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

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**).

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. Introduction

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 (**EU**). The enactment of these measures would therefore not enjoy constitutional immunity as being "necessitated" by Ireland's membership of the 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.

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. Providing for the offence of 'bid-rigging'

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

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.

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

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

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.

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* –

- *directly or indirectly fix purchase or selling prices or any other trading conditions;*
- *limit or control production, markets, technical development or investment;*
- *share markets or sources of supply;*
- *apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; and*
- *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."*

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.

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.

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.

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".*

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 €992m 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 €1.3bn which was at that time, the largest fines from one decision for a breach of Article 101 of the TFEU.

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

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" 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.

The CCPC in its "*Guide for Small and Medium Enterprise on Consortium Bidding*" (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."

In 2018, the CCPC published a Business Guide on "*Bid-Rigging: What you need Know*" 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.

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.

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".

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.

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

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.

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.

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.

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.

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. 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

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 €20m, €28m and €124m 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 €80m being imposed by the French competition agency on SFR and Altice as well as fines of €4m imposed by the BkA in Germany and €40m 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.

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).

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.

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.)

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)

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.

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.

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).

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.

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.

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.

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.

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).

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).

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. 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?

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.

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.

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.

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.

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).

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.)

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.

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

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

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.

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

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.

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.

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[1], 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. 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.

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.[2] This would require an entire legislative regime which would require cross-governmental consultation and a detailed regime to allow for such monitoring to occur.

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.

European law requirements for data retention

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.[3]

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

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

[3] 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.

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 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.

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.

Importantly the Court interpreted Article 23(1) of the General Data Protection Regulation[4] (**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.

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.

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)[5] and the Right to Privacy under the Convention may be violated if the measures are not necessary, proportionate and justified by legitimate reasons.

The CJEU has also stressed that video surveillance systems processing personal data are lawful only under certain conditions.[6] 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 organs of State, should have this power to monitor people without court authorisation. This lack of involvement of the Gardaí and the courts is highly exceptional – as the consultation document records at page 3:

"*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.*"

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.

Implementation of the Powers would be disproportionate

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] 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.

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

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

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).

Divergence from the European System

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.

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.

Safeguards

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.[7] There may be circumstances where the Powers are not appropriate and the CCPC will have conduct a balancing test for each application.

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.

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.

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

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.

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

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.

4. Other amendments relating to the operation of merger control

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

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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.

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").

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

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

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.

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.

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.

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

If the Department would like to discuss any of our observations further please do not hesitate to contact the Group via Dr Vincent Power, Anna Marie Curran or Alan McCarthy.

Key contacts

Vincent Power
Partner
+353 1 649 2226
vpower@algoodbody.com

Anna-Marie Curran
Partner
+353 1 649 2227
amcurran@algoodbody.com

Alan McCarthy
Partner
+353 1 649 2228
amc@algoodbody.com

Lorna McLoughlin
Associate
+353 1 649 2187
lmcloughlin@algoodbody.com

Thomas O'Donnell
Associate
+353 1 649 2549
todonnell@algoodbody.com

Emma Bermingham
Solicitor
+353 1 649 2758
ebermingham@algoodbody.com