Seirbhís Leabharlainne 7 Taighde
Library & Research Service

Bill Digest

Competition (Amendment) Bill 2022

Bill No. 12 of 2022

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Abstract

The main purpose of the *Competition (Amendment) Bill 2022* is to transpose Directive (EU) 2019/1, also known as the ECN+ Directive into Irish law. The Bill provides for a system of non-criminal enforcement mechanisms and penalties for certain provisions of competition law, a leniency programme for certain undertakings, and increases in the penalties for certain criminal offences. The Bill also provides for new surveillance powers for the Competition and Consumer Protection Commission.

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Legal Disclaimer

Glossary of terms and abbreviations

Term	Description
Principal Act	*Competition Act 2002*
2002 Act	*Communications Regulation Act 2002*
2014 Act	*Competition and Consumer Protection Act 2014*
CCPC	Competition and Consumer Protection Commission
ComReg	Commission for Communications Regulation
Department	Department of Enterprise, Trade and Employment
DPP	Directive of Public Prosecutions
ECN	European Competition Network
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
Joint Committee	Joint Committee on Enterprise, Trade and Employment
MEAT	Most economically advantageous tender
Mens rea	Blameworthy state of mind which must accompany a criminal offence.
Nolle prosequi	Unwilling to prosecute – refers to a stay of proceedings entered by the prosecution before judgment. It is not an acquittal and does not prevent a new indictment at a later date.
PLS	Pre-legislative Scrutiny
RIA	Regulatory Impact Assessment
TFEU	Treaty on the Functioning of the European Union

Introduction

The *Competition (Amendment) Bill 2022* was published by An Tánaiste, Leo Varadkar TD, on 31 January 2022. An Explanatory Memorandum is also available in relation to the Bill. The main purpose of the Bill is to transpose Directive (EU) 2019/1, also known as the ECN+ Directive. The objective of the ECN+ Directive is to empower the competition authorities of the Member States to be more effective enforcers of European competition law, through its effective and consistent application by Member States through the European Competition Network (ECN). The Directive set a transposition deadline for Member States of 4 February 2021.

As well as to transpose the Directive, the Bill seeks to align the enforcement of domestic competition rules under sections 4 and 5 of the *Competition Act 2002* (the Principal Act) with those under the ECN+ Directive, as well as strengthening the powers of competition authorities in response to the Review of Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption (Hamilton Review). This includes the introduction of a specific offence of bid-rigging into section 4 of the Principal Act.

In order to achieve these objectives, the Bill proposes the following:

- A system of non-criminal enforcement of certain provisions of competition law. This includes the appointment of independent adjudication officers, and the issuing of prohibition notices in response to certain suspected infringements of competition law;
- A system of enforcement and non-criminal penalties in relation to certain breaches of competition law. This includes non-criminal structural and behavioural remedies and certain non-criminal financial sanctions. Processes for the appeal, remittal and confirmation of penalties by the High Court also provided for;
- A leniency programme in relation to certain undertakings; to provide for cooperation between competition authorities in the European Union and certain bodies in the State;
- Increases to the penalties for certain criminal offences for breach of competition law;
- Additional powers of surveillance to the Competition and Consumer Protection Commission in relation to the investigation of certain criminal offences; and
- The amendment of certain provisions relating to the procedure for notifying mergers to the relevant authorities.

The Bill is structured in terms of the legislation it is amending to implement the above changes:

- Parts 2 and 3 of the Bill – *Competition Act 2002*;
- Part 4 of the Bill – *Competition and Consumer Protection Act 2014*;
- Part 5 of the Bill – *Criminal Justice (Surveillance) Act 2009*
- Part 6 of the Bill – *Communications Regulation Act 2002*; and
- Part 7 of the Bill – *Consumer Protection Act 2007*;

Each of these Parts, and the sections they contain, are set out in the Table of Provisions below.

Table of provisions

The following table summarises the Bill's provisions. A more detailed discussion of some provisions is included in the Principal Provisions section of this document.

Table of Provisions of the *Competition (Amendment) Bill 2022*

Section	Title	Effect
Part 1 – Preliminary and General		
1	Short title, collective citation, construction and commencement	This is a standard provision that addresses the citation and commencement of the Bill.
2	Definitions	Sets out definitions for the Act of 2014 (*Competition and Consumer Protection Act 2014*) and the Principal Act (*Competition Act 2002*).
3	Transitional provisions	Sets out transition provisions in relation to investigations that begin on or after the commencement of section 12 of the Bill. It provides that: • In relation to suspected infringements of relevant competition law, that the unamended versions of Parts 2, 3, 4 and 6 apply to investigations of conduct that took place before 4 February 2021. The amended versions of these Parts are to apply to investigations of conduct that took place after this date. • Civil or criminal proceedings, investigations carried out by a competent authority, or DPP investigations related to suspected infringements of relevant competition law, which are open or pending on the date section 12 of the Bill is commenced, are to operated under the unamended versions of Parts, 2, 3, 4 or 6. This provision also carries over the definition of competent authority from the Principal Act and clarifies the term relevant competition law as sections 4 or 5 of the Principal Act or Articles 101 and 102 of the TFEU.
Part 2 – Amendments to Principal Act – Relevant Competition Law		
4	Amendment of section 3 of Principal Act	Inserts a number of new definitions into the Principal Act, including definitions for: • Act of 2002 • Act of 2014 • Article 16(1) periodic penalty payment • Article 16(2) periodic penalty payment • Administrative sanction • Breach of procedural requirement • Bid-rigging • Cartel

Section	Title	Effect
		• Directive • Enforcement proceedings • Hearing requirement • Hearing requirement periodic penalty payment • Notified undertaking • Periodic payment payment • Prohibition notice • Relevant competition law • Relevant Minister • Relevant recipient • Settlement submission • Structural or behavioural remedy. The definition for "authorised officer" is also substituted by this section.
5	Amendment of section 4 of Principal Act	Amends section 4 of the Principal Act to make express reference to an offence of bid-rigging.
6	Amendment of section 6 of Principal Act	Amends section 6 to add the additional requirements to the offences under section 4(1) of the Principal Act or Article 101(1) TFEU to provide that an undertaking must either intentionally or recklessly: - act to prevent, restrict or distort competition; or - make omissions having the effect of preventing, restricting or distorting competition. A further amendment is made to expressly include bid-rigging.
7	Amendment of section 7 of Principal Act	Amends section 7 to add the additional requirements to the offences under section 5(1) of the Principal Act or Article 102(1) TFEU to provide that an undertaking must either intentionally or recklessly: - act to prevent, restrict or distort competition; or - make omissions having the effect of preventing, restricting or distorting competition.
8	Limitation on certain prosecutions	Inserts a new section 7A and section 7B into the Principal Act Section 7A provides for a limitation on certain prosecutions, stating that undertakings shall not be prosecuted under section 6 (breaches of section 4(1) or Article 101(1) TFEU) unless the offence: - relates to agreements between competing undertakings, decisions by associations of undertakings or concerted practices, and - involves price fixing, market sharing, output restrictions, bid-rigging, collective boycott agreements, sharing information on future prices and production quantities or restricting certain undertakings' abilities in research and development.

Section	Title	Effect
		This has the effect of introducing a *mens rea* element to breaches under section 4(1) or Article 101(1)TFEU. Section 7B provides for a presumption in administrative proceedings that the objective of certain circumstances set out in the section is the prevention, restriction or distortion of competition. It also sets out a number of defences to administrative proceedings.
9	Amendment of section 8 of Principal Act	Amends section 8, which relates to penalties and proceedings in relation to offences under sections 6 and 7 of the Principal Act. It amends the penalties to increase the limits on fines for convictions on indictment from the greater of €5,000,000 or 10% of turnover to €50,000,000 or 20% of turnover.
10	Amendment of section 9 of Principal Act	Amends section 9, which relates to expert evidence, to expand references to courts to adjudication officers also. A further amendment is made to section 9(2) to provide that the powers of a court to direct that expert evidence is not admissible in proceedings under sections 6 and 7 of the Principal Act is expended to all proceedings under the Act.
11	Amendment of section 12 of Principal Act	Amends section 12(1) to expand presumptions under the section to include proceedings under Parts 2C to 2H (inserted by section 12 of the Bill below)
12	Insertion of Parts 2C to 2H into Principal Act	Inserts six new Parts into the Principal Act, Parts 2C to 2H, which consist of 51 new provisions in total: Part 2C – Investigations • Section 15G: Conduct of certain investigations • Section 15H: Prohibition notice • Section 15I: Appeal against prohibition notice • Section 15J: Ending of effect of prohibition notice • Section 15K: Choice of enforcement mechanism • Section 15L: Statements of objections • Section 15M: Referral • Section 15N: Withdrawal of referral Part 2D – Adjudication officers • Section 15O: Appointment of adjudication officers • Section 15P: Independence of adjudication officers • Section 15Q: Regulations for appointment and independence of adjudication officers • Section 15R: Appointment of assistants to adjudication officers • Section 15S: Effect of appointment of an adjudication officer upon terms of employment or contract • Section 15T: Division of adjudication officers • Section 15U: Action by adjudication officer after receiving referral

Section	Title	Effect
		• Section 15V: Admissibility of Evidence and Rules for Oral Hearings • Section 15W: Powers and offences • Section 15X: Decision by the adjudication officer • Section 15Y: Notice of decision • Section 15Z: Structural or behavioural remedies • Section 15AA: Administrative financial sanctions • Section 15AB: Calculation of administrative financial sanctions • Section 15AC: Maximum amount of administrative financial sanctions • Section 15AD: Periodic penalty payments • Section 15AE: Commitments • Section 15AF: Guidelines • Section 15AG: Conduct of investigations Part 2E – Leniency programme • Section 15AH: Definitions (Part 5) • Section 15AI: Immunity from administrative financial sanction • Section 15AJ: Reduction in administrative financial sanction • Section 15AK: General conditions for leniency • Section 15AL: Form of leniency statements • Section 15AM: Markers for applications for leniency from administrative financial sanctions • Section 15AN: Summary applications for leniency • Section 15AO: Relationship between applications for immunity from administrative financial sanctions and sanctions on natural persons • Section 15AP: Leniency programme for other infringements Part 2F – Mutual Assistance • Section 15AQ: Cooperation with other competition authorities • Section 15AR: Requests for the notification of preliminary objections and other documents • Section 15AS: Requests for the enforcement of decisions imposing administrative financial sanctions or periodic penalty payments • Section 15AT: General principles of cooperation • Section 15AU: Disputes concerning requests for notification or enforcement of decisions imposing administrative fines or periodic penalty payments Part 2G – Procedural provisions • Section 15AV: Access to file by parties and limitations on the use of information

Section	Title	Effect
		• Section 15AW: Admissibility of evidence before national competent authorities • Section 15AX: Confidentiality rings Part 2H – Appeals, confirmations and judicial review • Section 15AY: Appeal against certain decisions • Section 15AZ: Court confirmation of decision on certain administrative sanctions • Section 15AAA: Judicial review • Section 15AAB: Appeals to the Court of Appeal • Section 15AAC: Conduct of proceedings • Section 15AAD: Treatment of amounts paid in respect of administrative financial sanctions • Section 15AAE: Recovery of amounts of administrative financial sanctions and periodic penalty payments due.
Part 3 – Miscellaneous Amendments to Principal Act		
13	Amendment of section 18 of Principal Act	Inserts two new subsections into section 18 which would allow for voluntary notifications of a merger that does not meet the turnover threshold in the section and for the CCPC to review the merger and take interim measures.
14	Insertion of sections 18A and 18B into Principal Act	Inserts a new section 18A into the Principal Act, which would allow the CCPC to require undertakings that do not meet the threshold obliging them to notify it to make such a notification, if the CCPC is of the opinion that the merger may have an effect on competition in the market for goods and services in the State. Section 18B would empower the CCPC to apply interim measures in respect of mergers notified under sections 18(1), 18(3), 18(3A), 18(12A) or 18A.
15	Amendment of section 19 of Principal Act	Amends section 19(2) of the Act to provide that a merger or acquisition to which sections 18(1), 18(3) or 18A(1) is void until a determination is made by the CCPC under section 21(2)(a) or under section 22(3). Also amends the definition of an appropriate date under section 19(6) and provides for a new offence where a merger or acquisition is put into effect, or purports to be put into effect, before a determination is made by the CCPC or the period for doing so has elapsed.
16	Amendment of section 20 of Principal Act	Provides for the substitution of a new section 20(2) to provide that the CCPC, in its consideration of a merger or acquisition, may require further information from one or more undertakings involved in the merger, or any other person or undertaking that it considers may have relevant information. It also makes changes to sections 20(2A) and 20(2B) to account for the substitution of section 20(2).
17	Amendment of section 22 of Principal Act	Provides for amendments to section 22 of the Principal Act to allow the CCPC to make a determination that a merger or

Section	Title	Effect
		acquisition be unwound or dissolved or, if this is not possible, that the undertakings involved take steps to restore as far as practicable the pre-merger / acquisition position.
18	Amendment of section 47B of Principal Act	This amends section 47B of the Principal Act, which relates to the delegation of functions of ComReg, to provide that it may not delegate its functions in relation to administrative sanctions proceedings.
19	Amendment of section 47E of Principal Act	This amends section 47E of the Principal Act, which relates to the settlement of disputed questions between the CCPC and ComReg, to extend this provision to functions conferred on competent authorities under Parts 2C and 2D, which are proposed to be inserted by section 12.
20	Amendment of section 47H of Principal Act	Inserts a new section 47H into the Principal Act, which relates the liability of the competent authority, its members, adjudications officers under the Act and employees and agents of the competent authority. It provides that such persons are not liable for damages and proceedings for damages may not be maintained unless it is proved that the person acted in bad faith. Provision is also made for the competent authority to indemnity persons to whom the section applies if it is satisfied that they acted in good faith.
21	Amendment of section 52 of Principal Act	Inserts a new section 52(3) which requires the Minister for Enterprise, Trade and Employment to consult with the Minister for the Environment, Climate and Communications when making regulations under Parts 2C to 2H that relate wholly to the CCPC, or jointly to the CCPC and ComReg. This operates *vice versa* when the Minister for the Environment, Climate and Communications makes regulations that relate wholly to ComReg.
Part 4 – Amendments to Act of 2014[1]		
22	Amendment of section 2 of Act of 2014	Inserts a definition for "relevant competition law" to the effect that it has the same meaning as the Principal Act.
23	Amendment of section 10 of Act of 2014	Amends section 10, which relates to the functions of the CCPC, to provide that it may delegate its functions to an authorised officer of the CCPC. It also provides that the CCPC may not delegate its functions under the proposed Parts 2C to 2H which are to be inserted by section 12 of the Bill.
24	Amendment of section 18 of Act of 2014	Amends section 18, which relates to investigations by the CCPC, so that offences provided for by section 18(4) to not

[1] This section refers to the Principal Act instead of the "Act of 2002", which is the term used in the Bill, as these terms both refer to the Competition Act 2002.

Section	Title	Effect
		apply in relation to investigations, hearings or any other matters under the proposed Part 2C.
25	Amendment of section 20 of Act of 2014	Amends section 20 to provide that directions of the Minister under the section cannot be given or applied to adjudication officers appointed under section 15O of the Principal Act, and assistants to adjudication officers appointed under section 15R of the Principal Act.
26	Amendment of section 24 of Act of 2014	This is a consequential amendment to account for the insertion of section 15AV into the Principal Act.
27	Amendment of section 25 of Act of 2014	Amends section 25, which prohibits the unauthorised disclosure of confidential information, to extend its provisions to adjudication officers. References to the CCPC are also extended to competent authority.
28	Amendment of section 27 of Act of 2014	Substitutes section 27, which relates to accountability to other Oireachtas Committees, to extend its applicability from the chairperson of the CCPC to members of the CCPC. It also amends a provision not requiring an account to be given to Committees on proceedings before a court or tribunal to proceedings before adjudication officers.
29	Amendment of section 33 of Act of 2014	Amends section 33, which protects privileged legal material, to extend its provisions from the High Court to adjudication officers in respect of proceedings under the proposed Parts 2C, 2D and 2G of the Principal Act.
30	Amendment of section 34 of Act of 2014	Amends section 34 to substitute a new definition for “records” to include any form of data or digital communications.
31	Amendment of section 37 of Act of 2014	Amends section 37, which relates to the powers of authorised officers in relation to investigations under the Principal Act. This provision expands the powers of authorised officers with regard to entry and search, seizure, access to documents and records and the securing of records, documents or any other matters.
32	Requests for information relating to investigations	Inserts a new section 37A into the 2014 Act, which provides for ComReg or an authorised officer it appoints under section 39 to require a person or undertaking to provide them with information connected to, or reasonably necessary for, the investigation.
Part 5 – Surveillance		
33	Surveillance	Makes a series of amendments to the *Criminal Justice (Surveillance) Act 2009* to extend its provisions to the Competition and Consumer Protection Commission and allow it to undertake surveillance functions.
Part 6 – Amendment of Communications Regulation Act 2002		
34	Amendment of section 34 of *Communications Regulation Act 2002*	Amends section 34 of the Act to provide that the Chairperson of the Commission shall not be required to give evidence in

Section	Title	Effect
		relation to, or account for, the functions of authorised officers appointed in respect of ComReg.
35	Amendment of section 39 of *Communications Regulation Act 2002*	Amends the current section 39 of the Act, which relates to the functions and powers of ComReg authorised officers to provide for separate powers regarding the obtaining any information that may be required in relation to a matter under investigation under relevant competition law.
36	Amendment of section 38D of *Communications Regulation Act 2002*	Amends section 38D of the Act, which relates to the offence of failing to appear before the Commission, to provide that an offence is not committed where the requirement to appear was made in relation to an investigation, hearing or any other matter under Part 2C of the Competition Act 2002.
37	Requests for information relating to investigations	Inserts a new section 39A into the Act, which provides for ComReg or an authorised officer it appoints under section 39 to require a person or undertaking to provide them with information connected to, or reasonably necessary for, the investigation. This mirrors the amendment made by section 32 above.
38	Amendment of section 40 of *Communications Regulation Act 2002*	Amends section 40 of the Act, which relates to search warrants, to extend the granting of warrants to information required by an authorised officer for the purposes of ComReg exercising its functions under relevant competition law, in addition to the functions stated in that section.
Part 7 – Amendment of Consumer Protection Act 1997		
39	Amendment of *Consumer Protection Act 2007*	Amends Schedule 9 of the Consumer Protection Act 2007, which sets out relevant statutory instruments in that Act, to add the following statutory instruments: • European Union (Low Voltage Electrical Equipment) Regulations 2016[2]; and • European Union (Personal Protective Equipment) Regulations 2018[3]

Source: Competition (Amendment) Bill 2022

[2] S.I. No. 345 of 2016.

[3] S.I. No. 136 of 2018.

Background

The main purpose of the *Competition (Amendment) Bill 2022* is to transpose the ECN+ Directive into Irish law. It also makes further amendments to Irish competition law, including the introduction of a specific bid-rigging offence, new requirements around the voluntary notification of mergers and acquisitions, gun-jumping (where a notifiable merger or acquisition has started without notification), the unwinding of mergers and acquisitions, and the introduction of surveillance powers. Finally, it makes the necessary amendments to align Irish and European competition provisions.

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 primary purpose of the Bill is to transpose Directive (EU) 1/2019 (known as the ECN+ Directive) into Irish law.[4] Article 1 of the Directive maintains three core elements to its subject matter and scope:

1. It sets out certain rules to ensure that national competition authorities (NCAs) have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to apply Articles 101 and 102 TFEU so that competition in the internal market is not distorted and that consumers and undertakings are not put at a disadvantage by national laws and measures which prevent NCAs from being effective enforcers;
2. It covers the application of Articles 101 and 102 TFEU and the parallel application of national competition law to the same case. As regards Articles 31(3) and (4) of the Directive, it also covers the application of national competition law on a stand-alone basis; and
3. It sets out certain rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the European Competition Network (ECN).[5]

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.[6] The structure of the ECN+ Directive is set out in the below table.

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[4] 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, OJ L 11/3, 14.1.2019.

[5] Article 1, Directive (EU) 2019/1; The network of public authorities formed by the national competition authorities and the Commission to provide a forum for discussion and cooperation as regards the application and enforcement of Articles 101 and 102 TFEU: see Article 2.1(5).

[6] See Recital 3 to 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, OJ L 11/3, 14.1.2019.

Table: Structure of the ECN+ Directive

Directive Chapter & Provisions	Objective
I (Arts. 1-2)	Subject matter, scope and definitions
II (Art. 3)	Fundamental rights
III (Arts. 4-5)	Independence and resources
IV (Arts. 6-12)	Powers of NCAs
V (Arts. 13-16)	Fines and periodic penalty payments
VI (Arts. 17-23)	Leniency programmes for secret cartels
VII (Arts. 24-28)	Mutual assistance
VIII (Art. 29)	Limitation periods
IX (Arts. 30-33)	General provisions
X (Arts. 34-36)	Final provisions

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.[7] Member States are obliged to ensure that NCAs are provided with a sufficient number of qualified staff and sufficient financial, technical and technological resources necessary for the effective performance of their duties.[8]

Under Chapter IV of the Directive, Member States are required to implement legislation to provide NCAs with:

- powers of inspection;[9]
- powers to require undertakings to provide information in accordance with formal requests;[10]
- powers to conduct interviews;[11]
- powers to make findings on infringements and impose behavioural or structural remedies to bring the infringement to an end;[12]
- powers to implement interim measures on undertakings to mitigate against potential damage caused by anti-competitive behaviour;[13] and
- powers to make binding any commitments offered by undertakings.[14]

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[7] 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, OJ L 11/3, 14.1.2019, Article 4.

[8] Ibid, at Article 5.

[9] Ibid, at Articles 6 and 7.

[10] Ibid, at Article 8.

[11] Ibid, at Article 9.

[12] Ibid, at Article 10.

[13] Ibid, at Article 11.

[14] Ibid, at Article 12.

Chapter V of the Directive empowers NCAs to calculate and then impose effective, proportionate, and dissuasive fines on undertakings. The fines may be imposed either directly through their own enforcement proceedings, or by a request through non-criminal judicial proceedings. NCAs are also empowered to apply periodic penalty payments on undertakings for continued acts of non-cooperation.[15]

Chapter VI requires NCAs to establish a leniency programme to enable them to grant immunity from fines or a reduction in fines to undertakings for disclosing their participation in secret cartels. Leniency would be offered on a first-come basis, with undertakings wishing to apply for leniency being initially granted a place in the queue if requested. Leniency may only be offered if the undertaking that comes forward proffers evidence of the alleged secret cartel which represents significant added value for the purpose of proving an infringement covered by the leniency programme. Undertakings seeking leniency must submit a leniency statement in a prescribed form and must be in position to satisfy the general conditions of leniency as set out in Article 19 of the Directive. Leniency would not be available to undertakings that have taken steps to coerce other undertakings to join a secret cartel or to remain in it.[16]

The Directive provides for increased cooperation between NCAs across the EU through a mutual assistance programme for the enforcement of decisions that impose fines or periodic penalty payments. The Directive also augments the way in which NCAs across the EU can cooperate with each on an operational level.[17]

Article 29 of the Directive requires that any limitation periods are suspended for the duration of enforcement proceedings. While Article 30 requires Member States to grant NCAs the right to appear in court their own right as a prosecutor, defendant or respondent in proceedings. The Directive also includes provisions to protect an undertaking's right to access to files and sets limits on the use of information. Appropriate safeguards are also required in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal.[18]

EU and domestic legislation

At this point, it is also important to distinguish between infringements of Articles 101 or 102 TFEU and infringements of sections 4 or 5 of the Principal Act. While sections 4 and 5 of the Principal Act cover infringements of both domestic and EU competition law, an infringement of Article 101 or 102 requires an element of trade between Member States. Although the ECN+ Directive only requires Member States to transpose the provisions in relation to cross-border infringements, the Bill seeks to apply the provisions of the Directive to infringements of domestic competition law as well. The Bill addresses this is by introducing the concept of "relevant competition law", which it provides as referring to both sections 4 and 5 of the Principal Act and to Articles 101 and 102 TFEU. The enforcement provisions introduced by the Parts 2C to 2H of the Principal Act proposed by the Bill, which primarily relate to relevant competition law.

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[15] Ibid, at Articles 13-16.

[16] See ibid, at Articles 17-23.

[17] Ibid, at Articles 24-28.

[18] See Ibid, at Articles 3 and 29-31.

Infringement proceedings

Under Article 258 TFEU, the European Commission may launch infringement proceedings against a Member State that fails to transpose EU rules into its national law, which consists of two steps:

- A reasoned opinion issued by the European Commission to the Member State after giving the Member State an opportunity to submit its observations; and
- If the Member State does not comply with the reasoned opinion, the European Commission may bring the matter before the Court of Justice of the European Union.

At present, the infringement process does not appear to have reached the reasoned opinion stage.[19]

National Competition Authorities

The Competition and Consumer Protection Commission (CCPC) was established by the *Competition and Consumer Protection Act 2014* (2014 Act). The 2014 Act amalgamated the Competition Authority and the National Consumer Agency into the CCPC (a combined competition and consumer watchdog), conferring their powers on the new body. The 2014 Act made a number of amendments to the *Competition Act 2002* (Principal Act) and the *Consumer Protection Act 2007*.

With regard to competition law, under section 10 of the 2014 Act, the CCPC's main functions include:

- promoting competition;
- carrying out investigations into suspected breaches of competition law;
- enforcing competition law; and
- encouraging compliance with competition law, including by publishing practical guidance on how to comply with the law.

Under Part 4A of the Principal Act, the Communications Regulator (ComReg) is given similar jurisdiction over the field of electronic communications networks, services and associated facilities.

Under section 4 of the Principal Act, all agreements and practices that have a purpose of prevention, restriction or distortion of competition in the trade in any goods or services in the State are considered void. This would include acts that have the effect of:

- fixing prices;
- limiting or controlling production or markets;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions; and
- tying supplementary conditions to the conditions of sale.

Section 5 of the Principal Act complements section 4 by prohibiting abuse of a dominant market position by an undertaking. Article 101 and Article 102 TFEU prohibit the same conduct as that prohibited by sections 4 and 5 respectively. The difference is that to activate the provisions of

[19] See https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions [accessed 7 February 2022]. A search for Ireland in relation to the ECN+ Directive appears to indicate that a decision on a letter of formal notice was made on 18 March 2021.

TFEU it must be shown that the conduct in question may affect trade between member states of the EU.

Finally, under Parts 3 and 3A of the Principal Act, the CCPC is also given responsibility for the enforcement of the law dealing with mergers and acquisitions in Ireland.

Current sanctions for breaching competition law

Regarding competition law in Ireland, depending on the type of breach, criminal or civil sanctions may apply.

Criminal sanctions

Section 6 of the Principal Act makes a breach of section 4 (anti-competitive agreements, decisions and concerted practices) an offence, while section 7 of the Principal Act makes breach of section 5 (abuse of dominant position) an offence. At present, the offence need only take place without any provision for intention or recklessness on the part of the undertaking, meaning the offences are considered to occur under strict liability.

Under section 8 of the Principal Act, these offences may be subject to either a summary conviction (Class A fine, currently an amount of up to €5,000 and, in the case of a breach by a natural person, imprisonment for up to 6 months) or an indictable conviction (up to €5,000,000 or 10 per cent of turnover, whichever is greater and, in the case of a breach by a natural person, imprisonment for up to 10 years). Where an individual is sentenced to a prison term, section 8(11A) provides that he or she is not eligible for probation.

The CCPC has explained that pursuing an indictment is generally reserved for 'hardcore' breaches, such as cartel behaviour that consists of:

- fixing or agreeing prices with competitors, including the level of price increases or discounts;
- sharing markets among competitors by dividing up territories or groups of customers;
- agreeing with competitors to artificially control the quantity of goods or services to be supplied in a market; and
- rigging bids so that a particular tender wins a contract.

Civil sanctions

Section 14A of the Principal Act gives the CCPC (and ComReg) a direct right of action for relief in respect of a breach of sections 4 or 5 of the Principal Act or a breach of Articles 101 or 102 TFEU. The action may be brought in the Circuit Court or in the High Court and may seek relief from an undertaking or an officer of an undertaking in the form of an injunction or a declaration. There is also recourse to a negotiated compliance agreement provided for in section 14B of the Principal Act. However, this procedure may not be exercised by the National Competition Authorities (NCAs) without the consent of the alleged infringing party.

In Ireland, the CCPC, ComReg, the DPP and the Courts are all NCAs for the purposes of EU competition law.[20] As explained by the CCPC, currently, courts do not have the power to impose

[20] Leo Varadkar T.D., Tánaiste and Minister for Enterprise, Trade and Employment, 'Response to Parliamentary Question No. 183 – Legislative Measures', *Dáil Éireann Debate*, 17 December 2020.

any form of civil financial penalty for breaches of competition law, and neither the CCPC nor ComReg have the power to independently impose administrative fines for breaches.

The current inability to apply civil fines was highlighted by the Department to the Joint Committee during Pre-Legislative Scrutiny on 2 February 2021, where the Department stated the following:

> "The Commission highlighted divergences in national powers, procedures and sanctions available to NCAs, which has resulted in uneven enforcement of EU competition rules. The Commission made direct reference to the inability of Irish NCAs to impose civil fines"[21]

Engaging with the Committee on 23 February 2021, ComReg also referred to the issue of fines:

> "Ireland is one of only two EU member states that do not already have a system of administrative fines for breaches of competition law. This means we rely solely on criminal enforcement for financial sanctions of competition law breaches. However, the evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof mean that criminal prosecution is neither practical nor appropriate in most competition law cases."[22]

At present, fines can only be applied by a court and a criminal standard of proof is applied, that is, beyond reasonable doubt. The level of fines compared to other Irish regulators and Member States has also been highlighted by practitioners. In the 25 years of competition enforcement in Ireland between 1996 and 2021, only €323,000 has been levied in fines.[23] When compared to Member States with a similar GDP to Ireland, the following totals were applied in 2019:

- Austria: €1,800,000
- Finland: €9,165,000
- Portugal: €340,000,000[24]

In its original proposal for the Directive, the European Commission noted that the national law of some Member States prevents NCAs from imposing effective fines for infringements of EU competition rules. It further states that:

> "… [i]nfringing companies present in Member States where NCAs lack effective fining powers are thus sheltered from sanctions and have little incentive to act in compliance with EU competition rules. This reinforces market distortions through-out Europe and undermines the internal market. Moreover, the differences between the Member States in the core principles for leniency programmes mean that companies can be treated differently depending on which authority acts. Only action at EU level can ensure that there are

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[21] Department of Enterprise, Trade and Employment, Opening Statement, Pre-legislative Scrutiny of the General Scheme of the Competition (Amendment) Bill 2021, 2 February 2021.

[22] Mr Garrett Blaney, Chairperson, Communication for Communications Regulation, Pre-legislative Scrutiny of the General Scheme of the Competition (Amendment) Bill 2021: Discussion (Resumed), *Committee Debate*, 23 February 2021.

[23] McCann Fitzgerald, Get Ready for ECN+ Antitrust Overhaul in Ireland - Topic 1: A New Risk of Competition Law Fines? (webpage), 30 March 2021 [accessed 7 February 2022].

[24] Ibid.

> common core principles for granting leniency, thus providing a more level playing field for businesses."[25]

The European Commission also referenced the 2009 European Court of Justice decision in *Inspecteur van de Belastingdienst v X BV*, where the court ruled that the "effectiveness of the penalties imposed by NCAs and the Commission is a condition for the coherent application of the EU competition rules".[26]

Articles 13 to 16 of the Directive set down the provisions in relation to fines on undertakings / associations of undertakings. Article 13 sets down a requirement on Member States to ensure that national administrative competition authorities may either "impose by decision in their own enforcement proceedings, or request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU".[27] Articles 14 and 15 set down EU requirements for the calculation and maximum amounts of fines respectively, while Article 16 sets down the requirements for periodic penalty payments.[28]

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[25] European Commission, Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final [accessed 7 February 2022], at p.5.

[26] Ibid, at p.16, citing *Inspecteur van de Belastingdienst v X BV*, C-429/07, ECLI: EU:C:2009:359, at [36] to [39].

[27] 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, OJ L 11/3, 14.1.2019, Article 13.

[28] Ibid, Articles 14 to 16.

Policy and Legislative Context

This section sets out some of the main policy and legislative considerations in relation to the Bill. These include the constitutional considerations regarding the administration of justice and the right to privacy, as well as the level of fines currently levied by the CCPC. It also considers the policy context in relation to bid-rigging and gun-jumping, and the extension of surveillance powers to the CCPC.

As part of a 2012 submission to the Law Reform Commission, four regulators, including ComReg and the then Competition Authority, outlined the need for enforcement powers to be a meaningful deterrent:

> " …To be effective the threat of enforcement must be real. This means that an enforcement procedure must be timely and efficient, particularly where there are high value dynamic markets and limited resources with which to regulate them."[29]

The submission also stated that fines would be a very effective method of deterrence, but noted that there is a perceived constitutional difficulty, which it also observed has never been definitively pronounced upon by the courts.[30] One of the central issues is whether the application of sanctions and remedies is an administration of justice.

Administration of Justice

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 34.1 of the Constitution provides:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

However, 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 Bill 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 tempers the requirement in Article 34.1, allowing for the exercise of "limited functions of a judicial nature" by bodies other than the courts. As noted in *Kelly: The Irish*

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[29] Commission for Communications Regulation, The National Competition Authority, Commission for Energy Regulation, Irish Medicines Board. Submission to the Law Reform Commission Proposed New Programme of Law Reform 2012. Enforcement of Competition and Regulatory Law: The Case for Reform, 14 December 2012 [accessed 7 February 2022].

[30] Ibid.

Constitution, the questions that arise are 'what constitutes an administration of justice' and 'what constitutes a limited function'.[31]

Kenny J in *McDonald v Bord na gCon*,[32] listed five criteria that could help define whether a civil process should be regarded as an administration of justice, notably, does the process involve:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment; and
5. The making of an order by the Court, which as a matter of history is an order characteristic of Courts in this country.[33]

These criteria were applied to a regulatory context by Hedigan J in the case of *Purcell v Central Bank of Ireland*.[34] The judge found that administrative fines that were 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 to the above, Article 38.1 of the Constitution 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,*[35] in which Lavery and Kingsmill Moore JJ highlighted the following essential features of a criminal offence:

1. its character as an offence against the community;
2. the detention or taking custody of a suspect and/or the entry of a criminal charge;
3. the punitive nature of the sanction;
4. the requirement of *mens rea.*[36]

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[31] Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (5th edn. Bloomsbury, 2018) paras. [6.1.13] – [6.1.44].

[32] *McDonald v Bord na gCon* [1965] IR 217, available here.

[33] Ibid, at 231, available here.

[34] *Purcell v Central Bank of Ireland* [2016] IEHC 514, available here.

[35] *Melling v O'Mathghamhna* [1962] IR 1.

[36] Ibid. *Mens rea* is a legal term meaning "guilty mind". It reflects a basic criminal law principle that a person can usually only be convicted of an offence if it was an intentional or reckless act. It is the mental element of an offence.

In *Purcell*, referring to administrative financial penalties, Hedigan J stated "none of the *indicia* of a criminal offence identified in *Melling v O'Mathghamhna* are present".[37]

The issues relating to the administration of justice and how they apply to the imposing of administrative financial sanctions are considered in further detail in the L&RS Spotlight published on this subject in 2019.[38]

Recent developments

In the 2021 decision of the Supreme Court in *Zalewski v Workplace Relations Commission*, the court further considered the requirements for determining what constitutes the administration of justice. In doing so, it found that the adjudication procedure of the WRC amounted to an administration of justice, but stopped short of holding it as constitutionally repugnant as it was an administration of justice permitted by Article 37 of the Constitution (i.e it involved "the exercise of limited functions and powers of a judicial nature").[39] The court did, however, comment on some of the procedural elements of the WRC process, holding that there is no "justification for a blanket prohibition on hearings in public before the adjudication officer", and also criticised the absence of an oath in WRC hearings.[40]

The court considered the *McDonald* criteria outlined above and concluded that these must be applied with some flexibility. As stated by O'Donnell J in his judgment:

> "The administration of justice is not, however, to be defined by, or limited to, those areas traditionally dealt with by the courts. The proper scope of the administration of justice is not determined simply by analogy with what was done by the courts as a matter of history, and still less by the form of orders traditionally made by them. It may be possible to say, even if no single test can be advanced, that an area is something intrinsically within the scope of the administration of justice. …
>
> Even if it is considered an impossible task, as a matter of pure theory, to define with precision the exact boundaries of the administration of justice or to offer a single infallible litmus test, we can still identify areas which can be agreed to be part of the administration of justice."[41]

O'Donnell J also addressed the issue of the independence of an adjudication officers and stressed that "[i]ndependence and impartiality are fundamental components of the capacity to administer justice", further noting that:

> "… [t]hese considerations are not peculiar to the Irish constitutional order: guaranteed impartiality and independence are also essential requirements for any adjudication within

[37] *Purcell v Central Bank of Ireland* [2016] IEHC 514 at para. 8.8.

[38] Oireachtas Library & Research Service, 2019, *Spotlight: Administrative financial sanctions*.

[39] *Zalewski v The Workplace Relations Commission* [2021] IESC 24.

[40] Ibid, *per* O'Donnell J at [142] and [144].

[41] Ibid, *per* O'Donnell J at [96].

> the scope of European law, or in accordance with Article 6 E.C.H.R. and the jurisprudence of the E.Ct.H.R."[42]

A more detailed analysis of the decision in *Zalewski* is included in the Bill Digest on the *Workplace Relations (Miscellaneous Amendments) Bill*.[43]

While the above decision concerned employment law, it did have some implications for the drafting of the Bill. The RIA outlines the approach of the Department in response to the judgment:

> "Transposing the ECN+ Directive raised significant constitutional considerations, given the particular role of the Courts in the Irish Constitution and particularly in light of the *Zalewski* judgement. The constitutional concerns included the introduction of the concept of administrative sanctions, periodic penalty payments, interim measures and leniency provisions. All of these issues have required careful drafting of the provisions to transpose the ECN+ Directive originally, and again in light of the *Zalewski* judgement, to ensure that they are robust both in terms of European law and lie within the limits of Article 37 of the Constitution on the administration of justice outside the Courts system which the Supreme Court judgement has clarified." The main changes to the General Scheme on foot of the *Zalewski* judgement have been around ensuring the independence of the adjudication procedures from the investigation process, and independence of adjudication officers in doing their work, as well as clarity around procedures and transparency across the various procedures and potential imposition of administrative financial sanctions. The Bill also has provision for Court confirmation of the decision of adjudication officers, as well as for appeal to the Court of those decisions of adjudication officers."[44]

The RIA goes on to explain that the main changes arising from the decision in *Zalewski* relate to ensuring the independence of adjudication procedures from the investigation process and of adjudication officers in their work, as well as clarity around procedures and transparency relating to the imposing of administrative financial sanctions.[45] Procedures for the confirmation of decisions and appeal of decisions to the High Court are also provided for in the Bill.[46]

National Competition Law

While the Bill transposes the ECN+ Directive, it also seeks to make amendments to national competition law also. These include the extension of the enforcement powers, provided for in the Directive in respect of EU competition law, to national competition law also. Furthermore, the Bill makes specific amendments to national competition law, including the creation of a separate offence of bid-rigging, provisions regarding mergers and acquisitions, including the prosecution of

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[42] Ibid, *per* O'Donnell J at [147].

[43] Oireachtas Library & Research Service, 2021, *L&RS Bill Digest: Workplace Relations (Miscellaneous Amendments) Bill 2021*, at pp.8-11.

[44] Department of Enterprise, Trade and Employment, Regulatory Impact Assessment, Competition (Amendment) Bill 2021, December 2021, at p.11.

[45] Ibid.

[46] Ibid, See also Principal Provisions below. Parts 2C to 2H set out the provisions relating to the adjudication process proposed by the Bill.

'gun-jumping' as a summary offence by the CCPC, and the creation of surveillance powers for cartel investigations by the CCPC.

Bid-rigging

The term 'bid-rigging' refers to a form of cartel behaviour in procurement processes, where the firms that bid under the process agree between them which firm submits the most economically advantageous tender (MEAT). The practice allows firms to extract a higher price for the contract up for procurement, as the other firms either submit inflated bids or don't bid at all. There are three forms of bid-rigging highlighted by the CCPC, set out below:

- **Bid suppression:** Bidders that would normally be expected to bid agree not to submit a bid, or withdraw a bid, so another party can win. This also removes the incentive to bid as low as possible.
- **Cover bidding:** Widely known as protective bidding or shadow bidding, which occurs when parties agree to submit artificially high tenders that cannot be selected, allowing for one of the other firms to win the contract.
- **Bid rotation:** Bidders take turns at being the winning bidder and may agree to take turns based on the size of the contract. [47]

At present, the offence is considered a form of price-fixing or market sharing, which are prohibited by section 4(1)(a) and section 4(1)(c) of the Principal Act respectively.

Consideration of this practice has led to proposals for a specific offence of "bid-rigging" to be created. The Hamilton Review has described bid-rigging as "a criminal activity carried out by cartels as a means of subverting this process and ensuring that the tenderer does not get value for money".[48] The Hamilton Review has also made a recommendation for the creation of an offence of 'bid-rigging' and noted that:

> "…[s]ubmissions received indicate that such an approach would be helpful to the work of the CCPC as bid-rigging is the most common form of cartel activity encountered in its work."[49]

The Hamilton Review also noted that the CCPC advised the review group that bid-rigging accounts for the majority of files it sends to the DPP, and also accounts for a high proportion of cases taken by competition authorities internationally.[50] The RIA references the difficulties experienced with taking cases before the courts as a rationale for introducing a specific offence.[51] Instances of bid-rigging have nonetheless been prosecuted under section 4 of the Principal Act.[52]

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[47] Competition and Consumer Protection Commission, Bid rigging – what you need to know (Business Guide) [accessed 7 February 2022], at p.3.

[48] Report of the Review Group, Review of structures and strategies to prevent, investigate and penalise economic crime and corruption (Hamilton Review), Department of Justice, November 2020 [accessed 7 February 2022], at p.40.

[49] Ibid, at p.42.

[50] Ibid, at p.41.

[51] Department of Enterprise, Trade and Employment, Regulatory Impact Assessment, Competition (Amendment) Bill 2021, December 2021, at p.15.

[52] See for example, *DPP v Aston Carpets and Smith* [2018] IECA 194, Court of Appeal, 20 June 2018.

Some reservations have been expressed in relation to creating a specific offence. The Law Society of Ireland has opined that the creation of a specific offence may be a reaction to the decisions of the courts.[53] In its submission, it noted that bid-rigging is "widely accepted as a hard-core competition law activity" and has also questioned the potential impact on judicial discretion and the separation of powers.[54] Additionally, it also argues that the proposed provisions may create a situation where only specific anti-competitive requests are considered criminal offences by trial lawyers.[55]

Referencing the vast amounts spent by the State on procurement warranting systemic screening for bid-rigging or associated criminal activity, 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.[56] These reservations were also noted by the Joint Committee in its consideration of the General Scheme and are highlighted as a key issue in its report.[57] However, matters relating to public procurement may be a matter for other Departments and thus may remain outside the scope of the Bill.

Gun-jumping

At present, section 18(9) of the Principal Act provides for an offence where an undertaking, or a person in control of an undertaking:

1) has failed to notify the CCPC within the specified period; or
2) has failed to supply the information required within the period specified by the CCPC.

Proceeding with a notifiable merger or acquisition without notifying or receiving the approval of the CCPC is known as "gun-jumping".

The CCPC itself has noted that presently, only the DPP may prosecute gun-jumping and that it does not have any power to bring summary prosecutions in relation to these offences.[58] At the time of its submission on the public consultation for the Bill, it also noted that the first (and only) criminal prosecutions in Ireland in respect of gun-jumping were brought before the District Court in 2019.[59]

The Department, during PLS hearings, also stated the rationale for the amendments proposed by the Bill:

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[53] Law Society of Ireland Submission to the Departmental Consultation on the Competition (Amendment) Bill 2021, January 2021 [accessed 7 February 2022], at [2.3.1]

[54] Ibid.

[55] Ibid.

[56] Report of the Review Group, Review of structures and strategies to prevent, investigate and penalise economic crime and corruption (Hamilton Review), Department of Justice, November 2020 [accessed 7 February 2022], at pp.41-42.

[57] Joint Committee on Enterprise, Trade and Employment, Report on the Pre-legislative scrutiny of the Competition Bill, 2021, June 2021, at p.19.

[58] Competition and Consumer Protection Commission, Competition (Amendment) Bill 2021, Public consultation by the Department of Enterprise, Trade and Employment, Submission of the Competition and Consumer Protection Commission (CCPC) [accessed 7 February 2022], at p.5.

[59] Ibid.

> "What we are trying to do here is put in a provision that the CCPC can bring a summary prosecution in respect of gun jumping. It will ease the burden on the DPP and, in effect, is trying to deal with that."[60]

Surveillance

In hearings, the CCPC has made the distinction between mass surveillance and the powers proposed in the General Scheme:

> "In terms of the surveillance powers, they are just used in order to get one to the point where one has evidence to bring to a court or a tribunal. At the point that one uses the surveillance powers there is no certainty of guilt or otherwise but they are a very important investigative tool. … There is a distinction between the powers that are proposed in this Bill, which are very targeted and would be exercised on foot of a warrant versus mass surveillance, which I think was the subject of the UK case that has been mentioned about communications, the retention of data and so on. We would see these powers as being exercised very narrowly and very much under the supervision of the courts …"[61]

The Hamilton Review, at Chapter 6, considers the issue of surveillance in some detail, particularly in the context of economic crime, noting that:

> "… the inherently clandestine and often conspiratorial nature of corruption and economic crime, and how this such activities have been made easier to conceal by technological developments. This is frequently counteracted in other jurisdictions by providing investigative bodies with powers of surveillance and of communications interception."[62]

It further cites the examples of the use of surveillance in other jurisdictions, including the United States (insider dealing), Iceland (following the collapse of its banking industry) and the United Kingdom (measures including video surveillance and the interception of private communication are used as evidence and sources of intelligence in economic crime investigations).[63] In the UK, the *Regulation of Investigative Powers Act 2000* (UK) provides for the use of these powers by or on behalf of the UK Competition and Markets Authority.

Criminal Justice (Surveillance) Act 2009

The amendments proposed by the Bill to allow for surveillance powers relate to the *Criminal Justice Surveillance Act 2009* (2009 Act). The 2009 Act provides a legislative framework for the authorisation of surveillance. Under this Act, certain "superior officers" in four law enforcement

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[60] Ms Clare McNamara, Principal Officer, Department of Enterprise, Trade and Employment, Pre-legislative Scrutiny of the General Scheme of the Competition (Amendment) Bill 2021, *Committee Debate*¸ 2 February 2021.

[61] Ms Isolde Goggin, Chairperson, Competition and Consumer Protection Commission, Pre-legislative Scrutiny of the Competition (Amendment) Bill, *Committee Debate*, 23 February 2021.

[62] Report of the Review Group, Review of structures and strategies to prevent, investigate and penalise economic crime and corruption (Hamilton Review), Department of Justice, November 2020 [accessed 7 February 2022], at p.118

[63] *Ibid.* at pp.118-119.

organisations may request authorisation from a court to carry out surveillance. These organisations are:

- An Garda Síochána;
- the Defence Forces;
- the Revenue Commissioners; and
- the Garda Síochána Ombudsman Commission (added to the 2009 Act by the *Garda Síochána (Amendment) Act 2015*).

The 2009 Act provides two definitions of surveillance for the purposes of the Act:

a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or
b) monitoring or making a recording of places or things.

Section 5 of the 2009 Act sets out the procedure for court authorisations for surveillance. Under this process, applications are made to the District Court and the Act further provides that applications to the court for authorisation cannot be made in public. Such applications are made *ex parte*.[64] The Act also sets a maximum period under which surveillance may be undertaken to a period of three months, although this may be extended by a further three months with court approval under Section 6 of the 2009 Act. There is no limit on the number of renewals that may be granted to an authorisation.

There are two primary forms of court authorisation under sections 4 and 6. Section 7 provides for approval by a law enforcement official, and not a court, in certain urgent cases. The following is a summary of these sections:

- Section 4, which sets out the procedure and circumstances for application to the court for an authorisation of surveillance.
- Section 6, which sets out the procedure for varying or renewing an authorisation
- Section 7, which sets out the procedure for urgent authorisation of surveillance. This permits surveillance to be carried out by an organisation for 72 hours without court authorisation if it is urgent. However, if the surveillance is expected to exceed 72 hours, then section 7(10) requires the superior officer to make an application for authorisation to the court under Section 4.
- Section 9 stipulates a time limit for the retention of records relating to an application to the court for authorisation, set at the later date of either three years after the authorisation expires, or the day on which they are no longer required for the relevant prosecution or appeal.

Section 12 of the 2009 Act requires a report on the operation of the legislation to be given annually to the Taoiseach by a designated judge of the High Court. This report is also laid before the

[64] An application made in a judicial proceedings made by a party to the proceedings in the absence of and without notice to the other party or parties or by a person who has an interest but is not a party thereto. (*Murdoch and Hunt's Encyclopedia of Irish Law*).

Houses of the Oireachtas under section 12(6). In recent years, the practice appears to have been to include an outline of the number of applications for **court authorisations** that have been made in respect of each law enforcement organisation.

Section 13 of the 2009 Act prohibits the disclosure of "any information in connection with the operation of this Act in relation to surveillance carried out under an authorisation or under an approval granted in accordance with section 7 or 8". This also extends to documents obtained by surveillance or the existence of applications for authorisation unless to an authorised person.

Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993

Applications to permit the interception of postal packets and telecommunications messages are also provided for under the *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993* (1993 Act), and are made to the Minister for Justice. The 1993 Act is, however, limited in scope to only intercepting telecommunications such as telephone calls or telegrams, and postal packets. Only two grounds for authorisations to intercept postal or telecommunications messages exist under *Section 2(1) of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*; for the purposes of investigating a criminal offence or in the interests of the security of the State.

Section 4 and Section 5 of the 1993 Act provide for the conditions justifying the interception of a postal packet or telecommunications message; for criminal investigations and the security of the State respectively. Section 4 of the Act provides that a criminal investigation may be conducted by An Garda Síochána or another public authority charged with the investigation of such offences. The investigation must concern a serious offence or suspected serious offence, or a serious offence that is apprehended but has not been committed.

An additional condition requires that investigations not involving interception have failed, or are likely to fail, to produce or produce sufficiently quickly information / evidence on whether an offence has been committed, or certain information that may prevent or detect an offence.[65]

The powers to intercept for the purposes of criminal investigation are limited to serious offences, which are defined in section 1 of the 1993 Act. A serious offence is an offence that a person over 21 years of age, of full capacity and not previously convicted may be punished for a term of five or more years. A serious offence must:

- involve loss, or serious risk of loss, of human life, serious personal injury or serious loss of or damage to property, or results or is likely to result in substantial gain;
- result in, or is likely to result in, substantial gain; or
- simply arise from the facts and circumstances of the case, which render the offence specifically serious (this may include situation where an act or omission occurring outside the State would be a serious offence if done within the State).

The definition under Section 1 also extends to an offence consisting of an attempt, conspiracy or incitement to commit an offence which is in itself a serious offence.

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[65] Set out under section 5(c) of the 1993 Act.

Section 6 stipulates that only the Garda Commissioner or the Chief of Staff of the Defence Forces may make applications for authorisation to the Minister. In the case of the Garda Commissioner, applications can be made under both of the above grounds. The Chief of Staff of the Defence Forces may only apply for authorisation in the interests of the security of the State.

Under Section 12 of the *Garda Síochána (Amendment) Act 2015*, the Garda Síochána Ombudsman Commission (GSOC) may also make an application under Section 6 of the 1993 Act for the purposes of investigating a criminal offence. Additionally, section 13 of the same Act extends the provisions of the *Criminal Justice Surveillance Act 2009* (the 2009 Act) to the GSOC.

It is also noteworthy that the 1993 Act provided for judicial oversight on the operation of the Act. Section 8 of the 1993 Act provides for a designated judge to furnish a report on the operation of the powers under the Acts to the Taoiseach. It also empowers the designated judge to investigate any case in which an authorisation has been given, and to have access to and inspect any official documents relating to the authorisation or the application. These provisions were subsequently extended to the *Communications (Retention of Data) Act 2011* (the 2011 Act) by section 11 and section 12 of that Act. It should be noted that these provisions were also extended to the CCPC by the 2014 Act, as the 2011 Act conferred powers on the CCPC in respect of disclosure requests (see below). The provisions in section of the 1993 Act do not, however, appear to extend to the CCPC.

The Department, in the PLS table below, addresses the Bill's approach of amending only the 2009 Act. No reference is made in the Bill to legislation on the interception of postal packets or telecommunications. In this regard, the Department notes the ongoing review of the latter legislation by the Department of Justice and that the remit of that project has been extended to the CCPC.

Communications (Retention of Data) Act 2011

The 2014 Act made amendments to extend the provisions in the *Communications (Retention of Data) Act 2011* on disclosure requests to the CCPC. Section 3 of the 2011 Act, as amended, provides for an obligation on service providers to retain data, while section 6 of the Act provides for disclosure requests for particular public bodies. Section 6(3A) of the 2011 Act, inserted by the 2014 Act, provides that a member of the CCPC may request a service provider to disclose data retained in accordance with section 3 where that member is satisfied that the data is required for the prevention, detection, investigation and prosecution of a competition offence.

Search powers and the right to privacy

A final policy context to the Bill relates to the search powers of the CCPC, which were successfully challenged in the High Court, with the appeal of the CCPC subsequently dismissed by the Supreme Court in *CRH v CCPC*.[66] The case concerned a raid on an Irish cement company under powers granted to the CCPC under section 37 of the 2014 Act. In dismissing the appeal, the Supreme Court found that the CCPC had acted *ultra vires* section 37 and that it had acted in breach of the respondents' right to privacy under the Constitution and Article 8 of the European Convention on Human Rights. Some practitioners have noted that the judgment should serve as a

[66] *CRH Plc, Irish Cement Ltd v Competition and Consumer Protection Commission* [2017] IESC 34.

cautionary note to regulators with broad search and seizure powers to show restraint when exercising these powers, as their excessive use may be open to challenge.[67] Following the judgment, the CCPC published privacy protocols, which outline the safeguards put in place by the CCPC for the protection of privacy rights in future investigations.[68] The protocol published by the CCPC sets out procedures for dealing with claims of privacy rights.[69] These include:

- That the search team takes steps at the planning phase to ensure the search is as focused as possible, including the formulation of search parameters such as keywords[70];
- The production of the search warrant to the person in charge at the search site and give the search target a photocopy of the search warrant at the outset of a search operation[71];
- The communication to the warrant holder of concerns that the search target has that certain material contains private information and should not be reviewed or forensically copied/seized by the CCPC[72];
- Where electronic material is involved which the search target claims to be private, but the CCPC authorised officers consider to be potentially relevant to the investigation, the material will be copied or seized separately from other electronic material and the warrant holder will ask the search target to set out details of the privacy claim in writing to the CCPC Director of Legal Services[73]; and
- In some circumstances where the search target is able to identify specific electronic files during the search, the warrant holder may examine the material at the search site to verify that it is indeed private.[74]

It may also be noteworthy that the amendments proposed by sections 31 and 35 of the Bill extend the search and seizure powers of the CCPC and ComReg to computers and storage media.

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[67] Dillon Eustace, Search and seizure – Supreme Court rules on competition case, July 2017 [accessed 7 February 2022].

[68] Competition and Consumer Protection Commission, Closure of Investigation into Alleged Anti-competitive Practices in the Bagged Cement Sector (press release), 28 February 2020 [accessed 7 February 2022].

[69] Competition and Consumer Protection Commission, Protocol for dealing with claims of privacy rights in connection with unannounced searches conducted on foot of a search warrant under section 36 or section 37 of the Competition and Consumer Protection Act 2014, 1 June 2018 [accessed 7 February 2022].

[70] Ibid, at [2.4] and [2.7].

[71] Ibid, at [3.1]-[3.2]

[72] Ibid, at [4.1].

[73] Ibid, at [4.3].

[74] Ibid, at [4.6]-[4.7].

Development of the Bill

This section briefly describes the main steps taken in the development of the Bill and references the public consultation that occurred in January 2021, the Regulatory Impact Assessment (RIA) and the Pre-legislative Scrutiny of the Bill by the Joint Committee on Enterprise, Trade and Employment.

Public consultation

In January 2021, the Department of Enterprise, Trade and Employment invited submissions from representative bodies, Government Departments and Agencies as part of a public consultation on certain aspects of the proposed Bill. The consultation invited submissions in relation to questions set out in the public consultation document across four areas:

- Providing for the offence of 'bid-rigging' – the consultation invited views on this proposed provision.
- The power of the competent body to prosecute "gun jumping" offences on a summary basis – the consultation invited views on this proposed provision.
- Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications – the consultation asked for views on what specific safeguards should be put in place to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?
- Other amendments relating to the operation of merger control – the consultation invited views on this proposed provision.

Regulatory Impact Assessment (RIA)

In developing the Bill, the RIA considered three possible options in ensuring that Ireland's competition policy regime remains effective and compatible with obligations under EU law and facilitates competition regulators in carrying out their obligations. These options were:

1. Do nothing / no policy change;
2. Transpose the ECN+ Directive with no changes to domestic legislation; or
3. Transpose the mandatory requirements of the ECN+ Directive into Irish law and make additional changes to domestic law where suitable.

Option 3 was identified by the RIA as the preferred option. Pursuing option 1 would have involved infringement proceedings from the European Commission, divergent regimes between Irish and EU competition law and a potential impact on Ireland's competitiveness and reputation.

Options 2 and 3 both provided for stronger and more coordinated competition enforcement with the European Commission and other EU Member States and the operation of fines as a deterrent to other undertakings and as an income for the Exchequer. In terms of costs, the CCPC has already acquired additional staffing in relation to the Directive and Brexit responses, and both options involved costs associated with the enforcement of legislation. Both options offered the impact of reducing white-collar crime and better coordination between Irish competition regulators.

Option 3, however, proposed the benefits of an updated competition law regime and improved domestic enforcement of competition law, while involving the additional costs associated with the creation of a panel of adjudication officers, which may be determined by the caseload and

membership of the panel. It also proposes the impacts of improved enforcement of domestic competition law and a level playing field for all participants in the market.[75]

Pre-legislative scrutiny of the General Scheme of the Bill

The Joint Committee on Enterprise, Trade and Employment considered the General Scheme of the Competition (Amendment) Bill in February 2021 and engaged with the following in public hearings held on 2nd and 23rd February 2021:

- Department of Enterprise, Trade and Employment (the Department)
- The Competition and Consumer Protection Commission (CCPC); and
- The Commission for Communications Regulation (ComReg).

The meeting transcripts are available at the following links:

- 2 February 2021: Pre-legislative Scrutiny of the General Scheme of the Competition (Amendment) Bill 2021
- 23 February 2021: Pre-legislative Scrutiny of the General Scheme of the Competition (Amendment) Bill 2021 (Resumed): Discussion

In its Report, the Committee identified 17 key issues in its scrutiny of the Bill, 12 of which related to the transposition of the Directive, and the remaining five issues concerning the domestic elements of the Bill.[76] These key issues are outlined in the below table, along with commentary from the Department on whether each issue has been addressed in the Bill. References to the '2002 Act' in the below table are references to the Principal Act.

Table: Comparison of the PLS issues raised with the Bill as published[77]

Commentary as per Committee report	Whether addressed (either in whole or in part) in the Bill
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.	In relation to transposition of the Directive, there is no difference between the roles of the CCPC and of ComReg as competition authorities, as the powers required for transposition of the Directive are given to both as "competent authorities" throughout the Bill.

[75] Department of Enterprise, Trade and Employment, *Regulatory Impact Assessment, Competition (Amendment) Bill 2021*, December 2021, at p.2 and pp.17-22.

[76] Joint Committee on Enterprise, Trade and Employment, Report of the Pre-legislative scrutiny of the Competition Bill, 2021, June 2021.

[77] The response text in this column is taken directly from the Department of Enterprise, Trade and Employment's email communication to the L&RS. The response was received from the Department following the routine request, as part of the preparation of Bill Digests, from the L&RS to Departments in respect of Bills that have undergone PLS and the extent to which the resulting Bill has considered the issues raised by the relevant Joint Committee.

Commentary as per Committee report	Whether addressed (either in whole or in part) in 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.	The powers for competent authorities, as part of an investigation into a potential infringement of competition law, to search a premises or vehicle and/or to seize materials relevant to that investigation, have been expanded to meet the needs of the Directive but these powers remain subject to the existing need for the competent authority to obtain a warrant from the District Court for the search and/or seizure in advance.
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.	Section 31 amends section 37 of the *Competition and Consumer Protection Act 2014*, including the insertion of new subparagraph (i) which allows for a premises or records to be sealed "for such period as may reasonably be necessary". The search and seizure powers referred to require a warrant to be issued by the Courts.
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?	No. The provisions in s.32 (insertion of s.37A(2)(b) into the *Competition and Consumer Protection Act 2014* in relation to the CCPC) and s. 37 (insertion of s. 39A(2)(b) into the *Communications (Regulation) Act 2002*) both ensure that a requirement that a person provide information to the CCPC or ComReg in the course of an investigation shall not require the person to admit to having contravened relevant competition law.
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.	The enforcement powers in the Bill, both in relation to administrative financial sanctions and also other sanctions such as structural or behavioural remedies, are identical in relation to EU and domestic law as they are subject to Court confirmation.

Commentary as per Committee report	Whether addressed (either in whole or in part) in the Bill
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.	The proposed maximum penalties for infringements of competition law are also the same regardless of whether it is EU or domestic law that has been infringed.
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.	There are separate provisions for periodic penalty payments in order to fulfil the specific requirements of article 16 of the Directive on the one hand, and the Constitutional requirements for domestic law on the other hand, which is the only instance where differentiation between "national administrative competent authorities" and "national judicial competent authorities" is relevant within the Bill.
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.	Rights to appeal have been dealt with in Part 2H to be included in the *Competition Act 2002*, which is included in section 12 of the Bill. The right to appeal includes provision to appeal periodic penalty payments.
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.	The decision on whether to grant leniency is a matter for the Competent Authority, as laid out in Part 2E to be inserted into the *Competition Act 2002*. It is not a matter for decision by the Adjudication Officer hence does not require Court confirmation.
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.	The decision on whether to grant immunity is a matter for the Competent Authority, as laid out in Part 2E to be inserted into the *Competition Act 2002*. It is not a matter for decision by the Adjudication Officer hence does not require Court confirmation.

Commentary as per Committee report	Whether addressed (either in whole or in part) in the Bill
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.	It was not considered necessary to define the term in the course of drafting, as the provision is to allow EU Member States "carry out any inspection or other fact-finding measure under its national law", so it is only those fact-finding provisions such as, *inter alia,* the examination of records or requests for information, which are provided for in national law which need to be defined.
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.	The Bill has separate provisions for periodic penalty payments in order to fulfil the specific requirements of article 16 of the Directive on the one hand, and the Constitutional requirements for domestic law on the other hand, which is the only instance where differentiation between "national administrative competent authorities" and "national judicial competent authorities" is relevant within the Bill.
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.	The inclusion of bid-rigging as a specific offence under section 4 of the *Competition Act 2002* means that the competition authorities can pursue cartels specifically involved in this activity in the future. This is an area which had been difficult to prosecute through the Courts in the past due to the lack of a specific definition within the realm of cartel behaviours.
Key Issue 14: The General Scheme does not appear to include provisions for the screening of e-tenders data.	The recommendation in the Hamilton report to screen e-tenders data is one that requires the Office of Government Procurement and other contracting authorities to give access to procurement data, so that the CCPC may undertake an analysis of patterns within that data and identify potential bid-rigging activity. The Minister for Justice has established an Action Plan to ensure the cross-Government implementation of the recommendations in the Hamilton report, including the screening of e-tenders data. The Department of Enterprise, Trade and Employment and the CCPC both actively engaging in that process. If any legislative changes are found to be necessary for full implementation of this recommendation, that will be a matter for the Minister for Justice or Minister for Public Expenditure and Reform to progress as it is not within the remit of the Minister for Enterprise, Trade and Employment.

Commentary as per Committee report	Whether addressed (either in whole or in part) in the Bill
Key Issue 15: As currently drafted, the General Scheme does not specify the offences for which covert surveillance may be conducted.	The amendment of the *Criminal Justice (Surveillance) Act 2009* which extends the power to undertake surveillance to the CCPC relates only to a "relevant competition offence", which is limited to "an offence under section 6 of the Competition Act 2002 involving an agreement, decision or concerted practice to which subsection (2) of that section applies".
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 Department of Enterprise, Trade and Employment worked with the Department of Justice in relation to the proposals on surveillance and interception to ensure alignment with the existing legislation and procedures. The extension of existing surveillance powers to the CCPC under the *Criminal Justice (Surveillance) Act 2009* is undertaken on the basis that the CCPC will be subject to the same levels of oversight and compliance as currently exist under that legislation. As a result of the Department of Justice's ongoing review of the Interception of Postal Packets and Telecommunications Messages (Regulation) legislation, it has been decided to include the CCPC within the remit of that project rather than through this Bill.
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 Department of Enterprise, Trade and Employment and the Department of the Environment, Climate and Communications are committed to ensuring sufficient resources for the CCPC and ComReg, respectively, to implement this legislation. Additional resources have already been put in place for the CCPC. However, both Departments will keep the needs of the CCPC and ComReg under review, in conjunction with the Department of Public Expenditure and Reform, as the legislation is concluded and implemented over time.

Source: The L&RS is grateful to the Department of Enterprise, Trade and Employment for providing their analysis of how it has responded to the issues raised by the Committee.

Principal provisions of the Bill

This section of the Bill Digest examines the main provisions of the Bill, with a synopsis of each Section of the Bill is given in the Table above. Given the length of the Bill and the time between publication and Second Stage debate, it is not possible to cover all provisions of the Bill in this section. Rather, as the title suggests, this section will focus on the principal provisions, setting out a general outline of the main sections of the Bill.

The Bill makes a series of amendments to the Principal Act, the *Communications Regulation Act 2002* (2002 Act) and the *Competition and Consumer Protection Act 2014* (2014 Act). According to the Department of Enterprise, Trade and Employment, speaking during the pre-legislative scrutiny process, it has three broad aims:

- To transpose the ECN+ Directive which will make the CCPC and ComReg more effective in overseeing and enforcing competition law;
- To introduce additional powers to the EU Directive to assist in this regard; and
- To do so in a way which establishes a clear and uniform regime for businesses and national competition authorities, so as not to have differing requirements under national and EU law.[78]

One of the primary changes of the Bill is that it introduces a definition for "relevant competition law", which means sections 4 or 5 of the Principal Act, or Article 101 or 102 TFEU. The amendments to Part 2 of the Principal Act set out the structures for investigations and administrative proceedings, including the application of administrative financial sanctions and periodic payment orders.

Part 2 – Amendments to Principal Act – Relevant Competition Law

A Specific Offence of Bid-Rigging

Section 5 of the Bill amends section 4 of the Principal Act to introduce an offence of bid-rigging into Irish law. It sets out the definition of bid-rigging as the formation or continuation of an agreement or concerted practice between undertakings in relation to participation or non-participation in a bidding process. The section also provides that bid-rigging may include:

- An agreement whereby one or more undertakings agree to not submit or withdraw a bid or tender as part of such a process;
- An agreement whereby one or more undertakings submit a bid or tender on terms or conditions arrived at in accordance with the agreement or concerted practice; or
- Collusive tendering.

The section also sets out a definition for relevant bidding process.

[78] Department of Enterprise, Trade and Employment, Opening Statement, Pre-legislative Scrutiny of the General Scheme of the Competition (Amendment) Bill 2021, 2 February 2021.

Addition of Mens Rea[79] Requirement to sections 6 and 7 of the Principal Act

Section 6 of the Bill amends the current section 6 of the Principal Act, which relates to offences in respect of section 4(1) of the Principal Act or Article 102 TFEU, to introduce an additional requirement to the offences for the undertaking to either:

- Intentionally or recklessly act to prevent, restrict or distort competition, or
- Intentionally or recklessly make omissions having the effect of preventing, restricting or distorting competition

This has the effect of introducing a *mens rea* (guilty mind) element to the offence, which currently operates on the basis of strict liability. The section also adds the engagement of bid-rigging as a form of agreement, decision or concerted practice for the purposes of the offence.

Section 7 adds a similar *mens rea* element to offences in respect of breaches to section 5(1) of the Principal Act or Article 101 TFEU.

Section 8 amends provisions relating to fines on conviction on indictment for offences under sections 6 and 7 of the principal, extending the maximum fine from the greater of €5,000,000 or 10% of turnover to the greater of €50,000,000 or 20% of turnover.

Parts 2C to 2H: Investigations and Enforcement

Section 12 makes the most significant amendments proposed by the Bill, inserting a series of new Parts into the Principal Act. These Parts, and the matters they deal with, are as follows:

- Part 2C: Investigations
- Part 2D: Adjudication Officers
- Part 2E: Leniency Programme
- Part 2F: Mutual Assistance
- Part 2G: Procedural Provisions
- Part 2H: Appeals, Confirmation and Judicial Review

In total, there are 51 new sections inserted into the Principal Act by section 12. This segment of the Principals Provisions will cover the main aspects of these sections. The headings of this section do not reflect the headings used in the Bill and are intended to indicate provisions on key elements provided for by Parts 2C to 2H.

Investigations

Part 2C consists of eight provisions in relation to investigations for suspected infringements of relevant competition law.

Under the proposed **section 15G**, authorised officers may carry out investigations for suspected infringements, but must do so if directed by a competent authority. On the completion of an investigation, the authorised officer is required to submit a report to the competent authority, which the provision states must contain the following:

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[79] To constitute a criminal offence, the offence must be accompanied by a blameworthy state of mind. What the law considers as blameworthy varies from offence to offence; *mens rea* must be considered in relation to the crime charged. (*Murdoch and Hunt's Encyclopedia of Irish Law*)

- The name of the undertaking or association of undertakings concerned;
- The investigative steps taken by the competent authority;
- The market or markets affected;
- The nature of the suspected infringement of relevant competition law;
- The authorised officer's preliminary view as to whether or not there has been an infringement of relevant competition law;
- An outline of the facts and evidence upon which the authorised based his or her preliminary view.

The section makes additional provision for the CCPC and ComReg to regulate their own procedures for conducting investigations, and for the joint preparing of reports if more than one authorised officer conducts an investigation.

Section 15H provides for the issuing, by a competent authority, of a prohibition notice where the authority suspects that there is a risk that an undertaking or association of undertakings will cause serious and irreparable harm to competition. The notice must state the authority's suspicion of this risk, the reasons for the suspicion and specify the nature of the infringement of relevant competition law. It may also give direction on measures to be taken to remedy any suspected infringement to which the notice relates, to avoid or limit serious and irreparable harm to competition or otherwise comply with or address matters specified in the notice. The notice must prohibit the continuation of the suspected infringement, must specify a period within which the notified undertaking may make written submission on the notice's content, and must be signed and dated by the competent authority.

The section further sets out the procedures for confirming measures to be put into effect under the notice, extending the period of the notice, amendments to the notice where it has issued in error or incorrect on a material respect, and for the notification of the European Competition Network by the competent authority.

Section 15I allows notified undertakings to appeal a prohibition notice in accordance with section 15AY, which sets out the procedures for appeals to the High Court.

Section 15J makes provision for the ending of effect of a prohibition notice, which must be the earlier of 1) the date on which a competent authority issues a notice to the undertaking stating the notice is withdrawn, or 2) the court confirms, under either section 15AY or 15AZ, the decision of an adjudication officer under section 15X on the matter to which the notice relates. There is a further provision for a third circumstance where the notice may be cancelled if issued in error or subject to material inaccuracy.

Section 15K sets out the provisions to be applied depending on whether an infringement of relevant competition law is to be treated as a criminal or civil matter:

- Where it is a criminal matter, the competent authority may refer it to the DPP for the purposes of considering whether to bring criminal sanctions under sections 6 or 7, or bring summary proceedings under section 8(9) of the Principal Act.
- Where it is a non-criminal matter, the competent authority may issue a statement of objection under section 15L or seek relief against an undertaking under section 14A or 14B.

Section 15K(6) makes reference to the following proceedings, which a competent authority may also take in certain circumstances:

a) Administrative financial sanctions under section 15AA;
b) Commitments in accordance with section 15AE;

c) Structural and behavioural remedies under section 15Z; and
d) Sections 14A, 14B and 14C.

Where a matter is referred to the DPP, if there are criminal proceedings, section 15K(3) prohibits the competent authority from taking a summary prosecution under section 8(9) or proceedings under section 15K(6) unless there is either a *nolle prosequi*[80] or the DPP decides not to commence criminal proceedings.

Section 15K(4) also prohibits a competent authority that has initiated proceedings under section 15K(6) which have not been withdrawn and are determined by an adjudication officer, from commencing further summary proceedings under section 8(9) or under section 15K(6) (with the exception of administrative financial sanctions under section 15AA).

Section 15K(5) also clarifies that for the purposes of a preliminary view on whether an infringement is criminal or non-criminal, the infringement does not have to be ongoing conduct.

Section 15L sets out provisions in relation to statement of objections. A competent authority may issue a statement of objections in relation to any of the following matters:

- An infringement of relevant competition law;
- A breach of a procedural requirement;
- A failure to comply with commitments under section 15AE;
- A failure to comply with a structural or behavioural remedy ordered under section 15Z;
- A failure to comply with a prohibition notice.

The statement must be in writing, state the preliminary view of the competent authority and set out its reasons for forming that view. The competent authority must also provide a copy of material it relied upon in forming its preliminary view, although this is also subject to certain requirements concerning redactions which may be considered necessary. The section also makes provision for procedures around the making, by the relevant recipient, of written submissions and the extension of periods in which such submissions may be made.

Following the period for written submissions, the competent authority may take any of the below actions following a statement of objections for an infringement of relevant competition law:

- Carry out further analysis or investigation;
- Close the investigation and take no further action;
- Enter into commitments with the relevant recipient under section 15AE;
- Agree a settlement at any time before a decision being made by an adjudication officer. This settlement may be for a structural or behavioural remedy or an administrative financial sanction; or
- Prepare a full investigation report and refer the matter to an adjudication officer.

Where there is a statement of objections for failure to comply with a procedural requirement, section 15AE commitments, a structural or behavioural remedy, or a prohibition notice, following

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[80] [Unwilling to prosecute]. In criminal proceedings, the entry of a *nolle prosequi* by the prosecution before judgment, operates to stay the proceedings; it is not equivalent to an acquittal and is no bar to a new *INDICTMENT* (qv) at a subsequent date for the same offence (*Murdoch and Hunt's Encyclopedia of Irish Law*)

written submissions, the competent authority may decide to take no further action or refer the matter to an adjudication officer.

Section 15L also sets out further requirements regarding supplementary statements of objections on different points of law or fact, or new evidence, and regarding settlements with undertakings or associations of undertakings. The procedural requirements in relation to simplified investigation reports (settlements) and full investigation reports (referrals for decision) are also set out in section 15L.

Section 15M provides for the referral of investigations to an adjudication officer. It provides that where there is a settlement, the competent authority must apply for an order of consent and furnish a simplified investigation report. Where the competent authority wishes to bring proceedings, it may refer the matter for decision to an adjudication officer and furnish a full investigation report, the statement of objections, if applicable the supplementary statement of objections, a copy of all material relied upon by the competent authority and any submissions made the undertaking or association of undertakings, including responses to statement of objections. The section further provides that the competent authority retains the ability to enter into legally binding commitments with the undertaking or association of undertakings. The section also sets out some procedural elements on the powers of the Minister to prescribe procedures for making and withdrawing referrals and making orders of consent, and on the powers of the competent authority for making rules detailing such procedures.

Section 15N provides that the competent authority may withdraw a referral before or while it is being considered by an adjudication officer.

Adjudication Officers

Part 2D sets out the provisions in relation to adjudication officers, including provisions on their appointment, independence and powers.

Section 15O provides that the competent authority, as a national administrative competition authority, shall nominate adjudication officers to be appointed by the relevant Minister, in order to make decisions under section 15X and otherwise to exercise functions under the Act. The Minister may make regulations concerning the creation of a panel of adjudication officers, the necessary requirements and qualifications, and the appointment of Chief Adjudication Officers. The Minister is required to appoint persons nominated by a competent authority unless they are not satisfied that the nominee meets the requirements and qualifications, or considers that the nominee does not have the necessary independence for the role.

Section 15P sets out the independence requirements of adjudication officers, making provision for their independence for the performance of their functions and in relation to conflicts of interest and recusal. It also provides that adjudication officers may not be involved in the drawing up or deciding of certain guidelines, policies and procedures, but may be consulted. Chairpersons of competent authorities are expressly prohibited from serving as adjudication officers, while members of competent authorities are prohibited from serving as Chief Adjudication Officer. The section makes further provision to prohibit members of a competent authority or its staff, who serve as adjudication officers, from performing any duties which are inconsistent with their independence, further requiring them to refuse to perform such duties if requested to do so.

Section 15Q relates to the making of regulations by the relevant Minister regarding the appointment and independence of adjudication officers. Among the key elements of this provision are the Minister's powers to make regulations prescribing the requirements upon the competent authority and adjudication officers to implement the appointment of adjudication officers and

ensuring their independence. These include the criteria for persons eligible to be appointed, the term of appointment, matters relating to remuneration, resignation and revocation of appointment, as well as matters relating to the role of Chief Adjudication Officer, the designation of divisions for particular periods or categories of cases by the Chief Adjudication Officers, rules on promotion and increments of staff of a competent authority who act as adjudication officers and in relation to assisting adjudication officers. The Minister may also make regulations on more detailed requirements for the independence of adjudication officers, such as the internal separation of their functions and the functions of the competent authority, as well as regulations on the publication of policies and implementation of measures to manage conflicts of interests on the part of adjudication officers or staff assisting them, and requiring the Chief Adjudication Officer and the competent authority to report annually on their compliance with the principle of independence.

Sections 15R and 15S respectively set out the provisions regarding the appointment of assistants to adjudication officers and the provisions in relation to the terms of employment or contract of adjudication officers. **Section 15T** provides that adjudication officers may sit in divisions, which are required to be of uneven number as the Chief Adjudication Officer may determine.

Section 15U provides for the actions of an adjudication officer upon receiving a referral under section 15M. Upon receiving a referral, an adjudication officer is required, as soon as practicable, to give the undertaking / association of undertakings the below details, unless there is an oral hearing.

- A copy of section 15U;
- If the referral is made under section 15M(2), a written notice stating that the undertaking / association of undertakings may make submissions in writing on the full investigation report within 30 days of receiving the notice, which may be extended by up to 15 days by the adjudication officer;
- If the referral is made under section 15M(1), a notice stating that the matter has been referred for an order of consent and asking the undertaking to confirm the settlement (administrative financial sanction or structural or behavioural remedy) within a period of 15 days of receiving the notice, which may be extended by up to 7 days by the adjudication officer.

The section also provides that the adjudication officer may do any of the following to resolve an issue of fact or enable the making of a decision:

- Exercise any of the powers of an adjudication officer under section 15W;
- Request further information from an undertaking / association of undertakings;
- Request further information from any other person and may, for the purposes of doing so, provide a copy of the full investigation report with due regard for commercial confidentiality;
- Conduct an oral hearing.

The section sets out further requirements in relation to the provision of the full investigation report for the purposes of requesting further information. Adjudication officers are permitted under the section to direct their assistants to communicate on their behalf.

Section 15V sets out the provisions on the admissibility of evidence and rules for oral hearings. In particular, the section contains provisions on the power of adjudication officers to summon witnesses to attend, the taking of evidence under oath, the holding of hearings in public, the holding of hearings remotely (at the discretion of the adjudication officer), circumstances where hearing may be held in private, the application of reporting restrictions, and legal professional privilege on certain information.

Section 15W provides for the powers of adjudication officers and offences for non-compliance with those powers. Under the section, an adjudication officer may on the application by the competent authority, the undertaking / association of undertakings concerned in the matter referred, or of their own motion:

- Direct authorised officers of the competent authority, or the undertaking / association of undertakings concerned (referred to as a party in the section), to answer an identified question in the manner or form specified by the adjudication officers. Such answers may be under oath or otherwise;
- Direct a party to adduce evidence or produce books, documents or records in its power or control; and
- Direct a party to clarify any issue of fact that an adjudication officer may deem necessary.

The section provides that an answer to a question put to a person is not admissible as evidence against the person in criminal proceedings, except proceedings for perjury if provided under oath. It further provides that a summons issued by an adjudication officer is the equivalent of any process for enforcing the attendance of witnesses and compelling the production of records, and that a person who is subject to a direction has the same immunities and privileges as a witness appearing before a court.

The section provides for a number of offences relating to matters including failure to attend the time or place indicated on a summons without reasonable excuse, the refusal to give evidence, produce records or answer questions, actions that would be contempt of court if the adjudication officer were a court of law, intentionally or recklessly destroys, disposes of, falsifies or conceals a book, document or record or knowingly provides false or misleading information. Penalties for offences are also provided for under this section.

Decisions of an Adjudication Officer

Section 15X sets out the provisions regarding the decision of the adjudication officer in relation to the following matters:

- An alleged infringement of relevant competition law;
- Breach of a procedural requirement;
- Failure to comply with a structural or behavioural remedy;
- Failure to comply with section 15AE commitments; or
- Failure to comply with a prohibition notice.

The adjudication officer is required to consider the following when making a decision:

- Statement of objections (and any supplementary statement of objections) prepared by a competition authority;
- The full investigation report prepared by the competent authority;
- Any written submissions made by the undertaking / association of undertakings on the statement of objections and the full investigation report;
- Any submissions, statements, admissions, information, records or other evidence provided to the adjudication officer in the course of proceedings;
- Any prior relevant decision of an adjudication officer under the Principal Act, except decisions not confirmed by the High Court.

The standard of proof for the adjudication officer's decision is whether, on the balance of probabilities, the undertaking / association of undertakings, intentionally, recklessly or negligently committed an infringement of relevant competition law, breached a procedural requirement or

failed to comply with a structural or behavioural remedy, section 15AE commitments or a prohibition notice. On making such a finding, the adjudication officer may impose:

- A structural or behavioural remedy;
- An administrative financial sanction; or
- Periodic penalty payments.

The adjudication officer is required to provide the competent authority and undertaking / association of undertakings with a copy of the decision and the proposed penalties. The section also outlines the procedures for proposing and imposing a structural or behavioural remedy, administrative financial sanction or periodic penalty payment, the matters an adjudication officer must have regard to when imposing an administrative financial sanction, the details to be included in the decision of the adjudication officer. The section also provides for matters for which the Minister may make regulations, the publication of guidelines on the conduct of proceedings by the competent authority, the imposition of administrative financial sanctions for agreed settlements and circumstances where an adjudication officer may award costs.

Section 15Y sets of the provisions in relation to notice of a decision. It provides for the requirements in relation to the furnishing of notice of the decision to the competent authority by the adjudication officer, the giving of notice, within 7 days of receipt, by that competent authority to the undertaking or association of undertaking concerned and details to be included in the notice. The section also sets out requirements and limitations in relation to the publication of decisions and the confidentiality of the content of notices before the publication of a decision.

Structural or behavioural remedies

Section 15Z sets out provisions in relation to implementing a decision of an adjudication officer to impose a structural or behavioural remedy. A structure or behavioural remedy (remedy) is stated in the section as meaning “any remedy or obligation requiring an undertaking or association of undertakings to take, or to refrain from taking, any action relating to the behaviour or structure of an undertaking or association of undertakings”. This includes requiring the undertaking / association or undertakings in question to do one or more of the following:

a) to sell or divest itself of any matter, including business, assets, shares, real property or intellectual property;
b) to modify or constrain its conduct in specified ways;
c) to grant specified undertakings access to assets, facilities, technology, infrastructure, information or services;
d) (d) to implement ring-fencing arrangements to prevent the sharing of specified competitively sensitive information;
e) to cease a specified conduct or practice;
f) to unbundle two or more products which were previously offered to customers jointly;
g) to discontinue customer rebate schemes, or a part of any such schemes;
h) to prevent the flow of competitively sensitive information between undertakings or within divisions, units, departments or other organisational units within an undertaking.

The adjudication officer is only confined to applying such a remedy where it is necessary to bring an existing infringement of relevant competition law to an end or prevent a similar infringement in the future and is proportionate to the infringement of competition law committed. Where more than one remedy is available, the adjudication officer is required to choose the remedy that is least burdensome for the undertaking / association of undertakings.

Decisions to apply a remedy must be confirmed by the High Court. Furthermore, an adjudication officer may impose a remedy at any point after a referral by a competent authority under section 15M, provided that the competent authority consents to this and the undertaking / association of undertakings acknowledges the commission of an infringement and also consents to the remedy being imposed.

Administrative Financial Sanctions

Section 15AA sets out the circumstances in which an adjudication officer may impose an administrative financial sanction on an undertaking / association of undertakings. The sanction must be effective, proportionate and dissuasive and may be made in relation to a decision of an adjudication officer on any of the five matters set out in section 15X. However, there are some limitations to these enforcement powers. Firstly, where an administrative financial sanction is applied for a matter that constitutes an offence, the undertaking / association of undertakings involved may not be prosecuted or punished for that offence. Inversely, where an undertaking / association of undertakings are the subject of criminal proceedings for the same infringement of relevant competition law, or breach of a procedural requirement, then administrative financial sanctions may not be applied unless the criminal proceedings have been determined by way of a *nolle prosequi*. Decisions to impose an administrative financial sanction must be approved by the High Court and the section makes further provision for administrative financial sanctions to be imposed on subsidiary undertakings if the adjudication officer considers that doing so would be effective, proportionate and dissuasive.

Section 15AB sets out the criteria for the calculation of an administrative financial sanction. It provides for the matters that an adjudication officer must have regard to when imposing a sanction. It also sets out matters to be considered in imposing or not imposing an administrative financial sanction on the members of an association of undertakings and for ensuring the full payment of the administrative financial sanction by the members of an association of undertakings. However, provision is also made for undertakings, that prove on the balance of probabilities that they did not implement, were unaware of or actively distanced themselves from the infringements, to not contribute to the full payment of an administrative financial sanction.

The section also provides for the application of decisions of the competent authority by the adjudication officer in relation to immunity or reduction of an administrative financial sanction. This takes place after the sanction has been determined and prior to any decision on periodic penalty payments. An adjudication officer is prohibited from varying any decision of a competent authority under Part 2E on the level of reduction of an administrative financial sanction. Finally, the relevant Minister may make further rules on the implementation of the section.

Section 15AC sets out the provisions in relation to the maximum amount of administrative financial sanctions that may be applied by an adjudication officer. The maximum amounts set for infringements of relevant competition law or the failure to comply with a structural or behavioural remedy, section 15AE commitments or a prohibition notice are as follows, with lower maximum amounts for breaches of procedural requirements. How this maximum is set differs slightly depending on whether the infringement relates to the activities of members of an association of undertakings.

Maximum amounts of an administrative financial sanction

Infringement	Maximum Amount
Infringement of relevant competition law. Failure to comply: - with structural or behavioural remedies, - section 15AE commitments, or - a prohibition notice.	The greater of €10 million or 10% of total worldwide turnover of the undertaking or association of undertakings in the preceding financial year.
Breach of procedural requirements	The greater of €1 million or 1% of total worldwide turnover of the undertaking or association of undertakings in the preceding financial year.

Further to the table above, where the infringement relates to the activities of members of an association of undertakings, the turnover requirement is based instead on the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association.

Periodic penalty payments

Section 15AD provides that an adjudication officer may impose a periodic penalty payment on an undertaking / association of undertakings. The purpose of a periodic penalty payment is to compel the undertaking or association to do any of the following:

- Comply with a search conducted by a competent authority under section 39 of the 2002 Act or section 37 of the 2014 Act;
- Provide complete or correct information in response to a requirement under section 39A of the 2002 Act or sections 18(1)(d) or section 37A of the 2014 Act;
- Attend at an interview, or otherwise give evidence or produce information or documentation, before a competent authority under section 38A of the 2002 Act, or sections 18 or 37A of the 2014 Act;
- Comply with a prohibition notice;
- Comply with section 15AE commitments; or
- Comply with structural or behavioural remedies.

An adjudication officer may also apply a periodic penalty payment on an undertaking / association of undertakings in order to compel them to comply with a hearing requirement, with provision also made to allow an adjudication to make such a decision without a referral. The procedures for issuing a notices of periodic penalty payments are also set out in the section. The maximum amount of a periodic penalty payment is set at 5% of the average total worldwide turnover of the undertaking or the association of undertakings concerned in the preceding financial year.

Where an undertaking / association of undertakings fails to comply with an obligation concerned before the date or expiration of the period specified in the notice:

- In relation to matters (i) to (vi) above, the competent authority is required to prepare a statement of objections under section 15L and may refer the matter to an adjudication officer under section 15M;
- In relation to a hearing requirement, an adjudication officer may make a decision under section 15X on their own motion.

Provision is also made for the setting and imposition of a periodic penalty payment and the section express provides that such an imposition does not affect the imposition of administrative financial

sanctions for a breach of a procedural requirement or a failure to comply with section 15AE commitments, the imposition of a structural or behavioural remedy or the issuing of a prohibition notice. Decisions to impost periodic penalty payments must also be confirmed by the High Court.

Commitments under Section 15AE

Section 15AE provides for a commitments process where an undertaking or association of undertakings may propose to the competent authority, at any time during an investigation or prior to a decision of the adjudication officer, measures appropriately addressing the suspected or alleged infringement. This process follows a number of steps, which are as follows:

- On receiving such a proposal, the competent authority may:
    - consult publicly, with other undertakings or persons participating in the market(s) concerned;
    - request further information from the undertaking or association of undertakings; and
    - where it considers necessary at any time before the proposal is subject to a commitment agreement, propose modifications, alterations, additions or other changes to the proposal.
- Before agreeing to the proposal, competent authority must inform the undertaking / association of undertakings that it is entitled to obtain legal advice and that failure to comply with the commitments may have legal consequences, including the imposition of administrative financial sanctions.
- After doing so, if the competent authority is satisfied that the proposal, subject to any changes proposed by the competent authority, appropriately addresses the matters relating to or findings of an investigation, the competent authority may notify the undertaking / association of undertakings that it agrees to the proposal.
- On receiving this notification, the undertaking / association of undertakings is required to notify the competent authority of its consent to the terms of the proposal.
- The competent authority and undertaking / association of undertakings enter into a commitment agreement, which must be published on the former's website. This must be done as soon as practicable and have due regard to commercial confidentiality. The commitment agreement itself is legally binding between dates specified in the agreement.

Once a commitment agreement is in place, the competent authority may not issue a prohibition notice, refer the matter to adjudication officer, or continue any proceedings under the Principal Act, unless the undertaking / association of undertakings fails to comply with the agreement.

The section sets out further requirements in relation to the amendment or termination of an agreement where there is a material change to the facts, and the termination of an agreement where it is no longer necessary, the undertaking fails to comply with it or where the undertaking / association of undertakings has submitted false, incomplete, incorrect or misleading information. The competent authority may also monitor and review commitments or other terms in the agreement.

Section 15AF sets out provisions regarding the making of guidelines with respect to any matter in Parts 2C and 2D of the Principal Act by the competent authority and matters that it must have regard to when doing so. **Section 15AG** provides that subject to such guidelines, as well as rules made under section 15V(14) and Parts 2C and 2D, a competent authority may follow such procedures for the conducting of an investigation that it considers appropriate.

Leniency Programmes

Part 2E sets out the provisions to be inserted into the Principal Act with regard to leniency programmes. This Part consists of nine sections in total.

Section 15AH sets out the applicable definitions, including definitions for applicant, competent prosecuting authority, immunity from administrative financial sanctions, leniency and marker.

Section 15AI obliges competent authorities to put a leniency programme in place, that would enable them to grant undertakings that disclose their participation in a cartel or voluntarily cooperate with an investigation of a competent authority. The section requires competent authorities to prepare a policy on how they will operate their leniency programmes, and to publish their leniency programmes on their respective websites. A leniency programme may also address the approach of a competent authority to leniency for other serious infringements of competition law. Under a leniency programme, a competent authority may grant immunity from an administrative financial sanction to an undertaking that is the first to come forward with evidence of an infringement, provided certain conditions are met. The section contains further provisions on undertakings requesting reduced administrative financial sanctions where an application for immunity has been rejected and provides for cooperation between the CCPC and ComReg.

Section 15AJ sets out the provisions in relation to the reduction of administrative financial sanctions for undertakings that do not qualify for immunity. Competent authorities are required to include provision for the reduction of administrative financial sanctions in their leniency programmes. To qualify for a reduction, an undertaking must:

- Disclose its participation in a cartel;
- Provide evidence of the alleged cartel that, in the view of the competent authority, represents added value relative to evidence already in its possession; and
- Otherwise satisfy the general conditions for leniency set out in section 15AK.

The section further provides that where an undertaking that has applied for a reduction submits compelling evidence that leads to the increase of administrative financial sanctions on other undertakings or associations of undertakings, the adjudication officer setting that undertaking's administrative financial sanction must not take that evidence into account when doing so.

A competent authority may take the timing when evidence was submitted and its overall value to an investigation when determining the appropriate level of reduction for an administrative financial sanction, but the level of reduction cannot exceed 50%. The section also makes provision for competent authorities to publish guidelines on what is considered significant added value and compelling evidence.

Section 15AK provides for the general conditions for leniency to be applied to an undertaking that has applied for leniency. These include the ending of its involvement in the cartel, its cooperation with the competent authority, and that it has neither destroyed, falsified or concealed evidence relevant to the application, nor disclosed the fact of or content of the application it is contemplating except to other competent authorities, competition authorities of the Member States, or the European Commission. All these requirements must be satisfied for an undertaking to be eligible for leniency. The section also sets out the procedural elements to an application for leniency and for offences in relation to applications for immunity from or a reduction of administrative financial sanctions or summary applications for leniency if it intentionally or negligently provides false or misleading information, or destroys, falsifies or conceals evidence.

Section 15AL provides that an undertaking may apply for leniency by making an oral or written statement describing its role and knowledge it has of a cartel. It also provides that the competent authorities must publish guidelines on the precise form of such statements and further provides that they shall not be admissible in proceedings except those brought under the Principal Act as amended, except for summary applications for leniency.

Section 15AM sets out the provisions with regard to markers. A marker is a protection for undertakings whereby they attain a specified period to gather the necessary information and evidence to meet the evidential threshold for leniency. This allows the applicant for a marker to retain their place in the queue in respect of applications for immunity or reductions in administrative financial sanctions. Competent authorities are further required to publish guidance on the application for markers online. Further provision is made for the contents of an application to be relied upon in any appeal where an application for immunity from an administrative financial sanction is rejected and such a sanction is imposed. Undertakings may also apply for a marker with regard to applications for a reduction in an administrative financial sanction.

Section 15AN sets out the procedure for summary applications for leniency from undertakings that have applied to the European Commission for leniency. Such applications may be accepted by competent authorities as applications for markers or a full application in relation to the same cartel. Such applications may only be accepted where the application to the European Commission covers more than three Member States as affected territories. The section sets out the details required in a summary application and further provides rules and procedures that may be prescribed by the relevant Minister.

Section 15AO sets out provisions for the relationship between applications for immunity from administrative financial sanctions and natural persons, providing that where conditions set out in section 15AO(2) are met, then current and former directors, managers and other members of staff of the undertaking concerned are fully protected from any sanctions in administrative and non-criminal judicial proceedings. They are also protection from criminal prosecution for infringements of sections 4 or 5 of the Principal Act, if they meet the conditions set out in guidelines made under section 15AO(4). The section also provides for contact between competent authorities and the authorities of other Member States and for the publication of guidelines relating to the operation of an immunity from administrative financial sanctions where another Member State is investigating the same cartel.

Section 15AP provides that competent authorities may put leniency programmes in place for infringements of relevant competition law other than cartels and further provides that the relevant Minister may prescribe procedures, conditions, appropriate scales and factors relevant to decisions under such leniency programmes, for which the competent authorities may also publish guidance.

Mutual Assistance

Part 2F sets out provisions that transpose the mutual assistance elements of the ECN+ Directive:

- **Section 15AQ** provides for cooperation with other competition authorities;
- **Section 15AR** provides for requests for the notification of preliminary objections and other documents
- **Section 15AS** provides for requests for the enforcement of decisions imposing administrative financial sanctions or periodic penalty payments
- **Section 15AT** sets out general principles of cooperation; and

- **Section 15AU** sets out provisions for jurisdiction of disputes concerning requests for notification or enforcement of decisions imposing administrative fines or periodic penalty payments.

Procedural Provisions

Part 2G of the Principal Act sets out a number of procedural provisions as follows:

- **Section 15AV:** Access to file by parties and limitations on the use of information;
- **Section 15AW:** Admissibility of evidence before national competent authorities; and
- **Section 15AX:** Confidentiality rings.

Appeals, Confirmations and Judicial Review

Part 2H sets out the provisions in relation to the appeal against the decisions of an adjudication officer.

Section 15AY sets out the procedure for appeals to the High Court. The following appeals are provided for in the section:

- An appeal by an undertaking / association of undertakings that is the subject of a decision under section 15X. This includes a decision on the basis of which an Article 16(1) periodic penalty payment is imposed. Such an appeal must be made 28 days after receiving notice of the decision.
- An undertaking / association of undertakings affected by, but not the subject of, a decision under section 15X may apply to the Court for leave to appeal against that decision; and
- A notified undertaking may appeal against a prohibition notice within 7 days after it is served with the prohibition notice.

The respondent to an appeal under the section is the competent authority. The section also makes provision for the procedural requirements for appeals and applications for leave to appeal, as well as the ability of the Court to set a time limit for payment of an administrative financial sanction it confirms or substitutes, and the awarding of costs.

Section 15AZ sets out the procedure for the confirmation decisions by the High Court that impose an administrative financial sanction, an Article 16(2) periodic penalty payment, a hearing requirement periodic penalty payment or a structural or behavioural remedy. Applications for confirmation are made by the competent authority, provided that undertaking / association of undertakings does not appeal, and may be made *ex parte* if the undertaking / association of undertakings consents to the decision in writing.

The findings of fact of an adjudication officer are accepted as final in confirmation proceedings, but the Court may make determinations in relation to:

- Errors of law that are manifest from the record of the decision and fundamental so as to deprive the decision of its basis; or
- The sanction or remedy is disproportionate or in excess of the required sanction or remedy to be dissuasive or effective.

In cases where a determination on an error of law or the sanction / remedy is made, the Court may refer the decision made to the adjudication officer for reconsideration and make directions as it sees fit (including directing that a specific aspect of a decision is considered or if the matter should be reconsidered by another adjudication officer). In relation to sanctions or remedies, the Court may decide to lower an administrative financial sanction instead of referring the matter back for reconsideration. The section also provides for a number of other procedural elements.

Section 15AAA sets out the requirements and procedures for applications for judicial review by an adjudication officer, either on their own volition or at the request of a competent authority on a point of law arising from a referral under section 15M, or the questioning of the validity of a decision or act of a competent authority (including an authorised officer or an adjudication officer) either by an application for judicial review or under a process provided for by the Principal Act, 2002 Act or 2014 Act.

Section 15AAB provides for the circumstances and procedures for appeals to the Court of Appeal.

Section 15AAC provides that while the proceedings are held in public as a default, the hearing or part of the hearing may be held otherwise than in public if the court considers it appropriate to do so in the interests of justice. **Sections 15AAD** and **15AAE** respectively provide that the payment of administrative financial sanctions or periodic payments may be made into the Exchequer, and that such payments may be recovered as simple contract debts by the competent authority.

Part 3 – Miscellaneous Amendments to Principal Act

Section 13 amends section 18 of the Principal Act to provide for the voluntary notification of a merger or acquisition that is not required to be notified to the CCPC after it has been put into effect. Section 18(3) currently provides for voluntary notification of a merger or acquisition that is not required to be notified before it is put into effect. The amendments also allow the CCPC to review such a notification and to take interim measures.

The section also makes amendments to section 18(2)(c), which relates to the acquisition of part of an undertaking that is a business to which turnover can be attributed, and inserts a new subsection (15) that allows the CCPC to bring summary prosecutions for conventions of sections 18(1), 18A(1) and section 20(2). The existing section 18(10) sets out the penalties for summary conviction as a maximum fine of €3,000 and further fines of a maximum or €300 for each subsequent day that the offence continues.

Section 14 inserts two new provisions into the Principal Act; section 18A and 18B.

- **Section 18A** empowers the CCPC to require mergers or acquisitions, that are below the threshold for mandatory notification and have not been voluntarily notified, to be notified to the CCPC if it is of the opinion the merger or acquisition may have an effect on competition in markets for goods or services in the State. The section also sets out the procedure to be followed by the CCPC in requiring such a notification. The provisions of section 18(8) and 18(12), which relate to fees and information provided in a notification, as well as sections 19, 20, 21 and 22, are required to apply to notifications under section 18A. Sections 19(1) to 19(5), which relate to permitting a merger or acquisition, do not apply if the merger or acquisition is already in effect.
- **Section 18B** empowers the CCPC to impose interim measures in respect of certain mergers and acquisitions notified under:
    - Section 18(1): Mergers or acquisitions meeting the threshold and required to be notified to the CCPC;
    - Section 18(3): Mergers or acquisitions that are voluntarily notified to the CCPC before they are put into effect;
    - Section 18(3A): Mergers or acquisitions that are voluntarily notified to the CCPC after they are put into effect;
    - Section 18(12A): Mergers or acquisitions to which section 18(1) applies that was purported to have been put into effect without been notified; or

- Section 18A: Mergers or acquisitions that do not have to be notified but are required to make a notification by the CCPC.

The CCPC may impose an interim measure on any of the above mergers or acquisitions notified to it if considers it appropriate to do so due to the risk that the merger or acquisition may have an effect on competition in any markets for goods or services. The section sets out the procedures for notifying an undertaking of an interim measure and for varying or revoking an interim measure.

The section also provides for offences where an undertaking fails to comply with an interim measure, which consist of an initial offence and additional offences per day if the contravention continues for one of more days. The section provides for the following maximum fines:

- On summary conviction, a fine of up to €3,000, with additional fines of up to €300 per day for subsequent offences; and
- For conviction on indictment, a fine of up to €250,000, with additional fine of up to €25,000 per day for subsequent offences.

The section also sets out what is meant by an interim measure under the section.

Section 15 amends section 19(2) to expand its requirements to section 18A and to provide that a merger or acquisition is void until a determination is made by the CCPC. It also amends the definition of an appropriate date in section 19 and provides for a new offence where a merger or acquisition is put into effect, or purports to be put into effect, before a determination is made by the CCPC or the period for a determination has elapsed. This offence carries the same penalties as those included in the proposed section 18B above.

Section 16 amends section 20 of the Principal Act to expand the current provision, which allows the CCPC to require further information from the undertakings involved in a merger or acquisition, to any other person that the CCPC considers may have information relevant to its consideration of a merger or acquisition. The person or undertaking must comply with such a requirement and the section sets out the procedures for certifying this on the part of the undertaking and person and notification from the CCPC on whether or not it is satisfied with the response. Provision is also made for extensions to notices requiring information.

Section 17 amends section 22 of the Principal Act to provide for a process where the CCPC may require that a merger or acquisition, that has been put into effect before its investigation is completed, be unwound. This provision applies to notifiable and voluntary mergers or acquisitions where the CCPC finds that the result of it would lessen competition in markets for goods and services in the State. In such cases, the CCPC may:

- Determine that a merger or acquisition be unwound to restore the *status quo* prior to the merger or acquisition, or
- If this is not possible, the CCPC may determine that the undertakings involved in the merger or acquisition take such steps to restore the *status quo* as far as practicable.

The section inserts further procedural provisions in relation to requirements for addition information relevant to its investigation.

Part 4 – Amendments to the *Competition and Consumer Protection Act 2014*

Section 31 amends section 37 of the *Competition and Consumer Protection Act 2014* to make further provision for the search and entry powers. The scope of section 37(1)(a) is expanded to include any vehicle and any place at which books, documents or records relating to the carrying on of a business are being kept. This expansion includes any place occupied by a director, manager or any member of staff of the undertaking / association of undertakings. The scope of powers under section 37(1)(c) to seize and retain any books, documents or records is also expanded to include computers or storage media, and expressly includes the taking and obtaining of copies and extracts from books, documents or records and continuing to search such items at premises other than the premises entered.

Authorised officers are also empowered to require assistance from any person who appears to them to be in a position to facilitate access to documents or records on data equipment or computers. This includes, providing documents or records in a legible and comprehensible form, giving any passwords necessary to make them legible or comprehensible, or otherwise enabling the authorised officer to examine them in a legible or comprehensible form. The section also provides powers to authorised officers to secure documents, records and any data equipment including computers, and to secure any place.

Section 32 inserts a new section 37A into the 2014 Act. It provides for the CCPC or any member or member of staff to whom it has delegated its functions, in the course of an investigation into a suspected infringement of relevant competition law, to require information connected to and reasonably necessary for an investigation from a person or undertaking under investigation. Such a requirement must specify the period of time in which the requirement must be complied with, the context in which the information is requested and the circumstances of the person or undertaking of whom the requirement is made, and must not require the person or undertaking to admit to having infringed relevant competition law.

Part 5 – Surveillance

Section 33 of the Bill proposes a series of amendments to the *Criminal Justice (Surveillance) Act 2009* to expand its remit to the CCPC. The precise changes made by the section are outlined below.

The amendments provide for the following definitions:

- The definition of superior officer is amended to include, in the case of the CCPC, an authorised officer not below the rank of principal officer;
- The definition of relevant Minister to include the Minister for Enterprise, Trade and Employment in relation to approvals granted by a superior officer of, and documents and information in the custody of, the CCPC; and
- Definitions for authorised officer and relevant competition offence are also inserted into the Act.

The amendments extend the application of the Act to provide that surveillance may be carried out by authorised officers of the CCPC with a valid authorisation, or an approval under sections 7 and 8 of the Act. A superior officer of the CCPC may apply to a judge for authorisation to carry out surveillance. An authorised officer of the CCPC may carry out surveillance without authorisation, or use a tracking device, if this is approved by a superior officer, with the scope of circumstances where this may be approved also extended to relevant competition offences (section 8(2)).

The complaints procedure is also amended to reflect the extension of surveillance powers to the CCPC, allowing the Referee to report a relevant contravention by the CCPC, and any recommendation on compensation, to the Minister for Enterprise, Trade and Employment. Provisions on the review of the operation of the Act by a designated judge are also extended to the chairperson of the CCPC. Provisions around confidentiality of information, admissibility of evidence, disclosure of information and the making of regulations are also extended to the CCPC and Minister for Enterprise, Trade and Employment, as appropriate.

Part 6 – Amendment of *Communications Regulation Act 2002*

Section 35 inserts new subsections into section 39 of the 2002 Act to align its provisions on the powers of entry, search and seizure of authorised officers with section 37 of the 2014 Act as would be amended by the Bill.

Section 37 inserts a new section 39A into the 2002 Act to align its provisions on the power to require information in the course of investigating a suspected infringement of relevant competition law with the provisions of section 37A of the 2014 Act.

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