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If it Ain't Broke, Fix it: Ireland's Competition Law, Version 2014

Philip Andrews (McCann FitzGerald) · Thursday, June 5th, 2014

It took five years to draft. But now everything's go!-go!-go! First published late spring 2014, Ireland's newest competition law reform could be adopted by July. And though planning was long and time for debate is now short, last minute changes (big ones too) continue. Just introduced amendments include new merger control thresholds. Other surprises include longer merger review periods and extraordinary new investigative powers: repeat summary detentions, all-night interrogations, and forced seizure of legally privileged material, to name a few. Are there also, buried in the whopper 100-page bill, changes that diminish accountability and independence of Ireland's new enforcement agency (the Competition and Consumer Protection Commission or CCPC)?

From Acorn to Oak

Merger of Ireland's Competition Authority and National Consumer Agency was first announced on 14 October 2008. The publicly-stated policy objective was cost cutting; – part of a "rationalisation plan for State agencies" (a.k.a., Ireland's bonfire of the quangos) to yield, the previous Minister said, synergies and efficiencies. Why it then took five years to publish legislative proposals to implement this policy objective is not clear. New laws to implement EU/IMF bailout commitments doubtless took Government priority. But an apparent policy change on the scope of reforms may also have contributed: in 2011, the Minister told lawmakers that the draft legislation had become an "all-encompassing" bill. A consolidated and updated competition law seemed to be on its way. (Since adoption, Ireland's 2002 statute has been subject to piecemeal reform via ten amendments, including multiple financial emergency statutes.) Later, however, for reasons not publicly explained, less ambitious changes seem to be have been preferred. By publication date (31 March 2014), little was known publicly what was on the cards.

The Big Changes

What we got is a melange: a major piece of reforming legislation, to be sure, but one that does not repeal Ireland's 2002 statute. Announcing the bill, the Minister said it had three main objectives: (i) to merge the agencies; (ii) to regulate "certain practices" in the grocery sector; and (iii) to adopt new rules on media mergers. The devil is in the detail. The bill also proposes big change to Irish merger thresholds and review procedures generally, the first in over a decade: expect longer delays for more deals. By proposing to apply recently adopted "white collar" criminal justice codes to cartel crimes, the bill also proposes big change to investigative procedures: expect greater involvement of the Gardaí, Ireland's police force, and an end possibly (or at least significant change) to the Competition Authority's immunity programme.

New Merger Thresholds & Procedures

Current Irish thresholds requiring that one party must have Irish revenues above €40 million and both parties carry on business on the island of Ireland are to be abolished, as is a requirement that each of at least two parties has worldwide revenues over €40 million. Instead, proposed new rules will require pre-clearance of deals involving parties with combined Irish revenues of €50 million, where at least two parties each has €3 million Irish revenues. This will catch foreign-to-foreign deals not previously caught, for instance, where one party has €30 million Irish revenues and the other €20 million, even if neither has physical presence in Ireland. A lot of smaller domestic deals will also be caught: a reasonable sized Irish convenience store could have €3 million annual turnover. Right now, as well as Irish revenues and/or business presence, such deals are excluded via a requirement each of at least two parties has worldwide revenues over €40 million.

Review periods will also increase: to 30 working days for Phase 1, and 120 working days for a full-length (Phase 1 and 2) review. That's up from 1 month (around 20 working days) for Phase 1 and 4 months in total, under current rules. To boot, a new stop-the-clock procedure will allow Irish officials unilaterally introduce further delay at either Phase 1 or 2. Vastly increased timeframes for review of "media mergers" – up to 240 working days (from a current maximum of 5 months) – are also proposed.

Criminal Cartel Enforcement

The bill proposes to designate cartel offences as "scheduled offences" – a reference to a schedule of 2011 legislation that sought to ease investigation of complex white collar crimes. Among other things, this 2011 legislation provides for repeat detention and interrogation of a suspect, up to three times over a four month period – oppressive practices otherwise unlawful in Irish law. The 2011 law also allows, in certain circumstances at least (including if a Garda considers it necessary to prevent destruction of evidence), all-night interrogations. In addition, the 2011 law creates a "withholding information" offence: in future, it will be a crime punishable by up to five years imprisonment for any person with information about cartel activity not to report it more or less immediately to the Gardaí ("as soon as practicable" by law).

Another notable proposal in the bill is for seizure of legally privileged materials. According to a provision of the bill titled "Saving for Legal Privilege" disclosure of information " … may be compelled or possession of it taken … notwithstanding that it is apprehended that the information is privileged legal material." A High Court determination is required before privileged legal material may be returned. But is such a provision consistent with Ireland's Constitution and/or with the ECHR? Can a High Court procedure to vindicate fundamental rights be justified where even the investigating CCPC officer "apprehends" the information is legally privileged? Nor is it clear how this provision fits with more general rules, explicitly referenced in the bill, that require investigators to refrain from seizing documents where it is "represented or appears" to the investigator that "the document was, or may have been, made for the purpose of obtaining, giving or communicating legal advice."

Comment

There's no use complaining about a fast-track legislative process, I suppose. But after such a long time drafting, why the big rush now? Questions public consultation might have raised:

1. Are new merger thresholds needed? Even the Competition Authority made little case for change to Ireland's existing statutory reporting thresholds. (To the contrary, it previously said existing thresholds conformed to ICN best practice.) And from a practitioner's perspective, there

seemed little gap to plug. A Competition Authority guidance note on voluntary notification of below-the-threshold deals, where those deals nevertheless could have had potential adverse effect on domestic markets, appeared to be working well. Were important deals missed due to the existing thresholds?

2. Are increased merger review periods (by up to 50%) needed? Again, this was not something the Competition Authority publicly sought. Nor would objective evidence suggest it is necessary. In one case over the 11-year lifetime of the existing regime (and over 600 notified deals), a review deadline was missed – Topaz/Statoil M/06/044. This deadline was missed, however, not due to the timeframe itself, but due to a "technical error" by the case team in calculating an extension to Phase 1 to review commitments submitted by the parties (according the ICA chair when testifying before Irish lawmakers).

3. Are draconian new investigative powers needed? Since criminalisation in 1996, four separate arrangements have been prosecuted as cartels, two successfully. Whether new powers proposed in the bill would have meant conviction in all four, or a higher number of prosecutions, is doubtful – certainly, there's no evidence to suggest it. The only two successful cartel prosecutions to date were brought pursuant to 1996 legislation. The first and still most important of those cases was, by all accounts, largely down to the dedication of two resourceful agency staffers. It also bears recalling that the investigative powers the bill proposes to apply to cartel investigations were conceived originally to facilitate investigation of complex corporate law offences where massive amounts of documentary evidence was likely to be generated. Do Irish cartels generate equivalent levels of evidentiary material? Previous cartel prosecutions would suggest not. Those cases relied primarily on witness (informant) testimony. Further, the kind of small businesses targeted in those cases, one-man hedge clipping operations, small-time waste collectors, heating oil distributors, and car dealers, seem unlikely to generate vast amounts of documentation.

4. Could there be unforeseen consequences? A possible consequence of the bill is that Gardaí, who wield the extraordinary investigative powers provided for in the bill (not CCPC officials), may take a greater role in investigation of cartel offences. The considerable emphasis in the Bill on arrest, detention, and interrogation of suspected cartelists – a power reserved to Gardaí (although up to two CCPC officials may participate in Garda interrogations) seems consistent with such an outcome. Does this mean a loss of CCPC control over case progress? The specialist Garda unit charged with investigation of corporate crimes is overwhelmed with work right now. A related issue is whether the bill's proposal to create a "withholding information" offence cuts across, in spirit and in practice, the Competition Authority's immunity programme (pursuant to which around 23 applications have been made since introduction 2001). That programme seeks to reward informants via a proffer of immunity from prosecution. But can one State agency reward reporting where another may prosecute failure to do so as a serious crime? Perhaps more importantly, given that the "withholding information" offence will apply to anyone with information of a cartel (including presumably the CCPC Immunity Officer), how can the confidential immunity application process work in practice? Presumably, in future, first contact will need to be with the Gardaí, not the CCPC.

5. More generally, could the bill diminish, in subtle but important ways, agency accountability and independence? In Ireland, as in most other free societies, a critical means to ensure agency accountability is via parliamentary oversight. This allows lawmakers opportunity to question agency representatives publicly and under the glare of media attention. It was in this way, for example, that public explanation of a missed deadline when reviewing a merger in 2006

(resulting in the deal being cleared by default) was obtained: the Competition Authority chair was brought before a parliamentary committee to explain. While the bill still provides for parliamentary committee attendance, it proposes that the CCPC chair may decline to answer questions related to law enforcement by the agency (including merger control). Thus, the bill proposes that the CCPC may refuse answer questions on "… any matter which is or has been or may at a future time be the subject of proceedings before a court or tribunal." But every meaningful action by the CCPC will necessarily involve potential for legal proceedings. At the same time, the bill contains an expanded power for the Minister to direct the CCPC as to its work programme.

6. Finally, questions could be asked what the larger policy aim of agency merger heralds for competition law enforcement? The two agencies have had differences. Take, for example, the response to a 2009 coordinated "price freeze" by Irish publicans: welcomed by the National Consumer Agency as pro-consumer, the Competition Authority viewed it as price fixing and threatened legal proceedings. Thanks to leadership of both agencies, relations do now seem better. And early concerns that the merger could effectively result in dilution of the new agency's competition law enforcement mission seem now assuaged. (In terms of budget numbers, the National Consumer Agency is significantly larger than the Competition Authority: the Competition Authority has a staff of around 50 and total exchequer funding of around €4 million per annum, while the National Consumer Agency, with similar staff levels, has annual budget of around €8 million per annum – nearly double the Competition Authority's.) Post-merger, the current Competition Authority boss will chair the new agency, while the NCA head will become one of four other directors. In terms of achieving the stated policy objective of cost savings, however, the merger is now expected to generate savings of around €170,000 per annum.

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