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Joint Committee on Enterprise, Trade and Employment

Pre-legislative scrutiny of the
Competition Bill, 2021

June, 2021

[33/ETE 3]

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Réamhrá an Chathaoirligh/Cathaoirleach's Foreword

Consumers and businesses benefit from competition through greater choice, lower prices and better-quality goods and services. Open and competitive markets, with strong incentives to innovate and be more efficient, deliver benefits for all. However, when competition laws are broken, consumers suffer and businesses can be affected by trading difficulties along with increased costs. Effective enforcement of competition law is necessary to guard against illegal business practices.

Last year, the Hamilton Review Group, which considered Ireland's ability to combat economic crime, identified weaknesses in legislation and in the resourcing of bodies charged with preventing illegal practices and enforcing the law.

Given the dependence of Ireland for so much of its economic activity, employment and tax revenues on the multi-national sector, it is important that Ireland is seen to have a credible infrastructure to deter and address economic crime. The threat of enforcement must be real and the sanctions must be appropriate.

The Joint Committee carried-out its pre legislative scrutiny of the General Scheme of the Competition Bill 2021 in this context. The Bill aims to transpose EU Directive (EU) 2019/1 - the European Competition Network (Empowerment) Directive - and to provide for other matters, notably ones arising from the Report of the Hamilton Review Group.

The ECN+ Directive provides for a wide-ranging reform of competition law in the EU. It aims to make national competition authorities across the EU more effective and consistent in their enforcement of EU competition law. The Directive introduces minimum standards in relation to the enforcement of competition law at a national level, and harmonises the resources, powers and tools available to national competition authorities. Of particular note in this regard are the introduction of civil sanctions for breaches of competition law and a leniency programme for businesses that come forward with evidence of a breach of competition law. The provisions for substantial fines, improved investigative powers, as well as improved institutional cooperation are also very important.

The Committee generally welcomes the provisions included in the General Scheme, considering that they are an important part of the State's overall approach to combatting white-collar crime. In its examination of the General Scheme, the Committee has identified a number of key issues which it believes need to be considered in drafting the Bill. However, the Committee is particularly anxious to stress the importance of the national competition authorities – the CCPC and ComReg – having adequate financial and other resources to implement fully the new powers and obligations that are being assigned to them.

I hope that the Minister for Enterprise, Trade and Employment will proceed quickly with the finalisation of the Bill, and the Committee looks forward to considering it further when it is examined at Committee Stage.

I would like to thank the CCPC and ComReg for their assistance to the Committee in this matter. I would also like to express my appreciation to the Library & Research Service of the Houses of the Oireachtas for their detailed examination of the General Scheme for the Committee.

Maurice Quinlivan

Cathaoirleach of the Joint Committee on Enterprise, Trade and Employment

Introduction

The General Scheme of the Competition Bill 2021 was referred to the Joint Committee on Enterprise, Trade and Employment ("the Committee") for pre-legislative scrutiny by Tánaiste and Minister for Enterprise, Trade and Employment, Mr Leo Varadkar T.D on 9 December 2020.

The Committee held two meetings on the General Scheme:

Date	Witnesses
2 February	Officials from the Department of Enterprise, Trade and Employment • Ms Clare McNamara • Ms Gráinne O'Carroll • Mr Seán Smith
23 February	Officials from the Competition and Consumer Protection Commission • Ms Isolde Goggin, Chairperson • Mr Brian McHugh, Member of the Commission Officials from the Commission for Communications Regulation • Mr Garrett Blaney, Chairperson • Mr Jeremy Godfrey, Commissioner

Key Issues

Key Issue 1: In parts, the General Scheme distinguishes between CCPC and ComReg as competent authorities. Some Heads make specific provisions for the CCPC, while others refer to a "competent authority". It is important that these distinctions do not result in an incomplete transposition of the ECN+ Directive. Further clarity may be needed at the drafting-stage of the Bill.

Key Issue 2: In relation to privacy, the search and seize powers included in the General Scheme may create a conflict of laws between Constitutional, EU and International human rights law, as formalised in the EU Charter. This appears to stem from the attempt to transpose the ECN+ Directive using primary legislation that also aims to bring the domestic law in line with the EU legislation. At the drafting stage, it may be necessary to ensure an obvious distinction between the powers arising from EU law from those coming from domestic law.

Key Issue 3: At present, there is no limit on the amount of time the competent authority can use its investigatory powers to seal business premises and/or books or records. As such an action may have a direct impact on the capacity of the business to function, the Department has committed to introducing a "very strict timeframe" for this power.

Key issue 4: Would a threat of administrative financial penalties act to compel a person to admit an infringement of competition law contrary to the general privilege against self-incrimination?

Key Issue 5: As currently drafted, the coming into effect of structural and/or behavioural remedies imposed under the General Scheme would not be contingent upon confirmation by the Court. There is provision for confirmation, but the imposition of those remedies is not expressly made subject to the confirmation. This may create constitutional issues with regard to the administration of justice if the remedies are deemed to be punitive in nature.

Key Issue 6: The proposed maximum fine for an infringement of EU law is 10 per cent of the total worldwide turnover of an undertaking or association of undertakings, while the maximum for an infringement of domestic competition law is 10 per cent of the total worldwide turnover or €10 million, whichever is greater. This means that a company with a worldwide turnover of less than €100 million may face a higher fine if the fine is issued with reference to sections 4 or 5 of the 2002 Act rather than Articles 101 or 102 TFEU. This would appear to go against the idea that infringements of domestic competition law should be treated in the same way as the identical infringement grounded in EU law.

Key Issue 7: Under the General Scheme, penalty payments imposed for infringements of domestic law would only be effective upon Court confirmation. However, as it is currently drafted, the General Scheme does not allow the relevant authority to apply to the Court for confirmation of a decision to impose penalty payments.

Key Issue 8: The apparent absence of a right to appeal a decision to impose periodic penalty payments may be seen to affect the fundamental rights of the affected undertaking or association of undertakings.

Key Issue 9: Although a grant of leniency is contingent on court confirmation, as currently drafted, the General Scheme does not provide for court confirmation of a decision to grant immunity.

Key Issue 10: As currently drafted, a grant of immunity is not subject to court confirmation, even though it may be used to grant immunity from administrative fines arising from domestic infringements by cartels.

Key Issue 11: The General Scheme is silent on what is meant by the term 'other fact-finding measure', a term that is not included in the Directive, the 2014 Act or the 2002 Act. The term is included in Article 22 of Council Regulation (EC) No 1/2003, but it is not defined. Further clarity may be required in this regard.

Key Issue 12: Ireland does not differentiate between "National Administrative Competent Authorities" and "National Judicial Competent Authorities". However, the difference between the two bodies may be relevant to the imposition of periodic penalty payments, as, under the Directive, these may only be imposed by the national administrative competition authority.

Key Issue 13: The offence of bid-rigging appears already to be provided for under the 2002 Act. It is considered a form of price-fixing or market-sharing. While bid-rigging is considered one of the most common competition law offences, some reservations have been raised about how it may impact judicial discretion and the separation of powers.

Key Issue 14: The General Scheme does not appear to include provisions for the screening of e-tenders data.

Key Issue 15: As currently drafted, the General Scheme does not specify the offences for which covert surveillance may be conducted.

Key Issue 16: As currently drafted, the General Scheme does not appear to address how the surveillance powers proposed will operate, including the level of oversight and compliance with the minimum requirements for the interception of communications in criminal investigations as identified by the case law of the European Court of Human Rights.

Key Issue 17: The national competition authorities – the CCPC and ComReg – must have adequate financial and other resources to implement fully the new powers and obligations that are being assigned to them by the General Scheme.

The ECN+ Directive

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, is commonly known as the ECN+ Directive (the European Competition Network (Empowerment) Directive). Article 34.1 of the Directive sets a transposition date of 4 February 2021.

The Directive establishes certain rules to ensure that National Competition Authorities (NCAs) have necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply EU competition law, and in particular Articles 101 and 102 of the Treaty on the Functioning of the European (TFEU). It also sets out certain rules on mutual assistance to safeguard the smooth functioning of the internal market and of cooperation within the European Competition Network (ECN). The Directive builds on Council Regulation (EC) No 1 of 2003, which required NCAs to apply EU competition law, but stopped short of providing means and instruments of enforcement.

The ECN+ Directive requires NCAs to be independent of government and that NCAs and their staff are facilitated to conduct their work in a fully impartial manner. Member States are obliged to ensure that NCAs are provided with sufficient qualified staff and sufficient financial and technological resources for the effective performance of their duties.

EU versus domestic legislation

While sections 4 and 5 of the Competition Act 2002 (the 2002 Act) cover infringements of both domestic competition law and EU competition law, an infringement of Article 101 or 102 would require a cross-border element. Although the ECN+ Directive only requires Member States to transpose the provisions in relation to cross-border infringements, the General Scheme aims to apply the provisions of the Directive to infringements of domestic competition law.

The General Scheme of the Bill

Authorised Officers

Head 8 of the General Scheme would empower the Competition and Consumer Protection Commission (CCPC) and/or the Commission for Communications Regulation (ComReg) to appoint authorised officers to carry out and report on investigations (as it considers necessary) of potential infringements of Articles 101 or 102 TFEU and/or sections 4 or 5 of the 2002 Act.

The conduct of the authorised officer during the investigation would remain subject to the statutory guidelines of the authority. Outside of certain procedural requirements, and subject to laws on procedural fairness, the CCPC and/or ComReg would be allowed to regulate their own investigative procedures.

Section 35 of the Competition and Consumer Protection Act 2014 (the 2014 Act) already gives the CCPC the power to appoint authorised officers and section 39 of the Communication Regulation Act 2002 provides a similar power to ComReg. However, in subhead (3), the use of the term 'Commission' instead of 'competent authority' would appear to limit the power to appoint an authorised officer for the purpose of Directive to the CCPC. As ComReg is a national regulatory authority (NRA) (a national administrative competition authority for the purposes of the Directive), it is arguable that the provisions of the General Scheme would not fully transpose the Directive – Articles 5 and 6 of the Directive require that NRAs have sufficient staff and that they are able to conduct all necessary inspections. ComReg are seeking an amendment to existing legislation to allow them to have identical powers in relation to competition as the CCPC and they identify a way to do this.

Key Issue 1: In parts, the General Scheme distinguishes between CCPC and ComReg as competent authorities. Some Heads make specific provisions for the CCPC, while others refer to a "competent authority". It is important that these distinctions do not result in an incomplete transposition of the ECN+ Directive. Further clarity may be needed at the drafting-stage of the Bill.

Investigatory powers

Head 9 of the General Scheme aims to transpose Article 6 of the Directive. It provides for the power to inspect the premises of an undertaking under investigation, unannounced but subject to obtaining a warrant. The authorised officer conducting the inspection may request the assistance of a member of An Garda Síochána to enable the inspection to take place, and a failure to comply with a requirement would be an offence.

Section 37 of the 2014 Act already provides extensive powers of investigation to authorised officers in relation to investigations under the 2002 Act (which would include, through sections 4 and 5, investigations into infringements of Articles 101 and 102 TFEU). However, the proposed

powers are broader, allowing authorised officers to call on members of the Gardaí to help with investigations, creating a specific requirement to provide passwords, and creating a specific offence of hindering an investigation.

The intention of the Department of Enterprise, Trade and Employment is to ensure that the same investigative and enforcement powers would be available to a competent authority regardless of whether it is applying Irish competition law, EU law or Irish competition law and European competition law in parallel.

The Explanatory Note suggests that differences between the domestic investigatory regime (section 37 of the 2014 Act) and the EU law regime (Head 9) may result in procedural and legal difficulties. It also states that the CCPC has requested a broadening of the definition of 'records', presumably to modernise the definition. This is expected to be done in consultation with the Office of the Parliamentary Counsel at the drafting stage.

In 2017, in the CPH case, the Supreme Court found that the CCPC had breached both Irish constitutional law relating to privacy and Article 8 of the European Convention on Human Rights by going outside the remit of the powers listed in section 37 of the 2014 Act. As a result, the Supreme Court granted an injunction preventing the CCPC from using or reviewing any material or data "which were the fruits of this unlawful search."

The Explanatory Note to Head 10 argues that there is a need for the CCPC search and seizure powers to be clearly and expressly included in legislation to allow the CCPC to better deal with the ramifications of recent cases such as the CPH case. However, even if the Heads included express provisions to allow for a broad invasion of privacy, a question arises as to whether these would stand up to judicial scrutiny given the CPH decision. As Article 29.4.6° of the Constitution provides that in the case of a conflict between European law and the Constitution, European law takes precedence, it could be argued that the provisions of Articles 6 and 7 of the Directive (to be transposed through Heads 9 and 10) could overcome any constitutional issues relating to privacy. However, regard also needs to be given to Ireland's commitments under the European Convention on Human Rights.

Key Issue 2: In relation to privacy, the search and seize powers included in the General Scheme may create a conflict of laws between Constitutional, EU and International human rights law, as formalised in the EU Charter. This appears to stem from the attempt to transpose the ECN+ Directive using primary legislation that also aims to bring the domestic law in line with the EU legislation. At the drafting stage, it may be necessary to ensure an obvious distinction between the powers arising from EU law from those coming from domestic law.

The investigative powers to seal business premises and/or books or records and the impact of this on the capacity of that business to operate was raised with the Department of Enterprise, Trade and Employment. Cases may arise where a business could be closed for a considerable period, leading to a loss of income and turnover, as well as damage to reputation. The Department

confirmed its intention to put into place a very strict timeframe, because in the same way that the level of fines is not meant to put undertakings out of business, the same should be true of sealing premises and gathering evidence.

Key Issue 3: At present, there is no limit on the amount of time the competent authority can use its investigatory powers to seal business premises and/or books or records. As such an action may have a direct impact on the capacity of the business to function, the Department has committed to introducing a "very strict timeframe" for this power.

Head 10 of the General Scheme transposes Article 7 of the Directive. It provides for a power to inspect other (non-business) premises, land or means of transport, subject to a warrant issued by the Court. To trigger an inspection, there would be a need for a reasonable suspicion that books or other records are being kept at that location. Inspections may be made unannounced and where the authorised officer is challenged, he or she may call on the assistance of the Gardaí.

Head 11 of the General Scheme transposes Article 8 of the Directive, giving the CCPC and ComReg, as part of an ongoing investigation, the power to require any person, including the person under investigation, to provide information on request within the specified timeframe. Requests for information must be proportionate and cannot be used to compel a person to admit an infringement of Articles 101 or 102 TFEU and/or sections 4 or 5 of the 2002 Act. However, under Heads 19 and 25 respectively, a failure to strictly adhere to a request within the specified timeframe may result in the imposition of an administrative fine or periodic penalty payments.

Some of the powers included in Head 11 are found in sections 18 and 37 of the 2014 Act, empowering the CCPC and its authorised officers to request information from specified people. A failure without reasonable cause to provide information requested by the CCPC pursuant to a notice is an offence under section 18(4)(d) of the 2014 Act. However, there does not appear to be any sanction for failing to adhere to a request for information under section 37.

There are two main issues that may arise from the provisions in Head 11, notably the privilege against self-incrimination and the blurring of the distinction between civil and criminal jurisdictions caused by the application of administrative fines.

At this point, it should be noted that in the case of *Sweeney v Ireland,* the Supreme Court affirmed the probable constitutionality of reporting obligations under Section 19 of the *Criminal Justice Act 2011*, which provides that it is a criminal offence for a person to withhold information from the Gardaí which they know or believe is of material assistance in relation to a relevant offence, including a offences relating to competition law. Nevertheless, the Court upheld the principle that unless a participant wishes to speak of their own volition, the law should not compel them to self-incriminate as to their commission of a crime. This principle may be asserted in civil or criminal proceedings and it is "one which is vested in witnesses before courts and in all persons subjected to investigations whether they be formal investigations or not." It could be argued that the principle of self-incrimination would extend to any crime or infringement, not just the crime or infringement that is the subject of the investigation. It would follow that the exemption in subhead 3 should be

extended to cover an admission of any crime or infringement, not just one pertaining to Articles 101 or 102 TFEU and/or sections 4 or 5 of the 2002 Act. The inclusion of the requirement that requests must be proportionate would appear to cover any constitutional issues affecting self-incrimination.

Key issue 4: Would a threat of administrative financial penalties act to compel a person to admit an infringement of competition law contrary to the general privilege against self-incrimination?

Separately, it is understood that ComReg would like the definition of 'electronic communications undertaking' removed from the *Competition Act 2002*, as it does not believe it is necessary and creates confusion. The proposal does appear to have some merit in that the term 'electronic communications undertaking' is not used substantially in the 2002 Act and it is not even used in the Communications Regulation Act 2002, which uses the general term 'undertaking', defined in section 2 of that Act as "a provider of electronic communications networks or services or associated facilities."

Head 12 of the General Scheme would transpose Article 9 of the Directive. It would empower the CCPC and ComReg to summon any person to attend an interview, where that person is suspected as possessing information relevant to an investigation into a breach of competition law.

This power repeats the powers already available through Part 2A of the Communications Regulation Act 2002 and section 18 of the 2014 Act. It appears to be acknowledged that this Head may be redundant, contingent upon ComReg being placed in the same position as the CCPC regarding its powers to enforce competition law.

Interim Measures – Prohibition Notices

Heads 13 and 14 of the General Scheme would transpose Article 11 of the Directive.

Head 13 would allow the CCPC or ComReg to put interim measures in place by issuing a written prohibition notice, especially where there is urgency due to the risk of serious and irreparable harm to competition, based on a prima-facie finding of a breach of competition law.

The undertaking that is the subject of the prohibition notice would have a right of appeal to the District Court, and the notice could be confirmed, varied or cancelled on appeal, or the notice may be suspended by the court.

Head 14 would provide for an expedited appeal process of a decision to issue a prohibition notice. When triggered, the appeal would involve an enquiry into the legality, including the proportionality, of the decision.

Statement of Objections

Head 15 of the General Scheme outlines the procedure of issuing a Statement of Objections. It repeats the requirements of Head 8(6) that must be satisfied prior to commencing an investigation into a suspected infringement.

Findings of an infringement

Head 16 of the General Scheme would transpose Article 10 of the Directive. It would allow the CCPC or ComReg, after it has completed its investigation, to make a finding that the relevant undertaking has infringed Articles 101 or 102 TFEU and/or sections 4 or 5 of the 2002 Act.

The finding of an infringement may be retrospective. Alternatively, where the authority has informed the European Commission of ongoing enforcement proceedings and it decides to close those proceedings, it would be required to inform the European Commission of that decision.

Subheads 2 and 3 of Head 16 would empower the CCPC or ComReg to calculate an administrative fine in accordance with Head 20 and impose structural or behavioural remedies in accordance with Head 17, after a finding has been made. It is unclear why these provisions are included in Head 16, as these powers are also included in Heads 17 and 20.

Behavioural and Structural remedies

Head 17 of the General Scheme would empower the CCPC or ComReg to determine relevant behavioural and/or structural remedies that should be placed on an undertaking found to be infringing Articles 101 or 102 TFEU and/or sections 4 or 5 of the 2002 Act. Remedies would need to be aimed at bringing the infringement(s) to an end and they would need to satisfy tests of proportionality and necessity. When faced with a choice of remedy, the relevant authority would need to choose the remedy that is least burdensome on the undertaking, in line with the principle of proportionality.

The Directive does not require Member States to provide for structural and behavioural remedies, and therefore this Head does not involve a transposition of EU law – it arises from a policy decision. Article 10(1) of the Directive provides that Member States:

> "… may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end."

It appears that the proposed provision was drafted to implement a recommendation of the Irish Law Reform Commission that in order to effectively tackle corporate crime, authorities should be empowered to be able to "enter into wide-ranging regulatory compliance agreements or settlements."

Subhead 3 notes that a decision to impose structural or behavioural remedies will be confirmed by the Court under Head 23. However, the provision in its current form does not make the imposition of a sanction contingent upon confirmation. This may be contrasted with Head 19(6), which

expressly states that a decision under that Head only comes into effect upon confirmation by the Court.

Key Issue 5: As currently drafted, the coming into effect of structural and/or behavioural remedies imposed under the General Scheme would not be contingent upon confirmation by the Court. There is provision for confirmation, but the imposition of those remedies is not expressly made subject to the confirmation. This may create constitutional issues with regard to the administration of justice if the remedies are deemed to be punitive in nature.

Legally-binding commitments

Head 18 of the General Scheme would give effect to Article 12 of the Directive. It would empower the CCPC or ComReg to legally bind companies to any commitments made during enforcement proceedings for a specified period.

Imposition and Calculation of Administrative Fines

Heads 19 to 22 would provide for the imposition and calculation of administrative fines for breach of competition law. These provisions would give effect to Articles 13 to 15 of the Directive.

Under Head 19, the CCPC or ComReg could impose administrative fines for infringements of Articles 101 or 102 TFEU and/or sections 4 or 5 of the 2002 Act, or for (intentionally or negligently) failing to adhere to specified obligations established by the General Scheme.

Head 20, in transposing Article 14 of the Directive, would provide for the calculation of administrative fines imposed under Head 19. The Law Reform Commission has recommended a level of transparency in the process of calculating financial sanctions for a regulatory breach to best ensure that sanctions are appropriate and have a deterrent effect. Some of the prescribed matters derive from this recommendation.

Head 21 sets the maximum fines applicable for infringements of Articles 101 or 102 TFEU while Head 22 sets the maximum fines applicable for infringements of sections 4 or 5 of the 2002 Act. Subheads 1 to 3 of Head 21 transpose Article 15 of the Directive, using almost identical language, setting the maximum fine at 10 per cent of the total worldwide turnover of an undertaking or association of undertakings. Subhead 4 provides that the financial sanction imposed must not be at a level that would force an undertaking to cease trading. This is not provided for in the Directive. Rather, it derives from a recommendation of the Law Reform Commission on Administrative Financial Sanctions. It is not clear how much value this provision adds to the provisions of the Directive given that any fine already needs to be effective, proportionate and dissuasive and it would be difficult to argue that a fine could conform to these principles while also having the effect of putting a company out of business. The main difference between Heads 21 and 22 is that the proposed maximum fine for an infringement of domestic competition law is 10 per cent of the total

worldwide turnover or €10 million, whichever is greater. This means that a company with a worldwide turnover of less than €100 million may face a higher fine if the fine is issued with reference to sections 4 or 5 of the 2002 Act rather than Articles 101 or 102 TFEU. This would appear to go against the idea that infringements of domestic competition law should be treated in the same way as the identical infringement grounded in EU law.

Key Issue 6: The proposed maximum fine for an infringement of EU law is 10 per cent of the total worldwide turnover of an undertaking or association of undertakings, while the maximum for an infringement of domestic competition law is 10 per cent of the total worldwide turnover or €10 million, whichever is greater. This means that a company with a worldwide turnover of less than €100 million may face a higher fine if the fine is issued with reference to sections 4 or 5 of the 2002 Act rather than Articles 101 or 102 TFEU. This would appear to go against the idea that infringements of domestic competition law should be treated in the same way as the identical infringement grounded in EU law.

Confirmation by the Court and Appeals

Head 23 of the General Scheme would provide that where the CCPC or ComReg decide to impose structural or behavioural remedies or an administrative fine, they would need to apply to the Court, on a summary basis, for confirmation of that decision. The Court would be obliged to confirm the decision unless it sees good reason not to do so.

Head 24 of the General Scheme would provide for an appeal of a decision of the CCPC or ComReg to impose behavioural or structural remedies under Head 17 or an administrative fine under Head 19. At its meeting with the Committee, the Department highlighted that a civil burden of proof (on the balance of probabilities) would apply to all decisions made by the relevant competition authority with respect to administrative fines and behavioural and structural remedies. The balance of probabilities burden is far lower than the criminal burden of proof that requires a level of certainty that is 'beyond reasonable doubt'. This lower burden would facilitate the relevant authority in its justification of a decision subject to appeal.

Periodic Penalty Payments

Heads 25 and 25A of the General Scheme would transpose Article 16 of the Directive, allowing the CCPC or ComReg to impose periodic penalty payments on undertakings or associations of undertakings. The penalty imposed must be determined in proportion to the average daily total worldwide turnover of the subject of the penalty payment in the preceding business year and calculated from the date of imposition.

Constitutional issues relating to administration of justice will be discussed in more detail below.

As penalty payments imposed under Head 25A would apply to domestic law as well as EU law infringements, that Head includes an extra provision, making the decision to impose penalty payments only effective upon confirmation under Head 23. However, it appears that a problem

arises as Head 23 does not allow the relevant authority to apply to the Court for confirmation of a decision to impose penalty payments.

Key Issue 7: Under the General Scheme, penalty payments imposed for infringements of domestic law would only be effective upon Court confirmation. However, as it is currently drafted, the General Scheme does not allow the relevant authority to apply to the Court for confirmation of a decision to impose penalty payments.

Neither Head 25 nor Head 25A includes an appeal provision, which may be seen to affect the fundamental rights of the undertaking or association of undertakings that is the subject of the penalty provision, as outlined in Head 5(2) of the General Scheme and Article 3 of the Directive.

Key Issue 8: The apparent absence of a right to appeal a decision to impose periodic penalty payments may be seen to affect the fundamental rights of the affected undertaking or association of undertakings.

Immunity and leniency

Heads 26 to 32 transpose Articles 17 to 23 of the Directive, which require the implementation of national immunity and leniency programmes for cartel whistle-blowers. The leniency programme proposed in the General Scheme would cover all forms of cartel behaviour, whether domestic or cross-border in nature.

Heads 26 and 27 require the CCPC and ComReg to put leniency programmes in place. The relevant policy on the leniency programme would need to be published.

The leniency programmes would allow undertakings to receive immunity from administrative fines or a reduction in the amount of the fine (leniency) in exchange for admitting participation in cartels and submitting evidence of the cartel's dealings. Any grant of immunity or leniency would be conditional. A list of prescribed conditions is included in Head 28 (transposed directly from Article 19 of the Directive). An application for leniency would be available to any undertaking that does not qualify for immunity under Head 26.

Head 27(1) provides that a grant of leniency is "subject to court confirmation under Head 24". However, court confirmation is provided for under Head 23 (Head 24 covers the appeals process). Furthermore, in its current state, Head 23(1) does not expressly allow the authority to apply for confirmation of a leniency decision – it is restricted to decisions made under Heads 17 and 19.

Key Issue 9: Although a grant of leniency is contingent on court confirmation, as currently drafted, the General Scheme does not provide for court confirmation of a decision to grant immunity.

Moreover, the General Scheme does not provide a formal appeal process for decisions to grant immunity or leniency and a grant of immunity is not subject to court confirmation, even though it may be used to grant immunity from administrative fines arising from domestic infringements by cartels.

Key Issue 10: As currently drafted, a grant of immunity is not subject to court confirmation, even though it may be used to grant immunity from administrative fines arising from domestic infringements by cartels.

It is noteworthy that the CCPC already operates a non-statutory immunity programme for investigations into cartels, run in conjunction with the DPP. The CCPC has also published a detailed Guidance Document on the *Cartel Immunity Programme*. It is expected that the existing programme will not be affected by the proposed immunity and leniency scheme. The DPP has flagged possible issues relating to admissibility of evidence in subsequent criminal prosecutions where that evidence is gathered from undertakings benefitting from the immunity and leniency programme. If this issue does eventuate, the transposition of the Directive could affect the existing capacity of prosecuting authorities to pursue criminal sanctions.

Mutual Assistance

Part 6 of the General Scheme (Heads 33 to 37) sets out proposed provisions for mutual assistance between the CCPC and other EU competition authorities. Mutual assistance between national competition authorities is provided for at EU level by Chapter VII of the Directive (Articles 24 to 28).

Under present Irish law, section 23 of the 2014 Act governs the relationship between the CCPC and other competition and consumer authorities.

Head 33 would transpose Article 24 of the Directive. It makes a number of provisions for the cooperation of a competent authority with competition authorities from other Member States.

The wording of the General Scheme differs slightly from the wording of the Directive. Subhead (1) includes the additional wording of “or other fact-finding measure” which is not included in the Directive, but it is included in Article 22 of the 2003 Regulation. The subhead also refers to carrying out inspection, interview, or other fact-finding measure “on behalf of” the applicant authority, leaving out the wording “and for the account of” included in the Directive.

Key Issue 11: The General Scheme is silent on what is meant by the term ‘other fact-finding measure’, a term that is not included in the Directive, the 2014 Act or the 2002 Act. The term is included in Article 22 of Council Regulation (EC) No 1/2003, but it is not defined. Further clarity may be required in this regard.

The CCPC has indicated that officials from other competition authorities who are attending or assisting an inspection, interview or other find-finding measure will have the same powers as staff of the CCPC. This may be in conflict with current powers under the 2014 Act, where some are conferred on CCPC staff, while others are conferred on authorised officers.

Head 34 would transpose Article 25 of the Directive and provides for the provision by a competition authority of certain information and documentation.

Head 35 would transpose Article 26 of the Directive. It provides for mutual assistance in the enforcement of decisions imposing administrative fines and periodic penalty payments and for such sanctions imposed in other Member States to be enforced in Ireland in certain circumstances.

Head 36 would transpose Article 27 of the Directive. It sets out general principles of cooperation between a requested authority and applicant authority across 19 subheads under the Head.

Head 37 would transpose Article 28 of the Directive, setting out which Member State's authority would hold competence with regard to disputes.

Procedural Provisions

Part 7 of the General Scheme, consisting of Heads 28 to 40, sets out a number of procedural provisions, including the role of competent authorities before the courts, access to a file by parties and limitations on the use of information, and the admissibility of evidence before national competent authorities.

Head 38 would transpose Article 30 of the Directive. It would provide that the CCPC or ComReg is empowered to bring actions before the courts in relation to the application of Articles 101 and 102 TFEU. This differs from the corresponding provision set out in the Directive, which requires Member States which designate both a "national administrative competition authority" **and** a "national judicial competition authority" to ensure that actions before the judicial authority may be brought by the administrative authority.

Ireland does not designate separate "National Administrative Competent Authorities" and "National Judicial Competent Authorities". Periodic penalty payments are to be imposed by National Administrative Competent Authorities only, which is understood by the European Commission as not including the courts.

Head 38(2) provides that CCPC or ComReg may act as a prosecutor, defendant or respondent, as appropriate, in proceedings taken in a court against the authority in relation to exercising certain powers provided for under the Bill.

Head 38(3) also proposes to grant an authority the right to appeal against a decision of a court pronouncing on a decision taken by CCPC or ComReg under Chapter IV and Articles 13 and 16 of the Directive. The General Scheme refers to the need to cross-reference this power against the relevant heads. These appear to be the provisions establishing administrative fines and periodic penalty payments.

Key Issue 12: Ireland does not differentiate between "National Administrative Competent Authorities" and "National Judicial Competent Authorities". However, the difference between the two bodies may be relevant to the imposition of periodic penalty payments, as, under the Directive, these may only be imposed by the national administrative competition authority.

Head 39 would transpose Article 31 of the Directive. This sets out the basis on which parties to enforcement proceedings may access a file of the proceedings, and also sets out which parts of a file may be used in a defence to proceedings.

Head 40 would transpose Article 32 of the Directive. It sets out the types of proof that are admissible as evidence before a competent authority.

National Law Provisions in the General Scheme

The final part of the General Scheme contains provisions that are to be introduced into Irish competition law, outside of the requirements of the Directive at the request of the CCPC or as recommended in the Hamilton review.

Bid-Rigging

Head 41 proposes to create a specific offence of bid-rigging. Bid-rigging occurs in procurement processes where the firms that bid under the process agree between themselves which firm submits the most economically advantageous tender (MEAT). Three types of bid-rigging are outlined in the General Scheme, and the practice enables firms to extract a higher price for the contract as the other firms would submit an inflated bid or do not bid at all.

Under the present law, bid-rigging is regarded as a form of price fixing or market sharing, offences prohibited by section 4(1)(a) and 4(1)(c) of the 2002 Act respectively.

The proposal for a specific offence of bid-rigging also follows the Recommendation of the Hamilton Review for such an offence. In contrast, the Law Society of Ireland has expressed reservations about creating a separate offence of bid-rigging, questioning the impact of a specific offence on judicial discretion and the separation of powers, as well as creating a situation where only specific anti-competitive requests are considered criminal offences by trial lawyers.

Key Issue 13: The offence of bid-rigging appears already to be provided for under the 2002 Act. It is considered a form of price-fixing or market-sharing. While bid-rigging is considered one of the most common competition law offences, some reservations have been raised about how it may impact judicial discretion and the separation of powers.

It is noteworthy that the Hamilton Review also recommended enabling the CCPC and other relevant bodies to access and process e-tenders' data for the purposes of detecting criminal activity, citing screening mechanisms developed internationally. It is understood that if additional powers are necessary, then these will be included in the drafting process undertaken with the Office of the Parliamentary Counsel.

Key Issue 14: The General Scheme does not appear to include provisions for the screening of e-tenders' data.

Voluntary notifications

Head 42 proposes to amend section 18 of the 2002 Act. It provides for voluntary notifications to the CCPC where the turnover threshold for a mandatory notification is not met.

Gun-Jumping as a Summary Offence

Head 44 would provide for the offence of "gun-jumping" to be a summary offence, prosecutable by the CCPC, under Irish law. Failure to notify the CCPC of a merger or acquisition is referred to as 'gun-jumping'. The offence may be prosecuted as a summary or an indictable offence, but only by the DPP. This Head would extend the ability to prosecute a summary offence to the CCPC.

Surveillance powers for cartel investigations

Head 49 would provide for powers to undertake surveillance for the purposes of cartel investigations. Under the Head 49(1), a competent authority may conduct covert surveillance on an undertaking, or an association of undertakings, suspected of committing an offence. However, it does not specify the offences covered.

Key Issue 15: As currently drafted, the General Scheme does not specify the offences for which covert surveillance may be conducted.

The Head is based on an understanding that the legislative basis for lawful intercepts is contained across three separate Acts. It also reflects the difficulties encountered by the CCPC in obtaining the content of communications, as it currently only has the power to obtain communications metadata. Certain forms of communication, including telephone conversations, internet chats and the covert taping of private meetings, are precluded under current rules.

It appears that powers providing for the interception of direct communications between cartel conspirators are, according to the General Scheme, already available in other jurisdictions.

The Head gives rise to certain issues that may require consideration:

- the absence of any provision for judicial oversight of the proposed powers, or of a time limit on the surveillance powers
- whether there is sufficient regard for cases requiring "urgent surveillance"
- the retention of data generated by surveillance
- allowing surveillance to be undertaken by any natural or legal person.

The Department acknowledges the importance of judicial oversight and the importance of safeguarding people's rights under the European Convention on Human Rights and the Charter of Fundamental Rights. It also indicated that when drafting the Bill, it would have to ensure that it is very clear that surveillance would be done with a warrant, also pointing out that a Garda is seconded to the CCPC all the time to assist the Commission.

Key Issue 16: As currently drafted, the General Scheme does not appear to address how the surveillance powers proposed will operate, including the level of oversight and compliance with the minimum requirements for the interception of communications in criminal investigations as identified by the case law of the European Court of Human Rights. The General Scheme also does not appear to include detail on how covert surveillance may operate with respect the admissibility of evidence.

Potential impact on the resources of competition authorities

The implementation of the proposed Bill will result in an increase in direct costs to the Exchequer. At the very least, the CCPC and ComReg will have need for additional staff resources. The costs of these resources have already been approved by the Government in Budget 2021, as part of a package of additional resources to allow the competition authorities to respond to the implementation of the Directive and Brexit.

As confirmed by the RIA, the additional costs associated with enforcement of the provisions of the General Scheme may indirectly be offset (at least in part) by the imposition and collection of administrative fines and periodic payments.

Additional Resources for Competition Authorities

In its consideration of the General Scheme, the Committee raised the issue of resources. In the 2021 Revised Estimate of Public Expenditure, the Competition and Consumer Protection Commission has been allocated €16,736,000 for 2021, an increase from €13,836,000 in 2020. The Department confirmed that it had taken account of the provisions of the General Scheme in the context of the allocation.

Administration of Justice issues

Administration of justice issues will inevitably arise from the use of sanctions and remedies by an administrative authority in response to behaviour deemed as infringing domestic law.

Article 29.4.6° of the Constitution provides that in the case of a conflict between European law and the Constitution, European law takes precedence. It follows that administration of justice arguments could not be used to question the imposition of sanctions by the CCPC or ComReg for a breach of Articles 101 or 102 TFEU (where there is a cross-border element to the infringement). The problem arises from the fact that the General Scheme aims to bring domestic competition law in line with EU law, as the provisions of the Constitution will directly apply to sanctions imposed under the domestic legal framework.

Article 37 of the Constitution allows for the exercise of “limited functions of a judicial nature” by bodies other than the courts. As noted in *Kelly: The Irish Constitution*, the questions that arise are ‘what constitutes an administration of justice’ and ‘what constitutes a limited function’.

Kenny J in *McDonald v Bord na gCon*, listed five criteria that could help define whether a civil process should be regarded as an administration of justice, and these criteria were applied to a regulatory context by Hedigan J in the case of *Purcell v Central Bank of Ireland*. The judge found that administrative fines issued by a regulatory body and confirmed by a court, and which are imposed within a well-defined regulatory process, do not amount to an administration of justice under Article 34.1 of the Constitution.

Civil versus Criminal sanctions

Further complicating the issue is Article 38.1 of the Constitution, which guarantees that “[n]o person shall be tried on any criminal charge save in due course of law.” In this regard, it is important to distinguish between a civil process and a criminal process. The leading authority on this question comes from the judgment of the Supreme Court in *Melling v O’Mathghamhna,* in which Lavery and Kingsmill Moore JJ highlighted the essential features of a criminal offence.

It is notable that administrative fines as proposed in the General Scheme do not involve the arrest and/or detention of suspects for questioning. Also, there does not appear to be any prospect of recourse to a criminal sanction for failing to pay the fine – as the General Scheme is silent on this, it may be assumed that the authority would need to pursue the defendant through civil courts to enforce the fine.

The right to fair procedures

One of the unenumerated rights in the constitution is the right to fair procedures. This constitutional right is also apparent in Article 47 of the EU Charter of Fundamental Rights – the right to an effective remedy and to a fair trial. It is notable that both of these provisions are reflected in Head 5(2) of the General Scheme.

The main issue that arises from this is that there is very little detail regarding how this provision could work in practice. The lack of detail in how the CCPC or ComReg would be expected to implement Head 5(2) may create grounds for a challenge in judicial review if the authority’s administrative act is considered *ultra vires*.

Privacy Issues under the ECHR

One of the central issues cutting through the General Scheme is the proposed introduction of surveillance powers for the CCPC.

The right to privacy is guaranteed by a number of international human rights instruments. Article 40.3 of Bunreacht na hÉireann also guarantees the protection of the personal rights of the citizen, and pursuant to this provision, the courts have identified privacy as a unenumerated right under Irish law.

Article 8 of the ECHR concerns the right to respect for private and family right. However, as outlined in paragraph 2 of Article 8, these rights are limited in certain circumstances, with one of these limitations being the application of surveillance by public authorities.

The case law of the ECtHR has considered the legislative basis for surveillance and the existence of appropriate safeguards from abuse.

In its meeting, the CCPC made the distinction between mass surveillance and the powers proposed in the General Scheme.

The Hamilton Review, at Chapter 6, considers the nature of corruption and economic crime and measures taken in other jurisdictions to counteract it.

A number of statutes already govern the law on surveillance and lawful interception in Ireland.

Appendices

Appendix 1: Membership of the Joint Committee

Deputies:	Maurice Quinlivan (SF) - Cathaoirleach
	Richard Bruton (FG)
	Francis Noel Duffy (GP)
	Joe Flaherty (FF)
	Paul Murphy (S-PBP)
	James O'Connor (FF)
	Louise O'Reilly (SF)
	Matt Shanahan (Ind)
	David Stanton (FG)
Senators:	Garret Ahearn (FG)
	Ollie Crowe (FF)
	Róisín Garvey (GP)
	Paul Gavan (SF)
	Marie Sherlock (Lab)

Appendix 2: Terms of Reference of the Joint Committee

a) Scope and Context of Activities of Committees (*derived from Standing Orders – DSO 84, SSO 70)*

1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil/and or Seanad;

3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993;

4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 111A; and

The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal officeholder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

5) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

b) Functions of Departmental Committees (derived from Standing Orders – DSO 84A and SSO 70A)

(1) The Select Committee shall consider and report to the Dáil on-

(a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and

(b) European Union matters within the remit of the relevant Department or Departments.

(2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.

(3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—

(a) Bills,

(b) proposals contained in any motion, including any motion within the meaning of Standing Order 187

(c) Estimates for Public Services, and

(d) other matters as shall be referred to the Select Committee by the Dáil, and

(e) Annual Output Statements including performance, efficiency and effectiveness in the use of public moneys, and

(f) such Value for Money and Policy Reviews as the Select Committee may select.

(4) Without prejudice to the generality of paragraph (1), the Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

(a) matters of policy and governance for which the Minister is officially responsible,

(b) public affairs administered by the Department,

(c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,

(d) Government policy and governance in respect of bodies under the aegis of the Department,

(e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

(f) the general scheme or draft heads of any Bill

(g) any post-enactment report laid before either House or both Houses by a member of the Government or
Minister of State on any Bill enacted by the Houses of the Oireachtas,

(h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,

(i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,

(j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (*d*) and (*e*) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and

(k) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—

(a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,

(b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(c) non-legislative documents published by any EU institution in relation to EU policy matters, and

(d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.

(6) Where the Select Committee has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.

(7) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

(a) members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,

(b) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(c) at the invitation of the Committee, other members of the European Parliament.

(8) The Joint Committee may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—

(a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 111F apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.