

LAW SOCIETY SUBMISSION



**PUBLIC CONSULTATION ON ASPECTS OF THE COMPETITION
(AMENDMENT) BILL 2021**

DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

January 2021

The Law Society of Ireland (“the Law Society”) welcomes the opportunity to make a submission on the proposed changes to Irish competition law described in the public consultation on aspects of the Competition (Amendment) Bill 2021 (‘the Consultation’).

Given the importance of the issues under consideration, it is regrettable that the consultation period is so highly truncated. Despite the limited time available, we trust the Department will take on board the Law Society of Ireland’s comments.

1. Proposed Implementation of the ECN+ Directive

1.1 The Law Society of Ireland notes that proposed changes, in particular changes required to implement the so-called ECN+ Directive, will fundamentally alter Irish competition law and enforcement. As the relevant Appendix to the Consultation states, implementation of the ECN+ Directive “... *is of specific importance for transposition in an Irish context as it will present a sea change in the enforcement capabilities of Irish NCAs*” (at 3.3.1). According to the same Appendix, “*the proposed legislation will allow for the introduction of a robust system for non-criminal financial sanctions arising from the Directive which can be cross applied to Irish competition law with appropriate constitutional and procedural safeguards*” (at 3.3.3). These are clearly profound changes. The Law Society is concerned, therefore, that only limited, high-level information is available in the Consultation on how ECN+ mandated changes will be implemented into Irish law. Key issues such as the legal standard to be applied by the CCPC, as well as the due process rights of parties before the CCPC are not addressed. In light of this, and given the implementation deadline of 4 February, the Law Society of Ireland is concerned that the Consultation exercise does not provide opportunity for meaningful comment. The Law Society considers it vitally important that a full and meaningful consultation exercise takes place in advance of implementation of these proposed changes.

2. Other Proposed Competition Law Changes

2.1 Proposed Powers in respect of Smaller, Below-the-Threshold Deals

2.1.1 The proposal to allow the CCPC to unwind completed below-the-threshold transactions will lead to significant and unnecessary uncertainty and cost for Irish businesses. In so doing, this could have a fundamentally detrimental effect on the attractiveness of Ireland as a place to invest.

2.1.2 Under the current regime, there are clear turnover thresholds establishing the CCPC’s jurisdiction and its power to investigate and, if required, prohibit transactions on the grounds of their effects on competition. These thresholds strike a balance between ensuring that potentially anti-competitive transactions are duly scrutinised and providing legal certainty to the market. The thresholds also provide transparent, clear and objective means to determine what transactions fall within the CCPC’s jurisdiction.

- 2.1.3 The proposed changes will seriously undermine this established clarity and certainty. If adopted as proposed, any below-the-threshold transaction could at any time in the future be subject to a CCPC unwind order requiring the parties to unwind their deal even if consummated years before. The mere existence of this draconian power creates sustained uncertainty and risk, particularly given that it does not appear to be subject to any time limitation. The changes also raise severe additional concerns given that acquirers in Smaller, Below-the-Threshold Deals may, as would be standard, make substantial investments into their newly acquired business/company and we would query the effects of any legislation on any such investments.
- 2.1.4 Additionally, very significant amounts of venture capital are each year invested in Irish start-up companies particularly in the areas of Life Sciences and IT with a view to the development of those companies and a successful sale to within the sector¹. It is not unusual that at the time of sale such a company is not just pre-profit but is pre-revenue with no market presence for its intended product.
- 2.1.5 Having regard to all other risks inherent in early stage investing, if venture capital funds had to contend with any risk that such a sale of an Irish company might be subsequently unwound, the probability that such start-up companies would be moved out of Ireland as a pre-requisite to receiving venture capital investment should be carefully considered. By reason of the start-up nature of the Company, relocation to elsewhere in the EU would not be problematic.
- 2.1.6 The Law Society of Ireland notes that no evidence is provided in the Consultation why changes to the established system are required. Nor is the Law Society of Ireland aware of any empirical evidence suggesting that these changes are necessary. Indeed, the existing voluntary regime appears to be working well (or there is no suggestion that it's not working more than adequately) with a number of voluntary notifications made in 2020 for example. Also, there is nothing to suggest that substantive sub-threshold deals are being *missed* by the CCPC. We refer to the Eason/Argosy and the more recent Eason/Dubray deals, for example.
- 2.1.7 As the Department will be aware, a requirement for merger notification can have a significant impact on a transaction, in terms of timing, cost, the final structure of the deal and commercial risk during the interim period. The powers proposed would mean that these serious implications, which could include an order to unwind the transaction, could never be definitively ruled out for a merger or acquisition.
- 2.1.8 The uncertainty arising from these powers will result in a potentially significant increase in voluntary notifications, where parties notify out of an abundance of caution, resulting in unnecessary administrative burdens for the CCPC. In addition, there is already scope for the CCPC to challenge below-the-threshold mergers in Irish competition law, by bringing a Competition Act, section 4 or section 5 action to challenge a deal. The proposed changes would also put us out of line with other jurisdictions and ICN Merger Guidelines.

¹ For example the sale of Inflazome to Roche Pharma for €360 million up front in September 2020.

2.2 Proposed Powers to require information from third parties in a merger review

2.2.1 Requests for information (“**RFIs**”) issued by the CCPC under section 20(2) of the Competition Act can be extensive in nature and may require parties to commit significant financial, time and personnel resources to provide a response within the timeframe set by the CCPC. Providing the CCPC with mandatory powers to issue RFIs to third parties who have no links with the parties involved in the transaction under review risks imposing significant burdens and costs on business. Again, the Law Society of Ireland notes that no evidence is provided to support the need for this proposal. Quite often the questions raised by the CCPC require the party to express opinions on matters on which they simply have no view. This is particularly difficult for larger multi-national groups who simply do not have the internal systems or controls to arrive at a “house” view on queries raised. However, many in the Law Society’s opinion will continue to deal in a good faith basis with the CCPC. Putting these entities under a legal obligation to respond will place a significant strain on this process and involve parties in considerable expense.

2.3 The Proposed New Offence of “Bid-Rigging”

2.3.1 The Law Society of Ireland questions whether provision for bid-rigging as a specific anti-competitive practice within the Competition Act 2002 (the “**Competition Act**”) is necessary. Bid-rigging is widely accepted as a hard-core competition law activity. We understand that this proposal may be a reaction to the Court of Criminal Appeal and Central Criminal Court verdicts in the *Flooring Contractors* case (although again no real rationale is provided in the Consultation). But seeking to limit judicial discretion on sentencing via creation in law of specific offences as proposed is often counterproductive and raises questions about separation of powers and judicial discretion. Creation of a specific offence could also have unintended consequences in our view, for instance by leading to a situation where only anti-competitive activities which are specifically identified by the Competition Act will be considered as criminal offences by trial lawyers.

2.4 Proposed Enhanced Surveillance Powers for the CCPC

2.4.1 The Law Society of Ireland notes that the Hamilton Review recommended that the surveillance powers contained in the Criminal Justice (Surveillance) Act 2009 (the “**2009 Act**”) be extended to the CCPC.^[1] The 2009 Act empowers the Gardaí and Revenue Commissioners to engage in *inter alia* “*monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications*” with the aid of surveillance devices or tracking devices. However, it does not extend to interception of telecommunications. But the Law Society of Ireland also notes that the proposed Competition (Amendment) Bill 2021 (the “**Bill**”) would go further than that envisaged by the Hamilton Review by also granting the CCPC a right to intercept and record electronic communications. It will be essential to ensure that any such new powers

^[1] *Review of structures and strategies to prevent, investigate and penalise economic crime and corruption* (fn 1), page 119.

are accompanied by sufficient safeguards so that rights protected by the EU's Charter of Fundamental Rights and the European Convention on Human Rights are not infringed. Moreover, such powers must also be exercised in compliance with the Irish Constitution and relevant case law of the Irish courts. On a number of occasions the CCPC has been subject to strong judicial criticism for failure to properly respect due process and fundamental rights. See, for example, the Supreme Court judgment in *CRH v CCPC*, as well as the High Court judgment in *The Law Society of Ireland v The Competition Authority*.

We hope that the Department will consider these comments to be constructive.

The Law Society will be happy to engage further with the Department on any of the matters raised.

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