



## **Ireland's New Competition and Consumer Protection Law:**

### **Competition and Consumer Protection Act 2014**

A guide by A&L Goodbody

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## 1. Introduction

Ireland's new competition and consumer protection law – the *Competition and Consumer Protection Act 2014* – enters into force on 31 October 2014.

Businesses and their advisors need to know about the implications of this 97-page reforming and wide ranging legislation.

The purpose of this guide is to prepare businesses and their advisors to plan for the new legislation.

The 2014 Act augments and amends the pre-existing Irish competition legislation. Unfortunately, there is no single consolidating measure. Instead, the 2014 Act builds on four other major competition law statutes to create a tapestry of rules. This short guide cuts through the labyrinth and gives you the key salient points.

The origins of the 2014 Act lie in a proposal made in 2008, at the height of the economic crisis, to merge the Competition Authority and the National Consumer Agency for cost-saving reasons. However, the opportunity of the legislation to bring about this merger has been taken to tighten some of the pre-existing competition rules, to overhaul the merger process, to provide for a new media merger regime and to create an additional regulatory regime for the grocery goods sector.

The 2014 Act makes a number of significant changes but much remains the same. The 2014 Act does not increase penalties or, as a general rule, create new major substantive competition law rules. It remains a criminal offence and a civil wrong to participate in an anti-competitive arrangement or abuse a dominant position. Fines and even imprisonment may be imposed by a court for serious breaches - the 2014 Act does not alter those penalties. Equally, aggrieved persons may still sue for damages, exemplary damages, injunctions and/or declarations. However, the 2014 Act should make the existing regime tighter and sharper with the result that businesses should expect that enforcement will be more common place and more effective.

Will the new 2014 Act make a difference? Yes is the short answer. For example, it will change how mergers are reviewed and create a review process which will probably be longer and more Irish focused.

Will this revision – the sixth major revision of Irish competition law since 1991 - be the last revision? No is the short answer. Governments, regulators and agencies globally continually fine tune legislation in this area. However, everyone will be watching to see whether the work which has gone into this legislation will be worth it and how it will be used.

### **Executive summary of the key elements of the 2014 Act are:**

- the merger of the CA and the NCA into one institution (i.e., the CCPC) with new powers and rules over and above what the two institutions possessed;
- the introduction of new thresholds for the compulsory notification of mergers;
- the establishment of a new merger control regime for media mergers;
- the enhancement of enforcement powers relating to cartel investigations;
- the establishment of a new additional regulatory regime for groceries.

## 2. New Competition and Consumer Protection Commission

### Introduction

Currently, the Competition Authority is the agency responsible for competition law in Ireland and the National Consumer Agency (NCA) is the agency responsible for consumer law. The Competition Authority has been in existence since 1991. The National Consumer Agency was only formally established in 2007 to take over from the Office of the Director of Consumer Affairs.

Under the 2014 Act, both agencies will be dissolved and the Competition and Consumer Protection Commission (CCPC) will be established. The CCPC will therefore have a dual mandate in terms of competition and consumer protection law. The CCPC will be established with effect from 31 October 2014.

The institutional change was originally announced as part of the 2008 Budget. It now forms part of a broader reform agenda within the Department for Jobs, Enterprise and Innovation for reducing the number of State agencies by 41. The Department describes the CCPC as a “powerful consumer watchdog with real teeth”. This is a reference to the stronger powers which the CCPC will have in addressing competition and consumer issues, which include new criminal investigation powers.

The CCPC's functions are a consolidation of the functions of the originating bodies but the Act also expands significantly its legislative and Governmental consultative functions.

The purpose behind amalgamating the agencies is to achieve efficiencies by improving co-ordination in regard to competition and consumer protection matters. The CCPC will have stronger powers than the agencies it replaces; this is significant if those powers are exercised. It remains to be seen whether the new body will be adequately resourced for full implementation of the competition and consumer protection provisions of the new Act but the signs to date are positive.

### Composition of the CCPC

Rather than having a CEO and board, the CCPC will have an executive Chairperson and a Membership structure. There will be a Chairperson and up to 6 Members. The Chairperson will have responsibility to the Oireachtas and Minister for Jobs, Enterprise and Innovation (the “Enterprise Minister”). This mirrors the structure of the current Competition Authority and is in line with the commitment in the 2011 Programme for Government that, where appropriate, agency boards would be scrapped and agency managers would be accountable directly to Ministers.

The CA currently has a Chairperson, Isolde Goggin and 3 full time Members, Professor Stephen Calkins, Gerald FitzGerald and Patrick Kenny. The NCA has a CEO, Karen O'Leary, a Chairperson and 11 board members. In the CCPC, Isolde Goggin will be the Chairperson and the Members will comprise the current 3 CA Members and Karen O'Leary of the NCA.

### Other bodies

The Minister for Jobs, Enterprise and Innovation (the “Enterprise Minister”) may issue directions to the CCPC and will appoint its Members. This Minister may also make regulations and guidelines in respect of grocery goods undertakings.

The Minister for Communications, Energy and Natural Resources (the “Communications Minister”) shall make determinations in relation to media mergers in the State and may issue guidelines on the criteria to be applied in reviewing transactions.

The Broadcasting Authority of Ireland (BAI) will carry out investigations on media mergers on request of the Communications Minister. The BAI shall also carry out reporting and research into the plurality of the media.

The courts will continue to have a role in the interpretation, application and enforcement of competition and consumer protection law. A new role which the courts will have is to determine whether information disclosed, to, or taken possession of, by the CCPC is subject to legal professional privilege. This latter power will prove very important in the case of material seized during dawn raids.

The Commission for Communications Regulation (ComReg) will continue to have some co-competition powers under the Broadcasting Act 2009. Under the 2014 Act, ComReg is added to the list of bodies that can seek commitments from undertakings following an investigation into an anti-competitive agreement or an abuse of dominance, and then apply to the High Court to have the commitments made an order of the Court.

### 3. Mergers & Acquisitions

#### Introduction

The 2014 Act will make significant changes to Irish merger control with effect from 31 October 2014.

#### What are the new Irish merger control notification thresholds?

A qualifying merger must be notified to the CCPC where, in the most recent financial year:

- the aggregate turnover in Ireland of the undertakings involved is at least €50 million; *and*
- the turnover in Ireland of each of 2 or more of the undertakings involved is at least €3 million.

Media mergers (i.e., where at least 2 of the undertakings involved carry on a media business and one of which is in Ireland) will also be notifiable to the CCPC irrespective of these thresholds provided at least one of the undertakings involved either: (i) has a physical presence in, and makes sales to, customers in Ireland; or (ii) made sales in Ireland of at least €2 million in the most recent financial year. A notification of such a media merger must also be made to the Communications Minister even if the transaction is otherwise notifiable to the European Commission under the EU merger control regime.

#### What will be the new time periods for Irish merger control review?

The 2014 Act extends the time periods for the CCPC to assess a notified transaction. The Phase 1 period will be up to **30 working days** (extendable where, for example, the CCPC requests further information) and the total period for assessment in Phases 1 and 2 will be up to **120 working days** (this period can be extended and/or suspended in Phase 2). It will be an offence for an undertaking involved (e.g., the acquiring company) to fail to notify where required to do so or to fail to provide data required by the CCPC.

#### Are there any changes to the type of merger notifiable under Irish merger control?

Yes. A notifiable asset acquisition will include the acquisition of a part of an undertaking (though not a corporate legal entity) involving the acquisition of assets that constitute a business to which a turnover can be attributed (and the term "assets" includes goodwill). Qualifying JVs will be defined as those which are established on a "lasting" basis and not, as present, on an "indefinite" basis.

#### When must a merger notification be made?

A transaction that meets the new compulsory notification thresholds will have to be notified and cleared before it is put into effect. The notification must be made where:

- a merger is agreed; or
- the undertakings involved show to the CCPC a good faith intention to conclude an agreement to merge; or
- one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted; or
- in relation to a scheme of arrangement, a scheme document is posted to shareholders.

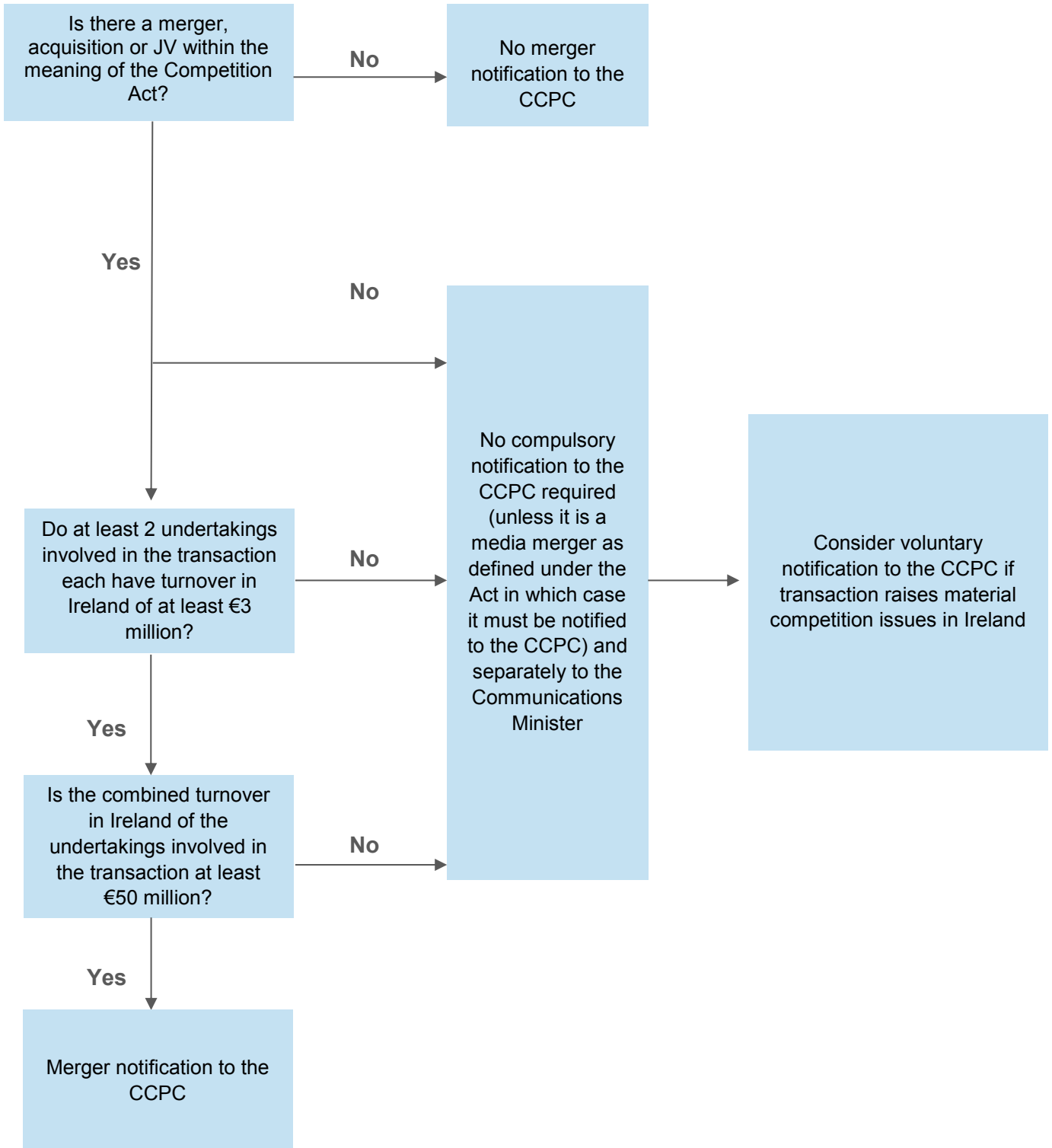
Transactions which do not meet the compulsorily notifiable thresholds will still be capable of notification, for example, where there would be a competition concern.

## Media mergers

The 2014 Act changes the way a media merger will be assessed including:

- the media merger which is notified to the European Commission under the EU merger control regulation or, if not, to the CCPC under Irish merger control for antitrust review *must also be notified separately* to the Communications Minister for an in-depth media plurality review;
- the Communications Minister must be notified no later than 10 working days after a European Commission or CCPC clearance decision but the notification to the Communications Minister may be made earlier;
- the Communications Minister will have **up to 30 working days in Phase 1** to make a decision (extendable and the exact date from when it begins depends in part on the European Commission or CCPC decision) and Phase 2 could last **up to an additional 100 working days** (also extendable) before that Minister must make a decision);
- the media merger may not be put into effect unless approved in advance by the Communications Minister;
- there will be additional factors to take into account in determining when media merger time-periods for review begin (e.g. date of a CCPC determination and the Broadcasting Authority of Ireland's Phase 2 review ); and
- expanding the range of notifiable media businesses including certain publications on the internet.

**FLOWCHART: MERGER CONTROL NOTIFICATION TO THE CCPC**





#### 4. Investigation and Enforcement

The 2014 Act increases the investigation powers of the CCPC and the Garda Síochána in respect of certain breaches of competition law. The 2014 Act also enhances the investigation of consumer protection law by providing the CCPC with stronger powers of inspection of the premises of businesses in the grocery goods sector.

(i) **Possession of legally privileged materials:** The 2014 Act provides a mechanism for the CCPC and other relevant bodies (such as the Garda Síochána and ComReg) to take possession or compel the disclosure of information that is regarded by the person possessing the information as legally privileged. The CCPC (and any other relevant body) must apply to the High Court within 30 days for a determination as to whether or not the information is legally privileged. An application may also be made to the High Court by the person disclosing the information for a determination that the information is legally privileged. The changes under the Act in relation to the treatment of privileged legal material are not confined to the investigation of serious breaches of competition law but can also apply to the other functions of the CCPC such as merger control, consumer protection functions, investigations of complaints and conducting market studies.

(ii) **Court sanction for information disclosure:** The 2014 Act provides for a new power for the Garda Síochána to make a court application to compel any person with relevant information to produce documents, answer questions and provide information for the investigation of serious competition law breaches. The order may require the person to identify and categorise the documents to be produced in a particular manner sought by the Garda Síochána or as the District Court judge directs. Failure to comply with a court order will be an offence. This may have the effect of the Garda Síochána taking on the primary investigative and enforcement role.

(iii) **Increase in CCPC's enforcement powers:** The 2014 Act increases the powers of the CCPC to investigate all suspected competition law breaches (for example, by giving greater latitude to the CCPC to retain documents seized from a business during an unannounced inspection and empowering authorised officers of the CCPC to question a person detained for a suspected cartel offence (accompanied by a member of the Garda Síochána)).

(iv) **Data retention:** Electronic communications and Internet companies will be required to retain certain records for up to two years and to disclose such records on request by the CCPC for the prevention, detection investigation or prosecution of a suspected cartel offence.

(v) **Failure to disclose cartel information:** It will be an offence under the Criminal Justice Act 2011 for a person to fail to disclose information which may be of material assistance to the Garda Síochána in relation to the prevention of a cartel offence.

(vi) **Release during detention period:** After the 2014 Act enters into force, a detained person could be released and their detention suspended for further investigations during the suspension period.

(vii) **Offence to withhold information:** The withholding of information in relation to certain breaches of competition law is an offence under the 2014 Act. In particular, anyone who (a) obstructs or impedes an authorised officer in the exercise of their enforcement powers under the Act; or (b) without reasonable excuse, fails to comply with a request of an authorised officer in the exercise of their enforcement powers under the Act; or (c) gives false or misleading information in a material respect, will be guilty of an offence punishable with a fine of up to €50,000 and/or imprisonment for up to 3 years. Where a member of the Garda Síochána is of the opinion that such an offence is being or has been committed by a person, the member will have power to arrest that person without a warrant.

## 5. Groceries

The 2014 Act creates an additional regulatory regime for the grocery sector. This is in addition to, for example, the EU competition regime as well as the general competition rules in the Competition Act 2002 and the grocery-specific competition rules in the Competition (Amendment) Act 2006.

Chapter 5 of the 2014 Act, dealing with grocery goods, amends Part 3 of the Consumer Protection Act 2007.

The 2014 Act allows the Enterprise Minister to impose terms and conditions in contracts between larger and smaller “grocery goods undertakings” aimed at ensuring balance and fairness in their commercial relations (primarily as between supplier and retailer) - these will take the form of a series of Regulations and it is expected they will be issued on or shortly after 31 October 2014. It is likely there will be a limited amount of consultation on these Regulations. (The term “grocery goods undertaking” is any business or person engaged for gain in the production, supply, distribution, wholesale or retail of grocery goods, whether or not the undertaking is engaged in the direct sale of those goods to the public.)

Grocery goods are defined as:

- (a) any food or drink that is intended to be sold for human consumption and includes:
  - (i) any substance or thing sold or represented for use as food or drink for human consumption; and
  - (ii) any substance or thing sold or represented for use as an additive, ingredient or processing aid in the preparation or production of food or drink for human consumption, and that is intended to be sold by a retailer as such an additive, ingredient or processing aid; and
  - (iii) intoxicating liquors, but does not include food or drink served or supplied on the premises of a grocery goods undertaking in the course of providing catering, restaurant or take-away services or any similar hospitality services, or intoxicating liquor served or supplied for consumption on the premises of a grocery goods undertaking;
- (b) household cleaning products;
- (c) toiletries; and
- (d) garden plants and garden plant bulbs.

The powers of investigation available to the CCPC in the event of breaches of the Regulations will be very significant. For example, it will be an offence to breach the Regulations and the CCPC will be able to issue enforceable "Contravention Notices" for the larger grocery goods undertakings which breach the Regulations.

The larger-sized grocery goods undertakings to which the Regulations are aimed are grocery goods undertakings engaged in the production, supply, distribution, wholesale or retail of grocery goods in Ireland that has, or is a member of a group of related undertakings that has, an annual worldwide turnover of more than €50 million.

The Enterprise Minister will be able to issue Regulations to control practices (in particular of larger grocery goods undertakings) including:

- (i) the form of contract;
- (ii) variation, termination or renewal of contracts;
- (iii) how terms such as payment are to be incorporated;
- (iv) the conditions under which retailers may require suppliers to obtain any goods, services or property from a third party where the retailer obtains payment for such an arrangement;
- (v) charging for listing grocery goods; and

(vi) when a larger grocery goods undertaking seeks payment from a supplier to secure better positioning.

The new regime will only relate to commercial practices in relation to grocery goods and not to prices. The Act also enhances the enforcement of consumer protection law by providing the CCPC with stronger powers of inspection of grocery goods undertakings premises than previously granted to the NCA.

**6. Competition Law Compliance**

Successful businesses and associations have a strong compliance culture which is often underpinned by a successful compliance programme. The entry into force of the Act on 31 October 2014 means businesses need to review and revise their compliance programmes otherwise there is a risk that their programmes will not be able to cope with the new regime.

**The Value of a Competition Law Compliance programme and what it can help avoid...**

For the Individual	For the undertaking
Worry	Fine of up to 10% of worldwide turnover at EU level and fine of up to 10% of worldwide turnover at Irish level and in other States
Reputation / Distraction	Reputation / Distraction
Will you be able to continue working in the company?	Cost of Competition Investigation (monetary and time)
Dawn raids on homes	Damages actions
Fines of up to €5 million	Dawn raids on business premises
Jail for up to ten years in Ireland	Anti-Competitive Agreements are void

**Our top tips on quality compliance programmes:**

- compliance programmes are not “one size fits all” - the programme must be tailored to the organisation to reflect the risks it is likely to encounter;
- compliance programmes are most likely to succeed where they have management support – the “tone from the top” is essential;
- the programme must match the culture of the organisation and the locations in which it operates;
- a company will not breach competition law, rather it is the individuals within the company who may cause a competition law problem;
- anyone in an organisation, regardless of their seniority, could breach competition law and should be trained in accordance with the competition risks they face (e.g., contacts with competitors, trade associations, scope for information exchange etc);
- the legal risks and the programme should match (e.g., there is little point in spending a great deal of time training people on abuse of dominance if the organisation is not dominant);
- the programme needs to be relevant to the target audience. Multi-billion euro fines are dramatic but will the particular audience find them relevant? The examples and issues must be relevant to the audience;
- encourage feedback on the programme and any training that is given - the programme should develop awareness and questions on the application of the competition law rules should be welcomed;
- the programme should be delivered without using legal jargon and should have practical examples which come from the “ground up” within the organisation rather than devised outside;
- the programme should highlight the potential to use competition law for competitive advantage;
- there needs to be internal “ownership” but not “abdication”: someone needs to take charge but everybody else should not abdicate responsibility to that person;
- the word “audit” should not be used to describe a review of competition risks because it can give false comfort that the review is complete when it is often impossible to be comprehensive;
- the programme should be a living document and needs to be updated regularly – e.g., circulate examples of recent developments which are relevant, dawn raids or fines in the sector;

- careful records should be made and retained of who participated in the training and what they were taught, including new starters (particularly when they come from competitors).

#### Examples of real life loose drafting (taken from competition law cases):

*'Ian ... This is a great initiative that you and Neil have instigated!!!!!!! However, a word to the wise, never ever put anything in writing, its highly illegal and it could bite you right in the arse!!!! suggest you phone Lesley and tell her to trash? Talk to Dave. Mike'* - the makers of Monopoly sent this email after fixing prices for games and toys with various retailers.

*"Confidential please, so we aren't accused of being a cartel."* ~British public school fees (2005)

#### Useful Sources:

European Commission: *Compliance matters - What companies can do better to respect EU competition rules*

<http://bookshop.europa.eu/uri?target=EUB:NOTICE:KD3211985:EN>

Irish Competition Authority: *Complying with Competition Law – A Guide for Businesses and Trade Associations*

[www.tca.ie/images/uploaded/documents/Booklet%20-](http://www.tca.ie/images/uploaded/documents/Booklet%20-%20Guide%20to%20Competition%20Law%20and%20Policy%20for%20Businesses.pdf)

[%20Guide%20to%20Competition%20Law%20and%20Policy%20for%20Businesses.pdf](http://www.tca.ie/images/uploaded/documents/Booklet%20-%20Guide%20to%20Competition%20Law%20and%20Policy%20for%20Businesses.pdf)

UK Competition and Markets Authority - *Four-step process to competition law compliance*

[www.gov.uk/government/publications/how-small-businesses-can-comply-with-competition-law](http://www.gov.uk/government/publications/how-small-businesses-can-comply-with-competition-law)

International Chamber of Commerce: *Antitrust Compliance Toolkit* [www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/ICC-Antitrust-Compliance-Toolkit](http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/ICC-Antitrust-Compliance-Toolkit)

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