Submission in response to Public Consultation on Aspects of the Competition (Amendment) Bill 2021

Patrick Massey

Director

Compecon – Competition Economics

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This submission is made in response to the Department of Enterprise, Trade and Employment's Public Consultation on Aspects of the Competition (Amendment) Bill, 2021. The consultation seeks views on the following issues.

1. Proposal to create a specific offence of bid-rigging.
2. Proposal that the CCPC be given power to prosecute "gun jumping" offences on a summary basis.
3. Providing for the power to
   (i) carry out video and audio surveillance; and
   (ii) to require interception and recording of electronic communications.
4. What specific safeguards should be put in place in your view in respect of the powers at 3 above to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?
5. Proposal 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 and giving it powers to review such mergers and acquisitions.
6. Proposal that the CCPC be given 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, where 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).
7. Proposal 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 anticompetitive and so should be unwound.
8. Proposal to give the CCPC the power to require information from third parties in a merger review.

9. Provision clarifying 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.

Each of these issues is now addressed.

1. Proposal to Create a Specific Offence of Bid-Rigging.

With regard to this provision, the consultation states:

> "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 practises 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."

As stated in the consultation, price fixing and market sharing are specifically prohibited under sections 4(1)(a) and 4(1)(c) of the 2002 Act. In addition, although not mentioned in the consultation, section 6(2) provides that such agreements are presumed to have the object of preventing, restricting or distorting competition "unless the defendant proves otherwise."

The consultation states that difficulties have arisen with Court cases "where bid-rigging as a specific concept was considered to be beyond the existing scope of anti-competitive practises outlined in the Act." It is difficult to comment on this as the consultation provides no details of these difficulties. The present author has provided expert reports to the CCPC/Competition Authority in two bid-rigging cases, one of which resulted in a successful prosecution where the parties pleaded guilty. My understanding is that the file on the second case is still being considered by the DPP. I was also retained to act as a rebuttal witness by the Competition Authority in the Mayo Waste case and attended every day of that trial in which the defendants were acquitted.

In general, the proposal to create a specific bid-rigging offence is welcome, assuming that it will increase the ability of the CCPC and DPP to successfully prosecute such behaviour. In the absence of more detailed information about the actual nature of the problem which the measure seeks to address it is not possible to offer a more considered view on the proposal.

2. Proposal that CCPC be given power to prosecute "gun jumping" offences on a summary basis.

This proposal is welcome, although presumably the DPP will still be required to make a decision in each individual case as to whether prosecution should be on a summary basis or by way of indictment.

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

The consultation document couches the discussion of this proposal in terms of cartel investigations. Granting such powers to the CCPC is quite a far-reaching measure. Such powers are a necessary tool in the investigation of cartels. However, it is essential that such powers should only be available in the case of cartel investigations and not for investigations of non-cartel offences including alleged abuse of dominance cases. There is often a fine line between aggressive competition and abuse of dominance and the use of such powers in dominance cases would be wholly disproportionate and inevitably, in some cases, involve intrusions into the activities of law-abiding businesses which would be totally unjustified. Similar arguments apply in respect of vertical restraints. It is essential, therefore, that legislative provisions conferring such powers on the CCPC should be framed in a way that strictly limits them to cartel investigations.

4. What specific safeguards should be put in place in your view in respect of the powers at 3 above to ensure rights under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are protected?

First, as already stated, it is critical that such powers are strictly limited to cartel investigations only and cannot be used for non-cartel investigations. Second, there must be an effective mechanism of judicial oversight to prevent abuse. Finally, there should be a requirement for any material collected using such methods to be destroyed once any such investigation, including possible court proceedings have concluded.

5. Proposal 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 and giving it powers to review such mergers and acquisitions.

At the present time merging parties can make a voluntary notification of mergers below the notification thresholds if they have concerns that the merger might raise competition issues. There have been relatively few voluntary notifications since 2003. In a number of instances, most recently Eason/Dubray Books, the CCPC has contacted the parties involved in such mergers once they became aware of the transaction. In some of these cases the CCPC has indicated that, if the parties decide not to make a "voluntary" notification, it will investigate the transaction under sections 4 and/or 5. In some cases the merger may have been completed before the CCPC contacted the parties and thus the proposal seems designed to regularise such notifications. The proposal to allow for voluntary notification of below the threshold mergers after they have been completed in order to regularise the current situation sems reasonable. The consultation is silent as to whether this would be subject to some time limit. Arguably some limit is required to avoid notifications being made long after the merger has been completed. Suppose, for example, companies A and B merge in a transaction that is below the thresholds and, let us say, two years later company C decides to acquire the merged entity. Would the parties be able to voluntarily notify the original transaction in order to obtain legal certainty? It seems that there should be some time limit in respect of such voluntary notifications.

6. Proposal 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, where 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).

It seems reasonable that, where the parties have made a voluntary notification to the CCPC, the CCPC should have the power to make orders preventing the parties taking steps to integrate the business until the CCP has completed its review. Such arrangements apply, for example, under the UK's voluntary merger notification scheme. Similarly, if the merger is found to give rise to a substantial lessening of competition, it is logical that the CCPC should have the power to order the unwinding of the merger if it had already been completed. As part of the voluntary notification process, the parties would have the opportunity to offer remedies to address any competition concerns. For the avoidance of doubt perhaps it might be specified that the CCPC could only order the unwinding of a completed merger that has been the subject of a voluntary notification, after it had considered any remedies offered by the parties and concluded that they would be insufficient to prevent a substantial lessening of competition. Presumably, the parties would be afforded a right to appeal any such unwinding order.

7. Proposal 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 anticompetitive and so should be unwound.

It is unclear from the consultation what the objective of this proposal is, given the earlier proposal which allows for the CCPC to order the unwinding of a completed merger following an investigation arising on foot of a voluntary notification. It would seem to suggest that the CCPC would have the power to order the unwinding of an already implemented merger irrespective of whether or not it was the subject of a voluntary notification. Logically it would make sense to provide for such powers. Otherwise, the parties to a below the threshold merger which resulted in a substantial lessening of competition would have no incentive to make a voluntary notification.

Presumably it if felt that this is a more effective way to deal with unnotified below the threshold mergers than to have the CCPC challenge them under section 4 and/or 5. In the event that the parties do not make a voluntary notification, it would seem reasonable to require that the CCPC would have to come to a conclusion as to whether the merger resulted in a substantial lessening of competition and issue an unwinding order within the time limits set for considering notified mergers. This would also require the CCPC to inform the parties of the commencement of such an investigation. There should also be a time limit on the CCPC's ability to initiate such an investigation. Such a proposal should not lead to a situation where the CCPC could monitor a merger for a number of years after it had been implemented in order to establish whether or not it had resulted in substantial lessening of competition and then seek to unwind it retrospectively. Merger control is essentially *ex ante* in nature.

8. Proposal to give the CCPC the power to require information from third parties in a merger review.

The consultation states:

> "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."

Currently the CCPC, as a matter of routine, requests information from customers and competitors of merging parties. It has limited powers to compel them to provide such information although it has, in the past, used its summons powers to compel such parties to respond to its requests. It seems reasonable to give the CCPC power to require customers and competitors to provide information in relation to a proposed merger. The consultation, however, seems to suggest that the CCPC would be able to cast its net far and wide and require information from "any undertaking that it considers may be in possession of information relevant to its review of the merger or acquisition." This appears disproportionate. Such a requirement should be limited to customers and competitors of the merging parties.

There is also a practical consideration of how this provision would work. At present, where the CCPC issues a request for information to the parties, the legislation provides that the timeline for the CCPC to reach a decision is reset to the date on which the CCPC is satisfied that the parties have complied fully with this request. Would this also apply with respect to requests

for information to third parties? Unlike the merging parties, third parties would have little incentive to reply promptly to such a request. In fact, competitors would have a strong incentive to delay replying as long as possible if this would hold up the CCPC review of the merger as by doing so they could potentially derail the merger or at least delay its implementation which might well be in their interest. Logically there is no sense in allowing the CCPC to require third parties to provide information unless it will have sufficient time to analyse such information before it is required to take a decision. At the same time if information requests to third parties stop the merger process clock, then this could encourage strategic behaviour by competitors. While in principle the proposal seems like a good idea, careful consideration is required as to how it would apply in practice, before such provisions are introduced.

9. Provision clarifying 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.

No observations on this proposal.