

EU, COMPETITION AND PROCUREMENT

Far-reaching changes to Irish merger control and competition law in Ireland

December 2023

The far-reaching changes to Irish merger control and competition law in Ireland under the Competition (Amendment) Act 2022 (**Competition Amendment Act**) have now come into force. The Competition Amendment Act increases the Irish merger control and competition law powers of the Competition and Consumer Protection Commission (**CCPC**). These new powers will have material implications for companies doing business in Ireland. What are the main changes?

5 MIN READ

Increased Irish merger control powers

The CCPC is the primary enforcer of merger control in Ireland. As a result of the Competition Amendment Act, the CCPC can now:

- “Call-in” an unnotified sub-threshold transaction for compulsory notification by the merging parties which the CCPC believes “*may...have an effect on competition*” in Ireland
- impose interim measures on merging parties regarding any transaction notified to the CCPC (this is primarily to prevent any action by the merging parties that may prejudice or impede the CCPC’s review of a notification)
- unwind an already-completed and un-notified merger which the CCPC determines would substantially lessen competition in Ireland
- seek a summary prosecution of merging parties which have failed to notify a transaction (where required to do so) or to provide required information to the CCPC.

In addition, it is now a gun-jumping offence for merging parties to notify a transaction to the CCPC but subsequently to put it into effect before receiving CCPC approval (this can lead to fines of up to €250k plus daily default fines).

The pre-existing compulsory Irish merger control notification thresholds are unchanged (i.e. either (i) the merging parties have at least €60m aggregate turnover in Ireland and (ii) each of at least two of the merging parties has turnover in Ireland of at least €10m or the transaction is a “media merger”).

The new EU and Irish competition law powers

As part of the implementation in Ireland of the ECN+ Directive, the Competition Amendment Act gives multi-phase and complex administrative (i.e. civil) investigation and enforcement powers to the CCPC as well as the Commission for Communications Regulation (**ComReg**) regarding breaches of EU and Irish competition law.

This note focuses on the CCPC though in certain circumstances ComReg will also be able to exercise these competition law investigation and enforcement powers in the electronic communications and postal services sectors.

The new regime applies to breaches of EU and Irish competition law by companies which took place on or after 4 February 2021, irrespective of when the breach commenced – as a result, the new regime will apply to breaches that commenced prior to, and continued on or after, 4 February 2021.

Following an investigation into a potential breach of EU and/or Irish competition law (and unless it is treated as

a criminal matter), the CCPC can now, after engaging in an extensive investigation process and forming a preliminary view that a breach of EU or Irish competition law may have occurred, pursue administrative enforcement proceedings. It does this by referring the matter to an independent adjudication officer for a decision. While nominated by the CCPC, adjudication officers are appointed by the Irish Government and are independent of the CCPC in performing their functions.

The adjudication officer can make a number of decisions including whether there has been a breach of EU and/or Irish competition law (on the balance of probabilities), in respect of the companies being investigated and can impose:

- “administrative financial sanctions” on parties to the investigation (up to the greater of €10m or 10% of worldwide turnover) – in effect these are “civil fines”
- periodic penalty payments (up to 5% of average daily worldwide turnover) where, for example, a company being investigated fails to provide required information as part of a CCPC investigation
- structural and behavioural remedies.

The adjudication officer's decision must then be confirmed by the High Court unless it finds that the decision (i) contains a manifest or fundamental error of law or (ii) the fine or remedy imposed was manifestly disproportionate.

During its investigation, the CCPC can issue prohibition notices to companies (i.e. a form of interim measure) where it believes that the companies involved may otherwise cause serious and irreparable harm to competition in Ireland.

The companies which are being investigated by the CCPC can look to settle the case with the CCPC so as to limit the administrative and investigation process.

There is now an "Administrative Leniency Policy" for companies to avail of immunity from (or a reduction in) administrative financial sanctions for cartels or resale price maintenance - there is also a pre-existing and continuing Cartel Immunity Programme to enable companies to seek immunity (but not leniency) from criminal prosecution for involvement in cartels.

Despite efforts to future-proof the legislation (e.g. public oral hearings during the adjudication officer procedures), aspects of this new administrative investigation and enforcement system may be at risk of challenge under the Irish Constitution given the key role that the Irish Courts play in the administration of justice in Ireland.

Bid-rigging, increased criminal law sanctions and a new standard of proof for breaches of EU and Irish competition law

Much of the pre-existing criminal enforcement system in Ireland for breaches of EU and Irish competition law remains unchanged (including the possibility of prison for individuals for up to 10 years for cartel offences).

Three of the criminal law changes that have been made as a result of the Competition Amendment Act are that:

- there is a specific competition law cartel offence of 'bid-rigging'
- fines for companies and individuals committing breaches of EU and Irish competition law have increased to up to the greater of €50m or 20% of worldwide turnover (up from €5m or 10% of worldwide turnover)
- there is an intentional or recklessness standard of proof for breaches of EU and Irish competition law.

Looking ahead, the CCPC is developing tools to assist it to interrogate tendering data and uncover bid-rigging. There is also likely to be further legislation in the next short while which will improve access for the CCPC to such tendering data.

Increased dawn raid powers

On a dawn raid which is carried out on a company as part of an investigation into a possible breach of EU and Irish competition law, the CCPC can now:

- search vehicles or any place at which records are kept (including, any place occupied by a director, manager or any member of staff)
- seize and retain any computers or any other storage medium in which any record is kept
- take "any other" steps which appear necessary to the CCPC to preserve or prevent interference with relevant information including:
 - » taking or obtaining, in any form, copies of such information,
 - » continuing, at any time, to search such information seized or copied "at a premises other than the premises" dawn-raided - this may well include, in practice, at the CCPC's offices
- require any person (able to facilitate access to documents or records stored in any data equipment or computer) to provide the CCPC with "all reasonable assistance" regarding the operation of that equipment or access to the records.

- where the CCPC considers it necessary to preserve records and documents “or any other matter”, it can now secure for later inspection:
 - » documents or records accessed or found during the dawn raid, and any data equipment (including any computer), in which those documents or records are held
 - » a place dawn-raided by the CCPC (e.g. to seal company premises) - breaking a CCPC seal is a breach of a procedural requirement and can lead to an “administrative financial sanction” of up to the greater of €1m or 1% of worldwide turnover.

Separately, ComReg’s EU and Irish competition law dawn raid powers regarding electronic communications and postal services matters are also strengthened (similar to those of the CCPC).

New surveillance powers for the CCPC

The CCPC now has powers of surveillance (e.g. monitoring, observing, listening to or making recordings) in connection with the investigation of anti-competitive (essentially cartel) behaviour provided (in most cases) judicial authorisation is obtained in advance of such surveillance.

Comments

The new merger control powers under the Competition Amendment Act bring greater scrutiny to sub-threshold mergers as well as an ability to impose potentially far-reaching interim measures on parties to notified transactions.

The new administrative sanctions regime under the Competition Amendment Act is a fundamental change to the investigation and enforcement of EU and Irish competition law in Ireland and considerably strengthens the CCPC’s powers.

In particular, the ability of the CCPC to exercise enforcement powers leading to a finding of a breach of EU and Irish competition law as well as the imposition of significant administrative sanctions (i.e. civil fines) is entirely new for the CCPC. Formerly, these were decisions that only an Irish Court could make. These changes will materially increase the CCPC’s role in the investigation and enforcement of EU and Irish competition law in Ireland. However, issues remain including whether aspects of the new system are consistent with the Irish Constitution and how the division between the CCPC’s initial investigation role and that of the adjudication officers’ subsequent decision-making powers will work in practice.

Key contacts



Alan McCarthy
*Partner, EU, Competition
and Procurement*
+353 1 649 2228
amc@algoodbody.com



Anna-Marie Curran
*Partner, EU, Competition
and Procurement*
+353 1 649 2227
amcurran@algoodbody.com



Vincent Power
*Partner, EU, Competition
and Procurement*
+353 1 649 2226
vpower@algoodbody.com