National Competition Authority to undertake covert surveillance and consider relevant evidence, irrespective of the form in which it exists.

Cartels require communication, and as communications technology has improved over time, cartels have become more sophisticated as they have moved to exploit these and move away from paper communications. By its nature, a cartel is a secretive arrangement, which is often communicated electronically or by mobile phone. Currently, the CCPC has the power to obtain communications metadata, which shows when individuals have been communicating, but does not provide the content of those communications.

This precludes access to telephone conversations, internet chats or covert taping of private meetings, all of which can be important to show the extent of a cartel conspiracy.

There are similar powers to allow interception of direct communications between cartel conspirators in other jurisdictions with criminal law regimes for cartels, or in some more limited circumstances, bid rigging. These powers, on their own account or on their account by local police forces, are available in jurisdictions such as the UK, US, Canada, Australia, Austria and Israel. For example, the Regulation of Investigative Powers Act 2000 provides for the use of these powers by or on behalf of the Competition and Markets Authority (formerly the Office of Fair Trading) in the UK.

In order to ensure that the CCPC has sufficient power to gather all relevant evidence in investigations of cartels (and bid-rigging), and for that evidence to be admissible in both the investigation and any subsequent court proceedings, the Minister wishes to give the CCPC the power to undertake:

(i) Interception and recording of electronic communications; and
(ii) Video and audio surveillance of suspects.

The intention of this provision is to allow the CCPC to gather evidence as necessary, including at short notice, to reduce the burden on the Garda Síochána and Court Service in seeking short notice warrants to gather such evidence. This will also help to increase the CCPC's efforts to detect and punish these aspects of white-collar crime within the State, including by providing stronger evidence to the DPP when seeking prosecutions of cartel and bid-rigging cases.

Question: What specific safeguards should be put in place in your view to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?

2.4 Other amendments relating to the operation of merger control

Firstly, it is the Department's intention to clarify that the CCPC has the power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis. It also gives the CCPC powers to review such mergers and acquisitions.

Secondly, the intention is that the Bill will also ensure that 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 any voluntary notifications received. These orders would remain in force until the merger is cleared or remedial action is taken. In addition, in the event that the CCPC finds that the already completed merger gives rise to a substantial lessening of competition in any market, the CCPC has the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s) – see related provision above on "gun-jumping" regarding voluntary notifications.

Thirdly, it is also intended to provide that, in the event that the CCPC finds that an already implemented merger gives rise to a substantial lessening of competition in any market, the CCPC will have the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s). This would include allowing for voluntary notifications of mergers and acquisitions to be considered by the CCPC and become subject to this provision if they proceeded before CCPC approval and were found to be anti-competitive and so should be unwound.

A further proposed provision relating to mergers gives the CCPC the power to require information from third parties in a merger review.

Currently, Section 20(2) of the 2002 Act provides for the power to require further information from "undertakings concerned".

The term "undertakings concerned" is not defined in the 2002 Act and, in the absence of clarity as to the meaning of the term "undertakings concerned", it is intended to clarify that the CCPC can seek (or receive voluntarily) information from a party which is not directly part of the merger/acquisition proceedings but which is a relevant 3rd party to those proceedings.

This amendment will allow the CCPC to serve a requirement for further information on any one or more of the undertakings involved in the merger or acquisition, and on any other undertaking that the CCPC considers may be in possession of information relevant to its review of the merger or acquisition.

Finally, on the subject of mergers, the Bill provides for when the merger review clock restarts following a Request For Information (RFI) and provides specified periods for the CCPC to determine RFI responses to be compliant.

Question: You are invited to submit your views on all of these proposed provisions.

Appendix to the Original Consultation Document

Please note that in the following document the term DBEI refers to the previous name of the Department, the Department of Business, Enterprise and Innovation.

Appendix

Background material to forthcoming Competition (Amendment) Bill – ECN+ Transposition elements

European Competition Network and Regulation 1/2003

NCAs from each Member State and the Commission together form a network called the European Competition Network (ECN) which was established in 2004 when Council Regulation (EC) 1/2003 (Regulation 1/2003) entered into force. The ECN is intended to ensure effective and consistent application of the EU laws with close cooperation by its members.[1] The ECN provides a forum for the coordination of ongoing investigations, as well as the ability to pool experience and identify best practices. It aims to provide an effective and responsive

[1] For the operation of ECN see Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/03

mechanism to counter companies engaged in EU cross-border competition restricting practices to the detriment of consumers. The decentralisation of EU competition law enforcement also enables the Commission to dedicate its resources to curbing the most serious infringements of EU competition law.[2]

National Competent Authorities for Regulation 1/2003

State has designated the following bodies as NCAs as required by Article 35(1) of Regulation 1/2003:

- the Competition Authority (now the Competition and Consumer Protection Commission – the "CCPC"),[3]
- the Director of Public Prosecutions ("DPP"), [4]
- the courts (or, as appropriate, the office of the relevant court), [5] and
- the Commission for Communication Regulation ("Comreg"). [6]

In 2007, ComReg was designated as an NCA and has parallel powers to the CCPC to investigate breaches of European competition law for matters within its specific remit. Under Regulation 1/2003, the courts, along with the NCAs are empowered to apply Articles 101 and 102 TFEU in full. The courts[7] were designated an NCA[8] given the requirement on NCAs to impose financial sanctions and penalties in Article 5 of Regulation 1/2003[9] as the CCPC and ComReg do not currently have this power.

Article 35(2) of Regulation 1/2003 allows that different powers and functions can be allocated to those bodies designated as NCAs: "When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial."

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[2] Regulation 1/2003, recital 3
[3] European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004 SI 2004/195, reg 4 (2)(a) (SI 2004/195)
[4] SI 2004/195 reg 4(2)(b)
[5] Regulation 1/2003, art 6
[6] European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) (Amendment) Regulations 2007, SI 2007/525 reg 3(iii)
[7] District Court, Circuit Court, High Court, Court of Criminal Appeal and the Supreme Court.
[8] For the purposes of article 35 Regulation 1/2003.
[9] SI 2004/195, reg 4(2)(c)

Importance of Effect on Trade between Member States

EU competition law applies where when the alleged breach may affect trade between Member States[10] and/or where EU competition law must be taken into account. An NCA must consider whether to apply Articles 101 and 102 TFEU to a case which is not under investigation by the Commission by determining whether the agreement or conduct in question could affect trade between Member States. If there is no effect on intra-Member State trade, EU competition law does not apply, and the case may be decided exclusively on the basis of national competition law.

Conversely, if it is considered that there is an effect on trade between Member States, Article 3(1) of Regulation 1/2003 obliges the NCA to apply Articles 101 and 102 TFEU in conjunction with national law. The legality of the simultaneous application of EU and national law resulting in imposition of fines in a single decision by the same national competition authority has been recently upheld.[11] In Ireland, a breach of EU law which is prosecuted under the Competition Acts can result in criminal liabilities and can also apply to natural persons such as directors who can be subject to criminal sanction.

Review of Operation of Regulation 1/2003

In 2013, the EU Commission began its assessment of the functioning of the Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty. Based on the results of this analysis, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives'[12] (Commission Communication) found that there is scope for the NCAs of EU Member States to be more effective enforcers and identified a number of areas for action to boost effective enforcement by the NCAs. These include guarantees that NCAs have adequate resources and are sufficiently independent, have an effective enforcement toolbox, can impose effective fines and have effective leniency programmes. The Commission highlighted divergences in national powers, procedures and sanctions available to NCAs, which has resulted in uneven enforcement of EU competition rules.[13] The Commission made direct reference to the inability of Irish NCAs to impose civil fines: 'Firstly, in one Member State it is currently not possible to impose deterrent civil/administrative fines on undertakings.'[14]

[10] Regulation 1/2003, art 3(1)
[11] Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie* (Court of Justice, 3 April 2019), para 39
[12] COM (2014) 453 final (Commission Communication)
[13] ibid 9, 30-34
[14] Commission Communication, 10, 37

Arising from the findings of the Commission Communication and following additional stakeholder engagement and consultation, the Commission presented its formal proposal for a Directive[15] on 22 March 2017. The Directive was adopted by the European Parliament on 11 December 2018 and subsequently published in the Official Journal on 14 January 2019.

2. Proposed Legislation

2.1 ECN+ Directive overview and proposed legislation

Introduction

The *Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*[16] (ECN+ Directive) must be transposed into national law by 4 February 2021.[17] The Minister for Enterprise, Trade and Employment intends to transpose the ECN+ Directive by primary legislation.[18] It is also intended to introduce further provisions beyond what is mandated by the ECN+ Directive to provide coherence between national competition law and corresponding responsibilities in EU law. This consultation is related only to some of those further provisions. However the main objectives of the ECN+ Directive are set out for information purposes as is the Department's policy direction regarding the Directive's transposition.

Main objectives of the Directive

The central aim of the ECN+ Directive[19] is to ensure that National Competition Authorities (NCAs) have guarantees of independence, sufficient resources and appropriate powers of enforcement, including the ability to issue fines, for breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Alongside the application of Articles 101 and 102, the Directive also covers the parallel application of national competition law to the same case and (in Articles 31(3) and (4)[20]) the application of national competition law on a stand-alone basis. The Directive sets rules on mutual assistance to ensure close cooperation within the European Competition Network (ECN).

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[15] Commission, 'Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' COM (2017) 0142 final

[16] [2019] OJ L11/3 (ECN+ Directive)

[17] ECN+ Directive, art 34

[18] Parliamentary Question 24596/19 (https://www.oireachtas.ie/en/debates/question/2019-06-13/121/)

[19] ECN+ Directive, Recital 3

[20] These articles relate to the rules on access to leniency statements and settlement submissions.

The Directive aims to achieve the following specific objectives:

- ensuring all NCAs have effective investigation and decision-making tools
- ensuring that all NCAs are able to impose effective deterrent fines
- ensuring that all NCAs have a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions, and
- ensuring that NCAs have sufficient resources and can enforce EU competition rules independently.

The main objective of the ECN+ Directive is to make sure that the full potential of the decentralised system of enforcement of EU competition rules put in place by Regulation 1/2003 is realised thus boosting effective enforcement of the EU competition rules. It also aims to underpin close cooperation in the European Competition Network (ECN).

Scope of the Directive

The Directive puts in place a framework of rules to ensure that NCAs have the necessary powers and resources to effectively apply Articles 101 and 102 of the Treaty. The Directive also puts in place rules on mutual assistance to ensure close cooperation within the ECN. Legal advice was previously sought in relation to the scope of the ECN+ Directive which was received from DBEI legal advisers on 10th January 2019. A summary of this advice is that the ECN+ Directive will only apply in circumstances where the NCAs consider provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and when there is also an element of inter-state trade involved. The ECN+ Directive will not apply when the NCAs are considering a potential infringement of Irish competition law on a stand-alone basis, with the exception of article 31(3) and (4).

Cross Application of Measures to national competition law

The Minister of Enterprise, Trade and Employment aims to introduce these new measures and powers from the ECN+ Directive into Irish competition law in the most coherent manner possible and to avoid parallel systems of inspection, investigation, enforcement and sanction in operation. For this reason, it is intended that primary legislation which will bring the same powers, tools and recourse to sanction for the NCAs irrespective of whether there is EU cross-border effect. This approach reflect the fact that it may not be apparent at the beginning of an investigation whether there is cross-border effect in the matter under investigation, which could leave NCAs uncertain of the powers at their disposal in the preliminary investigation of a possible offence.

The Department is of the view that a robust suite of powers should be available for the investigation of competition law offences. The powers and sanctions that will be available arising from the transposition of the ECN+ Directive will be incorporated into national law, in so far as is possible, in order to avoid a divergence of outcomes depending on whether national or EU competition law is being applied.

4. Main features of ECN+ transposition

4.1 Powers of Inspection

The ECN+ Directive grants NCAs the power to conduct unannounced inspections of undertakings and associations of undertakings, including the power to enter any premises or vehicles and to examine any books and other records irrespective of the medium on which they are stored, including electronic communications and records stored in the Cloud. NCAs will also be able to seal any premises, vehicle or equipment pending later re-entry to the extent necessary for the inspection.

The transposition of the ECN+ Directive will mandate such powers for any investigation where it relates to provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and when there is also an element of inter-EU Member state trade involved. The legislation transposing ECN+ will ensure that NCAs investigating a potential infringement of Irish competition law without a cross-border element will be drawing from an identical set of powers.

NCAs have the power to investigate breaches of sections 4 and 5 of the Competition Act 2002 (2002 Act) on both a civil and criminal basis. Once the ECN+ Directive is transposed, NCAs should be in a position to use their search powers in the context of either a civil/administrative or criminal investigation.

4.2 Interim Measures

In order to ensure that an infringement of Article 101 or 102 TFEU does not seriously harm competition while an investigation is ongoing, the Directive seeks to give an NCA the power to take interim measures by decision. This power is considered important to avoid market developments that would be difficult to reverse at the end of an investigation. A decision imposing interim measures should be valid only for a specified period, either until the conclusion of the proceedings by an NCA, or for a fixed time period which can be renewed insofar as it is necessary and appropriate. Interim measures, or injunctions, are increasingly promoted by the European Commission as a way to intervene quickly in problematic markets.

Article 11 of the ECN+ Directive requires that NCAs be empowered to act of their own initiative to order by decision the imposition of interim measures by prima facie finding of an infringement. DBEI has obtained confirmation from the European Commission that the drafting language used in Article 11 of the ECN+ Directive refers to NCAs as a collective noun which can be understood by applying Article 35(1) of Regulation 1/2003. In keeping with Article 35(2), the relevant functions required by Article 11 can be assigned to different NCAs as appropriate.

The proposed legislation transposing ECN+ provides that a national administrative competition authority (as defined in the ECN+ Directive) should of its own initiative and arising from an ongoing investigation, introduce interim measures by way of prohibition notice which can be appealed to the court.

4.3 Fines

Introduction of fines

A central objective of the Directive is to ensure that NCAs in all Member States can impose 'effective, proportionate and dissuasive fines' for breaches of Articles 101 and 102 TFEU. The inclusion of these provisions in the ECN+ Directive is of specific importance for transposition in an Irish context as it will present a sea change in the enforcement capabilities of Irish NCAs. There are two types of fines required by the ECN+ Directive, non-criminal financial sanctions provided for in Article 13(1) and periodic payment penalties as in Article 16.

Non-criminal financial sanctions

Article 13(1) of the ECN+ Directive requires that Member States must ensure non-criminal financial sanctions can be imposed for breaches of EU competition law.[21] This obliges Member States, such as Ireland with a purely criminal regime for levying fines arising from convictions for competition law breaches, to introduce an additional non-criminal system. Article 13(1) specifies that an NCA must be able either to impose fines in its own administrative proceedings, or to seek the imposition of fines in non-criminal judicial proceedings. Recital 40 clarifies that the relevant system introduced arising from the requirements of Article 13(1) will be without prejudice to criminal proceedings under national law which can also result in the levying of fines.

Cross Application of non-criminal financial sanctions to Irish law

In order to ensure coherence with EU competition law, and in instances where there is a parallel application of EU and Irish law, the proposed legislation will allow for the introduction of a robust system for non-criminal financial sanctions arising from the Directive which can be cross applied to Irish competition law with appropriate constitutional and procedural safeguards.

[21] Further elaboration on this matter can be found in recitals 40-43 and 45-46.

Periodic payment penalties

Article 16 relates to periodic penalty payments with a view to tackling continuing and future non-compliance by undertakings without prejudice to the power of NCAs to punish non-compliance using measures arising from Article 13(2).[22] It should be noted that Article 16, in allowing for periodic payment penalties, distinguishes between national administrative competition authorities in 16(1)[23] and national competition authorities[24] in 16(2). This means that the CCPC and ComReg as national administrative competition authorities will be required to impose periodic penalty payments for failure of an undertaking/undertakings to supply information requested under Article 8 or to appear at an interview requested under Article 9. For the purposes of transposition, based on legal advice, the application of Periodic Penalty Payments will have two separate approaches depending on whether it is EU or Irish competition law that is being infringed. A decision to impose a periodic penalty payment in the case of an infringement of Irish competition law will require confirmation by the appropriate court.

4.4 Leniency and Immunity

The ECN+ Directive requires that Member States have a leniency programme for cartels which enables NCAs to grant immunity from fines, for disclosure of participation in a cartel, as well as a reduction in fines in certain circumstances for undertakings that do not qualify for immunity. The introduction of the leniency programme for cartels will ensure that the main principles of the ECN Model Leniency Programme[25] come into operation in Ireland. The leniency programme required by the ECN+ Directive will be a novel departure as Ireland is currently the only country that does not have such a leniency programme for competition law in place.[26] There is an additional measure in Article 18(3) in relation to the possibility to grant additional reductions in fines for compelling evidence submitted by the undertaking to the NCA which results in a higher fine levied on the participants in a cartel.

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[22] ECN+ Directive, recital 44

[23] 'national administrative competition authority' means an administrative authority designated by a Member State to carry out all or some of the functions of a national competition authority. ECN+ Directive, art 2(1)(2)

[24] 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003 as being responsible for the application of Articles 101 and 102 TFEU; Member States may designate one or more administrative competition authorities (national administrative competition authorities), as well as judicial authorities (national judicial competition authorities). ECN+ Directive art 2(1)(1)

[25] Further information on the ECN Model Leniency Programme is available at <http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf>

[26] Joint Committee on Business, Enterprise and Innovation Deb 13 February 2018, 9

The introduction of both immunity and leniency on a statutory basis is also being implemented in the proposed legislation for civil infringements of national competition law, as the incentive to apply for leniency could diminish if the NCA's investigation were to subsequently establish that the cartel was not capable of affecting trade between EU Member States and breached Irish competition law only.

Submissions

Please see below all submissions received as part of this public consultation.

A&L Goodbody

Public Consultation on Aspects of the Competition (Amendment) Bill 2021

Submission by the EU, Competition & Procurement Law Group of A&L Goodbody

29 January 2021

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1 INTRODUCTION

1.1 A&L Goodbody (**ALG**)'s European Union, Competition and Procurement Law Group (the **Group**) welcomes the opportunity to make a submission to the Department of Enterprise, Trade and Employment (the **Department**) in relation to our observations on the questions in the Public Consultation on Aspects of the Competition (Amendment) Bill 2021 document (the **Consultation**).

1.2 ALG is one of Ireland's leading law firms with 107 partners and over 800 staff and has offices in Dublin, Belfast, London, New York, San Francisco and Palo Alto. The Group is widely recognised as one of the leading and most experienced teams in its field in Ireland and has been ranked as one of the leading competition law practices in the world by the *Global Competition Review*.

1.3 The observations expressed in this submission are the personal views of the lawyers in the Group and do not purport to represent the views of ALG or its clients. These observations are expressed solely in the context of this Consultation only and are not binding. The observations are related to the legal issues involved and should not be seen as reflective, in any way, on any individual.

1.4 If the Department would like to discuss any of our observations further please do not hesitate to contact the Group via Dr Vincent Power (vpower@algoodbody.com), Anna Marie Curran (AMCurran@algoodbody.com) or Alan McCarthy (amc@algoodbody.com).

1.5 By way of a general introductory remark, these additional items which have been opened for consultation are, we understand, outside the scope of the ECN+ Directive. Their enactment is therefore not "necessitated" by virtue of Ireland's membership of the European Union. The enactment of these measures would therefore not enjoy constitutional immunity as being "necessitated" by Ireland's membership of the European Union (**EU**). In other words, these proposals are additions to the legislation designed to implement the ECN+ Directive. These additional items raise important and significant issues of policy and law (including constitutional and human rights law) so there should be careful and detailed consideration of these proposals – some of which are very novel and require very careful analysis. It may be that the Department would wish to proceed with the implementation of the ECN+ aspects (given the date for the implementation of that directive) and consider the full implications of these additional issues separately and decide whether or not they are suitable for enactment and whether some of them could withstand constitutional challenge.

1.6 It is also worth noting that the law on this area has been amended by individual Acts of the Oireachtas in 1991, 1996, 2002, 2006, 2010, 2012, 2014 and 2017. It is therefore worth considering whether another amendment of this type (above and beyond the ECN+ regime) is appropriate or necessary in this context.

2 SECTION 2.1: PROVIDING FOR THE OFFENCE OF 'BID-RIGGING'

Question: You are invited to submit your views on this proposed provision

2.1 The Consultation outlines a proposal to prohibit bid-rigging as a specific anti-competitive practice under the Competition Act 2002 (as amended) (**2002 Act**) and to empower the Competition and Consumer Protection Commission (**CCPC**) to review *any* competitive tendering process (including public tendering processes involving the State and State bodies) to ascertain if such bid-rigging has taken place. The proposal is in line with the proposals for a specific offence of bid-rigging as outlined in the Hamilton Review of the Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption published in December 2020.

2.2 **A specific prohibition for a specific anti-competitive practice for bid-rigging is unnecessary as it is already a well-established competition law infringement**

2.2.1 Bid-rigging is already well established as a competition law infringement under both Irish and EU law.

2.2.2 This is clear from the case law of the European Commission, the Court of Justice of the European Union (**CJEU**) and the Irish courts. Indeed, the CCPC has published an excellent guide on it and why it is unlawful: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/10/CCPC_Business_Guide_Bid_Rigging_WEB.pdf

2.2.3 Under Irish law, bid-rigging constitutes an anti-competitive arrangement within Section 4(1) of the 2002 Act. The concept of an anti-competitive arrangement is sufficiently broad to cover both explicit and tacit collusion between actual and potential competitors which has as its object or effect the prevention, restriction or distortion of competition. The list of anti-competitive practices outlined in Section 4(1) of the 2002 Act and Article 101(1) of the Treaty on the Functioning of the European Union (**TFEU**) is non-exhaustive i.e.

> *"…agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which –*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development or investment;*
>
> *(c) share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; and*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts."*

2.2.4 Indeed, it is often the case that a bid-rigging infringement is coupled with other specified and non-specified cartel activities such as market-sharing, price fixing and anti-competitive exchanges of information.

2.2.5 While neither Section 4(1) of the 2002 Act, nor Article 101(1) of the TFEU specifically list bid-rigging as an anti-competitive infringement, competition regulators (including the Irish courts)

have had no issue in terms of making findings that a bid-rigging practice constitutes a competition law infringement. The advantage of the broad embracive provision is that it covers more rather accidentally excludes some conduct. The elasticity of the language of Section 4(1) and Article 101(1) is that the Oireachtas does not have to enumerate every single breach of competition law – which would be unduly onerous and poor policy given that there are dozens of breaches and this list is neither closed nor finite.

2.2.6 In the Irish case of *DPP v. Aston Carpets and Flooring Limited and Brendan Smith*, the respondents entered guilty pleas in respect of engaging in and implementing an anti-competitive agreement contrary to Section 4(1), 6(1), 8(1) and 8(6) of the 2002 Act. Fines of €45,000 were imposed against the second defendant and he was also disqualified from holding a company directorship for five years in accordance with section 839 of the Companies Act 2014, while a fine of €10,000 was imposed against the first defendant.

2.2.7 In its 2019 Annual Report, the CCPC indicated that it had sent a file to the Director of Public Prosecutions (**DPP**) "*in relation to potential bid-rigging in the procurement of publicly-funded transport services, in certain parts of Munster and Leinster*".

2.2.8 Significant fines have been imposed by the European Commission in respect of bid-rigging infringements e.g. in 2007, the European Commission imposed fines of €992 million on members of the lifts and escalators cartels for bid-rigging, price-fixing, market and project allocation and the anti-competitive exchange of information, while in 2008 the Commission imposed fines of €1.3 billion which was at that time, the largest fines from one decision for a breach of Article 101 of the TFEU.

2.3 **Bid-rigging has been widely publicised as an anti-competitive practice and the creation of a new breach cannot provide any greater deterrent effect**

2.3.1 The prohibition on bid-rigging has been widely publicised as an anti-competitive practice. The practice has a considerably high profile compared to other forms of anti-competitive activity. The CCPC (and, its predecessor, the Competition Authority) have published a number of guidelines on the practice. For example, in November 2009, the Competition Authority published a booklet on "*The Detection and Prevention of Collusive Tendering"*[1] and highlighted that "*bid-rigging, or collusive tendering, is a serious form an anti-competitive behaviour".* The booklet outlined the various forms of cartels and collusive tendering, guidance on preventing collusive tendering, details of penalties for bid-rigging and what to do if collusive tendering was suspected.

2.3.2 The CCPC in its "*Guide for Small and Medium Enterprise on Consortium Bidding*"[2] (December 2014) included a section on bid rigging entitled "Bid-rigging is always prohibited by Competition law" and stated as follow:-

> *"'Bid-rigging', or collusive tendering, is a serious form of anti-competitive behaviour. It involves firms agreeing (in advance) on who will win a tender. It occurs when two or more firms agree not to bid, or how they will bid, against one another for a tender or contract. It typically results in the winning bid being higher than it should have been."*

2.3.3 In 2018, the CCPC published a Business Guide on "*Bid-Rigging: What you need Know*"[3] which outlines, among other things, what is bid rigging, the harm caused by bid-rigging, the different types of bid-rigging, the warning signs of bid-rigging, and how to prevent bid-rigging.

[1] *https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/Booklet-The-Detection-and-Prevention-of-Collusive-Tendering.pdf*

[2] *https://www.ccpc.ie/business/help-for-business/guidelines-for-business/consortium-bidding-guide/*

[3] *https://www.ccpc.ie/business/help-for-business/guidelines-for-business/bid-rigging-what-you-need-to-know/*

2.3.4 The CCPC has also worked with State agencies and organisations to develop awareness of the warning signs of bid-rigging. In its 2018 and 2019 Annual Reports, the CCPC outlined that it had:

- hosted a workshop, 'Screening for Bid-rigging in Public Procurement,' for procurement officials at which delegates from the Dutch, Portuguese and Swiss competition authorities delivered informative presentations to an invited audience from across the State sector dealing with public procurement. Information was also shared on different methods that are used to detect bid-rigging, including new screening tools being developed internationally that will be better at detecting patterns

- developed a new bid-rigging information booklet and checklist for businesses involved in procurement, highlighting the common signs of collusive tendering and information on steps that can be taken to mitigate them

- presented at Public Affairs Ireland's 'Certificate in Public Procurement' course.

2.3.5 Many public bodies include provisions on bid-rigging in their tender documents. For example, the template Request for Tenderers (for goods) developed by the Office of Government Procurement contains the following provision at Section 2.14:

> *"Anti-Competitive Conduct*
>
> *Tenderers' attention is drawn to the Competition Act 2002 (as amended, the "2002 Act"). The 2002 Act makes it a criminal offence for Tenderers to collude on prices or terms in a public procurement competition".*

2.3.6 In summary, businesses and public and private procurers are already well aware that bid-rigging constitutes an anti-competitive practice. Its inclusion as a specific anti-competitive practice cannot provide any greater deterrent effect given that it already has a high profile as an anti-competitive practice and the fact that it is already a hard-core offence under the 2002 Act.

2.4 **The creation of a specific prohibition on bid-rigging is a divergence from EU competition law and could impact parallel investigations into breaches of the anti-competitive practice under the new bid-rigging provision and under Article 101(1) of the TFEU**

2.4.1 Article 101(1) of the TFEU does not contain a specific prohibition on bid-rigging or collusive tendering. For the reasons outlined above, it is unnecessary as Article 101(1) of the TFEU (like Section 4(1) of the Irish 2002 Act) is sufficiently broad to capture bid-rigging practices.

2.4.2 The inclusion of bid-rigging as a specific prohibition under the 2002 Act would lead to a divergence with EU competition law contrary to the EU's objective of achieving harmonisation and convergence in substantive competition law and enforcement. Under EU competition law jurisprudence, bid-rigging falls squarely within the Article 101 prohibition on anti-competitive arrangements. The creation of a new bid-rigging prohibition outside of the prohibition on anti-competitive arrangements has the potential to complicate an investigation under Irish and EU competition law.

2.4.3 Many anti-competitive practices have the potential to affect trade between Member States. This is particularly so in the case of bid-rigging where bidders are often multi-nationals bidding in tender processes across the EU. The creation of a new bid-rigging infringement could have significant implications for how bid-rigging cases are investigated and enforced by the CCPC. The evidence and proof necessary for establishing a breach under the new provision may well diverge from the evidence and proof required to ground an infringement of Article 101 of the TFEU.

2.4.4 There would be unfortunate consequence that were conduct to involve bid-rigging which affected trade in Ireland and between EU Member States (it would be quite common for there to be an effect on trade in Ireland and between EU Member States) then a defendant would have to be charged under the specific Irish bid-rigging provision and the broad EU anti-competitive arrangements provision thereby putting additional costs and burden on the State but also laying open avenues of defence or escape for the unscrupulous defendant who would seek to abuse the process given the different offences for the same conduct.

2.4.5 For the reasons outlined above, the creation of a new bid-rigging prohibition would appear to be unnecessary, would not have any greater deterrent effect (given that it is already a high profile breach of Section 4 of the 2002 Act / Article 101 of the TFEU) and could lead to a divergence with EU competition law. Indeed, to enact specific legislation now could call into question whether it was unlawful beforehand. There appears to be no doubt in the mind of the CCPC, the European Commission as well the Irish and EU courts that it is unlawful and capable of being prosecuted under the existing rules. Therefore it is open to question whether doubt should now be introduced when none existed and it would only cause legal and practical difficulties.

3 SECTION 2.2: THE POWER OF THE COMPETENT BODY TO PROSECUTE "GUN JUMPING" OFFENCES ON A SUMMARY BASIS

Question: You are invited to submit your views of this proposed provision

3.1 There is no doubt that the premature implementation of a merger or acquisition – the issue addressed at 2.2 of the Consultation - can be a serious matter. For example, the European Commission has imposed fines of €20 million, €28 million and €124 million in the cases of Marine Harvest, Canon and Altice. The practice at EU level is also borne out at national level with fines, for example, of €80 million being imposed by the French competition agency on SFR and Altice as well as fines of €4 million imposed by the BkA in Germany and €40 million imposed by the UOKiK in Poland in particular cases. While the fines in Ireland are much less – although the maximum fine on indictment is up to €250,000 with daily default fines which could accumulate to a large amount - the issues involved in the practice are as complicated and as complex in Ireland as the comparable regime internationally. These can be serious matters.

3.2 It is equally clear that the practice on this area is very technical and often requires sophisticated analysis. This is evidenced by the approach taken by the CJEU in cases such as *Marine Harvest* (a case which lasted for six years). The issue is often not the deceptively simple one of whether a notification was made or was not made. When the cases are opened up, they often require complex jurisprudential analysis of, for example, whether a notification was needed at all and, if so, the circumstances of the case (e.g., the *Marine Harvest* and *AP Møller* case law).

3.3 The current proposal is unnecessary from a substantive law perspective. *The issue of gun-jumping is already addressed by section 18(9) of the 2002 Act*. The regime has been in place for many years – going back to 1978. It is notable that there is no criticism in the consultation paper of the substantive law or a call for it to be changed. The proposal is that the CCPC could bring prosecutions itself in the District Court for this complex and serious matter.

3.4 The proposal is also unnecessary from a procedural perspective. The DPP already has the power to prosecute the issue on a summary basis and there have been prosecutions recently and no suggestion that the DPP would be unwilling to bring further prosecutions. (If there was a suggestion that the State's primary prosecutorial agency thought it best not to bring prosecutions then that is no reason to entrust the role to another agency.)

3.5 The only stated reason for the proposal is that it would assist the DPP if the CCPC also had the power to bring summary prosecutions:

> *"The intention of this provision is to allow the CCPC to take summary prosecutions for gun jumping offences to reduce the burden on the DPP and to increase the enforcement of the gun-jumping provision generally."* (Emphasis added)

3.6 There is no evidence given for the notion that the DPP is too busy or that there have been prosecutions which have not been taken since 1 January 2003 when the current regime entered into force or, indeed, 3 July 1978 when the previous regime commenced.

3.7 It is submitted, for many reasons including those reasons below that this proposal ought not to be pursued because there is no substantive or real procedural need. Instead, adopting the proposal would complicate investigations and prosecutions leading to more appeals and greater uncertainty and costs for all involved with the taxpayer often having to pay for failed prosecutions and successful appeals against convictions.

3.8 This is clearly a complex and serious matter. It is only sometimes suitable for the District Court. In this context, one is minded of case law such as *Melling v Ó Mathghamhna, Conroy v Attorney General* and more recent case law saying that some issues are not suited for the District Court (where a summary prosecution under this proposal would have to be taken). When it is suitable for the District Court, it is *important, if not imperative, that the prosecution is taken by an agency which has not been directly involved in the matter so as to provide objectivity and independence of decision-making in whether a criminal*

prosecution should be instituted. The issues involved often go well beyond the simple question of whether a notification was, or was not, made. The questions involved include whether a notification ought to have been made and in what detail. The case law of the European Commission, the General Court of the European Union and the CJEU are all testament to how involved these issues can be in practice. It is submitted that it is rarely suited to the District Court but when it is (and it can happen), the decision to institute the proceedings should be taken by an institution (the DPP) which is not involved in the actual process under scrutiny (as the CCPC would have been and usually over many months).

3.9 It is worth recalling that the issue arises not only where there is a failure to notify but also when there is defective notification (as in some of the EU and international case-law). It would therefore be the same institution (i.e., the CCPC) which would have been involved in the case under prosecution, deciding on the prosecution and taking the prosecution. The same people from the CCPC would be involved in the review of the notification (or lack of it), review of the transaction, the decision to institute the prosecution, pursuing the prosecution and defending the almost inevitable appeal from such a prosecution where the prosecution was contested and/or appealed. It is more sensible and efficient to leave the current system involving the DPP (the specialist prosecutorial agency in the State) in place and not tamper with it.

3.10 While the European Commission may impose fines for the practice, it has elaborate procedures (which are nonetheless criticised from time to time) to address the fact that it would be taking a decision against the interests of the party who failed to notify it (e.g., the Hearing Officer and the hearing process). The CCPC does not have any of those procedures. Therefore the safeguards (in so far as they exist) would not be in the proposed change.

3.11 It is implied in the reason proposed that it would "increase the enforcement" of the provision. If this is a criticism that the DPP has not instituted enough cases then it needs to be justified much more; there is no suggestion that the DPP has taken too few cases or left prosecutions untaken. In any event, it would seem to be a more efficient use of resources for the CCPC – with its remit in merger control – to concentrate on detecting and investigating these cases and not be burdened by having to prosecute these cases as well which will add extra expense and complication when the resources and experience are already present in the DPP's office.

3.12 It is good policy and practice, in line with best international best practice, to have an independent and detached party (i.e., the DPP in this case) to take an objective and impartial decision on whether to prosecute rather than relying on an agency which might feel slighted by not receiving a notification or because of perceived gun-jumping.

3.13 For the avoidance of doubt, this proposal is not needed under the ECN+ regime. Indeed, given the view expressed by various commentators and cases that gun-jumping frustrates the work of the competition agency, it would appear wrong for that agency (which has a direct interest in the outcome) to be the sole decision-making body as to whether or not there should be a prosecution. By analogy, it would be unusual to implement this domestic proposal alongside the implementation of the ECN+ Directive which calls for "appropriate safeguards" (e.g., recital 14 and article 3).

3.14 Finally, leaving the law as it currently stands does not interfere with the CCPC's laudable desire to investigate and have such practices investigated and prosecuted. By leaving the prosecution to the DPP's office, which was established over four decades ago and has a wealth of prosecutorial experience, means that the CCPC would have resources to concentrate on its main remit (including increasing its vigilance in this area) and workload rather than prosecuting, and defending, appeals in this area. It is inevitable that the CCPC could investigate more cases of gun-jumping if it did not also have to prosecute those cases (leaving the prosecution to the DPP) thereby diverting its resources into prosecution when there is an established State apparatus to do that (i.e., the DPP).

3.15 It is submitted that this particular proposal should not be pursued because it does not address any need, adds complication and cost to the taxpayer while is not desirable either substantively or procedurally.

4 SECTION 2.3: PROVIDING FOR THE POWER TO (I) CARRY OUT VIDEO AND AUDIO SURVEILLANCE AND (II) TO REQUIRE INTERCEPTION AND RECORDING OF ELECTRONIC COMMUNICATIONS

<u>Question:</u> What specific safeguards should be put in place in your view to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?

4.1 Ensuring individuals and businesses have a continued and uninterrupted right to privacy is crucial to the proper functioning of the Irish economy and society as part of Ireland's respect for human rights.

4.2 Against that backdrop, there are situations where the interception and recording of certain communications may not be in the State's best interests and therefore some interference or screening is needed. However, a society or responsible state will be concerned with any improper interference where there is any threat at all to the Rule of Law.

4.3 The introduction of a communications screening framework providing for the power to: (i) carry out video and audio surveillance; and (ii) to require interception and recording of electronic communications to gather relevant evidence in investigations of cartels (and bid-rigging) (**Interception, Recording and Surveillance Powers or the Powers**) without appropriate safeguards being taken could well involve inappropriate interferences with fundamental rights and would not provide the adequate safeguards for citizens and businesses and indeed the country's interests.

4.4 The Department will no doubt be taking detailed legal advice on the serious legal implications of the introduction of powers for an agency to interfere with rights of privacy without the prior intervention of a court or comparable third party agency.

4.5 It is curious that the question did not have regard to the Bunreacht na hÉireann (**Constitution**) which is fundamental in Ireland to defending the rights of all (whether Irish or not and whether a business or a private party).

4.6 Introduction of the powers could result in a conflict between and interference with the fundamental rights guaranteed by the Constitution, the European Convention on Human Rights (Convention) and the Charter of Fundamental Rights (CFR). (The Constitution is extremely important in this area and it is surprising that the question for consultation refers to the Convention and the CFR but not the Constitution.)

4.7 The high standards for data retention at a European level preclude the general and indiscriminate transmission or retention of traffic data and location data for the purpose of combating crime in general or of safeguarding national security, or as a preventative measure. Similarly the CJEU has also stressed that video surveillance systems processing personal data are lawful only under certain conditions. There are clearly an array of requirements to be considered.

4.8 We do not consider that the Interception, Recording and Surveillance Powers are necessary to achieve the objectives set out in the 2002 Act.

4.9 Similar powers have not been introduced for the purposes of serious crimes.

4.10 Introduction of the Powers would involve a divergence from the European Commission practice. This is not unlawful but it may be undesirable. Directive 2003/1 (**ECN+ Directive**) does not contain any provision relating to the Interception, Recording and Surveillance Powers nor does it require for any such powers or for any communications screening system to be transposed into national law. The implementation of the Powers goes beyond the scope of the ECN+ Directive and requires more detailed consideration. Comparable powers have never been introduced at the European Commission's Directorate General of Competition.

4.11 Interferences with the fundamental rights guaranteed by the Constitution, Convention and CFR would be a matter of serious concern:

4.11.1 Irrespective of whether Ireland takes steps to introduce the Interception, Recording and Surveillance Powers at the domestic level, it will be bound by national, international and European requirements and safeguards, in particular the Constitution, European and Irish Law, the Convention and the CFR.

4.11.2 The introduction of the Interception, Recording and Surveillance Powers may result in serious interferences with the fundamental rights guaranteed by the Constitution, Convention and CFR. This may be the case even where there is no ultimate link between the conduct of the persons whose data is affected and the objective pursued by the legislation at issue.

4.11.3 European Court of Human Rights (**ECtHR**) case-law provides that it is essential that any legislation provides sufficient clarity, so as to provide adequate protection against abuse of power. In a UK case involving the interception of telephone, email and data communications, the ECtHR found that there was a violation of Article 8 of the Convention as the domestic law lacked clarity and did not provide protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the authorities to intercept and examine external communications.[4] It is notable that in the context of the current consultation about possible Irish legislation, there is no clarity or certainty about which communications would be monitored and how that would interact with the current communications regime.

4.11.4 ECtHR case-law requires that there be robust oversight mechanisms and effective remedies and that legislation be set out in a form accessible to the public including the procedure to be followed for selecting, for examination, sharing, storing and destroying intercepted material.[5] This would require an entire legislative regime which would require cross-governmental consultation and a detailed regime to allow for such monitoring to occur.

4.11.5 The Consultation proposes introducing the Interception, Recording and Surveillance Powers for evidence gathering purposes. Information is gathered in the preliminary stages of competition investigations, at which stage the undertakings or persons involved have allegedly committed a crime. At this stage, the persons or undertakings have **no legal charge** against them. At investigative stage, the undertakings or persons involved have not breached any laws and yet it is proposed that their fundamental rights be restricted and potentially infringed.

4.12 **European law requirements for data retention**

4.12.1 There is an extremely high standard for data retention at a European level. The CJEU has confirmed that EU law (in particular, Directive 2002/58 (as amended)) (**ePrivacy Directive**), read in the light of the CFR, precludes national legislation requiring a provider of electronic communications services to carry out the general and indiscriminate transmission or retention of traffic data and location data for the purpose of combating crime in general or of safeguarding national security, or as a preventative measure.[6]

4.12.2 The CJEU has held that in situations where the Member State concerned is facing a serious threat to national security, that proves to be genuine and present or foreseeable, or in order to shed light on serious criminal offences, the ePrivacy Directive does not preclude recourse to an order requiring providers of electronic communications services to retain, generally and

[4] Liberty and Others v. the United Kingdom (58243/00 – 1 July 2008).

[5] Liberty and Others v. the United Kingdom (58243/00 – 1 July 2008).; Roman Zakharov v. Russia (47143/06 – 4 December 2015)

[6] On 6 October 2020, the CJEU delivered judgments on data retention in the cases of C-623/17 (Privacy International) and in Joined Cases C-511/18, La Quadrature du Net and Others, C-512/18, French Data Network and Others, and C-520/18, Ordre des barreaux francophones et germanophone and Others.

indiscriminately, traffic data and location data. In this regard, the judgment specifies that the decision imposing such an order, for a period that is limited in time to what is strictly necessary, must be subject to effective review, either by a court or by an independent administrative body whose decision is binding, in order to verify that one of those situations exists and that the conditions and safeguards laid down are observed.

4.12.3 The cases highlight the concern with the obligations to forward and to retain data in a general and indiscriminate way and that these actions constitute particularly serious interferences with the fundamental rights guaranteed by the CFR, where there is no link between the conduct of the persons whose data is affected and the objective pursued by the legislation at issue.

4.12.4 Importantly the Court interpreted Article 23(1) of the General Data Protection Regulation[7] (**GDPR**), in the light of the CFR, as precluding national legislation requiring providers of access to online public communication services and hosting service providers to retain, generally and indiscriminately, inter alia, personal data relating to those services.

4.12.5 There are also limits and safeguards on the targeted retention of traffic and location data. The CJEU has outlined that the ePrivacy Directive, read in the light of the CFR, does not preclude targeted retention of traffic and location data where this is limited in time to what is strictly necessary and on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion.

4.12.6 The legality of use of video and audio surveillance also depends on a number of factors, including the location and the privacy of the setting (whether the area is open to the public, whether there is an expectation of privacy or the place is private in nature)[8] and the Right to Privacy under the Convention may be violated if the measures are not necessary, proportionate and justified by legitimate reasons.

4.12.7 The CJEU has also stressed that video surveillance systems processing personal data are lawful only under certain conditions**.**[9] For example, the party to whom the data is disclosed must pursue a legitimate interest and *there must be no other way to reasonably achieve the legitimate data processing interests pursued by video surveillance that are less restrictive of the fundamental rights and freedoms of data subjects*. The CCPC has functioned effectively in dealing cartels, as has, moreover, the European Commission's Directorate General for Competition for six decades without such powers. The burden rests on the CCPC to explain why it, as opposed to the other agencies and organ of State, should have this power to monitor people *without court authorisation*. This lack of involvement of the Garda and the courts is highly exceptional – as the consultation document records at page 4:

> "The intention of this provision is to allow the CCPC to gather evidence as necessary, including at short notice, to reduce the burden on the Garda Síochána and Court Service in seeking short notice warrants to gather such evidence."

4.12.8 The introduction of the Powers requires a balancing of opposing rights and interests, which depends on the individual circumstances of each particular case in question. It is difficult to see how an agency which wants to intercept, record and survey a third party can conduct its own decision-making about whether to do so and on what terms. If there was a court procedure then it ought to be at least a High Court judge.

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[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

[8] López Ribalda and others v Spain (C- 1874/13 and C-8567/13 – 17 October 2019).

[9] TK v Asociaţia de Proprietari bloc M5A-ScaraA (C 708/18 – 11 December 2019).

4.13 **Implementation of the Powers would be disproportionate**

4.13.1 It is highly questionable whether the powers are appropriate where comparable powers have not been enacted in this way for the prevention, investigation, detection and prosecution of even more significant and serious criminal offences.

4.13.2 Furthermore, the burden rests on the CCPC to demonstrate that the Interception, Recording and Surveillance Powers are necessary to achieve the objectives set out in the 2002 Act. They are not needed for the achievement of the objectives set out in the comparable EU legislation. As a corollary to this, the introduction of the Powers would go farther than is necessary to meet the purposes of the 2002 Act of prohibiting anti-competitive conduct and could pose an actual threat to the rights of both individuals and businesses, as well as a potential threat to security and public order (if the appropriate security, management and safeguards are not implemented or if such a system were ever to be breached).

4.14 **Divergence from the European System**

4.14.1 The ECN+ Directive does not contain any provision relating to the Interception, Recording and Surveillance Powers nor does it require for any such powers or for any communications screening system to be transposed into national law. Comparable powers have not been introduced even at the European Commission's Directorate General of Competition. We would suggest drawing analogy with and guidance from the existing EU merger control regime. This is an example of an existing European merger control framework that functions effectively and strikes a balance between ensuring that European and third country undertakings meet the highest standards of competition law compliance and regulatory probity, without inhibiting core fundamental rights.

4.14.2 Furthermore, introducing the Powers would result in a divergence between the Irish and the EU competition law investigative powers even in regard to the same matter. It could also cause problems when evidence is gathered in this way under the Irish-related provisions but not under the EU-related provisions of the 2002 Act.

4.15 **Safeguards**

4.15.1 Should it be determined that the Powers are necessary, in certain cases, we consider it necessary that the CCPC should be required to apply for a separate warrant to exercise the Powers in respect of each individual case. This is in line with CJEU case law, which requires the individual circumstances of each particular case to be considered.[10] There may be circumstances where the Powers are not appropriate and the CCPC will have conduct a balancing test for each application.

4.15.2 The decision to grant the Powers should be by a court (probably the High Court) or by an independent entity exercising a judicial type function.

4.15.3 It would be necessary to verify that a situation exists requiring the Powers and that the conditions and safeguards, which must be laid down, are observed.

4.15.4 The decision to grant and impose such an order should be subject to effective review by a court.

4.15.5 The order providing for the Powers should only be given for a period limited in time and it should be limited to what is strictly necessary. However, it is open to question whether such powers may be exercised at all without appropriate authorisation.

4.15.6 The order may preclude the use of the Powers in certain geographical locations, settings etc.

[10] *TK v Asociaţia de Proprietari bloc M5A-ScaraA (C 708/18 – 11 December 2019).*

4.15.7 The team that is involved in the use of the Powers should be a separate team to the case team but this may be difficult to apply in practice particularly in the context of governance and the limited number of members of the CCPC.

5 SECTION 2.4: OTHER AMENDMENTS RELATING TO THE OPERATION OF MERGER CONTROL

Question: You are invited to submit your views on all of these proposed provisions.

5.1 In summary, we does not consider that it is necessary to adopt the proposed provisions under Part 3 of the 2002 Act because the current provisions and the application of Part 3 of the 2002 Act (including in the context of the application of EU merger control concepts) address most of the issues raised in the Consultation.

5.2 **The power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis**

5.2.1 The Department intends to clarify that the CCPC has the power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis.

5.2.2 Section 18(3) of the 2002 Act provides that where a merger that is not required to be notified under Section 18(1) of the 2002 Act, any of the undertakings involved may, before putting the merger or acquisition into effect, notify the CCPC.

5.2.3 The voluntary merger control system should only be applicable where there is a material competition issue with a proposed merger which is under the Section 18(1) 2002 Act thresholds.

5.2.4 The application of the other provisions of the 2002 Act (i.e. primarily Sections 4 and 5 of the 2002 Act) are sufficient for circumstances where a completed sub-threshold merger raises competition issues in Ireland. Adopting this proposal would add a further and unnecessary layer of merger control assessment.

5.3 **A power to the CCPC to make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its review of any voluntary notifications received. These orders would remain in force until the merger is cleared or remedial action is taken. In addition, in the event that the CCPC finds that the already completed merger gives rise to a substantial lessening of competition in any market, the CCPC has the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s) – see related provision above on "gun-jumping" regarding voluntary notifications.**

5.3.1 The proposed additional powers in the context of voluntary notifications are not necessary and the Courts are most appropriately placed to address these important issues.

5.3.2 Issuing interim orders and unwinding mergers under any circumstances are highly significant steps. The CCPC's role is to assess whether a merger would substantially lessen competition. The evidentiary and procedural significance of any interim orders or the unwinding of a merger is an entirely different role and one that can only be carried-out by the Courts. The rights of the defence of merging parties are protected by the Courts.

5.4 **Thirdly, it is also intended to provide that, in the event that the CCPC finds that an already implemented merger gives rise to a substantial lessening of competition in any market, the CCPC will have the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s). This would include allowing for voluntary notifications of mergers and acquisitions to be considered by the CCPC and become subject to this provision if they proceeded before CCPC approval and were found to be anti-competitive and so should be unwound.**

5.4.1 As stated above, for procedural and evidentiary reasons, only the Courts can address these important issues, in particular the unwinding of mergers. The rights of the defence of merging parties are protected by the Courts.

5.4.2 In any event, the 2002 Act already contains significant powers, sanctions and implications for merging parties if they proceed with a merger prior to approval under Part 3 of the 2002 Act.

5.5 **A further proposed provision relating to mergers gives the CCPC the power to require information from third parties in a merger review.**

- **Currently, Section 20(2) of the 2002 Act provides for the power to require further information from "undertakings concerned".**
- **The term "undertakings concerned" is not defined in the 2002 Act and, in the absence of clarity as to the meaning of the term "undertakings concerned", it is intended to clarify that the CCPC can seek (or receive voluntarily) information from a party which is not directly part of the merger/acquisition proceedings but which is a relevant 3rd party to those proceedings.**
- **This amendment will allow the CCPC to serve a requirement for further information on any one or more of the undertakings involved in the merger or acquisition, and on any other undertaking that the CCPC considers may be in possession of information relevant to its review of the merger or acquisition.**

5.5.1 We do not consider that these proposed additional powers are necessary.

5.5.2 Article 2 of the CCPC's 2014 "Notice in respect of certain terms used in Part 3 of the Competition Act 2002, as amended" explains what is meant as "undertakings involved" for the purposes of Part 3 of the 2002 Act.

5.5.3 Any perceived lack of clarity about the term "undertaking involved" (one that has been familiar since the beginning of the application of Part 3 of the 2002 Act) is resolved by reference the equivalent term under the EU Merger Regulation (i.e. "undertakings concerned").

5.5.4 Part 3 of the 2002 Act is fundamentally based on the EU Merger Regulation and the terms used are largely the same.

5.5.5 Third parties are not undertakings involved under Part 3 of the 2002 Act.

5.5.6 The CCPC may issue a summons to a third party obliging such third party to provide information to the CCPC on any aspect of the application of Part 3 of the 2002 Act (i.e. under Section 18 of the Competition and Consumer Protection Act 2014 (**2014 Act**) and by reference to the powers accorded to the CCPC under Section 10(1)(d) of the 2014 Act)). There are clear sanctions for a breach of this provision under the 2014 Act, it is the appropriate way to deal with requests for information from third parties and is consistent with previous practice in this regard.

5.6 **Finally, on the subject of mergers, the Bill provides for clarification of the circumstances when the merger review clock restarts following a Request For Information (RFI) and provides specified periods for the CCPC to determine RFI responses to be compliant.**

5.6.1 We look forward to details of the proposals under the Bill and note that Part 3 of the 2002 Act sets-out the timing requirements in the context of the time-period for merger review following an RFI.

5.6.2 We look forward to the clarity on a specified time period to determine if RFI responses are compliant.

Competition (Amendment) Bill 2021

Public consultation by the Department of Enterprise, Trade and Employment

Submission of the Competition and Consumer Protection Commission (CCPC)

CCPC

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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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29 January 2021

By Email: conspol@enterprise.gov.ie

Dear Sir and Madam

PUBLIC CONSULTATION ON ASPECTS OF THE COMPETITION (AMENDMENT) BILL 2021

We refer to the above public consultation (**Consultation**) published by the Department of Enterprise, Trade and Employment (**Department**).

DLA Piper Ireland welcomes the opportunity to provide our observations in relation to the questions raised in the Consultation. We set our comments below and would be pleased to discuss any of these further with the Department.

1. Proposal for bid rigging offence

1.1 As a serious form of anti-competitive behaviour, bid rigging is a type of cartel offence which currently falls within the category of behaviour sanctioned by the Irish Competition Acts 2002-2017 (**Competition Act**). We submit that it is not necessary for the Irish legislature to separately identify bid rigging as a specific anti-competitive offence in section 4 of the Competition Act.

1.2 We note that the recent review of structures and strategies to prevent, investigate and penalise economic crime and corruption (**Hamilton Review**) suggested such a legislative amendment in Recommendation 17. Before introducing such an offence, however, we suggest the Department engage in further analysis on this issue.

1.3 The extent to which comparable legislation in other jurisdictions provides for a specific bid rigging offence is not clear. Many cartels at EU-level are already investigated and sanctioned without a specific reference to bid rigging in Article 101 TFEU. In the UK, the Competition Act 1998 does not provide for a separate offence (although a reference to bid rigging as a *type* of cartel is included in section 188 of the Enterprise Act 2002).

1.4 Research by DLA Piper's Global Antitrust Team in September 2020 identifies that competition authorities throughout the world continue to successfully actively enforce against bid rigging practices, typically as part of a general cartel prohibition without express legislative enactment for bid rigging. The Cartel Enforcement Global Review 2020 identifies bid rigging decisions in the past three years in Canada, Denmark, Italy, Indonesia, Romania, Russia, Spain,

Singapore and the United Kingdom.[1] Indeed, in Ireland, the DPP obtained the first successful Irish conviction of a bid rigging offence in the *Flooring Cartel* in 2017 – without statutory reference to the term in the Competition Act.

1.5 As understood in practice, bid rigging is simply a context or situation in which price fixing, output limitation, customer allocation or market sharing can occur. In our view, the term bid rigging is not a term of art that meaningfully extends the application of section 4 of the Competition Act.

1.6 Moreover, there are countless forms of *permissible* joint bidding arrangements. These may require analysis to ensure compliance with section 4 of the Competition Act / Article 101 TFEU. If the Competition Act expressly prohibited bid rigging without ensuring that permissible forms of joint tendering could continue unhindered, it may risk overenforcement errors and raise legal uncertainty. Further, by separately treating bid rigging as a standalone offence, it may well be asked whether there is a hierarchy of anticompetitive behavior which itself may cause further uncertainty.

1.7 A final point bears mention. The Hamilton Review focused largely on ensuring that the CCPC (and/or an investigating authority) has sufficient resources to investigate anticompetitive activity in public procurements – such as enabling the CCPC access to bid data on eTenders. This is encapsulated in Recommendation 18 of the Hamilton Review and is worth further consideration by the Department. For example, it may wish to reflect not only how the CCPC can assist *public* authorities to detect collusive behavior but also how it may assist *private* firms to detect and prevent such harm – given that they also run procurement processes which are often highly valuable.

2. The power to prosecute "gun jumping" offences on a summary basis

2.1 At present, failure to notify a merger or acquisition to the CCPC is a criminal offence and may be prosecuted with the imposition of a fine of up to €3,000 on summary conviction, and a maximum of €250,000 on indictment. To date, there has been limited prosecution of gun jumping in Ireland. In April and May 2019, the DPP secured the first two guilty pleas for gun jumping in *Armalou Holdings Limited* and *Airfield Villas Limited*.

2.2 For that reason, in principle, we have no objection to the CCPC being empowered to prosecute cases for failure to notify a merger or acquisition on a summary basis – a power which is already exercised by the DPP. However, two wider issues should also be considered (i) whether criminal fines for breaches of the merger control rules are consistent with the ECN+ Directive, and (ii) whether further guidance on determining jurisdiction for mergers and acquisitions will accompany this change.

Criminal sanctions for gun jumping

2.3 We note that the Department has not yet engaged in a wider consultation in relation to the implementation of Directive 2019/1 (**ECN+ Directive**) into Irish

[1] https://www.dlapiper.com/en/ireland/insights/publications/2020/09/cartel-enforcement-global-review-2020/

law. We would welcome the opportunity to comment should this occur later in 2021.

2.4 Generally, the ECN+ Directive once implemented will provide the CCPC with wider powers to enforce Article 101 and 102 TFEU – and the Department appears to have taken the sensible view that such powers will extend equivalently to sections 4 and 5 of the Competition Act, even where there is no effect on intra-EU trade. Article 13 of the ECN+ Directive requires that national competition authorities be empowered to impose or request *non-criminal* financial sanctions. It is not clear, however, whether the Department proposes to allow this *civil* fining power to cover infringements of the merger control rules under the Competition Act.

2.5 This may result in the unusual situation that breaches of Part 3 of the Competition Act (i.e., merger offences) would *only* be punishable at a criminal standard – while breaches of section 4 or 5 of the Competition Act would be subject to *non-criminal* financial penalties even though the latter cases are more likely to concern actual competitive harm. We consider that the implementation of the ECN+ Directive is an opportune moment to consult more widely on this issue.

Guidance on Jurisdiction

2.6 Another key issue to consider before adopting greater criminal enforcement powers for gun jumping concerns jurisdictional certainty. Irish law generally requires criminal offences to be clear as Irish courts strictly interpret such statutes. At present, there is limited Irish-specific guidance on aspects of determining whether a merger or acquisition is mandatorily notifiable to the CCPC in Ireland.

2.7 While the CCPC is willing to engage with parties, pre-notification guidance from the CCPC is generally not published or constitutes a formal view. Parties often take comfort from the fact that the CCPC will generally follow the European Commission's Consolidated Jurisdictional Notice (**CJN**). Yet, there can remain considerable legal risk and uncertainty around the criteria for notification because (i) the CCPC has not issued equivalent guidance to the CJN, (ii) the CCPC has not publicly confirmed that it will not depart from the CJN and, in certain cases, adopts an alternative view, and (iii) the CJN itself is not binding and contains gaps and uncertainties.

2.8 Together, these considerations often raise costs for business operating in Ireland. Given the possible implications of a criminal conviction and fine, we consider that any move to empower the CCPC to prosecute gun jumping offences should be accompanied by more detailed jurisdictional guidance.

3. Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications.

3.1 The Consultation requests views on the specific safeguards that should be put in place to ensure rights under the Charter of Fundamental Rights of the European Union (**Charter**) and the European Convention on Human Rights

(**Convention**) are protected when the CCPC conducts secret surveillance and interception activities. However, we consider that the Department should consult on whether such powers ought to be assigned to the CCPC *at all*.

3.2 We recognise that competition investigations are difficult and require the careful deployment of resources to uncover hidden cartels or abusive activity. However, we do not consider that it is appropriate, in the current environment, for the CCPC to be empowered to secretly conduct surveillance and interception of electronic communications. We consider that the proposals raise very significant implications for the right to privacy and fair trial – requiring careful analysis and justification. Such invasive law enforcement measures are properly reserved only for serious crimes for which *alternative* means of investigation are not possible.

3.3 In our view, it is currently possible to lawfully investigate anticompetitive conduct by less intrusive mechanisms. In particular, the Irish legislature will already further resource and empower the CCPC under the ECN+ Directive. As noted above, the Department has not consulted on the implementation of the ECN+ Directive at this time. Yet, these new rules will enhance two of the main evidence-gathering mechanisms by which the CCPC may detect anticompetitive conduct, namely *via* dawn raids and leniency regimes.

3.4 First, Articles 6 – 9 of the ECN+ Directive will further empower the CCPC to conduct surprise inspections and interviews.

3.5 Second, Articles 17 – 23 of the ECN+ Directive provide for an enhanced leniency regime in Ireland. This is to be welcomed. Leniency remains one of the most effective tools to uncover cartels.

3.6 These new measures ought to be put into practice *before* recourse to any secret surveillance and interception legislative powers are considered. Indeed, there is a long line of case law on the extent to which competition authorities may (and may not) encroach on the right to privacy before the EU courts, the Irish courts and the Strasbourg court. This case law confirms that evidence gathered in breach of the protections under the Charter, Convention or Irish Constitution (Article 40.3) is likely to result in the exclusion of that evidence.

3.7 Should the Department nevertheless wish to pursue this proposal, it should give careful consideration to the following:

(a) how the Irish Courts would exercise prior oversight and authorisation in relation to approving such surveillance and interception measures,

(b) how the CCPC would show that it cannot obtain the potential evidence through less intrusive means,

(c) how after-the-fact review would be possible for individuals or firms subject to surveillance or investigation,

(d) how non-relevant or private information would be protected and excluded from any investigation file,

(e) how legally privileged material would be protected and excluded from any investigation file, and

(f) how an individual or firm's right to a fair trial may be affected.

3.8 Finally, we note that in 2017 the former Chief Justice of Ireland, John Murray, completed a review on the Law on the Retention of and Access to Communications Data (the **Murray Review**).[2] It has since been recognised by the Department of Justice that wider reform is necessary in the area of interception more generally.[3] A proposed bill is under consideration.[4] We consider that any powers of surveillance and interception held by the CCPC ought to be consistent with those provided for elsewhere.

4. Other amendments relating to the operation of merger control

Power of CCPC to accept and review completed transactions and associated power to make interim orders or unwind completed transactions

4.1 We do not have an objection to the CCPC being empowered to *accept* notifications of transactions which have already been put into effect. Indeed, the power to review below-threshold transactions notified on a voluntary basis *prior to completion* was recently inserted into the Competition Act (section 18(3)) by the Competition and Consumer Protection Act 2014 (section 55(c)).

4.2 However, we do not consider that it is appropriate for the CCPC to be empowered to compel or "call in" non-notified transactions that it may wish to review. In part, this appears to be in contemplation in relation to the proposal to empower the CCPC to make interim orders in relation to voluntary notifications of *completed* transactions. However, those powers are consistent with a voluntary notification regime such as the UK where, from time to time, the Competition and Markets Authority (**CMA**) impose Interim Enforcement Orders (**IEO**) in completed transactions to allow it complete its review.

4.3 We caution that the proposals would have negative implications for how the Irish merger control regime currently operates. By reference to its mandatory nature and clear financial thresholds, the Irish merger control regime provides legal certainty and works well. This significantly reduces time and cost burdens on business. It is an attractive feature for firms doing business in Ireland. Those benefits may well be lost in a situation where there is heightened uncertainty in relation to the status of non-notified and/or below-threshold transactions. Introducing a vague power for the CCPC to accept and review completed transactions is more consistent with a voluntary notification

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2 http://www.justice.ie/en/JELR/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf/Files/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf

3 http://www.justice.ie/en/JELR/Amendments_to_the_legislative_basis_for_the_lawful_interception_of_communications_policy_paper.pdf/Files/Amendments_to_the_legislative_basis_for_the_lawful_interception_of_communications_policy_paper.pdf

4 https://www.gov.ie/en/press-release/996c1-autumn-legislative-programme-published/

regime. Given the existing level of intervention in merger transactions in Ireland, it is questionable whether this proposal is likely to result in a greater saving to the economy than the current regime provides.

4.4 In any event, we do not consider that it is appropriate for the CCPC to review below-threshold transactions by reference to the substantial lessening of competition (**SLC**) test – rather than by reference to its residual power to investigate non-notified mergers or acquisitions under sections 4 or 5 of the Competition Act.

Power to require information from third parties in a merger review

4.5 In principle, we do not have an objection to the CCPC being empowered to formally issue a request for information (**RFI**) to third parties. However, we do not consider it appropriate that a third party RFI should have any impact on the existing statutory timelines for merger review.

4.6 Since introduction of the Simplified Merger Notification regime in July 2020, the CCPC has a strong track record in clearing no-issue transactions. Yet, at the same time, there is an unsatisfactory trend for longer review in more complex transactions, with some transactions taking almost a year for review. In our view, the Department should consider carefully any measures that might adversely impact on deal timelines or prolong merger review processes.

We greatly value the opportunity to offer our views and would be delighted to discuss these further with the Department.

Please contact Darach Connolly (darach.connolly@dlapiper.com; +353 1 487 6667) or Louise McErlean (louise.mcerlean@dlapiper.com; +353 1 487 6679).

Yours sincerely

DLA Piper Ireland

DLA PIPER IRELAND

Submission on the Department of Enterprise, Trade and Employment's Public Consultation to Review Certain Aspects of Competition Law in Ireland

by

Paul K Gorecki[1]

29 January 2021

I. Introduction

The Department of Enterprise, Trade and Employment (the Department) has invited submissions to a public consultation to review certain aspects of competition law in Ireland. The forthcoming Competition (Amendment) Bill 2021 (the Bill) will transpose Directive (EU) 2019/1 into law.[2] However, the Bill also includes amendments to existing competition legislation not covered by this Directive. These additional amendments seek to strengthen the enforcement powers of the Competition and Consumer Protection Commission (CCPC). This submission addresses five issues surrounding the proposed additional amendments: bid-rigging; gun-jumping; covert surveillance; below threshold mergers; and, requests for further information.

II. Bid-Rigging

Proposal

The Department proposes the creation of a separate, specific bid-rigging offence under the Competition Act 2002 as amended (the 2002 Act) as well as ensuring that the CCPC has "sufficient powers to review any competitive tendering process … to ascertain if such bid-rigging has taken place."[3] These proposals are based on the recommendations of the Hamilton Review (2020, p. 16, pp. 40-42) of criminal justice structures to combat economic crime and corruption.

[1] Member Competition Authority (2000-2008), Research Professor, Economic and Social Research Institute (2009-2013), and, Adjunct Lecturer, Department of Economics, Trinity College Dublin (2013-2019). The submission was not undertaken on behalf of any third-party. It reflects the author's views based on experience as a competition enforcer and commentator on competition law enforcement and administration.

[2] For details see DETE (2021b).

[3] DETE (2021a, p. 2).

At the present time bid-rigging is regarded as a form of price fixing and/or market sharing under sections 4(1)(a) and 4(1)(c) of the 2002 Act. However, the Department argues, "as a specific concept [bid-rigging] was considered [by the Courts] to be beyond the existing scope of anticompetition practises outlined in the Act."[4] As a result, the Department argues "express provision" in competition law "for bid-rigging is intended to make clearer that such concerted behaviour during the tender process is unlawful as it distorts competition."[5]

Attention is confined in this submission to considering the merits of the creation of a separate, specific bid-rigging offence. Granting the CCPC powers such that it can review any competitive tendering process is a sensible move that will enable the better detection and investigation of bid-rigging by Ireland's competition agency.

Rationale

Three rationales are offered by the Hamilton Review (2020) and the Department (2021a) for the creation of a separate bid-rigging offence as opposed to relying on the existing provisions of the 2002 Act to address bid-rigging. Each rationale is considered separately, together with an examination of its credibility.

The first rationale for a separate, specific bid-rigging offence is that "[T]he consequences of hard core cartel bid-rigging go beyond that of a standard cartel."[6] However, it is not at all clear what is meant by this statement. In this submission it is interpreted to mean that the price enhancing impact of bid-rigging is more serious than other forms of cartel (e.g. price fixing or a buyers' cartel).

There is, however, no evidence that bid-rigging cartels are more effective at raising prices than other types of cartels. A simple comparison of median and mean cartel overcharge by cartel type suggests, if anything, that bid-rigging cartels are less successful at raising prices.[7] However, as Connor (2014, p. 54) notes, this may be misleading since "[R]egression analyses suggest that overcharges from bid rigging are no different from classic price fixing."

[4] DETE (2021a, p. 2).
[5] DETE (2021a, p. 2).
[6] Hamilton Review (2020, p. 16).
[7] Connor (2014, Figure 6, p. 52 and Figure 7, p. 53). This source was selected since it was relied on by the Hamilton Review (2020, fn. 47, p. 41).

Irrespective of the consequences of the price-enhancing effects of bid-rigging, it is not at all clear that there is a meaningful or relevant distinction to be drawn between bid-rigging cartels and so-called "standard cartels." Indeed, bid-rigging cartels can be thought of as part of the set of cartels that are 'by object' breaches of competition law.[8] As such they all fall under the presumptions set out in section 6 of the 2002 Act.[9]

The second rationale for a separate specific bid-rigging offence appears to be that bid-rigging is a prevalent form of cartel activity. According to the Hamilton Review (2020, p. 41), the "CCPC advised that bid-rigging accounts for a majority of the files that it sends to the ODPP [Office of the Director of Public Prosecutions] and of the cases subsequently heard in Court." It is undoubtedly the case that the CCPC stresses the importance of bid-rigging in its enforcement of competition law,[10] has issued guidance to business on how to detect and prevent bid-rigging[11] and referred a bid-rigging case to the Director of Public Prosecutions (DPP) in 2019.[12] However, the majority of cartel cases taken by the DPP on the foot CCPC (and the Competition Authority before it) are not bid-rigging. Over the period 2000 to 2020:[13] three were for price fixing;[14] one for market sharing;[15] and, one for bid-rigging.[16]

The third rationale for a separate, specific bid-rigging offence is, as noted above, the Department's view that bid-rigging is a "concept … considered [by the Courts] to be beyond the existing scope of competition practises outlined in the Act."[17] In other words, the Courts in Ireland consider that bid-rigging is *ultra vires* competition law. At first glance such a statement is scarcely credible, given the widespread condemnation of bid-rigging, the fact that it is already covered by section 4 of the 2002 Act and, finally, bid-rigging has been

[8] See Whish & Bailey (2018, p. 131) for details. Such cartels are also referred to as hard core.
[9] For further discussion of these presumptions see Andrews, Gorecki & McFadden (2015, pp. 94-104).
[10] CCPC (2019, p. 7).
[11] CCPC (2018).
[12] CCPC (2020, p. 4).
[13] Andrews, Gorecki & McFadden (2015, Table 2.3, p. 77) for a list of the four cartel cases initiated by the DPP between 2000 and 1 May 2015; subsequently later in 2015 the first bid-rigging case was initiated by the DPP in the commercial flooring case. No further cartel cases appear to have been initiated by the DPP up to 31 December 2020.
[14] Heating oil; Citroen Dealers Association; and Irish Ford Dealers. Andrews, Gorecki & McFadden (2015, Table 2.3, p. 77) and https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/.
[15] Mayo Waste. For details see Andrews, Gorecki & McFadden (2015, Table 2.3, p. 77; Annex B, pp. 393-400).
[16] Commercial flooring. Gorecki (2017; 2019) and, https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/
[17] DETE (2021a, p. 2).

successfully prosecuted in other jurisdictions using the same legislative wording as in the 2002 Act.[18]

Although the Department references no Court cases to support its assertion that bid-rigging is beyond the scope of the Court's interpretation of competition law in Ireland, the Department's view nonetheless appears to be based on the judgments of the Central Criminal Court and the Court of Appeal in the commercial flooring case. The judgments in this case are undoubtedly a setback not only for bid-rigging prosecutions but also for cartel enforcement more generally. As a result of the wider implications of these judgements for cartel enforcement it is not at all clear that inserting a separate, specific bid-rigging offence in the 2002 Act is the answer. Indeed, many problems are likely to remain, irrespective of whether or not this legislative change is made.

The commercial flooring judgments pose a number of problems, *inter alia*, for cartel enforcement in Ireland:[19]

- The commercial flooring bid-rigging arrangement, according to the trial Court, "didn't involve a cartel." However, while this conclusion was appealed, the Court of Appeal did not rule on the issue.[20] Hence there is some ambiguity as to whether or not bid-rigging can be characterised as a cartel. Certainly, it is not at all clear that the Department's assertion that bid-rigging is beyond the scope of the 2002 Act is settled case law;

[18] See, for example, Whish & Bailey (2018, pp. 567-568) on the UK experience.
[19] This discussion is based on Gorecki (2017; 2019).
[20] The DPP stated that "the learned sentencing judge erred in principle in observing that the respondent and Mr Radburn … were not a cartel in circumstances where the evidence established the existence of a cartel and same formed the basis of the offence to which the respondent had pleaded guilty." (*DPP v Aston Carpets and Flooring and Brendan Smith* [2108] IECA, 194, para. 7. However, the Court of Appeal in its twenty-four paragraph judgment did not address this ground of appeal, nor for that matter several of the other important grounds of appeal.

- An inappropriate and flawed sentencing methodology was used by the Courts resulting in no gaol time for the individual[21] and fines that were too low and aimed at the wrong target (i.e. the individual not the undertaking);[22] and,
- A paradox: if there was no cartel why were fines imposed for a breach of the anti-cartel provisions of the 2002 Act?

The issue thus becomes the best way to resolve these problems.

Criminal cartel cases are few and far between in Ireland. Over the period 2009 to 2020 there has been only one such cartel case initiated by the DPP on the foot of a file from the CCPC. The Courts are thus unlikely to be familiar with the theory and practice of competition law as it relates to cartels. Thus, there is merit in providing in a timely manner the judiciary with a greater understanding what a cartel is, why bid-rigging is a cartel, why cartels damage consumers, the appropriate sentencing methodology and so on.

One option would be for the CCPC, in conjunction with, for example, the DPP, to hold a seminar(s) similar to that held by the CCPC on 22 November 2008, 'Sanctions, Fines and Settlements in Cartel Cases: Developments and Deterrence in the EU and Ireland.' Leading members of the judiciary, the competition bar and economists/lawyers from the Netherlands, the UK and the US chaired sessions and made presentations. The conference influenced the language and approach of Justice McKechnie in the *Duffy* judgment in which he quoted from the paper on sanctioning cartels presented by Gregory Werden, US Department of Justice.[23]

Turning to the Court-imposed sanction, the DPP should, it could be argued, be much more robust in arguing in Court what is the appropriate sanction for both individuals and undertakings in cartel cases together with the methodology, especially given the reluctance of the Court to opine on these issues in any meaningful manner in the commercial flooring

[21] The Courts imposed no gaol time either custodial or suspended for breaches of the 2002 Act. No explanation was offered. Such a result was inconsistent with the expectation after the earlier *Duffy* judgment that the next conviction for a cartel offence would result in a custodial sentence. (For a discussion of the *Duffy* judgment see Gorecki & Maxwell (2013a)). Application of the US Sentencing Guidelines to the facts of the commercial flooring case would have resulted in a gaol sentence of between 10 and 16 months.

[22] The bulk of the fines were imposed on the individual (€45,000), rather than the undertaking (€10,000). Application of the US Sentencing Guidelines would have resulted in a fine on the undertaking of between €155,680 and €311,360; the EU Guidelines, €224,540.

[23] Werden's paper was subsequently published in 2009. On the influence of this paper on the *Duffy* judgment see Gorecki & Maxwell (2013a).

case.[24] Such a methodology should be based on the US Sentencing Guidelines and the EU Guidelines on the Method of Setting Fines,[25] rather than the flawed approach used in the commercial flooring cartel of comparing the facts of the *Duffy* judgment with those of the commercial flooring case, while paying little or no attention to the important differences between the facts of the two cases. Reliance on EU and US sentencing guidelines would result in more effective sanctions, rather than what is, in effect, currently in Ireland no more than a periodic licensing of illegality by the Courts.[26]

Commentary

The Department is correct to identify enforcement difficulties arising out of the recent commercial flooring bid-rigging case. However, it is difficult to argue, for reasons set out above, that the Department's solution of making bid-rigging a separate, specific offence does anything to solve the problems associated with the commercial flooring judgment with respect to cartel enforcement in general or bid-rigging in particular.

It is not at all obvious that had the charges in the commercial flooring case been preferred with respect to bid-rigging as a separate, specific offence that the result would have been any or substantially different. Almost certainly the same flawed methodology would have been used to determine the sanction with the same result. Recall that the individual and the undertaking both pleaded guilty to breaching section 4 of the 2002 Act in the commercial flooring case; all that had to be decided was the sanction. There was thus no question of bid-rigging not being illegal.

Nonetheless, this does not mean that bid-rigging cartels should get a pass. As noted above the CCPC referred a bid-rigging cartel to the DPP in 2019. The alleged bid-rigging cartel concerns, according to the CCPC (2020, p. 4), the "procurement of publicly-funded transport services, in certain parts of Munster and Leinster." If the DPP decides to proceed with the

[24] The DPP (2016, para. 8.14) has in the past been reluctant to make such arguments. For further discussion see Gorecki (2019, pp. 304-305; 2021) and O'Malley (2014).
[25] See Gorecki & Maxwell (2013b) for an application of these guidelines to the Citroen Dealers Association case.
[26] This issue is discussed further in Gorecki (2019, pp.304-305). It should also be noted that the Judicial Council Act 2019 contains under section 23 provisions for a Sentencing Guidelines and Information Committee which will have the power to prepare and submit sentencing guidelines for approval by the Judicial Council. However, it is unlikely that criminal cartel sentencing will be a high priority given the lack of guidelines across many aspects of criminal law.

case, presumably sometime in 2021, then the prosecution will almost certainly be under the same provisions of the 2002 Act as were employed in the commercial flooring case.

The prospect of the prosecution of the alleged publicly-funded public transport bid-rigging cartel in the near future offers an opportunity to implement the measures outlined above with respect to a conference on the impact of cartels, especially those involving bid-rigging, as well as the DPP taking a more robust attitude to arguing for an appropriate sentencing methodology as well as expounding the ills of bid-rigging in terms of 'ripping off' taxpayers.

III. Gun-jumping

Proposal

Under the merger provisions of the 2002 Act, mergers that meet certain financial thresholds must be notified to the CCPC. Such notifiable mergers cannot be implemented until they have been cleared by the CCPC; they are void. Putting into effect a notifiable merger prior to CCPC clearance is referred to as gun-jumping. Under the 2002 Act gun-jumping is an offence that can be prosecuted on a summary basis or on indictment. However, only the DPP can bring such prosecutions. It is proposed that the CCPC be given the power to bring summary prosecutions for gun-jumping.

Rationale

The Department argues that internationally, "including Europe, competition authorities are increasing their efforts to combat instances of 'gun-jumping'" so as to deter such illegal behaviour.[27] If the CCPC were able to take summary prosecutions for gun-jumping this would, the Department argues, "reduce the burden on the DPP" and increase the enforcement of the gun-jumping provisions of the 2002 Act.[28]

Commentary

This is a sensible administrative proposal, particularly in view of the fact that the CCPC already has the power to take summary prosecutions in cartel cases. However, in order to ensure a more evidence based rationale for the proposal the Department and the CCPC should have at

[27] DETE (2021a, p. 3).
[28] DETE (2021a, p. 3).

least quantified the incidence of gun-jumping in Ireland to determine the scale and extent of the problem.

IV. Covert Surveillance of Cartels

Proposal

The Department proposes to grant the CCPC in relation to the investigation of cartels (including bid-rigging cartels) the power to undertake: "(i) [I]nterception and recording of electronic communications; and (ii) [V]ideo and audio surveillance of suspects."[29] In other words, the evidence gathering powers of the CCPC will be considerably enhanced such that the agency can conduct covert surveillance.

Rationale

Cartels by their very nature are secretive. This reflects: their illegal nature; the reputational damage that cartel members are likely to experience should consumers become aware of the anti-competitive conduct; and, the possibility of follow-on claims for damages after a successful prosecution by the DPP.

A variety of methods of communication are used by cartel members to co-ordinate their anti-competitive activity. At the present time only a subset of those methods can be accessed by the CCPC under the 2002 Act. By adding covert surveillance (i.e. access to telephone conversations, internet chats, and covert taping of private meetings) to the CCPC's existing evidence gathering powers, the Department's proposal will considerably enhance the CCPC's ability to investigate and detect cartels. Such additional investigative powers for the CCPC will bring Ireland into conformity with a number of other leading jurisdictions in terms of cartel enforcement such as the UK.

Commentary

The addition of covert surveillance to the CCPC's investigative toolkit for cartel investigations is a sensible move that will increase the likelihood cartels are detected and successfully prosecuted. Given that cartels are almost universally condemned for their adverse effects on competition and consumers, measures to protect the alleged cartelist's rights under various

[29] DETE (2021a, p. 4).

conventions and charters should be the minimum necessary to ensure the effective use of the covert surveillance powers.[30] Unnecessary administrative burdens should be avoided.

V. Below Threshold Mergers: Increased CCPC Powers

Proposal

Mergers that are below the mandatory notification thresholds are not required to be notified to the CCPC. Such thresholds are designed to ensure that the CCPC's resources are devoted to those mergers which are likely to have the most serious effect on competition and consumer welfare, while, at the same time, minimising the regulatory burden on business.

On occasion, however, a below threshold merger may adversely affect competition.[31] In such situations the CCPC can 'encourage,' but not compel, the undertakings concerned to notify the merger or, if that fails, commence an investigation under section 4 of the 2002 Act. Since notification is not required for below threshold mergers, steps may have already been taken to implement the transaction in whole or in part. Needless to say, this complicates designing appropriate remedies or even prohibiting the merger should serious competition issues arise.

The Department makes a number of proposals in relation to below threshold mergers. First, it will be clarified "that the CCPC has the power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis."[32] Second, the CCPC would have the power to make interim orders to, for example, prevent the completion of a merged which is notified on a voluntary basis. Third, if the CCPC makes a determination that a below threshold merger results in a substantial lessening of competition (SLC), the CCPC "has the power to require that the merger must be unwound and pre-merger status quo restored to safeguard competition."[33] Fourth, and related to the previous point, if the CCPC finds that an already implemented notifiable merger results in SLC, then the CCPC will have the power to unwind the merger.

[30] It is assumed, although it is not stared by the Department (2021a, p. 4), that the covert surveillance powers will only apply to hard core cartels (i.e. those agreements subject to the presumptions in section 6, 2002 Act).
[31] See, for example, M/17/012 – *Kantar Media/Newsaccess*.
[32] DETE (2021a, p. 5).
[33] DETE (2021a, p. 5).

Commentary

No rationale is advanced by the Department to support its proposals with respect to increased CCPC powers in relation to below threshold mergers. No attempt is made to document, for example, the degree to which the raising of the merger notification thresholds in 2018 has led to an increase in the incidence of anticompetitive mergers escaping CCPC scrutiny.[34] The CCPC's annual *Mergers & Acquisitions Reports* for 2019 and 2020 do not highlight below threshold notifications as an issue.

Given the substantial enhancement in the powers of the CCPC in relation to below threshold mergers it seems likely that there will be a rise in the number of voluntary merger notifications, out of an abundance of caution by, for example, legal advisors and the merging parties themselves. Hence this is likely to reimpose some of the burdens on business that the raising of the merger notification thresholds in 2018 was designed to remove.[35] A stronger case needs to be made by the CCPC and the Department for the enhanced proposed powers of the CCPC in relation to below threshold mergers.

VI. Mandatory Requests For Information (RFI)

Proposal

At the present time the CCPC in gathering information in a merger investigation has the statutory power to issue RFIs, but this is limited to the "undertakings concerned." The latter term has been interpreted to refer to the parties to the merger transaction. However, important information is likely to held by, *inter alia*, customers and competitors of the merged entity. In order to ensure that the CCPC can access such information the Department intends to make it clear that the CCPC can receive information from these parties and that the CCPC has the power to require responses to any RFIs issued. In other words, response to the RFI will become mandatory rather voluntary.

Commentary

The Department provides no justification for this proposal.

[34] S.I. No. 388 of 2018 Competition Act 2002 (Section 27) Order 2018, came into effect on 1 January2019.
[35] DBEI (2017) discusses this point.

On the one hand, the proposal seems a sensible clarification and extension of the CCPC's powers when conducting a merger investigation. Time is often tight in terms of meeting statutory deadlines and it is important that all relevant information is collected in a timely manner. Incomplete and partial responses to voluntary RFIs can lead to a biased sample response complicating what is often an already difficult task of deciding whether or not the merger will result in an SLC. CCPC staff should not have to spend time and effort trying to cajole customers and competitors to respond on a voluntary basis to RFIs.

On the other hand, however, if the reason for the reluctance by competitors and customers to respond reflects the time and cost involved in completing an RFI, then this may signal a need to carefully weigh the costs and benefits of such an extension in the power of the CCPC to compel responses to RFIs in order to ensure that unduly onerous burdens are not being placed on customers, competitors and others. The CCPC might, for example, have documented the extent of non-response by customers, competitors, and others in responding to questionnaires seeking information and views on the competitive landscape in a merger investigation.

VII. Conclusion

The Department has proposed a number of amendments to Ireland's competition law and invited submissions on these proposals. The proposals relate to cartels and mergers. They are designed to enhance the effectiveness of the CCPC by giving the agency greater powers, while creating a separate, specific offence of bid-rigging.

The proposals to strengthen the powers of the CCPC:

- to review any competitive tendering process;
- to prosecute gun-jumping offences on a summary basis; and,
- to undertake covert powers of surveillance with respect to cartels,

are sensible and sound. As such these proposals should be supported.

A stronger case needs to be made by the CCPC and the Department for the CCPC:

- to have the power to compel the completion of an RFI beyond the merging parties (e.g. customers and competitors); and,
- to have enhanced powers in relation to below threshold mergers.

The CCPC would be, for example in relation to the latter, be given the power to unwind a merger and issue interim orders preventing the completion of a below threshold merger. The Department's consultation document offers no justification for such proposals.

Cartels are the top priority of competition agencies worldwide. Cartels raise prices and damage competition. Hard core cartels have few if any redeeming features. It is therefore vitally important that the legislation defining cartels fits the bill. However, despite the enforcement problems created by the recent commercial flooring bid-rigging case, the Department's proposal to create a separate, specific bid-rigging offence should, for the time being at least, be rejected. A separate, specific bid-rigging offence will not solve the problems created by that case. Instead, it is suggested that these problems should be addressed through robustly prosecuting the current publicly-funded transport bid-rigging cartel referred to the DPP in 2019, providing, of course, that the CCPC's case meets the DPP's prosecution threshold.

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LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

PUBLIC CONSULTATION ON ASPECTS OF THE COMPETITION (AMENDMENT) BILL 2021

DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

January 2021

The Law Society of Ireland ("the Law Society") welcomes the opportunity to make a submission on the proposed changes to Irish competition law described in the public consultation on aspects of the Competition (Amendment) Bill 2021 ('the Consultation').

Given the importance of the issues under consideration, it is regrettable that the consultation period is so highly truncated. Despite the limited time available, we trust the Department will take on board the Law Society of Ireland's comments.

1. Proposed Implementation of the ECN+ Directive

1.1 The Law Society of Ireland notes that proposed changes, in particular changes required to implement the so-called ECN+ Directive, will fundamentally alter Irish competition law and enforcement. As the relevant Appendix to the Consultation states, implementation of the ECN+ Directive "… *is of specific importance for transposition in an Irish context as it will present a sea change in the enforcement capabilities of Irish NCAs*" (at 3.3.1). According to the same Appendix, "*the proposed legislation will allow for the introduction of a robust system for non-criminal financial sanctions arising from the Directive which can be cross applied to Irish competition law with appropriate constitutional and procedural safeguards*" (at 3.3.3). These are clearly profound changes. The Law Society is concerned, therefore, that only limited, high-level information is available in the Consultation on how ECN+ mandated changes will be implemented into Irish law. Key issues such as the legal standard to be applied by the CCPC, as well as the due process rights of parties before the CCPC are not addressed. In light of this, and given the implementation deadline of 4 February, the Law Society of Ireland is concerned that the Consultation exercise does not provide opportunity for meaningful comment. The Law Society considers it vitally important that a full and meaningful consultation exercise takes place in advance of implementation of these proposed changes.

2. Other Proposed Competition Law Changes

2.1 Proposed Powers in respect of Smaller, Below-the-Threshold Deals

2.1.1 The proposal to allow the CCPC to unwind completed below-the-threshold transactions will lead to significant and unnecessary uncertainty and cost for Irish businesses. In so doing, this could have a fundamentally detrimental effect on the attractiveness of Ireland as a place to invest.

2.1.2 Under the current regime, there are clear turnover thresholds establishing the CCPC's jurisdiction and its power to investigate and, if required, prohibit transactions on the grounds of their effects on competition. These thresholds strike a balance between ensuring that potentially anti-competitive transactions are duly scrutinised and providing legal certainty to the market. The thresholds also provide transparent, clear and objective means to determine what transactions fall within the CCPC's jurisdiction.

2.1.3 The proposed changes will seriously undermine this established clarity and certainty. If adopted as proposed, any below-the-threshold transaction could at any time in the future be subject to a CCPC unwind order requiring the parties to unwind their deal even if consummated years before. The mere existence of this draconian power creates sustained uncertainty and risk, particularly given that it does not appear to be subject to any time limitation. The changes also raise severe additional concerns given that acquirers in Smaller, Below-the-Threshold Deals may, as would be standard, make substantial investments into their newly acquired business/company and we would query the effects of any legislation on any such investments.

2.1.4 Additionally, very significant amounts of venture capital are each year invested in Irish start-up companies particularly in the areas of Life Sciences and IT with a view to the development of those companies and a successful sale to within the sector[1]. It is not unusual that at the time of sale such a company is not just pre-profit but is pre-revenue with no market presence for its intended product.

2.1.5 Having regard to all other risks inherent in early stage investing, if venture capital funds had to contend with any risk that such a sale of an Irish company might be subsequently unwound, the probability that such start-up companies would be moved out of Ireland as a pre-requisite to receiving venture capital investment should be carefully considered. By reason of the start-up nature of the Company, relocation to elsewhere in the EU would not be problematic.

2.1.6 The Law Society of Ireland notes that no evidence is provided in the Consultation why changes to the established system are required. Nor is the Law Society of Ireland aware of any empirical evidence suggesting that these changes are necessary. Indeed, the existing voluntary regime appears to be working well (or there is no suggestion that it's not working more than adequately) with a number of voluntary notifications made in 2020 for example. Also, there is nothing to suggest that substantive sub-threshold deals are being *missed* by the CCPC. We refer to the Eason/Argosy and the more recent Eason/Dubray deals, for example.

2.1.7 As the Department will be aware, a requirement for merger notification can have a significant impact on a transaction, in terms of timing, cost, the final structure of the deal and commercial risk during the interim period. The powers proposed would mean that these serious implications, which could include an order to unwind the transaction, could never be definitively ruled out for a merger or acquisition.

2.1.8 The uncertainty arising from these powers will result in a potentially significant increase in voluntary notifications, where parties notify out of an abundance of caution, resulting in unnecessary administrative burdens for the CCPC. In addition, there is already scope for the CCPC to challenge below-the-threshold mergers in Irish competition law, by bringing a Competition Act, section 4 or section 5 action to challenge a deal. The proposed changes would also put us out of line with other jurisdictions and ICN Merger Guidelines.

[1] For example the sale of Inflazome to Roche Pharma for €360 million up front in September 2020.

2.2 Proposed Powers to require information from third parties in a merger review

2.2.1 Requests for information ("**RFIs**") issued by the CCPC under section 20(2) of the Competition Act can be extensive in nature and may require parties to commit significant financial, time and personnel resources to provide a response within the timeframe set by the CCPC. Providing the CCPC with mandatory powers to issue RFIs to third parties who have no links with the parties involved in the transaction under review risks imposing significant burdens and costs on business. Again, the Law Society of Ireland notes that no evidence is provided to support the need for this proposal. Quite often the questions raised by the CCPC require the party to express opinions on matters on which they simply have no view. This is particularly difficult for larger multi-national groups who simply do not have the internal systems or controls to arrive at a "house" view on queries raised. However, many in the Law Society's opinion will continue to deal in a good faith basis with the CCPC. Putting these entities under a legal obligation to respond will place a significant strain on this process and involve parties in considerable expense.

2.3 The Proposed New Offence of "Bid-Rigging"

2.3.1 The Law Society of Ireland questions whether provision for bid-rigging as a specific anti-competitive practice within the Competition Act 2002 (the "**Competition Act**") is necessary. Bid-rigging is widely accepted as a hard-core competition law activity. We understand that this proposal may be a reaction to the Court of Criminal Appeal and Central Criminal Court verdicts in the *Flooring Contractors* case (although again no real rationale is provided in the Consultation). But seeking to limit judicial discretion on sentencing via creation in law of specific offences as proposed is often counterproductive and raises questions about separation of powers and judicial discretion. Creation of a specific offence could also have unintended consequences in our view, for instance by leading to a situation where only anti-competitive activities which are specifically identified by the Competition Act will be considered as criminal offences by trial lawyers.

2.4 Proposed Enhanced Surveillance Powers for the CCPC

2.4.1 The Law Society of Ireland notes that the Hamilton Review recommended that the surveillance powers contained in the Criminal Justice (Surveillance) Act 2009 (the "**2009 Act**") be extended to the CCPC.[1] The 2009 Act empowers the Gardaí and Revenue Commissioners to engage in *inter alia* "*monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications*" with the aid of surveillance devices or tracking devices. However, it does not extend to interception of telecommunications. But the Law Society of Ireland also notes that the proposed Competition (Amendment) Bill 2021 (the "**Bill**") would go further than that envisaged by the Hamilton Review by also granting the CCPC a right to intercept and record electronic communications. It will be essential to ensure that any such new powers

[1] *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption* (fn 1), page 119.

are accompanied by sufficient safeguards so that rights protected by the EU's Charter of Fundamental Rights and the European Convention on Human Rights are not infringed. Moreover, such powers must also be exercised in compliance with the Irish Constitution and relevant case law of the Irish courts. On a number of occasions the CCPC has been subject to strong judicial criticism for failure to properly respect due process and fundamental rights. See, for example, the Supreme Court judgment in *CRH v CCPC,* as well as the High Court judgment in *The Law Society of Ireland v The Competition Authority*.

We hope that the Department will consider these comments to be constructive.

The Law Society will be happy to engage further with the Department on any of the matters raised.

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Private and Confidential

29 January 2021

Dear Sir/Madam

Response to Public Consultation on Aspects of the Competition (Amendment) Bill 2021

Matheson welcomes the opportunity given by the Department of Enterprise, Trade and Employment's ("**DETE**") to comment on aspects of the Competition (Amendment) Bill 2021 ("**Bill**").

Matheson is a market leader in providing Irish competition law advice to companies based in Ireland and abroad, and has advised on the most significant Irish competition cases pursued by the Competition and Consumer Protection Commission ("**CCPC**") since it was formed nearly 20 years ago. We draw on this experience, as well as our extensive experience before other competition authorities such as the European Commission and the UK Competition and Markets Authority, in making the below comments on the proposed competition law amendments as described in DETE's consultation paper ("**Paper**").

At the outset, we would make two important points - about the overarching policy objectives and the approach to public consultation on the Bill.

As regards the policy objectives, it is important that there is a clear understanding of why changes are being made and what evidence is available to demonstrate the necessity of such changes. All stakeholders can understand why the ECN+ Directive is being transposed into Irish law and why it is sensible to take that as an opportunity to also make other necessary changes to the Competition Act 2002 (as amended) (the "**Act**"). However, it is not fully clear from the Paper why 20+ years of Irish competition law enforcement proves that some of the other changes are, in fact, necessary and

appropriate. Our comments below explain this point in more detail.

As regards the approach to public consultation on the Bill, we submit that the Bill requires a wider and more in-depth consultation process than what is envisaged by the Paper. Firstly, the consultation process should be widened to cover the Government's implementation of the ECN+ Directive. Whilst implementation of the ECN+ Directive is mandated by EU law, the Government has many options to choose between in doing so. Public consultation on such options is critical, in particular given that ECN+ will reform radically how competition law is enforced in Ireland, with significant consequences for both business and investors alike. Specifically, only the Irish Courts can determine a breach of competition law and impose sanctions (fines, custodial sentences, director disqualification etc) at present – the current enforcement framework will therefore be fundamentally changed by ECN+, and there are several options for doing so. Secondly, the consultation process should be deepened to reflect the complexity and scope for debate on all parts of the Bill, not least because of the constitutional issues raised. It is international best practice to construct human rights safeguards carefully when increasing the investigation and enforcement powers of authorities such as the CCPC and the Commission for Communications Regulation, and the need to do so here is especially clear given that Ireland has a special constitutional context and that the human rights concerns identified by the Supreme Court regarding the CCPC's interpretation of what safeguards on its existing, more limited powers are required in the relatively recent case of CRH plc v CCPC (and which we would note have not yet been fully resolved, given the continued absence of any CCPC guidance regarding the exercise of its existing search and seizure powers as mandated by the Supreme Court's judgment).

In light of the two important preliminary remarks above, we trust that further information and consultation will occur in advance of the initiation of the legislative process for the Bill.

1. Introduction of a Specific Offence of 'Bid-Rigging'

We note the recommendations of Review Group into the "Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption" (the "Hamilton Report") as regards the possible introduction of a specific offence of bid-rigging or the specification of bid-rigging as an example of a hard core cartel activity.[1] Based on these proposals, we understand it is proposed that bid-rigging is made a specific offence under section 6 (as opposed to section 2, as stated in the Paper) of the Act.

We would question the necessity of this proposal and caution about potential unintended consequences:

- The necessity of the proposed amendment is unclear to us and no specific evidence is proffered in the Paper by way of context. In our view, the offence is widely accepted to be a hard-core competition offence and specifically to come within the meaning of price-fixing, output limitation or market sharing under section 4(1) of the Act, or is otherwise adequately covered by the definition of active corruption under section 5 of the Criminal Justice (Corruption Offences) Act 2018.

1. See page 16 of the Hamilton Report where it is stated at Point 17 that *"The Review Group recommends that Irish competition law be amended to create a specific offence of bid-rigging or, in the alternative, specify bid-rigging as an offence as a form of market sharing. The consequences of hard core cartel bid-rigging go beyond that of a standard cartel, warranting the creation of a specific offence of bid-rigging or, in the alternative, the amendment of Section 4 of the Competition Act 2002 to specify bid-rigging as an example of a hard core cartel activity."*

- The reference in the Paper to "some difficulties with Court cases" that the absence of a specific offence of bid-rigging is purported to have led to is unclear and provides no clear rationale or evidence of need for the proposed change. To the extent that the proposed changed is motivated by a perception that a more severe sentence might have been imposed in the relatively recent successful prosecution in Aston Carpets had bid-rigging been a standalone offence, we believe that this is an inappropriate reason for a change in law in particular because it risks being seen as an inappropriate breach of separation of powers and judicial discretion.

- Finally, creation of a specific offence could also have the unintended consequence of supporting technical legal arguments by future defendants that anti-competitive activities which are not specifically identified by the Competition Act are therefore not criminal competition law offences.

2. Introduction of Summary 'Gun-Jumping' Powers for the CCPC

Since the summary of the current position in the Paper is slightly confusing, we wish to clarify that the offence under section 18(9) of the Act is failure to notify the CCPC of a transaction prior to completion. Completion of the transaction prior to clearance is not currently criminally sanctioned, but is subject to section 19(2) of the Act. We therefore assume that the CCPC's summary powers would only relate to the offence under section 18(9) – any expansion of the current gun-jumping offence would clearly need serious thought and be subject to a further consultation before any changes are introduced.

We would make the following brief observations in relation to these new summary powers:

- We understand the rationale for this proposal is to "allow the CCPC to take summary prosecutions for gun-jumping offences to reduce the burden on the DPP and to increase the enforcement of the gun-jumping provision generally". We would expect that the CCPC is properly resourced and publishes clear and transparent procedures to deal with potential 'gun-jumping' concerns within the definition of the current offence and hope to have the opportunity to comment on the CCPC's proposed procedures to deal with these matters, along with the CCPC's other new procedures, in due course.

- Since the exercise of any new summary powers regarding the current offence will remain at the CCPC's discretion, we would expect such powers to be reserved for the most egregious types of pre-emptive conduct issues, rather than inadvertent breaches or issues that are mandated by other overriding factors (eg, transaction requirements in the context of restructuring or distressed M&A scenarios). In particular, we would hope that the new summary powers would not be used in circumstances where the parties are mandated to implement appropriately structured 'hold separate' arrangements regarding the Irish business based on legitimate commercial justifications.

- Our assumption is that the CCPC would appraise potential breaches of the current offence in accordance with the guiding principles of the EU courts. This would be a clear imperative to align with those applied by practitioners in advising clients on the legal boundaries between permissible integration planning activities and impermissible pre-emptive measures. Such principles include those in the leading case of the European Court of Justice in the EY / KPMG case, noting it was held that "…a concentration is only implemented by a transaction which, in whole or in part, in fact or

in law, contributes to the change of control of the target undertaking" and, further, that steps which are merely of an "ancillary and preparatory nature" are unlikely to contribute to any change of control and are therefore do not qualify as 'gun-jumping'.

- Noting that the significant reputation damage flowing any prosecution (summarily orr otherwise) can often far outweigh any financial or other penalties imposed, we would expect that firms are afforded adequate due process and other constitutional protections in the exercise of these new summary powers, with the opportunity to be heard before internal decision-makers (eg, Commissioners) following a declaration of intention to prosecute summarily and before a court summons is issued.

- Finally, while there has been relatively greater enforcement across European jurisdictions in recent years, we would note that 'gun-jumping' breaches remain in the small minority across all jurisdictions and so we would expect very few such enforcement actions by the CCPC to arise in practice (also noting, as above, that the current Irish offence is narrower than in other jurisdictions). In the last 5 years, there has been just three enforcement actions at EU level, four before the CMA, one before the French Competition Authority and one before the German Federal Cartel Office.

3. Introduction of Additional Surveillance and Electronic Interception and Recording Powers

We note the proposed CCPC power to undertake (i) interception of recording of electronic communications; and (ii) video and audio surveillance of suspects. We are particularly concerned by the proposal in relation to (i) as this is not contemplated by the Hamilton Review and therefore constitutes a major proposed intrusion which is not supported by any detailed review process.

We would question the urgent need for the introduction of such powers – both at all and in particular at this point in time – and the evidence that would demonstrate such necessity, including based on the comparative experience in other jurisdictions regarding the utility of such powers in the competition law context. Instead, we believe there would be a strong rationale to consider a 'staged' approach to the CCPC's increased powers and incentives, whereby the CCPC first obtains enhanced fining and leniency powers under ECN+ and, if considered appropriate and necessary at a later stage, the CCPC would then obtain further enhanced investigation powers such as those proposed.

Any new interception and surveillance powers would clearly require robust safeguards to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are appropriately protected. This is particularly the case because, as noted above, there is an important Irish constitutional law context and the Supreme Court expressed concerns regarding the lack of respect of human rights in the exercise of the existing, more limited investigation powers of the CCPC in the relatively recent case of CRH plc v CCPC. In light of this, it would take significant time and work to construct such appropriate safeguards, and this required effort may be disproportionate taking into account the lack of any clear reasons or evidence in the Paper for why these powers are necessary in the first place.

It is international best practice to construct human rights safeguards carefully when increasing the investigation and enforcement powers of authorities such as the CCPC and the Commission for Communications Regulation, and the need to do so here is especially clear

given that Ireland has a special constitutional context and that the human rights concerns identified by the Supreme Court regarding the CCPC's interpretation of what safeguards on its existing, more limited powers are required in the relatively recent case of CRH plc v CCPC (noting that these concerns have not yet been fully resolved, given the continued absence of any CCPC guidance regarding the exercise of its existing search and seizure powers as mandated by the Supreme Court's judgment).

Moreover, it is important to emphasise that protections would be needed both before and after the exercise of such powers. In this regard, a comparative perspective of other relevant jurisdictions provides helpful guidance on how such protections can be adequately afforded (noting the comparative references in the Paper).

More detailed / granular observations in addition to the above overarching concerns may be summarised as follows:

- As regards the necessary safeguards before the exercise of such powers, we see an urgent need for appropriate internal 'checks and balances' within the CCPC with some level of judicial oversight to ensure that the legal basis for the exercise of these powers is robustly reviewed and cross-checked. This is clearly mandated by the strong body of jurisprudence from the European Court of Human Rights ("ECtHR") as regards the scope of protections afforded under Article 8 ECHR regarding the right to privacy. Two points therefore strike us based on the summary in the Paper:

- The suggestion in the Paper that the CCPC could exercise without a court warrant is concerning. While we acknowledge that the use of the comparable surveillance powers in the UK must be authorised by a senior CMA official and – exceptionally, as compared with all other jurisdictions – does not require a court warrant, the CMA is bound by the relevant Home Office Codes of Practice which afford significant protections and has the resources to ensure the checks and balances are performed independently and properly. Since the CCPC is a much smaller organisation than the CMA, ensuring such internal checks and balances are performed independently and properly would likely present significant challenges given resource constraints at the CCPC and so enabling the CCPC to grant authorisation on its own is unlikely to afford appropriate protections consistent with ECtHR case law.

- Therefore, along with the introduction of an internal Code of Practice within the CCPC which would in any event be necessary, we would recommend that some level of judicial oversight is introduced into the system. This would align with the approach in all other jurisdictions with comparable powers (ie, Australia, Austria, Canada, Israel and the US) and would appear to be an appropriate solution given resource constraints at the CCPC.

- As regards the necessary safeguards after the exercise of such powers, appropriate procedures would be needed to ensure that any disputes regarding the legality of any evidence gathered through interception or surveillance are appropriately handled by the CCPC. Such procedures would need to ensure that the protections afforded are similar those in dawn raid scenarios where legality issues are raised. Accordingly, parties' external counsel would be entitled to review all evidence gathered covertly through interception or surveillance before the evidence is put on the cartel prosecution file, such disputes would be appropriately supervised and decided on by

an independent third party within the CCPC and any evidence that is ultimately excluded would be deleted promptly across all CCPC servers and devices.

4. Other Amendments Relating to the Operation of Merger Control

Under the current regime, turnover thresholds clearly delineate the CCPC's jurisdiction and the value of this certainty to investors cannot be underestimated. A merger control process before the CCPC has a significant impact on transaction parties, in terms of cost, timing and certainty and the current regime allows the possibility of a merger control process to be definitively excluded in some cases, thus reducing the risk for prospective investors.

As regards the proposal in relation to 'below threshold' mergers, we note the current provision under section 18(3) of the Act enables parties to notify 'below threshold' mergers either before or after completion of the transaction. Where the parties do so before completion, details regarding the timing and steps towards completion must be provided, but the CCPC has no power to prevent completion from taking place. In practice, parties voluntarily notify mergers either on their own initiative or following a request from the CCPC. Voluntary notifications are still rare in practice – instead, the vast majority of notifications are reviewed under the CCPC's mandatory notification regime. Based on our experience, the voluntary regime works well in practice, with a high degree of cooperation between parties and the CCPC.

Accordingly, we are surprised that significant changes to the current voluntary notification regime are proposed and are unclear on what evidence is available to demonstrate their necessity. In particular:

- We are most concerned by the uncertainty / cost for Irish businesses and damage to Ireland's attractiveness as a place to invest which would likely arise from the proposal to empower the CCPC to unwind completed mergers. No clear reasons or evidence is provided in the Paper as to why the current regime needs to be changed. With over 20 years of experience available, it should be possible to point to real life cases where the absence of the proposed unwinding power has prevented appropriate regulatory action. The proposed changes could mean that any below-threshold merger could be unwound by the CCPC at any time, potentially even years after the fact.

- As regards the proposed CCPC power to make an interim order in the case of a voluntary notification (seemingly in both 'anticipated' and 'completed' transactions), we would strongly challenge the necessity of such power which would appear to be misguided in light of both its inherent complexity and resource implications and the dampened incentives for parties to cooperatively voluntarily notify 'below threshold' deals to the CCPC. The CMA's comparative experience in managing its 'initial enforcement order' or IEO regime demonstrates the complexity of managing such powers – which is relevant even in the context of a small number of voluntary notification processes before the CCPC. Any interim order regime that would prevent completion of the transaction would inherently need to have a mechanism to enable 'derogations' from the interim order to be granted in respect of the non-Irish parts of the target business (as under the CMA's IEO regime). The resources needed to manage such regime should not be underestimated, in particular given the significance (and therefore resource implications) of the other proposed changes to the CCPC's enforcement regime. The proposal is also misguided in terms of removing incentives: parties would be more reluctant to cooperate with the CCPC under its voluntary regime given the possibility of interim orders and so the CCPC

would likely need to bring a 'below threshold' transaction before the courts if it perceived competition concerns.

Finally, as regards the proposed CCPC power to issue a formal requirement for further information ("**RFI**") on a third party, we note that it is typically extremely time-consuming and costly for a business to respond to a request for information issued by the CCPC under section 20(2) of the Competition Act, noting that up to 50 questions have been asked by the CCPC in previous cases. Therefore:

- It is concerning that no clear reason for why this new power is necessary is provided in the Paper. Again, over 20 years of experience should mean that specific reasons and evidence of why the lack of such a power has been problematic should be available if the power is in fact necessary.
- Providing the CCPC with powers to make parties with no links or financial interest in a merger subject to RFIs risks imposing significant costs on business and undermining Ireland's reputation among the international business community.
- In addition, it would be most important that any such power would not lead to delays in the CCPC's merger review processes, in particular since compliance with RFIs by third parties would be outside the merging parties' control.

We hope that the views expressed in this paper are of some assistance to the Department in its review.

Yours sincerely

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McCann FitzGerald

OUR REF	YOUR REF	DATE
NANF\40099161.3		29 January 2021

Competition Policy Unit
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2

ECN+ Consultation By Email

Dear Sirs

McCann FitzGerald welcomes this opportunity to make this submission in response to the Department of Enterprise, Trade and Employment's (the "**Department**") Public Consultation on Aspects of the Competition (Amendment) Bill 2021 (the "**Consultation**").

Notwithstanding the above, we note that this Consultation does not afford stakeholders an opportunity to make submissions on the Department's transposition of the ECN+ Directive into Irish law, and that only limited details on its transposition are contained in an Appendix to this Consultation.

In our view, given its importance, stakeholders should be granted an opportunity to comment on the ECN+ Directive's transposition, and if it is the Department's intention to do so at a later date, we look forward to providing our comments.

1. **Providing for the offence of "bid-rigging"**

1.1 We do not believe that an express provision for bid-rigging as a specific anti-competitive practice within the Competition Act 2002 (the "**Competition Act**") is necessary.

1.2 While we note the recommendations of the recently published *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption* by the Hamilton

Review Group[1] (the "**Hamilton Review**") on bid-rigging, we do not consider that any such change is required.

1.3 In our view, such a change could lead to a situation whereby only anti-competitive activities which are specifically identified by the Competition Act could be classed as unlawful activity amounting to a criminal breach of the Competition Act.

1.4 As currently drafted, the Competition Act allows for flexibility in relation to anti-competitive practices in order to allow for prosecutors to adapt to evolving anti-competitive practices. In contrast, an approach which seeks to set out in detail what constitutes an anti-competitive could stymie enforcement as prosecutors and courts would be constrained by the detailed provisions of the Competition Act.

1.5 Moreover, we note that Article 101(1) of the Treaty on the Functioning of the European Union does not specifically list bid-rigging as an anti-competitive practice, however this has not affected the European Commission's ability to take enforcement cases relating to bid-rigging.

1.6 We believe that an express power for the Competition and Consumer Protection Commission (the "**CCPC**") to review any competitive tendering process for bid-rigging could be a positive development in relation to detection of bid-rigging. However, this should not impose a disproportionate burden on Irish businesses. Any powers granted to the CCPC to require information from, or otherwise affect the rights of, private parties should be proportionate. For example, such powers should be exercisable only if the CCPC has reasonable grounds, based on reliable evidence, to believe there were irregularities in the public procurement process under investigation.

1.7 Finally, we would submit that the Hamilton Review's recommendation on increased guidance and education for procurers on bid-rigging should be implemented.[2] Provision of guidance and training on bid-rigging on a rolling basis would serve to highlight for procurers, the potential for bid-rigging to occur and would complement efforts to combat such activities.

2. Summary prosecution of "gun-jumping" by the CCPC

2.1 In recent years, prosecutions and investigations relating to gun-jumping have become increasingly prominent across many jurisdictions. In particular, the European Commission has issued a number of significant fines for gun-jumping.[3] In this jurisdiction, there have also been developments in relation to gun-jumping with the Director of Public Prosecutions taking its first gun jumping criminal prosecution case in 2019.[4]

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1 Department of Justice, *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption,* Report of the Review Group. Available at: http://www.justice.ie/en/JELR/Hamiliton_Review_Group_Report.pdf/Files/Hamiliton_Review_Group_Report.pdf.

2 *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption* (fn 1), page 42.

3 See for example, Case M.8179 – *Canon/Toshiba Medical Systems Corporation*, where the European Commission imposed a €28m fine on Canon for gun jumping. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3429.
See also Case M.7993 - *Altice/Pt Portugal,* where the European Commission imposed a fine of €125m on Altice for implementing an acquisition prior to notification or approval by the European Commission. Available at: https://ec.europa.eu/competition/mergers/cases/decisions/m7993_849_3.pdf.

4 CCPC, *Guilty plea in Ireland's first criminal prosecution case involving "gun-jumping" in a merger,* 9 April 2019. Available at:

2.2 The seriousness of non-compliance with the Competition Act in this respect is clear in that such a breach is an offence under section 18(9) of the Competition Act. It is also important that sanctions are deployed by prosecuting authorities to create a deterrent effect. In this regard, we believe that the proposal outlined in the Consultation for the CCPC to be granted the power to take summary prosecution cases for gun-jumping would assist in providing the primary national competition regulator with the power to enforce a key provision of national competition law, which in turn could be expected to encourage compliance with the Competition Act's filing requirements.

2.3 Such a power would also align with the CCPC's existing ability to bring summary prosecution cases for other significant competition related offences such as anti-competitive agreements under section 8(9) of the Competition Act.

2.4 As a result, we see no reason why a right to bring summary prosecution cases for gun-jumping could not be extended to the CCPC, and that such an extension would assist in prosecuting gun-jumping in the State.

3. Enhanced surveillance powers for the CCPC

3.1 As noted in the Consultation, evidence suggests that cartels now use more sophisticated forms of technology than in past decades, and in this respect it is clear that enforcement authorities such as the CCPC must have evidence gathering mechanisms at their disposal which keep pace with technological developments.

3.2 We note in particular that the Hamilton Review recommended that the surveillance powers contained in the Criminal Justice (Surveillance) Act 2009 (the "**2009 Act**") be extended to the CCPC.[5] The 2009 Act empowers the Gardaí and Revenue Commissioners to engage in *inter alia* "*monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications*" with the aid of surveillance devices or tracking devices. However, it does not extend to interception of telecommunications.

3.3 We note that the proposed Competition (Amendment) Bill 2021 (the "**Bill**") would go further than that envisaged by the Hamilton Review by also granting the CCPC a right to intercept and record electronic communications. In particular, the Hamilton Review expressed the view that the extending of such interception powers to enforcement agencies other than the Gardaí for the purposes of investigating economic crime and corruption, even with judicial oversight, "*might be widely perceived as posing undue risks to privacy and as an excessive infringement of civil liberties.*"[6]

3.4 It will be also be essential to ensure that any such new powers are accompanied by sufficient safeguards so that rights protected by the EU's Charter of Fundamental Rights and the European Convention on Human Rights are not infringed. Moreover, such powers must also be exercised in compliance with the Irish Constitution and relevant case law of the Irish courts.

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

5 *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption* (fn 1), page 119.

6 *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption* (fn 1), page 119.

3.5 In particular, considerations regarding the protection of legal privilege, the right to a fair trial and the right to privacy should be at forefront of any proposal to enhance the CCPC's evidence gathering powers.

3.6 The case law of the European and Irish courts demonstrates that an absence of such considerations can ultimately lead to the invalidation of evidence-gather exercises during investigations. In particular, we note the Supreme Court's statements in its judgment in *CRH v CCPC* that limitations placed on rights must be necessary and proportionate.[7]

3.7 Moreover, there must be adequate safeguards which protect legal privilege as well as the rights to privacy and to a fair trial.

3.8 Furthermore, under section 5 of the 2009 Act, judicial authorisation is required in order to conduct surveillance activities provided for under the 2009 Act. Notwithstanding this, it is also possible to conduct surveillance activities without judicial authorisation in urgent cases once approval is obtained from a superior officer, which in the case of the Gardaí is an officer not below the rank of superintendent.

3.9 In the event that this power is extended to the CCPC, it will be necessary to include appropriate safeguards (*e.g.* to ensure that an approval is obtained from a superior officer of the CCPC who is not connected to the investigation for which approval is sought). This will ensure that the Supreme Court ruling in *Damache v DPP* is complied with. In *Damache v DPP* the Supreme Court found unconstitutional section 29(1) of the Offences against the State Act 1939, which had made it possible for issuance of a search warrant by a person connected with the investigation, with the Supreme Court finding that search warrants should be issued by an independent person.[8]

3.10 Moreover, *CRH v CCPC,* highlighted the absence of a mechanism in the Competition and Consumer Protection Act 2014 (the "**2014 Act**") which addresses how the CCPC should treat private and/or irrelevant material which comes into its possession as a result of an investigation. In this regard, any legislative changes to the CCPC's investigatory powers should be accompanied by a provision which sets out how the CCPC is to treat private and/or irrelevant material it obtains through the exercise of its new evidence gathering powers. Such clarification would be welcomed by the business community and the competition bar.

4. Changes to the operation of Irish merger control

Notification, investigation and unwinding of completed transactions

4.1 The changes outlined in the Consultation in relation to merger control are substantial, and will require careful consideration before being enacted. Our views on this aspect of the Consultation are high level only, given that the Consultation does not provide detail as to the precise scope and effect of proposed changes to the merger control regime. More detail on the significant changes proposed would be welcome.

4.2 Overall, the combined effect of permitting notification, investigation and unwinding of completed transactions under the Irish merger control regime (*i.e.* Part 3 of the Competition

[7] See for example, *CRH v Competition and Consumer Protection Commission*, [2018] 1 IR 521, para 247.
[8] *Damache v DPP* [2012] 2 IR 266, para 59.

Act) is likely to lead to significant uncertainty and cost for Irish businesses, as well as potentially reducing the attractiveness of investing in Irish businesses. It is difficult to justify such changes to the regime in circumstances where the Consultation does not refer to any evidence as to why such changes should be made to Ireland's merger control regime.

4.3 Under the current regime, there are clear turnover thresholds establishing the CCPC's jurisdiction and its power to investigate and, if required, prohibit transactions on the grounds of their effects on competition. The turnover thresholds strike a balance between ensuring that potentially anti-competitive transactions are duly scrutinised, and providing legal certainty to the market, as well as reducing the administrative burden on the CCPC. They provide a simple and objective mechanism that can easily by handled by businesses. Businesses can take comfort from the clear thresholds and invest in M&A transactions. However, if (following the proposed changes) any completed merger or acquisition might be investigated and unwound by the CCPC, buyers will likely be discouraged from entering into transactions involving Irish businesses.

4.4 Importantly, the proposed changes would bring the Irish merger control regime significantly out of line with best practice at the EU level (which determines jurisdiction to review, block and unwind deals on the basis of clear turnover thresholds only).

4.5 Specifically, it is difficult to see what benefit, if any, would arise from granting the CCPC the power to receive voluntary notifications for mergers and acquisitions which have already been completed.

4.6 If, per paragraphs 2 and 3 of Consultation section 2.4, the CCPC were to be granted the powers (i) in the case of a voluntarily notified transaction to make interim and final orders that the transaction be unwound and (ii) to unwind any other completed transaction, this would lead to significant uncertainty for parties. It would undermine the certainty provided by the current clear turnover-based thresholds for merger review.

4.7 As we understand it, the proposed changes would mean that, for any transaction that is not mandatorily notifiable (i.e. does not meet the relevant thresholds) and is completed by the parties involved, the CCPC could decide to investigate and seek to unwind the transaction (whether the parties voluntarily notify it or not). The mere existence of this draconian power (which, we note, does not appear to be subject to any time limitation) would throw the stability of any merger or acquisition into doubt for a prolonged period.

4.8 In our view this uncertainty is likely to discourage investment in businesses operating in Ireland. As the Department will be aware, a requirement for merger notification can have a significant impact on a transaction, in terms of timing, cost, and the final structure of the deal (which may depend on remedies required to address competition concerns). The powers proposed would mean that these serious implications (which could include an order to unwind the transaction) could never be definitively ruled out for a merger or acquisition.

4.9 The uncertainty arising from these powers may also result in a large increase in voluntary notifications, where parties notify out of an abundance of caution, and to secure the legal protection that merger clearance provides. This could result in an unnecessary administrative burden for the CCPC.

4.10 We believe that the combination of (i) the certainty provided by the current financial thresholds and (ii) the related voluntary notification regime provided for in section 18(3) of

the Competition Act works well. The current voluntary regime allows parties to obtain certainty that their transaction will not be subject to any further scrutiny on receiving clearance from the CCPC, should they wish to make a voluntary notification.

4.11 We note also that the CCPC has the power under existing legislation to investigate and challenge a merger or acquisition that does not satisfy the turnover thresholds but which the CCPC considers may breach section 4 or 5 of the Competition Act.

4.12 Furthermore, the language of the Competition Act is clear, and effectively provides that only those mergers or acquisitions which meet the statutory turnover thresholds, or which constitute media mergers, are notifiable to the CCPC. Any legislative change which would enhance the CCPC's powers in relation to mergers and acquisitions which do not come within its statutory remit should therefore be carefully considered and should only be implemented on the basis of clear evidence of a need for such powers.

Power to require information from third parties in a merger review and 'restarting the clock'

4.13 As regards the definition of "undertakings concerned", clarification of this term would be a positive development.

4.14 Requests for information ("**RFIs**") issued by the CCPC under section 20(2) of the Competition Act are often extensive in nature and may require parties to commit significant financial, time and personnel resources to provide a response within the timeframe set by the CCPC.

4.15 In 2020, more transactions were subject to extended investigations by the CCPC than in any other preceding year, which can impact on the timeframe for the CCPC's delivery of a final determination on a transaction.

4.16 It is against this background that any amendment which would seek to enlarge the CCPC's RFI powers to unconnected third parties should be considered. Providing the CCPC with mandatory powers to issue RFIs to third parties who have no structural links with the parties involved in the transaction under review risks imposing significant legal obligations on small and medium sized Irish businesses.

4.17 Furthermore, it should also be noted that under section 18 of the 2014 Act, the CCPC may issue a witness summons, require that witness to produce books, documents and records under his/her control and require parties to produce written information which it may require for an investigation.

4.18 The CCPC previously issued a witness summons to a third party in *M/10/040 – Unilever/Alberto Culver*. However, in that case the CCPC subsequently withdrew its summons following submission by the third party of information which rendered the summons unnecessary.[9]

4.19 As a result, we believe that the additional powers set out in the 2014 Act are sufficient to enable the CCPC to conduct a merger review in those limited cases where input from an unconnected third party is necessary.

[9] CCPC, *M/10/040 – Unilver/Alberto Culver,* para 13. Available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M10-040-Unilever-Alberto-Culver-Determination.pdf.

4.20 The Consultation's other proposal that there be a specified period for the CCPC to determine RFI responses to be compliant would be a welcome development, and would add certainty to the merger review process for parties, so long as the period is proportionate.

4.21 It is clear that any proposed period for such a determination by the CCPC should balance parties' need for certainty that they have complied with an RFI against the CCPC's need for sufficient time to ensure that the RFI has been responded to in full. This might be achieved by providing for a set number of working days for the CCPC to conduct this exercise (*e.g.* no more than 5 working days).

4.22 Finally, it is unclear to us what is meant by the proposal for a "*clarification of the circumstances when the merger review clock restarts*". Therefore, we cannot comment on this. We would welcome an opportunity to understand what is intended and to make submissions to the Department.

Yours faithfully

Sent by email and accordingly bears no signature

McCann FitzGerald

Submission in response to Public Consultation on Aspects of the Competition (Amendment) Bill 2021

Patrick Massey

Director

Compecon – Competition Economics

29th January 2021.

This submission is made in response to the Department of Enterprise, Trade and Employment's Public Consultation on Aspects of the Competition (Amendment) Bill, 2021. The consultation seeks views on the following issues.

1. Proposal to create a specific offence of bid-rigging.
2. Proposal that the CCPC be given power to prosecute "gun jumping" offences on a summary basis.
3. Providing for the power to
   (i) carry out video and audio surveillance; and
   (ii) to require interception and recording of electronic communications.
4. What specific safeguards should be put in place in your view in respect of the powers at 3 above to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?
5. Proposal to clarify that the CCPC has the power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis and giving it powers to review such mergers and acquisitions.
6. Proposal that the CCPC be given the power to make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its review of any voluntary notifications received. These orders would remain in force until the merger is cleared or remedial action is taken. In addition, where the CCPC finds that the already completed merger gives rise to a substantial lessening of competition in any market, the CCPC has the power to require that the merger must be unwound, and the pre-merger status quo restored to safeguard competition in the relevant market(s).
7. Proposal that, in the event that the CCPC finds that an already implemented merger gives rise to a substantial lessening of competition in any market, the CCPC will have the power to require that the merger must be unwound, and the pre-merger status quo restored to safeguard competition in the relevant market(s). This would include allowing for voluntary notifications of mergers and acquisitions to be considered by the CCPC and become subject to this provision if they proceeded before CCPC approval and were found to be anticompetitive and so should be unwound.
8. Proposal to give the CCPC the power to require information from third parties in a merger review.

9. Provision clarifying the circumstances when the merger review clock restarts following a Request For Information (RFI) and provides specified periods for the CCPC to determine RFI responses to be compliant.

Each of these issues is now addressed.

1. Proposal to Create a Specific Offence of Bid-Rigging.

With regard to this provision, the consultation states:

> "In Ireland, the practice to date has been to regard bid-rigging as a form of price fixing or market sharing. Price fixing and market sharing are specifically prohibited by sections 4(1)(a) and 4(1)(c) of the 2002 Act. However, this approach has led to some difficulties with Court cases, where bid-rigging as a specific concept was considered to be beyond the existing scope of anti-competitive practises outlined in the Act.
>
> The express provision for bid-rigging (in general) is intended to make it clearer that such concerted behaviour during the tender process is unlawful as it distorts competition."

As stated in the consultation, price fixing and market sharing are specifically prohibited under sections 4(1)(a) and 4(1)(c) of the 2002 Act. In addition, although not mentioned in the consultation, section 6(2) provides that such agreements are presumed to have the object of preventing, restricting or distorting competition "unless the defendant proves otherwise."

The consultation states that difficulties have arisen with Court cases "where bid-rigging as a specific concept was considered to be beyond the existing scope of anti-competitive practises outlined in the Act." It is difficult to comment on this as the consultation provides no details of these difficulties. The present author has provided expert reports to the CCPC/Competition Authority in two bid-rigging cases, one of which resulted in a successful prosecution where the parties pleaded guilty. My understanding is that the file on the second case is still being considered by the DPP. I was also retained to act as a rebuttal witness by the Competition Authority in the Mayo Waste case and attended every day of that trial in which the defendants were acquitted.

In general, the proposal to create a specific bid-rigging offence is welcome, assuming that it will increase the ability of the CCPC and DPP to successfully prosecute such behaviour. In the absence of more detailed information about the actual nature of the problem which the measure seeks to address it is not possible to offer a more considered view on the proposal.

2. Proposal that CCPC be given power to prosecute "gun jumping" offences on a summary basis.

This proposal is welcome, although presumably the DPP will still be required to make a decision in each individual case as to whether prosecution should be on a summary basis or by way of indictment.

3. Providing for the power to
(i) carry out video and audio surveillance; and
(ii) to require interception and recording of electronic communications.

The consultation document couches the discussion of this proposal in terms of cartel investigations. Granting such powers to the CCPC is quite a far-reaching measure. Such powers are a necessary tool in the investigation of cartels. However, it is essential that such powers should only be available in the case of cartel investigations and not for investigations of non-cartel offences including alleged abuse of dominance cases. There is often a fine line between aggressive competition and abuse of dominance and the use of such powers in dominance cases would be wholly disproportionate and inevitably, in some cases, involve intrusions into the activities of law-abiding businesses which would be totally unjustified. Similar arguments apply in respect of vertical restraints. It is essential, therefore, that legislative provisions conferring such powers on the CCPC should be framed in a way that strictly limits them to cartel investigations.

4. What specific safeguards should be put in place in your view in respect of the powers at 3 above to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?

First, as already stated, it is critical that such powers are strictly limited to cartel investigations only and cannot be used for non-cartel investigations. Second, there must be an effective mechanism of judicial oversight to prevent abuse. Finally, there should be a requirement for any material collected using such methods to be destroyed once any such investigation, including possible court proceedings have concluded.

5. Proposal to clarify that the CCPC has the power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis and giving it powers to review such mergers and acquisitions.

At the present time merging parties can make a voluntary notification of mergers below the notification thresholds if they have concerns that the merger might raise competition issues. There have been relatively few voluntary notifications since 2003. In a number of instances, most recently Eason/Dubray Books, the CCPC has contacted the parties involved in such mergers once they became aware of the transaction. In some of these cases the CCPC has indicated that, if the parties decide not to make a "voluntary" notification, it will investigate the transaction under sections 4 and/or 5. In some cases the merger may have been completed before the CCPC contacted the parties and thus the proposal seems designed to regularise such notifications. The proposal to allow for voluntary notification of below the threshold mergers after they have been completed in order to regularise the current situation sems reasonable. The consultation is silent as to whether this would be subject to some time limit. Arguably some limit is required to avoid notifications being made long after the merger has been completed. Suppose, for example, companies A and B merge in a transaction that is below the thresholds and, let us say, two years later company C decides to acquire the merged entity. Would the parties be able to voluntarily notify the original transaction in order to obtain legal certainty? It seems that there should be some time limit in respect of such voluntary notifications.

6. Proposal that 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 any voluntary notifications received. These orders would remain in force until the merger is cleared or remedial action is taken. In addition, where the CCPC finds that the already completed merger gives rise to a substantial lessening of competition in any market, the CCPC has the power to

require that the merger must be unwound, and the pre-merger status quo restored to safeguard competition in the relevant market(s).

It seems reasonable that, where the parties have made a voluntary notification to the CCPC, the CCPC should have the power to make orders preventing the parties taking steps to integrate the business until the CCP has completed its review. Such arrangements apply, for example, under the UK's voluntary merger notification scheme. Similarly, if the merger is found to give rise to a substantial lessening of competition, it is logical that the CCPC should have the power to order the unwinding of the merger if it had already been completed. As part of the voluntary notification process, the parties would have the opportunity to offer remedies to address any competition concerns. For the avoidance of doubt perhaps it might be specified that the CCPC could only order the unwinding of a completed merger that has been the subject of a voluntary notification, after it had considered any remedies offered by the parties and concluded that they would be insufficient to prevent a substantial lessening of competition. Presumably, the parties would be afforded a right to appeal any such unwinding order.

7. Proposal that, in the event that the CCPC finds that an already implemented merger gives rise to a substantial lessening of competition in any market, the CCPC will have the power to require that the merger must be unwound, and the pre-merger status quo restored to safeguard competition in the relevant market(s). This would include allowing for voluntary notifications of mergers and acquisitions to be considered by the CCPC and become subject to this provision if they proceeded before CCPC approval and were found to be anticompetitive and so should be unwound.

It is unclear from the consultation what the objective of this proposal is, given the earlier proposal which allows for the CCPC to order the unwinding of a completed merger following an investigation arising on foot of a voluntary notification. It would seem to suggest that the CCPC would have the power to order the unwinding of an already implemented merger irrespective of whether or not it was the subject of a voluntary notification. Logically it would make sense to provide for such powers. Otherwise, the parties to a below the threshold merger which resulted in a substantial lessening of competition would have no incentive to make a voluntary notification.

Presumably it if felt that this is a more effective way to deal with unnotified below the threshold mergers than to have the CCPC challenge them under section 4 and/or 5. In the event that the parties do not make a voluntary notification, it would seem reasonable to require that the CCPC would have to come to a conclusion as to whether the merger resulted in a substantial lessening of competition and issue an unwinding order within the time limits set for considering notified mergers. This would also require the CCPC to inform the parties of the commencement of such an investigation. There should also be a time limit on the CCPC's ability to initiate such an investigation. Such a proposal should not lead to a situation where the CCPC could monitor a merger for a number of years after it had been implemented in order to establish whether or not it had resulted in substantial lessening of competition and then seek to unwind it retrospectively. Merger control is essentially *ex ante* in nature.

8. Proposal to give the CCPC the power to require information from third parties in a merger review.

The consultation states:

> "This amendment will allow the CCPC to serve a requirement for further information on any one or more of the undertakings involved in the merger or acquisition, and on any other undertaking that the CCPC considers may be in possession of information relevant to its review of the merger or acquisition."

Currently the CCPC, as a matter of routine, requests information from customers and competitors of merging parties. It has limited powers to compel them to provide such information although it has, in the past, used its summons powers to compel such parties to respond to its requests. It seems reasonable to give the CCPC power to require customers and competitors to provide information in relation to a proposed merger. The consultation, however, seems to suggest that the CCPC would be able to cast its net far and wide and require information from "any undertaking that it considers may be in possession of information relevant to its review of the merger or acquisition." This appears disproportionate. Such a requirement should be limited to customers and competitors of the merging parties.

There is also a practical consideration of how this provision would work. At present, where the CCPC issues a request for information to the parties, the legislation provides that the timeline for the CCPC to reach a decision is reset to the date on which the CCPC is satisfied that the parties have complied fully with this request. Would this also apply with respect to requests

for information to third parties? Unlike the merging parties, third parties would have little incentive to reply promptly to such a request. In fact, competitors would have a strong incentive to delay replying as long as possible if this would hold up the CCPC review of the merger as by doing so they could potentially derail the merger or at least delay its implementation which might well be in their interest. Logically there is no sense in allowing the CCPC to require third parties to provide information unless it will have sufficient time to analyse such information before it is required to take a decision. At the same time if information requests to third parties stop the merger process clock, then this could encourage strategic behaviour by competitors. While in principle the proposal seems like a good idea, careful consideration is required as to how it would apply in practice, before such provisions are introduced.

9. Provision clarifying the circumstances when the merger review clock restarts following a Request For Information (RFI) and provides specified periods for the CCPC to determine RFI responses to be compliant.

No observations on this proposal.

Reforming Non-Notifiable Mergers in Ireland: the Kantar Media/Newsaccess Transaction

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Reforming Non-Notifiable Mergers in Ireland: the Kantar Media/Newsaccess Transaction

By

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Abstract

In January 2021 the government department with responsibility for competition policy in Ireland proposed that for mergers notified to competition agency on a voluntarily (as opposed to mandatory) basis that the agency be empowered: (i) to make interim orders preventing the implementation of the transaction; and, (ii) to unwind a completed merger so as to restore pre-merger status quo. No rationale or justification was offered. This paper examines the proposed powers in relation to the record of the competition agency's long standing procedure for dealing with non-notifiable mergers, and, the possible hypothetical use of the powers in a two-to-one merger notified on a voluntary basis in 2017. The competition agency procedure for dealing with non-notifiable mergers that raise competition concerns has worked well. The case study reinforces this conclusion. Government needs to furnish a compelling rationale for the proposals to go forward.

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Acknowledgments: The author was Adjunct Lecturer at Trinity College Dublin between 2013 and 2019 and a member of the Competition Authority between 2000 and 2008, where he was responsible for merger control. For the Kantar Media/Newsaccess transaction the author was not involved for the CCPC or the parties to the merger or for any third party. The paper has benefited from comments and suggestions from Francis O'Toole, while Philip Andrews and Niall Fitzgerald supplied the list of voluntary merger notifications. The usual disclaimer applies. All links were valid as of 15 March 2021.

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I. Introduction

In January 2021 the Irish government department with responsibility for competition policy issued proposals to address problems that may arise due to the implementation of non-notifiable mergers before the Competition and Consumer Protection Commission (CCPC), Ireland's competition agency with responsibility for merger control, has had an opportunity to assess such transactions.[1] Under the Department of Enterprise, Trade and Employment's (the Department) proposals, the CCPC will:

- "*have the power to make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its review of any voluntary notifications received*;" and,
- "*in the event that the CCPC finds that an already completed merger gives rise to a … [substantial lessening of competition] …, the CCPC has the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition."*[2]

A leading Irish law firm stated that the latter power "*is a potentially very significant development in Irish competition law*."[3]

The purpose of this paper is to present a case study of what appears to be the only non-notifiable merger between 2003 and 2020 where both of these powers could have been applied, the acquisition of Newsaccess Limited (Newsaccess) by Kantar Media: the transaction was voluntarily notified, albeit at the request of the CCPC; steps had already been taken to implement the transaction when the CCPC intervened; the CCPC requested that further implementation cease; and, the CCPC concluded that this two-to-one merger would likely have led to a substantial lessening of competition (SLC), the statutory competition test under the Competition Act 2002, as amended (the 2002 Act). The SLC finding might have provided grounds for unwinding the merger. Since, however, steps had already been taken to implement the merger this may have constrained the range of available remedies.[4] The case study thus should be able to cast light on the issue of whether or not these new powers will assist the CCPC in dealing with non-notifiable mergers that raise SLC concerns.

The paper is divided into five sections. Sections II sets outs the CCPC's current procedure for dealing with transactions that fall below the mandatory notification thresholds (i.e. non-notifiable mergers), while at the same providing the background to the selection of the Kantar Media/Newsaccess transaction as a case study. In Section III the CCPC's analysis of the competitive effects of the Kantar Media/Newsaccess merger is presented, Section IV Kantar Media's Proposals that became binding commitments (i.e. the remedy). Section V analyses the proposed new CCPC powers, both in relation to the CCPC's current long standing procedure for dealing with non-notifiable mergers and in relation to the Kantar Media/Newsaccess transaction.

[1] On the merger provisions of Ireland's competition law, see Andrews, Gorecki & McFadden (2015, pp. 247-378).
[2] DETE (2021, p. 5).
[3] McCann FitzGerald (2021b).
[4] For example, in the case of an already consummated US hospital merger, although the retrospective challenge to the merger as anticompetitive proved successful, the merger was not dissolved but rather an ineffective conduct remedy was imposed instead, in part because the merger had been in effect for several years. For details see Hass-Wilson (2014).

II. Non-Notifiable Mergers: Current Procedure

a. CCPC Guidance, Policy, & Practice

Ireland, like a number of other jurisdictions including the European Union, has a mandatory notification regime for mergers that exceed certain turnover thresholds.[5] Below threshold or non-notifiable mergers in Ireland, can, however, be notified on a voluntary basis.[6] No matter where the threshold is drawn between mandatory and voluntary notifications, there is a risk that anti-competitive below threshold mergers may slip through the net; however, if the notification threshold is too low then competition agency resources are needlessly devoted to examining mergers that likely raise no competition concerns.[7]

Where the CCPC believes, however, that a below threshold merger may lead to a SLC, the CCPC can request the merging parties to voluntarily notify the merger. The CCPC may also request, at the same time, that the merging parties give an undertaking not to take further steps implementing the transaction.

If, however, the parties decide not to voluntarily notify the merger, the CCPC may investigative the transaction as an illegal anti-competitive agreement and/or as an abuse of a dominant position under the 2002 Act.[8] Where the CCPC deems it necessary the agency may issue an injunction to restrain implementation of the merger; if it is already implemented then the CCPC "*may invoke the courts' equitable jurisdiction to restore the status quo ante. This may result in the merger being reversed.*"[9]

The CCPC approach to non-notifiable mergers that may raise competition concerns is long standing. It was first articulated by the Competition Authority in 2003,[10] the year that merger control was assigned to the agency.[11] It was reaffirmed by the CCPC (2104a), the successor body to the Competition Authority, in 2014.

The number of below threshold mergers that raised possible competition concerns for the Competition Authority/CCPC between 2003 and 2020, as set out in Table 1 based on agency publications, is small:

- three of the voluntarily notified mergers raised such concerns, accounting for 6 per cent of all notified mergers that raised competition concerns; and,

[5] OECD (2021, p. 7). The current merger notification thresholds in Ireland, which came into effect on 1 January 2019 are: (i) the aggregate turnover in the most recent financial year in the State of the undertakings involved in the transaction is not less than €60 million, and, (ii) the turnover in the most recent financial year in the State of each of the two or more of the undertakings involved in the transaction is not less than €10 million. (The legislative basis is set out in S.I. No. 288 of 2018, Competition Act 2002 (Section 27) Order 2018). Between 2014 and 2018 the notification thresholds were: €50 million and €3 million, respectively. For a discussion of the merger thresholds since 2003 under the 2002 Act see Andrews, Gorecki & McFadden (2015, pp. 272-274).

[6] Once notified, there is no difference in the treatment of a voluntary as compared to a mandatory notification. For example, the same competition test is used to assess the merger.

[7] There is no hard and fast rule concerning the line between voluntary/mandatory merger notification. For discussion see OECD (2016) and ICN (2008).

[8] A similar situation is present in some other jurisdictions. See OECD (2014, pp. 7-9).

[9] CCPC (2014a, para. 1.8).

[10] Competition Authority (2003).

[11] Prior to that date merger control was the responsibility of the relevant Minister using a public interest test to assess the merger.

- four mergers were investigated as being potentially an anti-competitive agreement and/or an abuse of a dominant position.

In other words, over the period 2003 to 2020 a non-notifiable merger raised competition concerns once every two to three years.

Table 1
Non-Notifiable Mergers, Competition Concerns, Ireland, 2003-2020

Period[a]	Proportion of Notified Mergers That Raise Competition Concerns That Were Voluntarily Notified[b]	Investigations of Mergers as Anti-Competitive Agreements and/or Abuse of a Dominant Position[c]
2005-2005	0/10	1[d]
2006-2010	1/16	0
2011-2015	0/7	3[e]
2016-2020	2/17	0[f]
Total	**3/50**	**4**

a. For mergers dated by year of notification; for anticompetitive agreement/abuse of dominance, by year reported in the competition agency's *Annual Report* and/or press releases.
b. Mergers that raise competition concerns defined as: all Phase II and Phase I cleared with conditions. The following were notified voluntarily: M/07/031-*Galco/Sperrin/Sperrin*; M/17/012 – *Kantar Media/Newsaccess*; and, M/17/036 – *Sean Loughnane/Crinkle*.
c. As recorded in the competition agency's *Annual Report*. References to preliminary investigations or inquiries are not included. There are references to such investigations/inquiries for 2003-2006 but not in later years.
d. Monaghan Mushrooms/Carbury Mushrooms.
e. *Easton/Argosy*; *Corrib Oil/Suttons Oil*; and, *Kilsaran & Roadstone/Cemex*.
f. The CCPC *Annual Report* for 2020 is unpublished at the time of writing. Hence for this year reference was made to CCPC, *Press Releases*.

Source: Competition Authority, *Annual Reports*, various issues; CCPC, *Annual Reports*, various issues; CCPC, *Mergers & Acquisitions Report*, various issues; and, CCPC, *Press Releases*, various.

b. Voluntary Merger Notifications

One of the difficulties with the current approach to non-notifiable mergers in Ireland, as noted above, is that when such mergers come to the CCPC's attention the transaction may have been partially or completely implemented. However, as detailed in column (2) of Table 2, of the eleven mergers that were notified on a voluntary basis between 2003 and 2020, nine were voluntarily notified on the initiative of the parties themselves. In only two instances was the merger voluntarily notified by the parties at the request of the CCPC. In these two cases, column (3) of Table 2 shows that in only one instance, the Kantar Media/Newsaccess transaction, did the CCPC also request the parties not to take further steps implementing the transaction.

c. Anti-competitive Agreements and/or Abuse of Dominant Position

Attention next turns to the four non-notifiable mergers identified in Table 1 that raised competition concerns that the CCPC investigated as anti-competitive agreements and/or abuse of a dominant position rather than being voluntarily notified. In one instance, the merger agreement had not been signed so that the merger could not be notified to the CCPC; in the remaining three, although there is no evidence that the CCPC requested the mergers to be voluntarily notified, it appears that the parties cooperated with the CCPC investigation (Table 3). While the CCPC explicitly requested the parties to cease implementation of the merger in only one of the four cases, in the three other the evidence suggests that the merger had not been implemented at the time of the CCPC investigation.

Table 2
Voluntary Merger Notifications, Competition & Consumer Protection Commission Role, Ireland, 2003-2020

Voluntary Merger Notification (Column 1)	Evidence CCPC Requested Voluntary Notification (Column 2)[a]	Evidence CCPC Requested Parties Cease Implementation of Transaction (Column 3)[a]	Outcome of CCPC Merger Investigation (Column 4)[a]
M/03/012 – *Smurfit Ireland/Lithographic Universal*	No	No	Approved
M/05/004 – *IBM/Equitant*	No	No	Approved
M/07/031 – *Galco/Sperrin/Sperrin*	No	No	Approved
M/11/004 – *Glanbia/Dawn Dairies*	No	No	Approved
M/15/016 – *PRL/MFS*	No	No	Approved
M/15/049 – *AIB/Gerard Gannon*	No	No	Approved
M/17/012 – *Kantar Media/Newsaccess*	Yes	Yes[b]	Approved, Sale of Selected Assets
M/17/036 – *Sean Loughnane/Crinkle*	No	No	Approved, Deletion of Non-Compete & Non-Solicitation Clauses
M/19/012 – *APCOA Parking/NCPS*	No	No	Approved
M/19/017 - *Duke Street / DCC Vital (UK) & Kent Pharma UK*	No	No	Approved
M/20/012 – *Eason/Dubray*	Yes	No	Approved

d. The evidence used for columns (2), (3) & (4) is drawn from the CCPC merger determination.
e. The CCPC request was made on 17 February 2017; the Share Purchase Agreement was dated 1 February 2017; on 23 February 2017 the parties gave undertakings not to take further steps towards implementing the proposed transaction.

Source: Col (1), Philip Andrews & Niall Fitzgerald; Cols (2), (3), & (4), www.ccpc.ie

In terms of the outcomes of the CCPC's investigation into the mergers, in three out of the four cases the CCPC closed the investigation on the grounds that the merger was not anti-competitive; in the remaining case the CCPC initiated legal proceedings since it formed the view that the Eason/Argosy merger was an anti-competitive agreement. As a result the merging parties abandoned the merger. This appears to be the only instance where the CCPC has taken such action concerning a non-notifiable merger, not voluntarily notified, that it viewed as anti-competitive.

d. Comment

Non-notifiable mergers that raise competition concerns in Ireland are rare: seven over 17 years. Nonetheless, the CCPC, using the existing powers in the 2002 Act, has developed two mechanisms to deal with such mergers: requesting voluntary notification; or anti-competitive agreement/abuse of dominance investigations. The evidence to date, summarised in Tables 1 to 3, suggests that by and

large that the CCPC's use of these mechanisms has worked well in that mergers where the CCPC has SLC concerns have either been approved with conditions that mitigate the competitive harm of the merger or abandoned once the agency initiated legal proceedings. It may be, however, that such a high level treatment of non-notifiable mergers that raise competition concerns does not present the complete picture; nuance, colour and qualification are missed. To address this possible lacuna the Kantar Media/Newsaccess transaction is explored in more depth.

Table 3
Mergers Below Mandatory Threshold Notification, Investigated by CCPC as Anti-Competitive Agreements and/or Abuse of a Dominant Position, Ireland, 2003-2020[a]

Below Threshold Merger (Year)	**Evidence CCPC Requested Voluntary Notification**	**Evidence CCPC Requested Parties Cease Implementation of Transaction**	**Outcome of CCPC Investigation**
(Column 1)	**(Column 2)**	**(Column 3)**	**(Column 4)**
Monaghan Middlebrook Mushrooms Ltd/Carbury Mushrooms Ltd (2004)	Parties offered to notify on a voluntary basis; but agreement to merge not signed, so could not notify.	Not relevant. CCPC investigation concluded shortly after merger agreement signed.	CCPC decided that there was "*not sufficient likelihood of anti-competitive effects*."
Eason/Argosy (2012)	No, but Eason's informed the CCPC of the merger agreement on 27 August 2012.	No, but evidence in column (4) suggests merger had not been implemented.	CCPC initiated legal proceedings, anti-competitive agreement, merger abandoned; parties committed to inform CCPC of any similar arrangement for 12 months.
Corrib Oil Ltd/Suttons Oil Ltd (2013)	No, but parties "*voluntarily cooperate[d] with … [the CCPC] investigation*."	No, but see wording in next column (4) suggesting transaction not completed.	CCPC decided that "*it did not intend to challenge or object to the completion of the proposed transaction*."
Kilsaran & Roadstone/Cemex ROI Limited (2014)	No, but parties appear to have cooperated with CCPC investigation.	Yes	CCPC decided that "*it did not intend to challenge or object to the completion of the proposed transaction*."

a. The CCPC *Annual Report* for 2020 is unpublished at the time of writing. Hence for this year reference was made to CCPC, *Press Releases*

Source: Competition Authority (2004; 2013, pp. 30-31; 2014a, p. 28; 2014b, paras. 1.10-1.12;1.15-1.16; 2015, pp. 17-18); and, CCPC, *Press Releases*, various.

III. Kantar Media/Newsaccess Transaction: CCPC Merger Analysis[12]

a. Timelines

Mediawatch Limited trading as Kantar Media, an indirectly wholly owned subsidiary of WWP plc (WPP), acquired Newsaccess pursuant to a Share Purchase Agreement (SPA) dated 1 February 2017.[13] On 17 February 2017 the CCPC requested Kantar Media and Newsaccess (the parties) not to take any further steps pursuant to the SPA implementing the merger and to voluntarily notify the transaction.

The CCPC request reflected the fact that it had "*reached the preliminary view that the [merger] … could potentially raise competition concerns*" in media monitoring.[14] In a letter dated 23 February 2017 the parties agreed: not to take further steps towards implementing the transaction; and, to voluntarily notify the merger. The notification was filed on 9 March 2017.

The CCPC cleared the merger on 11 July 2017 after an extended Phase I, subject to a fix-it-first remedy. The remedy involved a purchaser selecting from an a la carte menu, *inter alia*, of tangible assets (Newsaccess Fixed Assets) and gaining access to a number of Newsaccess customers (Selected Newsaccess Customer Contracts). In other words, the divestment of selected assets. The CCPC determined that given this remedy the merger would not lead to a SLC. There was no appeal from the CCPC's decision.[15]

b. The Parties

Kantar Media, like Newsaccess, is a private company limited by shares registered in the State. Both undertakings were involved in media monitoring and evaluation services. Media channels monitored included: print (e.g. national and regional newspapers); broadcast (e.g. television, radio); online/digital (e.g. online news portals); social media (e.g. Twitter, Facebook); and, international. In 2017 Kantar was owned by WPP, a media giant with turnover of €17.6 billion in 2016.[16] While Newsaccess's turnover, which was less than €3 million in 2016, was generated entirely within the State, Kantar's turnover exceeded €3 million, some of which was generated outside the State.

c. Market Definition

Kantar Media and Newsaccess physically monitored – typically using keywords - various media channels on behalf of customers (i.e. public relations firms, government agencies and departments, firms and so on) to whom reports are furnished. Based on internal documents and tender data, the CCPC noted that customers preferred to purchase the full spectrum of media monitoring services. A subset of customers, however, confined their media monitoring purchases to social media. The parties were the principle providers of media monitoring services in the State.[17]

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[12] Sections II and III are based on the CCPC merger determination: M/17/012 – *Kantar Media/Newsaccess*. All CCPC merger determinations can be found on its website: www.ccpc.ie.

[13] Newsaccess's turnover in the financial year ending 31 December 2016, its most recent financial year, was below the €3 million mandatory notification threshold relevant between 2014 and 2018. (M/17/012 – *Kantar Media/Newsaccess*, para. 4).

[14] M/17/012 – *Kantar Media/Newsaccess,* para. 5.

[15] Only the parties to the merger can appeal under the 2002 Act.

[16] WPP (2019) announced the sale of 60 per cent of its share in Kantar, "*its global data, research, consulting and analytics business*," to Bain Capital Private Equity in late 2019. This transaction was not notified to the CCPC.

[17] The parties also provided evaluation reports based on media monitoring. No third party complaints were received by the CCPC concerning this secondary activity, which was not widely purchased. (M/17/012 – *Kantar Media/Newsaccess,* para. 31).

Product Market

The CCPC conclusion as to the competitive effects of the merger was unaffected whether a narrow (i.e. the provision of print and broadcast media monitoring services) or wide (i.e. the provision of the full spectrum of media monitoring services, including online) product market definition was used. However, monitoring print and broadcast media confirmed a competitive advantage on a provider, which suggests that "*it is the print and broadcast media segment that is of foremost strategic importance*."[18] The CCPC found that [80-90]% of Newsaccess and [70-80]% of Kantar Media's turnover in 2015 was accounted for by this media segment. Therefore, CCPC used a narrow product market definition in assessing the competitive effects of the merger.[19]

Geographic Market

The CCPC conclusion as to the competitive effects of the merger was unaffected whether a narrow (i.e. the State) or wide (i.e. the State and the UK) geographic market definition was used. The CCPC noted that there were few media monitoring service providers operating outside the State, mainly in the UK. But these relied of local service providers in the State "*as far as it relates to print and broadcast monitoring and especially regional print and broadcast monitoring*."[20] Media monitoring service customers "*are normally interested in national coverage in the media and whether it is a local Irish business or a multinational with local presence, domestic news and coverage of their business and/or products nationally is of importance*."[21]

The CCPC argued that service providers located in the State possessed a competitive advantage over those located in the UK and elsewhere "*due to the practicalities of monitoring print and broadcast media, such as for example the need to mainly physically gather and scan newspapers every morning.*"[22] Almost all – [90-100]% - of the customers of Newsaccess were based in the State.[23] Therefore, the CCPC used a narrow geographic market definition in assessing the competitive effects of the merger.

d. Market Structure

The CCPC determined that the proposed Kantar Media/Newsaccess transaction was a two-to-one merger in the provision of print and broadcast media monitoring services in the State. The CCPC came to this conclusion based on: submissions made by third parties and customers; tender data; and, the party's identification of their closest competitor. For example, the Public Relations Institute of Ireland (PRII), the representative body of "*Irish communications and PR practitioners*," stated that following the transaction that "*there would not be any credible alternative to Kantar*."[24]

[18] M/17/012 – *Kantar Media/Newsaccess,* para. 33.
[19] In the analysis below, unless otherwise specified, the same narrow market definition is used.
[20] M/17/012 – *Kantar Media/Newsaccess,* para. 36.
[21] M/17/012 – *Kantar Media/Newsaccess,* para. 37.
[22] M/17/012 – *Kantar Media/Newsaccess,* para. 37.
[23] In other words, a hypothetical monopolist of media monitoring services in the State could profitably raise the price of these services. Providers located outside the State would be at a competitive disadvantage.
[24] M/17/012 – *Kantar Media/Newsaccess,* para. 25. The lack of alternatives applied "*particularly when it comes to Ireland's important regional media*."

e. Theory of Harm: Horizontal Unilateral Effects

Ability & Incentive

According to the CCPC *Merger Guidelines*, unilateral effects occur "*when a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordination with its competitors*."[25] The CCPC found that post-merger Kantar Media/Newsaccess would have both the ability and the incentive to raise price.

The merged entity will have the *ability* to raise prices since it is a merger to monopoly. There were no competitors – actual or potential - to which customers can switch. Although a couple of competitors were identified it transpired that Newsaccess "*was … [their] provider of media monitoring services for Irish print titles*."[26]

Absent entry, the merged entity would find it profitable to raise prices (i.e. it would have the *incentive*). Customers would have no alternative to the merged entity for the provision of print and broadcast media monitoring services. Furthermore, because the provision of these services is negotiated on a bilateral basis for individual customers the merged entity would be a position to "gauge" customer willingness to pay (i.e. act as a discriminating monopolist).

Entry

A price rise by the merged entity might be mitigated if, according to the CCPC's *Merger Guidelines*, entry is likely, timely and sufficient.[27] These three conditions are cumulative. The CCPC was concerned that, absent binding commitments from Kantar Media, that entry "*could be hampered by*:"[28]

- non-compete contractual restrictions on Newsaccess staff;
- the difficulty of sourcing necessary equipment, thus delaying timely entry;
- Kantar Media negotiating favourable contracts for itself with Newsaccess customers by, for example, longer contracts, thus making access by entrants more difficult; and,
- Newsaccess customers "*on long-term contracts being precluded from switching to any new service provider*."[29]

The CCPC argued that "*should any of the above factors prevent or delay entry that is timely, likely or sufficient, the Proposed Transaction could be expected to result in a*" SLC.[30]

The CCPC were of the view that all of the factors in the preceding paragraph were present. The CCPC thus concluded "*that the Proposed Transaction may therefore raise significant concerns*."[31] The CCPC did not, however, have to come to a definitive conclusion; Proposals were submitted that "*had the potential to replace the competition that would have been lost as a result of the Proposed Transaction in the potential market for the provision of print and broadcasting media monitoring services.*"[32]

[25] CCPC (2014b, para. 4.8).
[26] M/17/012 – *Kantar Media/Newsaccess,* para. 45.
[27] CCPC (2014b, paras. 6.4-6.10).
[28] M/17/012 – *Kantar Media/Newsaccess,* para. 55.
[29] M/17/012 – *Kantar Media/Newsaccess,* para. 55.
[30] M/17/012 – *Kantar Media/Newsaccess,* para. 56.
[31] M/17/012 – *Kantar Media/Newsaccess,* para. 56.
[32] M/17/012 – *Kantar Media/Newsaccess,* para. 56. It is not clear why the market definition is qualified by the word "potential" given the earlier discussion of market definition.

IV. Remedy: Fix-it-First

a. The Proposals

Kantar Media submitted Proposals to the CCPC.[33] These were accepted by the CCPC as mitigating its competition concerns. Accordingly, the Proposals became binding commitments upon Kantar Media. The Proposals were summarised by the CCPC, in particular, as follows:

> "*a. to sell to a prospective new entrant into the market all scanners, computers, servers, printers and related equipment owned and used by Newsaccess in the monitoring of print and broadcast media ('Newsaccess Fixed Assets');*
>
> *b. to offer a specified number of customers of Newsaccess on fixed term contracts the option to be released from the remainder of their contracts in order to facilitate market entry by the purchaser of the Newsaccess Fixed Assets referred to in part a) above;*
>
> *c. to procure that Newsaccess will not unilaterally amend or vary the prices agreed between Newsaccess and customers of Newsaccess (including any Contract Customer) for the provision of print or broadcast media monitoring services prior to the termination of the customer's contract; and*
>
> d. *not to enforce any contractual obligation on current or former staff of Newsaccess, excluding its directors and shareholders, which would prevent such staff from working for another provider of media monitoring services in the State*."[34]

Newsaccess customers that switched would continue to have access the relevant Archive Facility.[35] Kantar Media also had, under the Proposals, to notify the CCPC of any below threshold mergers for two years.

The Proposals largely mirror the factors identified in the CCPC's competitive effects analysis that could hamper entry. In other words, the remedy is congruent with the problem, at least as far as entry is concerned. The Proposals are a mixture of structural, quasi-structural and behavioural remedies.

The Proposals were market tested by the CCPC with potential entrants. The responses suggested that the Proposals were "*adequate to facilitate entry, which is both timely and likely.*"[36] The CCPC also came to the view that entry was likely to be sufficient since customers, in response to CCPC market enquiries, "*showed a willingness to consider alternative service providers*," while there was a record of customer switching.[37]

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[33] The detailed formal Proposals were set out in M/17/012 – *Kantar Media/Newsaccess,* pp. 14-22.

[34] M/17/012 – *Kantar Media/Newsaccess,* para. 57. In relation to condition (b) Kantar Media undertook not to actively canvas or solicitor such customers for a period of twelve months, but Kanata Media could respond to unsolicited requests. (M/17/012 – *Kantar Media/Newsaccess,* Proposals, para. 5).

[35] Defined as: "a repository of the media content that has been provided to a Customer by Newsaccess during the period up to and including the 30th of April 2017, in accordance with such Customer's current contract with Newsaccess for the provision of a Media Monitoring Service." M/17/012 – *Kantar Media/Newsaccess,* Proposals, p. 14.

[36] M/17/012 – *Kantar Media/Newsaccess,* para. 58.

[37] M/17/012 – *Kantar Media/Newsaccess,* para. 59.

b. Implementation[38]

On 28 June 2017 Newsaccess entered into a binding sale and purchase agreement with respect to Newsaccess Fixed Assets with a purchaser currently providing or intending to provide a media monitoring service in the State (the purchaser). The purchaser, whose identity was not revealed in the CCPC's merger determination, was unconnected and independent of Kantar Media.[39]

Kantar Media also selected, with CCPC agreement, Selected Newsaccess Customer Contracts that would not be enforced for their remaining term should the Newsaccess customer decide to switch to the purchaser. An undertaking was given by Kantar Media to distribute, on a one off basis, advertising material from the purchaser of Newsaccess Fixed Assets to these customers. Timelines and compliance mechanisms were set out in the Proposals to assist in their transfer.[40]

Hence prior to the CCPC clearing the merger on 11 July 2017, Newsaccess Fixed Assets had been divested to a purchaser, while Kantar Media had committed to releasing a number of Newsaccess's customers if they expressed a preference for switching to the purchaser. In other words, condition (a) had been implemented, while condition (b) could be triggered at the discretion of the purchaser.

c. Commentary

Entry is the mechanism that the CCPC relied upon to mitigate its competition concerns. It seems reasonable to assume, based on the CCPC's merger determination, that entry will be likely and timely. The purchaser, for example, had already acquired the Newsaccess Fixed Assets prior to the CCPC's clearance of the transaction.[41] There are, however, grounds for arguing that entry may not be sufficient. Thus the remedy may not eliminate entirely the competition concerns raised by the merger.[42]

First, the number and importance of the Selected Newsaccess Contract Customers that may switch to the purchaser is not stated. The very use of the word 'Selected' suggests that not all Newsaccess customers were given an opportunity to switch prior to any existing contractual obligations expiring. If the purpose of the remedy is to restore the pre-merger level of competition then surely *all,* or substantially all, of Newsaccess customers should have been given the opportunity to switch to the purchaser.[43]

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[38] It should be noted that the body of the Kantar Media/Newsaccess written determination only summarises the eight page Proposals which are appended to the determination (i.e. conditions (a) to (d) set out in the text above). There is, however, no mention in the body of the determination that the remedy is a fix-it-first remedy. It is only by reading the Proposals that this becomes clear. The fix-it-first nature of the remedy is confirmed by the CCPC in other related merger publications (e.g. CCPC, 2018, para. 3.8).

[39] M/17/012 – *Kantar Media/Newsaccess,* Proposals, para. 2. The CCPC confirmed, in an email dated 15 January 2021, that the purchaser was NR Media Intelligence Limited trading as TrueHawk.

[40] M/17/012 – *Kantar Media/Newsaccess,* Proposals, paras. 3-7.

[41] The evidence is consistent with this prediction. The purchaser started canvassing for business in the media monitoring market in September 2017 (Sexton, 2017).

[42] The CCPC does not publish guidance on merger remedies. Reliance is thus placed on European Commission (2008, para. 9) guidance – often relied upon by the CCPC - which states that the remedy should eliminate entirely the competition concerns.

[43] In general structural remedies consisting of the divestment of a standalone viable business are preferred by competition agencies in addressing SLC concerns in merger cases. In other words, if firm A acquires firm B and there is a SLC concern in a particular market then either firm A's or firm B's operations in that market would be divested; not firm A's (or firm B's) operations in that market less (say) 40 per cent of its customers. The latter option is analogous to the remedy in the Kantar Media/Newsaccess transaction.

The media monitoring market shares of Kantar Media and Newsaccess are not detailed by the CCPC, nor is the importance of the Selected Newsaccess Contract Customers. It is not a case of such information being partially redacted in the CCPC's determination – as is often the case with market shares; it is not there in the first place.[44] Nonetheless, using various sources, in 2015 Newsaccess accounted for 31.7 per cent of the media monitoring market, Kantar Media the remaining 68.3 per cent.[45] If the purchaser is to restore competition this suggests that Selected Newsaccess Contract Customers should account for at least 20 to 25 per cent, if not a third, of the media monitoring market. However, the market share of the Selected Newsaccess Contract Customers cannot be estimated based on available information.

Second, the purchaser's capacity to market its services to the Selected Newsaccess Contract Customers is arguably too limited. Under the Proposals Kantar Media undertakes that "*it will procure that Newsaccess will distribute on a once off basis, advertising material on behalf of the Purchaser to each of the Selected Contract Customers of Newsaccess.*"[46] Kantar Media incentives are not aligned with those of the CCPC nor the purchaser. The former does not want to lose Newsaccess customers,[47] while the CCPC and the purchaser want these customers to switch.

Third, there is no mechanism that ensures a certain minimum number of Selected Newsaccess Contract Customers switch to the purchaser. While clearly it is up to each customer to decide whether or not to switch to the purchaser, the remedy could have included a provision that Kantar Media would facilitate switching and if not all of the initial set of Selected Newsaccess Contract Customers switched, then Kantar Media will add further customers until the minimum is attained. At this point the merger could have been completed. This provides the appropriate set of incentives for Kantar Media.

Fourth, reliance on entry to resolve competition concerns flowing from a merger does not have a good track record while the evidence suggests that there are better alternative remedies than the sale of selected assets. A recent ex post study of eight UK merger cases, where entry and expansion played an important role in the UK competition agency's decision to clear the merger, in only three cases was entry timely, likely and sufficient.[48] The US Department of Justice's *Antitrust Division Policy Guide to Merger Remedies*, states "*[T]he Federal Trade Commission Divestiture Study found that divestitures of on-going businesses succeeded at a higher rate than divestitures of selected assets*."[49] The 2020 US Department of Justice's *Merger Remedies Manual* makes a similar claim based on a more recent Federal Trade Commission remedy study.[50]

[44] Typically in competition agency merger determinations such as those of the CCPC or the European Commission market shares are redacted but placed within 5 or 10 percentage point intervals.
[45] For details see Annex A.
[46] M/17/012 – *Kantar Media/Newsaccess,* Proposals, para. 3. By accessing such information Kantar Media potentially has access to market sensitive information that can be used to better compete with the purchaser.
[47] As a result those Newsaccess customers least likely to switch might be selected and/or "difficult" customers such as those that are tardy in paying or constantly complaining.
[48] KPMG (2017).
[49] US, DoJ (2011, pp. 8-9).
[50] US, DoJ (2020, p. 8, & fn 30).

V. Would the Proposed New CCPC Powers Have Made A Difference?

a. Introduction

Typically, a merger to monopoly would be prohibited by a competition agency or alternatively cleared with the divestment of a viable, existing business covering the area of the overlap.[51] Up until the Kantar Media/Newsaccess transaction all two-to-one mergers in Ireland had either been prohibited by the CCPC (M/04/032 – *IBM/Schlumberger*) or the parties had withdrawn the merger following the initiating of legal proceedings by the CCPC (*Eason/Argosy*). None had been cleared by the CCPC with or without conditions. In 2017 Kantar Media/Newsaccess was the first example in Ireland of a two-to-one merger being cleared, albeit with conditions.[52]

The CCPC were, it could be argued, in a difficult position in terms of agreeing a suitable remedy with the parties in the Kantar Media/Newsaccess transaction. Steps had already been taken to implement the transaction by 23 February 2017, when Kantar Media agreed not to take further steps towards implementation:

- on 1 February 2017 the three Directors of Newsaccess together with the Secretary had resigned; [53]
- employment (including directors) levels in Newsaccess were more than halved in 2017; from 20 (on average) in 2016 to seven in 2017; and,
- Newsaccess customers migrated to the centralised London based Kantar Media platform for media monitoring purposes from 1 February 2017.[54]

Unwinding the merger would therefore seem to have been impractical. In other words, neither retrospective prohibition of the transaction nor Kantar Media divesting itself of Newsaccess (i.e. a viable existing business covering the area of overlap) seemed to be feasible remedies. Since the merger was below the compulsory notification thresholds, gun jumping was not an issue.

Thus, the CCPC appears to have had little option but to accept a remedy that arguably suffered from a number of shortcomings (Section IV). This raises the question of whether or not the new powers that the Department proposes to grant the CCPC with respect to mergers that are notified on a voluntary basis: (i) to make interim orders preventing the implementation of a transaction; and, (ii) to unwind a completed merger so as to restore pre-merger competition, would have made a difference in the Kantar Media/Newsaccess merger.

b. Rationale for New CCPC Powers?

Before answering this question, the Department's grounds for the proposed changes with respect to below threshold mergers are considered. The rationale should inform the discussion of the Kantar Media/Newsaccess case study; it should also point to shortcomings in the current long standing approach of the CCPC to below threshold mergers which may raise competition concerns. However,

[51] Of course, if barriers to entry are low and customers are not in some way locked into the incumbent, then the merger to monopoly may not lead to a SLC.

[52] Based on McCann FitzGerald (2021a), which refers to, "*Key Investigations 2003-2020*." It should be noted that this source does not include the Kantar Media/Newsaccess transaction in this tabulation.

[53] On this and the next point see Newsaccess Limited, *Unaudited Abridged Financial Statements for the Year Ended 31 December 2016*. These accounts are filed with the Companies Registration Office. (For details see: www.cro.ie).

[54] For details see Paul (2017) and, PRII (2017).

what is striking is that the Department offers in its consultation document no justification, explanation and/or context for the proposed new CCPC powers.[55,56]

Indeed, the evidence cited in Section II suggests that the current approach of the CCPC to below threshold or non-notifiable mergers that may raise competition concerns is working well. In autumn 2012, for example, the CCPC were concerned that the two-to-one Eason/Argosy below threshold merger would lead to increased prices and reduced choice. However, as noted in Section II, after the CCPC initiated legal proceedings on the basis that the merger was an anti-competitive agreement, the merger was abandoned.

Nonetheless, the proposed new CCPC powers may have reflected a concern that raising the merger thresholds on 1 January 2019 would lead to an increase in the incidence in the below threshold mergers that raised competition concerns.[57] However, there is no evidence that this is the case. There was no upsurge in such cases (Table 1).[58] The CCPC's annual *Mergers & Acquisitions Reports* for 2019 and 2020 does not highlight or even mention below threshold notifications as an issue nor does it feature in the CCPC's *Annual Report* for 2019.[59] The CCPC also files, at the OECD, an *Annual Report on Competition Policy Developments in Ireland.* While the most recent, for 2019, refers to the increase in merger thresholds in 2019 there is no mention of difficulties arising with respect to below threshold mergers raising competition concerns.[60]

c. New Powers, Better Outcome for Consumers?

In the Kantar Media/Newsaccess transaction it is difficult to see how the proposed new powers would have been deployed such that consumer welfare would have increased. The SLC test is a consumer welfare test. Hence the benchmark for assessing the proposed new CCPC powers for below threshold mergers is whether their introduction improves consumer welfare.

Although Kantar Media agreed to take no further steps towards implementing the transaction on 23 February 2017, the notification was not made until 9 March 2017. It would only have been at that stage that the CCPC could have issued an interim order preventing further implementation of the transaction. In other words, the interim order would not have come into effect until two weeks after the voluntary undertaking already given by Kantar Media.[61] Admittedly an interim order has greater

[55] DETE (2021, p. 5). Neither has the CCPC provided a justification. See, for example, the CCPC's testimony on 23 February 2021 during the pre-legislative scrutiny of the General Scheme of the Competition (Amendment) Bill 2021 before the Joint Committee on Enterprise, Trade and Employment. In part this is explained by the fact that the focus of the proposed legislation is on the transposition of the ECN+ Directive. https://www.oireachtas.ie/en/debates/debate/joint_committee_on_enterprise_trade_and_employment/2021-02-23/2/.

[56] The issue of killer acquisitions has raised questions concerning the appropriate merger thresholds and the power of competition agency's to compel notification for below threshold mergers. (For further discussion see OECD (2020)). However, it is not at all clear how the Department's proposals relate to such acquisitions.

[57] For details of the change in merger notification thresholds see footnote 5 above.

[58] It should be noted that the merger thresholds were also raised in 2006, which it was anticipated would also lead to a substantial decline in merger notifications. However, Tables 1 to 3 show no upsurge in below threshold mergers that raise competition concerns followed . For discussion of this 2006 change in thresholds see Andrews, Gorecki & McFadden (2015, pp. 272-274) and Gorecki (2011).

[59] All these publications may be found on the CCPC's website: www.ccpc.ie.

[60] CCPC (2020, paras. 1, 3 & 10).

[61] Such a lag is likely to be the rule in cases where the CCPC has requested voluntary notification.

legal weight than an undertaking in terms of enforceability, but there is no evidence that Kantar Media did not comply with its undertaking to the CCPC.

In terms of the second power, to unwind the merger, such a move by the CCPC would, as noted above, be difficult in view of the fact that substantial steps had already been undertaken to implement the transaction. Furthermore, the centralisation of operations in London suggests certain indivisibilities, inhibiting the creation of a standalone business. Nonetheless, abstracting from these practical problems, assume that the merger could have been unwound at minimal cost, would this have made a difference to the outcome of the Kantar Media/Newsaccess in terms of the remedy?

If the CCPC were to have ordered the unwinding of the Kantar Media/Newsaccess transaction then this implies that:

- the merger is likely to lead to an SLC. If the merger raises no competition concerns then there are, of course, no grounds for unwinding the merger; and,
- prohibition is the appropriate remedy. If the SLC can be cured by the merged entity divesting itself of the overlap activities where the SLC arises, then this can be achieved without necessarily unwinding the merger.

In the Kantar Media/Newsaccess transaction, the first condition is satisfied for reasons set out in Section III. Whether or not the second condition is satisfied requires more discussion.

If CCPC precedent concerning two-to-one mergers is used as guide then the CCPC would likely in 2017 have prohibited the Kantar Media/Newsaccess transaction. This conclusion is strengthened by the fact that the remedy agreed between the CCPC and Kantar Media suffers a number of shortcomings that raise questions concerning its efficacy. In other words, it is arguable that the CCPC had to settle for a second best solution due, in part at least, to the exigencies of the situation in which it found itself.

This is, however, an untenable argument. First, notwithstanding the points raised in Section IV concerning the shortcomings in the remedy, there is no evidence that the CCPC considered the remedy in the Kantar Media/Newsaccess merger was inadequate. Several of the criticisms of the merger remedy could have been easily accommodated. The CCPC concluded, based on market testing the remedy with potential entrants and responses from customers, that entry would be likely, timely and sufficient.[62] The CCPC explicitly state that in light of the Proposals that the merger "*will not substantially lessen competition*."[63]

Second, if the CCPC had decided to prohibit the Kantar Media/Newsaccess merger the transaction would have been void and would, of necessity, have to be unwound. Kantar Media might well have appealed the CCPC decision, with the courts having to decide on the merits of the CCPC's intervention. It is not clear how the situation would have been any different if the Department's proposal had been in existence and the CCPC decided to unwind the merger using this new power. Again Kantar Media might well have appealed the CCPC decision with the issue once again ending up in the courts.[64]

[62] M/17/012 – *Kantar Media/Newsaccess*, paras. 58-59.
[63] M/17/012 – *Kantar Media/Newsaccess*, para. 61.
[64] But the burden of proof may, of course, be different. Matters will become cleared when the legislation underpinning the Department's proposals is published.

Third, there are grounds for arguing that even if the Kantar Media/Newsaccess transaction had been a notifiable transaction a similar, if not the same, remedy would have been adopted. The next two-to-one notifiable merger after Kantar Media/Newsaccess, M/18/036 - *Enva/Rilta*, was also cleared with conditions, rather than prohibited.[65] In July 2019 the CCPC cleared M/18/063 - *Berendsen (Elis)/Kings Laundry*, a three-to-two merger, with remedy similar to that in Kantar Media/Newsaccess. Arguably, given the strong grounds for finding a SLC, the Berendsen (Elis)/Kings Laundry should have been prohibited.[66]

Fourth, more generally, the CCPC has recently shown a marked reluctance to prohibit mergers and has typically cleared notified mergers where there were SLC concerns, but with conditions. Since 2009 the CCPC has not prohibited a single notifiable transaction.[67] Arguably, as noted above, at least one of these notified transactions should have been prohibited. In contrast, between 2003 and 2008 the CCPC prohibited three notified transactions.[68,69]

In sum, had the new powers proposed by the Department been available to the CCPC in the Kantar Media/Newsaccess case it seems that little purpose would have been served. Certainly, there is no evidence that consumer welfare would have been enhanced.

d. New Powers: Influencing Notification Behaviour?

The discussion so far has assumed that the introduction of these new CCPC powers with respect voluntary notifications will have no influence on the notification behaviour of merging parties. This is unlikely to be the case. These new powers – depending on what legislative constraints are placed on the CCPC in exercising the powers - arguably give the CCPC draconian powers in relation to below threshold mergers that are notified voluntarily. The very existence of such powers, especially in the absence of any justification, is likely to generate considerable uncertainty.

In contemplating whether to notify a below threshold merger it seems likely that there will be an increase in the number of voluntary merger notifications, out of an abundance of caution by, for example, legal advisors and the merging parties themselves. This is likely to reimpose some of the burdens on business that the raising of the merger notification thresholds effective from 1 January 2019 was designed to remove.[70] On the other hand, if a below threshold merger likely to raise competition concerns has already been partially or fully implemented and the CCPC requests the firm to notify voluntarily, there is likely to be considerable reluctance to do so, given the new CCPC powers.

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[65] M/18/036 – *Enva/Rilta*. In this merger there were a number of markets in which both of the merging parties participated. In one of these, the treatment of hazardous oily tank and interceptor waste, it was a two-to-one merger.

[66] For a discussion of the remedy in this case see Gorecki (2020; 2021).

[67] Although, as noted above, when the CCPC challenged the *Eason/Argosy* below threshold merger in 2012 as an anti-competitive agreement the parties abandoned the merger.

[68] The CCPC assumed responsibility for merger control on 1 January 2003. The three prohibited transactions were: M/04/032 - IBM/Schlumberger; M/06/039 - *Kingspan/Xtratherm*; and, M/08/009 – *Kerry/Breeo.* In the case of M/08/009 – *Kerry/Breeo,* however, the CCPC's merger determination was subsequently overturned on appeal to the High Court and the merger allowed to proceed. For further discussion of the latter merger see Gorecki (2009).

[69] This pattern of merger enforcement is consistent with concerns, albeit expressed with reference to the US, of under enforcement of merger law. See, for example, Kwoka (2020).

[70] DBEI (2017).

e. Conclusion

No rationale has been advanced by the Department for the CCPC to be given powers to: (i) make interim orders preventing the implementation of a transaction; and, (ii) unwind a completed merger so as to restore pre-merger competition. This is not perhaps surprising in view of the fact that the existing long standing CCPC procedure for dealing with below threshold or non-notifiable mergers that are likely to lead to competition concerns is not only more than adequate but appears to be working well. The lack of rationale for the Department's proposals is inconsistent with the better regulation agenda of government[71] and the movement towards a more evidence based policy formulation.[72]

[71] See, for example, Department of the Taoiseach (2004).
[72] See, for example, the opening paper in Lunn & Ruane (2013).

Annex A: Estimating Kantar Media & Newsaccess Market Shares

Kantar Media operates in both Northern Ireland with an office established in 2007 in Belfast and in Ireland, with an office in Dublin established in the 1990s. In other words, Kantar Media operates on an all-Ireland basis. As a result, the aggregate data for Kantar Media needs to be decomposed by geographic area in order to isolate the Ireland component. Kantar Media's annual *Abridged Financial Statements* filed with the Companies Registration Office (CRO) in Dublin separates out the firm's activities by geographic region – Northern Ireland and Ireland - with respect to sales or turnover but only for 2015 (i.e. €4.952 million sales in Ireland) and 2016 (€4.676 million sales in Ireland).[73]

In contrast, Newsaccess's annual *Abridged Financial Statements* filed with the CRO do not detail its sales or turnover. However, in an article in the *Irish Times* commenting on the Kantar Media/Newsaccess transaction, O'Halloran (2017) states that Newsaccess's sales in 2015 were €2.3 million and that it employed 20 persons. These estimates are consistent with the CCPC stating that the turnover of Newsaccess fell below the €3 million notification threshold,[74] and, WPP (2017, Slide 63), the ultimate parent of Kantar Media, in commenting on the acquisition of Newsaccess stating that its employment was "*around 20 people*."

Given that Newsaccess and Kantar Media were the only two print and broadcast media monitoring firms in the State, then in 2015 Newsaccess accounts for 31.7 per cent of the market (i.e. €2.3 million/(€4.952million + €2.3million)); Kantar Media, 68.3 per cent (i.e. €4.952 million/(€4.952million + €2.3million)).

Employment is one of the only metrics that, using the *Abridged Financial Statements*, can be used to compare the size of Newsaccess and Kantar Media. For the years 2013, 2014 and 2015 for Kantar Media the average number of employees was: 54; 57; and 52 respectively; and for, Newsaccess: 17; 20; and 20, respectively.[75]

If employment had been used instead of sales to estimate market shares then the results for 2015 would have been similar: for Kantar Media, 72 per cent (i.e. 52/(52+20)); for Newsaccess 28 per cent (i.e. 20/(72+20)).

[73] These *Abridged Financial Statements* are for Mediawatch Limited for reasons set out in Section III of the paper. The *Abridged Financial Statements* can be downloaded from the CRO website: www.cro.ie.
[74] M/17/012 – *Kantar Media/Newsaccess,* para. 4.
[75] The estimate for 2015 is taken from the sources in the second paragraph of this Annex.

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mcmillan

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Dear colleagues,

Re: "ECN+ Consultation": Public Consultation on Aspects of the Competition (Amendment) Bill 2021, relating to merger control

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network ("ICN"),[2] of which Ireland's Competition and Consumer Protection Commission ("CCPC") is an active member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 60 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty-five other jurisdictions (*e.g.*, the United Kingdom, Brazil, China, France, Germany, India, Italy, Japan, Portugal, Russia, South Korea, and Spain) to promote reforms consistent with the *Recommended Practices*. In 2008 and 2017, the Group provided comments to the Department of Enterprise, Trade and

[1] The current members of the Group include Accenture, BHP, Chevron, Cisco, Danaher, Oracle, Procter & Gamble, Siemens, and United Technologies.
[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> ("*Recommended Practices*").

Employment (the "Department") in public consultations related to the operation and implementation of the merger control regime in the *Competition Act* (the "Act").

The Group writes in connection with the Department's public consultations on merger-related aspects of the Competition (Amendment) Bill 2021 (the "Consultation"). The Group applauds the Department for its ongoing efforts to improve the merger control process in Ireland. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger and acquisition transactions, will prove useful to the Department in finalizing proposed amendments to the merger provisions of the Act.

1. Remedial Action in Relation to Non-Notifiable Mergers

Under sections 4 and 5 of the Act, the CCPC retains jurisdiction to review transactions that fall below the notification thresholds where such transactions have as their object or effect the prevention, restriction or distortion of competition, or where they may create or strengthen a dominant position. Part 2.4 of the Consultation proposes to clarify the CCPC's ability to review and take remedial action in respect of non-notifiable mergers that are voluntarily notified to the CCPC.

The Group recognizes that residual jurisdiction to review non-notifiable transactions is a feature of a number of competition law regimes around the world. Such residual jurisdiction may diminish the legal certainty that merging parties seek to achieve when assessing their notification obligations under a mandatory notification regime. However, at the same time, a well-designed voluntary notification regime can provide opportunities for merging parties and agencies to focus on mergers that raise genuine competition concerns, while avoiding the expenditure of time and resources on transactions that do not raise significant concerns.

In order to reduce the risk of compromising the legal certainty of the mandatory notification regime, the Group respectfully suggests that the Act be amended to specify the time period within which a non-notifiable merger may be reviewed and challenged. Such a limit would be relevant, regardless of whether a transaction has been voluntarily notified or has not been notified.

Most regimes that allow for review of below-threshold mergers include a limitation period for enforcement action. A reasonable time limit for enforcement action provides important clarity for the merging parties, other market participants and the enforcement agency. The Group believes that an appropriate period for exercising such residual jurisdiction could be as short as four months and, in any event, should not extend beyond one year after the closing of the transaction. Such a time period should be ample for the review of a merger voluntarily notified to the CCPC and would also allow customers or other market participants to identify competition concerns for the CCPC to examine in respect of a non-notified merger.

We note that there is marketplace experience with similar time limits for residual jurisdiction enforcement in various other regimes. For example, a four-month period is used in the UK's voluntary merger control regime.[3] In Canada, the Competition Bureau may review and take enforcement actions against non-notifiable transactions, if they are likely to result in a substantial lessening or prevention of competition for up to one year after the closing of the transaction.[4] The same time limit applies to voluntarily notified mergers that are closed prior to completion of the review process.

As the ICN *Recommended Practices* make clear, "[w]hen a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority."[5]

The absence of a deadline or limitation period for the review of mergers subjects all non-notifiable transactions to considerable uncertainty. As the ICN *Recommended Practices* make further notes, delays in merger review may "*have an adverse impact on the merging parties' individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty*."[6] They may also create uncertainty for employees as well as customers, suppliers and other market participants. Moreover, the ability of a competition agency such as the CCPC to obtain effective remedies will diminish with the passage of time following the closing of a transaction. The *Recommended Practices* recognize this, and counsel that "*the passage of time may render it more difficult for the competition agency to obtain effective post-closing remedies*."[7] A limitation period aligns the incentives of agencies and private parties to identify and deal with competition concerns in a timely manner.

The Group therefore recommends that the Act be amended to specify a deadline for enforcement action in relation to voluntarily-notified and other non-notifiable transactions. We suggest that four months, and in any event no more than one year, after the closing of a transaction would be an appropriate period in which the CCPC should be required to take any enforcement action.

[3] *Enterprise Act 2002*, section 24.
[4] Competition Act, R.S.C. 1985, c. C-34, as amended, section 97.
[5] Recommended Practice, II.A. Comment 3.
[6] Recommended Practice IV.A, Comment 1 (emphasis added).
[7] Recommended Practice IV.A, Comment 3.

2. Interim Orders in Relation to Non-Notifiable Mergers

Part 2.4 of the Consultation further proposes to empower the CCPC to make interim orders to prevent any action (such as integrating the merging businesses) that may prejudice or impede its review of any voluntarily-notified transaction.

The Group is concerned that a unilateral power for CCPC to impose prohibitions and mandatory orders related to integration would be unfair and burdensome given the potential serious business and financial consequences to the affected parties. While restrictions on integration may, in certain (but not all) situations, be appropriate to prevent irreversible steps that would undermine adequate remedies in the event that a transaction is determined to be anti-competitive, such restrictions may also impose significant costs and disruption on a business and may delay the realization of any efficiencies or other benefits resulting from a transaction.

To ensure procedural fairness, the Group believes that it would be important to provide reasonable notice to merging parties, and an opportunity to respond, prior to a prohibition on further integration or any orders to reverse prior actions. In addition, the Group believes that, as with any form of injunctive relief involving significant consequences to the affected parties, a right to expeditious appeal should be available.

The Group suggests that the safeguards of notice and an opportunity to respond, and the provision of a right to appeal, would ensure that the CCPC's interest in the availability of effective remedies is limited to situations where these extraordinary interventions are shown to be needed, and the ability to impose them is implemented in a manner that respects fairness and due process.

3. Merger Notification Thresholds

The Act contains two primary financial thresholds that need to be met for pre-merger notification to be required. Following a consultation process in 2017, the notification thresholds were increased, effective in 2019. The Group commends the Department for recognizing that Ireland's thresholds had been subjecting a large number of very small transactions, with limited if any impacts on competition in Ireland, to mandatory merger review.

The new "individual turnover threshold" requires that the turnover in Ireland of each of two or more of the undertakings involved in the merger or acquisition is not less than €10 million, and the new "aggregate turnover threshold" requires that the aggregate turnover in Ireland for the involved undertakings must be at least €60 million. The Group believes that the changes proposed in the current Consultation, which will enhance the voluntary notification process, can allow further increases to be made to Ireland's mandatory merger notification thresholds. The anticipated result would be that merging parties will be

incentivized to voluntarily notify mergers that raise potential concerns, while the CCPC and merging parties will spend less time and resources on non-problematic transactions.

Such a change would be particularly beneficial in light of the enormous current demands on CCPC resources, and government resources more broadly, in the midst of rapid technological change and economic challenges arising from the pandemic. Notably, Germany has recently increased its merger notification threshold with the express intention of reducing the workload of the Bundeskartellamt, the German federal cartel office, an agency known for its efficiency. The President of the Bundeskartellamt noted that the agency was reviewing a large number of cases every year, "many of which were not really relevant cases in terms of competition" an, as a result, the agency welcomed the increase in the thresholds because "resources that will now become available to us will allow us to focus even better on those cases that raise serious concerns".[8]

(a) Individual Turnover Threshold

The 2017 Consultation Paper[9] correctly recognized that the financial thresholds for individual undertaking turnover in comparable European jurisdictions are much higher than in Ireland. While the individual turnover threshold was subsequently increased (turnover in Ireland of each of two or more of the undertakings involved is not less than €10 million), it is still low relative to comparable countries when considered in reference to their relative economic positions.

In the following table, we present the Gross National Income ("GNI") per capita and individual turnover threshold for Ireland and the same European comparison countries that were discussed in the 2017 Consultation Paper. Ireland and the Czech Republic currently have almost identical individual turnover thresholds, even though Ireland's GNI per capita is 72% higher than that of the Czech Republic. Denmark's threshold is 34% higher despite its GNI per capita being 10% lower than that of Ireland. Finland's and Belgium's individual turnover thresholds are twice and four times that of Ireland, respectively, even though Ireland's GNI per capita is 33% and 25% higher than that of Finland and Belgium, respectively.

[8] Bundeskartellamt, Press Release, "Amendment of the German Act against Restraints of Competition", January 19, 2021,https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

[9] "Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to merger and acquisitions", September 29, 2017, p. 6, see https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-review-certain-provisions-Competition-Act-2002-as-amended-merger-and-acquisitions.pdf

Country	GNI per capita, PPS (current prices), 2019 data[10]	Individual turnover threshold (as of May 2020)
Ireland	€46,635	Turnover in Ireland of each of two or more of the undertakings involved is not less than **€10 million**
Belgium	€37,283	At least two of the parties have an individual Belgian turnover of at least **€40 million**
Czech Republic	€27,171	Each of at least two of the parties to the concentration for the last completed accounting period has domestic turnover (in the Czech Republic) exceeding 250 million Czech koruna (**€9 million**)
Denmark	€41,921	The aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than 100 million kroner (**€13.4 million**)
Finland	€34,910	The aggregate turnover in Finland of each of at least two of the undertakings concerned exceeded **€20 million**

Further increasing the individual turnover threshold from the current €10 million to, for example, €20 million would bring Ireland into closer proximity with these comparable countries in Europe. It would also materially reduce the number of notifications received and thereby free up more time for the CCPC to focus on transactions that raise serious competition concerns. Given that the CCPC retains the residual jurisdiction to review below-threshold transactions and, as proposed in the current Consultation, the CCPC may be empowered to make interim orders and will have a clearer framework for reviewing voluntarily-notified mergers, raising the individual turnover threshold to a level similar to comparable European countries should not jeopardize CCPC's enforcement efforts. It will also reduce burdens for companies engaging in transactions in which one or both merging parties have Irish turnover levels lower than the increased individual turnover threshold.

(b) Aggregate Turnover Threshold

The 2017 Consultation Paper noted that aggregate turnover thresholds are, on average, six times the individual turnover thresholds in merger regimes that employ both types of thresholds.[11] This appears to be the basis on which the aggregate turnover threshold was

[10] Eurostat, GNI (gross national income) per capita in PPS, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_pp&lang=en

[11] The Department considered the following European merger regimes in making this calculation: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Greenland, Hungary, Italy, Norway, Portugal, Sweden and Switzerland.

changed to €60 million in 2018 when the individual turnover threshold was changed to €10 million.

While the Group recognizes that there may be a general mathematical relationship between these two types of thresholds in various jurisdictions, the Group believes that it is also useful to consider the aggregate turnover threshold in relation to the order of magnitude of GNI per capita. Of the comparable European countries discussed above, Czech Republic has a comparable aggregate turnover threshold (approximately €58 million threshold) despite the significant GNI difference discussed above. Others are much higher: Belgium (€100 million threshold) and Denmark (approximately €121 million threshold).[12]

Therefore, the Group suggests that the Department consider an increase in the aggregate turnover threshold to a level such as €100 million or €120 million. As the commentary to *Recommended Practice* I-C notes, "*notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities*."[13] In the Group's view, mergers among parties whose collective turnover in Ireland is less than €100-120 million are unlikely to raise significant competitive concerns in Ireland's economy. Moreover, the residual jurisdiction to review below-threshold mergers, and the incentives of merging parties to voluntarily notify transactions with potential concerns to avoid post-closing enforcement risks, provide substantial safeguards.

Thank you very much for considering the Group's input. We believe that the further updating of Ireland's merger control laws discussed above would have the beneficial effect of focusing resources on transactions that are most likely to have significant competitive effects in Ireland while reducing unnecessary time and cost burdens for businesses as well as the CCPC.

The Group would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours truly,

Neil Campbell William Wu

cc: Members of the Merger Streamlining Group

[12] Finland has worldwide turnover thresholds instead of in-country aggregate turnover thresholds.
[13] Comment 1 to *Recommended Practice* I-C.

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4 February 2021

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Response to the Public Consultation on Aspects of the Competition (Amendment) Bill 2021 (the "Consultation")

Dear Sir/Madam

William Fry is grateful for the opportunity provided by the Department of Enterprise, Trade and Employment (the "**Department**") to comment on the issues identified in the Consultation. We apologise for the delay, primarily caused by pressing client demands, in responding to the Consultation, but request that the Department nonetheless take our views into account.

Our comments are based on our experience of advising international and Irish businesses on the Irish competition law and merger control regimes and engaging with the Competition and Consumer Protection Commission (the "**CCPC**") and its predecessor the Competition Authority over many years. We do not respond to each and every aspect of the Consultation – instead, we have focussed on areas where we can add most value.

Issue 1: Our views on the proposed offence of 'bid-rigging'

In the General Scheme of the relevant draft legislation, the Department proposes to create a specific offence of bid-rigging. The Department observes that Irish practice has been to regard the offence of bid-rigging as a form of price fixing or market sharing under existing provisions of the Competition Act 2002 (the "**2002 Act**"), but that this approach has led to some enforcement difficulties. The Consultation refers to a proposal to make bid-rigging a "*specific anti-competitive practice under Section 2 [of the 2002 Act]*", and to provide the CCPC with "*sufficient powers to review any competitive tendering process (including public tendering processes) to ascertain if such bid-rigging has taken place*".

In our view, bid-rigging already falls within the relevant sections of the 2002 Act. That said, given the harm bid-rigging can cause, and to the extent that clarification would be helpful in prosecution, we see no reason in principle why bid-rigging – in both public and private procurement processes – should not constitute a specific offence.

We consider it appropriate to list the specific offence under Section 4 of the 2002 Act (and not Section 2 as referenced in the Consultation). A clear definition will be critical for legal certainty and the rights of the defence. Including it in a separate provision (e.g., a new Section 4(1A)), would ensure that the relevant arrangements currently enumerated in Section 4(1)(a) to (e) (inclusive) remain aligned with those in Article 101(1) of the Treaty on the Functioning of the European Union. This approach would emphasise the specificity of the offence and mirror the approach followed in jurisdictions such as Germany, Canada and the United Kingdom.

We consider the alternative approach outlined in recommendation 17 of the Hamilton Review Group Report – to specify bid-rigging as an example of a 'hard-core' cartel activity – to be less compatible with the creation of a clearly defined offence, not least because bid-rigging activity could, in different instances, fall within either or both of sub-Sections 4(1)(a)) (price-fixing) and 4(1)(c) (market-sharing).

Three forms of bid-rigging activity are identified in the Consultation. The Department has not stated whether it proposes to define an offence by reference to these three forms, or in more general terms. Whichever approach is adopted, the primary focus must be to ensure that the resulting offence is clearly defined and sufficiently precise. The approach followed in some other jurisdictions with a specific bid-rigging offence may assist the Department in the drafting process:

- In Germany, the offence consists of, "*in connection with an invitation to tender relating to goods or services, [making] an offer based on an unlawful agreement whose purpose is to cause the organiser to accept a specific offer*".

- In Canada, the offence is defined so as to include both an agreement not to submit a bid or tender and submitting bids or tenders that are arrived at by agreement or arrangement between competing bidders.

- "Bid-rigging" is defined in Section 188(5) of the UK Enterprise Act 2002 as an arrangement between two parties A and B whereby either "*A but not B may make a bid, or A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements*".

Issue 2: Our views on the CCPC prosecuting "gun-jumping" offences on a summary basis

The Department proposes to amend the 2002 Act to grant the CCPC the power to prosecute "gun-jumping offences" on a summary basis. According to the Consultation, the intention is "*to reduce the burden on the DPP and to increase the enforcement of the gun-jumping provision generally*".

Failure to notify a transaction which falls to be notified under Part 3 of the 2002 Act is an offence under Section 18(9) of the 2002 Act and is a classic example of gun-jumping. Currently, only the Director of Public Prosecutions (the "**DPP**") may prosecute this offence, either summarily or on indictment.

As a preliminary point, we note that the Consultation includes, in its description of gun-jumping, putting a notifiable transaction into effect before clearance. This is the most widely understood definition of gun-jumping, including under the EU Merger Regulation. However, Section 18(9) of the 2002 Act currently penalises only the failure to notify a notifiable transaction and the failure to supply information requested by the CCPC. While a transaction which purports to have been completed without clearance by the CCPC is void under Section 19(2) of the 2002 Act (and may give rise to a substantive competition law infringement under Section 4 and/or 5 of the 2002 Act), the transaction's implementation is not currently a specific procedural offence separate to the failure to notify. This raises particular issues in the case of transactions which are notified to the CCPC, but which are completed in the absence of CCPC clearance (or deemed clearance). The Department should thus consider whether, as part of the overall exercise, it is appropriate to amend Section 18(9) to include implementing or completing a notified transaction prior to clearance by the CCPC.

On the question raised in the Consultation, we agree that increased enforcement powers would, in principle, serve as a deterrent to would-be "gun-jumpers" and would align the CCPC's powers with its power under Section 8(9) of the 2002 Act to prosecute Section 4 and 5 offences on a summary basis. That said, under Section 18(9)(a) the maximum penalty on summary conviction is EUR 3,000 (plus daily fines of EUR 300). Therefore, we question whether granting the CCPC summary prosecution powers

is the most effective mechanism to counteract the potentially severe (and sometimes irreparable) harm caused by gun-jumping. We believe the DPP is already well placed to take cases on indictment.

Issue 3: Our views on the specific safeguards which should be put in place to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected

The Department proposes to expand the scope of surveillance and interception powers available to the CCPC. The aim would be to "*to allow the CCPC to gather evidence as necessary, including at short notice, to reduce the burden on the Garda Síochána and Court Service in seeking short notice warrants to gather such evidence*". This is in line with the recommendation of the Hamilton Review Group to extend surveillance powers under the Criminal Justice (Surveillance) Act 2009 to other bodies that have a statutory remit to investigate economic crime or corruption, including the CCPC.

We do not comment on the specific safeguards required to ensure the protection of rights in accordance with the Constitution, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, if this recommendation is accepted.

Our observation is more fundamental. We recognise that the means of communication employed by cartels and other parties engaging in competition offences continue to grow in sophistication, with a consequent requirement to increase the technical and legal armoury available to gather evidence of illegality. Nevertheless, we query the real, as opposed to perceived, benefits of the proposals. If the CCPC is to be granted such direct powers, it must be given the legal and technical resources to exercise them effectively in a manner compliant with the appropriate procedural safeguards. Rather than duplicating such intrusive powers, which already carry a significant risk of abuse or at least inadvertent infringement of constitutional and human rights, there is a strong argument for centralising them in one expert, experienced and appropriately-resourced agency (i.e. the police). (We are aware that the Gardaí have sent senior officers to the CCPC on secondment in order to assist with cartel investigations – presumably, such officers will be able to use the relevant police powers.)

Issue 4: Our views on other amendments relating to the operation of merger control

The Consultation proposes miscellaneous amendments in the area of merger control. As a whole, the proposals seek to augment the scope of the CCPC's powers, particularly in the context of non-notifiable mergers. While we are not commenting on each proposal, we make the following observations:

- It is not clear whether the first proposal (accepting and reviewing voluntary notifications in respect of completed transactions) is limited to transactions that do not meet the thresholds for notification and that are nonetheless notified post-completion, or is intended to capture transactions that do meet the thresholds, and are only notified post completion (outside the timeframe set out in Section 18(1A)) of the 2002 Act.

- We expect there to be a limited appetite from the relevant parties for post-completion notification of below-threshold transactions. If so, the CCPC will be forced to investigate under competition rules. (See below). However, we do encourage the Department to clarify the position in respect of notifiable transactions which were not notified at the relevant time but were subsequently notified to the CCPC under Part 3 of the 2002 Act. The CCPC's stated position is that the voidness of such mergers or acquisitions under Section 19(2) is cured if the transaction is cleared or deemed cleared by the CCPC, but this approach – while having practical merit – has no legislative basis.

- Empowering the CCPC to require the unwinding of an implemented transaction which gives rise to a substantial lessening of competition/SLC (third proposal) carries an obvious difficulty in practical implementation: how to unscramble the eggs? Indeed, this proposal might only apply to notified transactions since the statutory SLC test only applies to notified transactions.

- It is not clear from the Consultation how the power to review (and potentially unwind) transactions notified after the fact would sit with the CCPC's power to investigate breaches of Sections 4 and 5 of the 2002 Act. The CCPC has significant powers of investigation and enforcement under Part 2 in relation to completed mergers which do not benefit from merger control clearance. We understand that the proposal relates only to transactions that have been notified in accordance with Part 3 (as may be modified as a result of the Bill). Even so, this raises a number of questions, such as: (1) Will there be a time limit post-completion for such notifications and/or for the CCPC's determination? (2) Would the parties be able to stymie a Part 2 investigation by submitting a merger notification after the event? (3) Will the CCPC be required to opine that the result of the transaction has been to substantially lessen competition, or that the result will be to substantially lessen competition? Indeed, the SLC test in the 2002 Act (see, for example, Section 20 (1) (c)) is forward-looking or prospective, therefore, is it applicable to a completed transaction?

- Under the fourth proposal, the CCPC would have the power to require information from third parties in a merger review. This change would formalise the existing process whereby the CCPC requests information and/or views from the merging parties' customers, suppliers and competitors, or from a vendor in the case of an asset acquisition, on a voluntary basis. In our view, the desired results could be achieved through existing means. For example, the CCPC could use the witness summons procedure under Section 18 of the Competition and Consumer Protection Act 2014 to compel the relevant information. The witness summons procedure has been used in the past in the context of merger reviews. If a new specific power is introduced, it should be drafted so that – unlike a requirement for information under Section 20(2) of the 2002 Act – failure to respond should have no impact on the statutory timeframe for clearance. This is to remove the possibility that the actions or inactions of third parties (who may well have competing incentives) could adversely impact on the review timetable.

- We believe there is significant merit in changing the threshold for triggering a Phase 2 merger investigation by the CCPC. At present, the test is negative: Section 21(2) of the 2002 Act merely requires the CCPC not to opine that the result of the merger or acquisition will not be to substantially lessen competition. In our view, the timeframe for review in Phase 1 (which includes the possibility for significant extension (in one ongoing case[1] Phase I lasted nearly ten months) where further information is required) is sufficient to justify the requirement for the CCPC to articulate a credible theory of harm in writing, or at least (positively) identify serious written SLC doubts/concerns regarding the merger, before triggering a detailed investigation.

These comments reflect the views of William Fry only and not of any William Fry client (past, present or future).

Yours faithfully

William Fry

William Fry

WF-28707060-2

[1] M/20/005 – ESB/Coillte JV. Notified on 12 February 2020 and move to a Phase 2 investigation on 10 December 2020.

The Beefplan Movement,
[redacted]

by email to: conspol@enterprise.gov.ie

RE: Subject "ECN+ Consultation"

29th January 2021

Beef Plan Movement CLG wish to make the following observations and submissions in relation to the public consultation to review certain aspects of Competition Law in Ireland in relation to the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council issued 11 December 2018 (hereinafter "the Directive").

1. **DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL issued by the European Parliament on 11 December 2018 on Transposition states at Article 34 that "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 February 2021. They shall immediately inform the Commission thereof."**

   The Irish Government issues a Public consultation to review certain aspects of Competition Law in Ireland on 12 January 2021 with a deadline for Submissions on 29 January 2021.

   Furthermore, the Irish Government does not make a copy of the draft Bill available as part of the public consultation documents and if such draft Bill exists, the Irish Government certainly did not make the draft Bill easily available for public comment.

   By conducting the business of implementation of the terms of the Directive in such a lethargic, late and hurried manner, the public consultation is inadequate and unreliable and therefore an extension of time is necessary.

The Beefplan Movement,
[redacted]

2. **The pubic consultation invites submissions to be made by electronic means thus denying the possibility to make submissions by post. As there are a significant number of citizens in Ireland that are not computer literate and would be more competent making submissions by post, this policy effectively denies many citizens the opportunity to make submissions at all. The public consultation is inadequate and unreliable and therefore an extension of time is necessary to allow all citizens of Ireland an opportunity to make submissions.**

3. **Whereas we are told that the draft Bill seeks to include provisions for the offence of "bid-rigging", provisions giving the powers of a competent body to prosecute "Gun Jumping" offences and seeks to make provisions for the operation of merger control, we are not provided with the scope of any of such provisions.**

   Beef Plan Movement certainly welcomes the inclusions of such provisions in the Bill and submits that proper and adequate mechanisms must be included to give effective practical implementation of these provisions to regulate the food processing and retail industries so as to ensure maximum protection of primary producers in Agriculture is available and enforceable.

4. **The directive goes to great lengths to ensure the independence of National Competition Authorities. Article 4, DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 provides;**

"Independence

1. To guarantee the independence of national administrative competition authorities when applying Articles 101 and 102 TFEU, Member States shall ensure that such authorities

The Beefplan Movement,
[redacted]

perform their duties and exercise their powers impartially and in the interests of the effective and uniform application of those provisions, subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the European Competition Network.

2. In particular, Member States shall at a minimum ensure that the staff and persons who take decisions exercising the powers in Articles 10 to 13 and Article 16 of this Directive in national administrative competition authorities:

(a)are able to perform their duties and to exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence;"

The requirement for independence of the National Competition Authority (NCA) is not new to European and National Competition Law enforcement. In this regard the Government of Ireland has failed abysmally in its duty to implement and protect European Competition Law requirements.

In Ireland the body appointed as the National Competition Authority is the Competition and Consumer Protection Commission more commonly referred to as the CCPC. This body is an amalgamation of the former Competition Authority and National Consumer Agency.

The new body, the CCPC is a body that lacks sufficient independence to ensure proper implementation of competition law protections effectively in the state.

These proposals will allow these far reaching powers be used under the guise of consumer protection which it is not intended for. In recent sector analysis by Grant Thornton, it appears that the retailers are considered the Consumer in the

The Beefplan Movement,
[redacted]

case of the Beef sector. The consequence of this conclusion would leave primary producers powerless, which is the exact opposite to the intended outcome of these changes. The CCPC is currently reporting to the Minister for Trade and Employment which is further proof that they are not independent.

Clearly, the CCPC has failed in its mandate to implement and protect Irish citizens from anti-competitive practices. It neglects to protect the Farmers of Ireland and the Rural economy and wellbeing of Ireland. In its opening statement to Joint Committee on Agriculture, Food & the Marine: CCPC Opening Statement by Isolde Goggin in May 2019, on the incompatibility of the protections required in the forthcoming transposing of the Directive on Unfair Trading Practices with its current remit, she states "The legal basis for the Directive lies in Article 43(2) TFEU which relates to CAP and its objectives, including to safeguard farmers to make a reasonable living. While we recognise and acknowledge the importance of such objectives, they can and will conflict with consumers' interests and welfare".

During interview by the Oireachtas on the 4th October 2019, when questioned by Anne Rabitte TD, Isolde Goggin of the CCPC stated "we are on the side of the consumers, that's our job, the job that the Oireachtas gave us. We are not on the side of one particular side or another in an industrial sector ……Our role is to promote Competition and protect Consumers and" when a conflict arises, she stated, "it's the side of the consumer that we are going to be on".

The CCPC has been part of the catastrophic failures of the bodies put in place to

The Beefplan Movement,
[redacted]

protect Irish Farmers. Unfair practices appear rife with the industry. The CCPC either miss the point or fail to accept that internationally, there is widespread acceptance that if players are going out of business at one level of an industry, it is prima facie evidence that there is Anti-Competitive practices within that industry. Beef farmers are going out of Business at a rapid rate. They are leaving the land. 9000 land leases signed in recent years. That's evidence that 9000 farmers have left the business. That's 9000 less farmers in rural economies. That's a loss of Social Capital from Rural Ireland. That's a loss of our culture and general wellbeing, and all while the CCPC don't care! They fail to appreciate the "Level of economic and/or physical harm" being suffered by Irish Farmers and Rural economies.

Beef Plan Movement has since its inception argued that the 30 month rule, the 4 movement rule, 60/70 day residency rules, carcase weight limits and many other rules and restrictions are anti-competitive practices imposed on farmers by the processing industry rather than legitimate objective requirements by consumers. No evidence was ever produced by the industry that consumers ever sought such requirements for beef. The processing industry effectively made live animals a perishable commodity and embellished its profits unfairly from farmer loss.

The CCPC is conflicted. The CCPC has failed. The Government of Ireland has failed in its obligations under EU Treaties. The Irish Government must use this opportunity in amending the Competition Acts to create a new independent body for the proper implementation of the Competition Acts. Alternatively, the Government must assign the duties of the National Competition Authority

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required by EU Membership to the new Food Ombudsman which has been promised to Irish Famers for over a decade but has yet to materialise.

5. **The directive goes to great lengths to ensure adequate resources are provided to National Competition Authorities. Article 5, DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 provides;**

"1. Member States shall ensure at a minimum that national competition authorities have a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties, and for the effective exercise of their powers for the application of Articles 101 and 102 TFEU as set out in paragraph 2 of this Article."

On the CCPCs own website, under the heading, "How we decide to take action", the CCPC states "With a very broad mandate and limited resources it is not possible to investigate every consumer contact that we receive, nor can we pursue every issue. Therefore, we must prioritise our work."

There are 2 very worrying statements for farmer food producers that can be forced out of business by the practices of unruly processors:

Firstly, the CCPC refer only to contacts received from consumers, not farmer food producers. In line with the point made at 4 above, obviously the CCPC do not prioritise the concerns of farmer food producers being driven out of business. And they are been driven out of business in their droves. This statement proves the CCPC has a conflict of interest.

Secondly, by its own admission, the CCPC has limited resources and cannot deal with

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all complaints made to it. With priority given to other matters, farmer food producers have been left out in the cold without any protection as provided by the EU. The CCPC and consequently, the Irish Government has failed in its duty to Irish Beef farmers to ensure the creation of a properly resourced independent body to ensure the protection afforded by EU treaties on anti-competitive practices are implemented in Ireland to date. Apart from adequate financial resources, it appears that the CCPC lack the necessary technical and technological resources as it appears the CCPC fail to understand the very point of Competition Law and Consumer Protection:- The international widespread acceptance that if players are going out of business at one level of an industry, it is prima facie evidence that there is Anti-Competitive practices within that industry, and if anti-competitive practices are left unchecked, it is the consumers that ultimately suffer.

This is an opportunity for the Irish Government to mend its failings, create an independent body free of conflicts of interest and allocate adequate resources for same.

6. **The public consultation documents indicate that the proposed Competition (Amendment) Bill proposes to:**

   - **provide to the National Competition Authority for Ireland to have the power to carry out video and audio surveillance and to require interception and recording of electronic communications stating inter alia that such power is to allow the CCPC to gather evidence as necessary, including at short notice, to reduce the burden on the Garda Síochána and Court Service in seeking short notice warrants to gather such evidence.**

   - **provide Powers to conduct unannounced Inspections to the National**

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Competition Authority in both Civil and Criminal Cases.

- provide powers to the National Competition Authority to impose fines and other sanctions.

- provide powers to the CCPC over and above that required by the Directive.

As stated above, it is believed that the CCPC is not sufficiently independent to continue as the National Competition Authority of Ireland to ensure the effective implementation of Competition Law as required by membership of the EU.

As stated above, it is believed that the CCPC is not sufficiently resourced to continue the as the National Competition Authority of Ireland to ensure the effective implementation of Competition Law as required by membership of the EU.

On the occasion of the last two national beef protests (2014 & 2019) the CCPC issued formal warnings to the organisers that they were in breach of competition law. Had the CCPC the powers that are being proposed in these amendments they would have the ability to intercept all individuals' communications and issue fines without trial and without due process of the law. In its current form these amendments will end individual's right to protest simply by the fact that these powers are being given to an organisation that in our opinion has acted outside of its remit and in the interest of the processors.

It is considered that the CCPC has not the proper expertise to be an effective body to administer justice in accordance with the law and in accordance with the

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[redacted]

Constitution of Ireland. All laws implemented in Ireland must adhere to the provisions of the Constitution of Ireland. It is imperative that without the proper expertise, the CCPC must not be given any power to issue fines against primary producers in the food industry. If a new independent body with sufficient resources and independence is created to implement Competition Law in Ireland, it is imperative that any power given to issue fines is strictly limited in the case of private individuals.

Any provisions implemented must be proportional to other rights protected under the Constitution of Ireland. In particular, all provisions concerning surveillance must respect the right to Privacy of private individuals and citizens of Ireland as provided by Article 40 of the Constitution of Ireland. Provisions must be included in the Competition (Amendment) Bill for compensation to private individuals where it is found on the balance of probabilities that the National Competition Authority:

- **carried out surveillance of private individuals and or their families where it was obviously and completely unnecessary, even where it only subsequently transpired that it was unnecessary,**
- **went over and above its remit in surveillance of private individuals and or their families,**
- **is found to act with malice,**
- **is found to have acted negligently,**
- **it was obvious surveillance was a fishing expedition. Powers to carry out surveillance of private individuals must only be granted on proofs similar to applications for discovery in civil matters must be relevant and necessary**

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[redacted]

Surveillance of private individuals or their families must not be allowed where it reasonably appears that such individual is reasonably exercising his or her right Constitutional Right of Association or right to protest as protected under EU treaties. Such surveillance is not required under the Directive. Furthermore, provision should be included for punitive compensation to be made to an individual where it found that the National Competition Authority allowed and caused to be allowed any such surveillance.

Article 35 provides that the commission shall present a report to the European parliament and to the council on the transposition and implementation of this directive by 12th Dec 2024. Please ensure that we and all other farm organization are consulted by the commission, to seeking our views on the effectiveness of the transposition of this directive.

Beef Plan Movement CLG.

I, Maurice Fitzgerald, [redacted]: Make the following submission in relation the Public Consultation on Aspects of the Competition (Amendment) Bill 2021

As Follows:

2.1 Providing for the offence of 'bid-rigging'

Answer:

Any association of people who conspire or join to artificially control, adjust, or manipulate bids in any manner whatsoever should be considered a fraudulent practice and a criminal act against the state and the taxpayer. All legislative Acts should be amended and augmented to cover all and every situation where manipulation is a factor.

A standalone primary piece of severe criminal legislation should be commissioned with mandatory custodial sentences and very large financial penalties, both personal and corporate should be made available to the state to prosecute any company or sole trader who is involved in working with others both corporate or personal to control or set prices or bids. It should be a serious criminal act to tender any bid with another party, undeclared or entity when bidding or tendering for any project or works.

A new piece of standalone legislation who give all prosecuting bodies interested or charged with bid-rigging or price manipulation the power and standing to bring those perpetrating a fraud on the government and taxpayer. The legislation should also allow injunctive relief to the state to stop bidder attempting to rig any bid, or control or share a market of any kind.

Legislation for bidding should also require the state to get bids from outside the jurisdiction and not accept any bids without a minimum amount of tenders. Legislation should also allow for cases to be taken in the Special Criminal Court in relation to competition law offences involving attempted fraud on the taxpayer, either by bid rotation, bid suppression, complementary bidding. All these offences should be considered serious offences against the state.

2.2 The power of the competent body to prosecute "gun jumping" offences on a summary basis.

Answer:

The CCPC should have full executive authority to prosecute in any court, where summary or plenary, to take cases where gun-jumping is involved. Penalties should be severe, both corporate and personal for anyone engaged in such practice and with the intention of getting in or a bid or for any other anticompetitive practice. Legislation should allow for prosecutions to be taken in the special criminal court as an offence against the state.

Legislation should allow the state to reverse a merger and apply double taxation where a company is working alone and at the same time being part of another when it suits them. Legislation should allow for the DPP, the CCPC, or both in tandem, to prosecute in any court any time and have a right to a special sitting where the taxpayers' interest is, or is about, to be compromised. It should be a very serious criminal offence not to notify the state of a merger in whatever form it takes, and tenders revoked where the state has been misled.

2.3 Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications.

Question: What specific safeguards should be put in place in your view to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?

Answer:

The U.S. has a system where the FBI are allowed to intercept communications but must switch off if conversations do not pertain to an investigation into criminal matters. The CCPC must have the power to seize evidence pertaining to a criminal matter and also have the power of injunctive relief which is most important. Corporate bodies do not enjoy the same level of personal privacy protection and there is no reason why they should. They are not human. The ECHR and the CFR are human rights.

A special 'commercial court' with all necessary powers should also be established by the state, which would drastically improve the state's ability to deal with competition, merger and acquisitions and cartel cases.

2.4 Other amendments relating to the operation of merger control

Answer:

Legislation should bar any company from merging without state approval and treat any such gun-jumped merger as (provisional or unratified), where it has already happened without notification. It will be very effective also if Revenue authorities have to be immediately informed of such a merger and apply severe penalties for non disclosure. Prosecutions for not disclosing the merger to the CCPC and the failure to inform Revenue for reporting requirements should be taken in tandem in any proceedings. The CCPC rather than being notified or waiting for notification, could notify companies that they are treating them as merged without approval. And have the power to notify Revenue and all state departments.

The CCPC should have national subpoena power to demand all information where it believes competition law is being flouted. The CCPC should also have the power to 'raid' premises with Gardaí or engage in a cross departmental prosecution. Section 20(2) of the 2002 Act provides for the power to require further information from “undertakings concerned”. This should read "the power to require all and every material pertaining to a prosecution or injunction from a corporate entity, its servants, agents, officers, directors, staff, or contractors of the company — whether past or present, or sole trader and any other entity which has evidence or likely to have evidence. And the power to cite for obstruction of justice where cooperation is not forthcoming.

Finally, on the subject of mergers, the Bill provides for clarification of the circumstances when the merger review clock restarts following a Request For Information (RFI) and provides specified periods for the CCPC to determine RFI responses to be compliant.

Answer: No merger or acquisition should be recognised, until the state approves it. The CCPC should "demand", not 'request' that information be given and severe fines issued by the CCPC for not

complying with such requests. There should be no limits on where the clock might start for the purposes of any investigation. It would be silly to place such limits and restrict justice or the right of discovery of materials, documents or witness deposition.

You may publish this submission in full.