



Rialtas na hÉireann
Government of Ireland

Public Consultation on Aspects of the Competition (Amendment) Bill 2021

January 2021

Prepared by the Department of Enterprise, Trade and Employment

gov.ie

1. Consultation

1.1 Purpose of Consultation

The Competition Policy Unit of the Department of Enterprise, Trade and Employment now invite submissions from representative bodies, Government Departments, Agencies, and other interested parties to a public consultation to review certain aspects of Competition Law in Ireland. The forthcoming Competition (Amendment) Bill 2021 will transpose Directive (EU) 2019/1 into law. The Bill also includes amendments to existing legislation unrelated to the Directive but increasing other powers of the CCPC. This consultation is inviting views on those additional elements only.

Submissions will only be accepted when submitted by email to conspol@enterprise.gov.ie by 5pm, Friday 29 January 2021. Please have “ECN+ Consultation” in the subject of your email.

You are invited to make a submission with your observations in relation to the questions in this document. The submission process is an opportunity for stakeholders to provide information and experiences and different perspectives on the issues involved in preventing infringements and properly enforcing competition law in Ireland. Stakeholder submissions are a vital source of information and views, helping inform the Department’s final drafting of the amendments proposed.

1.2 Publication of Submissions and Freedom of Information

Any personal information, which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 and 2003. However, please note the following:

- The information provided in the submission form will be shared with relevant Government Departments and State organisations during the review process.
- The Department may publish the outcome of the reviews and the submissions received under this consultation on its website, and
- as information received by the Department is subject to the Freedom of Information Act, such information may be considered for possible release under the FOI Act. The Department will consult with you regarding such information before making a decision should it be required to disclose it.
- If you wish to submit information that you consider commercially sensitive, please identify that information in your submission and give reasons for considering it commercially sensitive.

2. Competition Enforcement Reform

In addition to the cross application of the measures contained in the ECN+ Directive to Irish competition law (see separate appendix), the Department is also including further provisions in the General Scheme of the draft legislation. These provisions include:

2.1 Providing for the offence of 'bid-rigging'

The recently published report of the Hamilton Review of the Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption contains a recommendation that Irish competition law be amended to create a specific offence of bid-rigging. This proposal also has significance in relation to public procurement fraud.

Bid-rigging is a form of cartel behaviour in which the firms that bid in a particular procurement process agree amongst themselves which firm submits the most advantageous tender. This enables firms to extract a higher price for the work as the bidders that agree to lose in the process submit inflated bids or do not submit a bid.

There are a number of types of bid-rigging:

- bid rotation – bidders take turns at being the winning bidder, a form of market allocation;
- bid suppression – some bidders sit out of a bidding process so another party can win a bid; and
- complementary bidding – uncompetitive bids are made to ensure that a certain bidder is selected.

In Ireland, the practice to date has been to regard bid-rigging as a form of price fixing or market sharing. Price fixing and market sharing are specifically prohibited by sections 4(1)(a) and 4(1)(c) of the 2002 Act. However, this approach has led to some difficulties with Court cases, where bid-rigging as a specific concept was considered to be beyond the existing scope of anti-competitive practices outlined in the Act.

The express provision for bid-rigging (in general) is intended to make it clearer that such concerted behaviour during the tender process is unlawful as it distorts competition.

The intention of this provision is to ensure that bid-rigging is a specific anti-competitive practice under section 2 of the Competition Act 2002 (as amended) and also that the CCPC may have sufficient powers to review any competitive tendering process (including public tendering processes) to ascertain if such bid-rigging has taken place.

Question: You are invited to submit your views on this proposed provision.

2.2 The power of the competent body to prosecute “gun jumping” offences on a summary basis

Under Irish competition law, mergers or acquisitions which reach certain financial thresholds in the State, must be notified to the CCPC. Such notifiable mergers or acquisitions cannot be put into effect without obtaining clearance from the CCPC. Failure to notify any such merger or acquisition or putting it into effect before clearance by the CCPC, is referred to as “gun-jumping”.

Currently, the offence of gun-jumping under section 18(9) of the 2002 Act can be prosecuted on a summary basis or on indictment by the DPP only. The CCPC does not have the power to bring a summary prosecution in respect of this offence.

Internationally, including in Europe, competition authorities are increasing their efforts to combat instances of “gun-jumping” in an attempt to deter early, unlawful implementation of transactions requiring prior merger control clearance. Competition authorities have become more vigilant by increasing their enforcement actions and imposing substantial financial penalties in an attempt to ensure that undertakings comply with the merger review rules.

The intention of this provision is to allow the CCPC to take summary prosecutions for gun jumping offences to reduce the burden on the DPP and to increase the enforcement of the gun-jumping provision generally.

Question: You are invited to submit your views of this proposed provision.

2.3 Providing for the power to (i) carry out video and audio surveillance and (ii) to require interception and recording of electronic communications.

The Department's General Scheme contains a provision that allows a National Competition Authority to undertake covert surveillance and consider relevant evidence, irrespective of the form in which it exists.

Cartels require communication, and as communications technology has improved over time, cartels have become more sophisticated as they have moved to exploit these and move away from paper communications. By its nature, a cartel is a secretive arrangement, which is often communicated electronically or by mobile phone. Currently, the CCPC has the power to obtain communications metadata, which shows when individuals have been communicating, but does not provide the content of those communications.

This precludes access to telephone conversations, internet chats or covert taping of private meetings, all of which can be important to show the extent of a cartel conspiracy.

There are similar powers to allow interception of direct communications between cartel conspirators in other jurisdictions with criminal law regimes for cartels, or in some more limited circumstances, bid rigging. These powers, on their own account or on their account by local police forces, are available in jurisdictions such as the UK, US, Canada, Australia, Austria and Israel. For example, the Regulation of Investigative Powers Act 2000 provides for the use of these powers by or on behalf of the Competition and Markets Authority (formerly the Office of Fair Trading) in the UK.

In order to ensure that the CCPC has sufficient power to gather all relevant evidence in investigations of cartels (and bid-rigging), and for that evidence to be admissible in both the investigation and any subsequent court proceedings, the Minister wishes to give the CCPC the power to undertake:

- (i) Interception and recording of electronic communications; and
- (ii) Video and audio surveillance of suspects.

The intention of this provision is to allow the CCPC to gather evidence as necessary, including at short notice, to reduce the burden on the Garda Síochána and Court Service in seeking short notice warrants to gather such evidence. This will also help to increase the CCPC's efforts to detect and punish these aspects of white-collar crime within the State, including by providing stronger evidence to the DPP when seeking prosecutions of cartel and bid-rigging cases.

Question: What specific safeguards should be put in place in your view to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?

2.4 Other amendments relating to the operation of merger control

Firstly, it is the Department's intention to clarify that the CCPC has the power to accept notifications in respect of mergers and acquisitions that have been completed which are notified to the CCPC on a voluntary basis. It also gives the CCPC powers to review such mergers and acquisitions.

Secondly, the intention is that the Bill will also ensure that the CCPC the power to make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its review of any voluntary notifications received. These orders would remain in force until the merger is cleared or remedial action is taken. In addition, in the event that the CCPC finds that the already completed merger gives rise to a substantial lessening of competition in any market, the CCPC has the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s) – see related provision above on “gun-jumping” regarding voluntary notifications.

Thirdly, it is also intended to provide that, in the event that the CCPC finds that an already implemented merger gives rise to a substantial lessening of competition in any market, the CCPC will have the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s). This would include allowing for voluntary notifications of mergers and acquisitions to be considered by the CCPC and become subject to this provision if they proceeded before CCPC approval and were found to be anti-competitive and so should be unwound.

A further proposed provision relating to mergers gives the CCPC the power to require information from third parties in a merger review.

- Currently, Section 20(2) of the 2002 Act provides for the power to require further information from “undertakings concerned”.
- The term “undertakings concerned” is not defined in the 2002 Act and, in the absence of clarity as to the meaning of the term “undertakings concerned”, it is intended to clarify that the CCPC can seek (or receive voluntarily) information from a party which is not directly part of the merger/acquisition proceedings but which is a relevant 3rd party to those proceedings.
- This amendment will allow the CCPC to serve a requirement for further information on any one or more of the undertakings involved in the merger or acquisition, and on any other undertaking that the CCPC considers may be in possession of information relevant to its review of the merger or acquisition.

Finally, on the subject of mergers, the Bill provides for clarification of the circumstances when the merger review clock restarts following a Request For Information (RFI) and provides specified periods for the CCPC to determine RFI responses to be compliant.

Question: You are invited to submit your views on all of these proposed provisions.

Competition Policy Unit

An Roinn Fiontar, Trádála agus Fostaíochta
Department of Enterprise, Trade and Employment

Lárionad Earlsfort, Sráid Haiste Íochtarach, Baile Átha Cliath 2, D02 PW01

Earlsfort Centre, Lower Hatch Street, Dublin 2, D02 PW01

T +353 (0) 1 631 2121

E: conspol@enterprise.gov.ie

enterprise.gov.ie gov.ie [Twitter](#)

January 2021

