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Competition and Consumer Protection Act 2014

by **Marco Hickey**

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This article examines certain key points of the new Competition and Consumer Protection Act 2014 which came into force on 31 October 2014.

The CCPC will replace the CA and NCA

The Competition Authority (CA) and the National Consumer Agency (NCA) will be dissolved and the Competition and Consumer Protection Commission (CCPC) will be established. The stated intention of this move is to create a powerful consumer watchdog. The CCPC will have the full range of consumer, competition and criminal powers of the CA and the NCA, along with the strong additional powers put in place by the 2014 Act.

New Thresholds for Notifiable Mergers

The new compulsory merger control thresholds for notifying a merger to the CPCC are that, in their most recent financial year:

1. the aggregate turnover in Ireland of the parties is at least €50 million; and
2. the turnover in Ireland of each of two or more of the parties is at least €3 million.

To take a simple example, this means that if a purchaser with turnover in Ireland of €47m seeks to acquire an entity with €3m turnover in Ireland, a notification will be required. This is a significant departure from the current position under the 2002 Act whereby a transaction was only caught if each of the two parties had aggregate worldwide turnover in excess of €40m and one of them had turnover of €40m in the State. The new changes can require a notification where only one of the parties has significant turnover.

Any merger or acquisition that triggers the revised thresholds will require compulsory notification to the CCPC and the parties will be required to suspend implementation of the transaction until clearance is granted.

The changes simplify the current threshold test by removing previous references to "carrying on business in any part of the island of Ireland" and "worldwide turnover". The revised tests also impose a more proportionate domestic turnover threshold, by requiring that at least two parties have €3,000,000 turnover in Ireland.

It should also be noted that transactions falling below the thresholds set out above are still subject to the rules on anti-competitive agreements and abuse of dominance in sections 4 and 5 of the 2002 Act, respectively. Therefore, care must be taken to ensure that a transaction falling below the thresholds does not give rise to competition concerns.

New Time Periods for Merger Approval

Notification to the CCPC will have a suspensory effect and parties will be unable to implement a transaction until the CCPC has given clearance (either explicitly or by default) for the transaction to proceed. Currently, the Phase I review period is one month and the Phase II review period is four months.

The time periods for the CCPC to review a notified merger have been increased under the new Act. As a general rule, the CCPC has up to thirty working days in Phase 1 and up to 120 working days in Phases I and II combined. These periods are significantly longer than under the current regime. Additionally, the 2014 Act also provides for the introduction of a new 'stop the clock' provision for formal information requests in Phase II.

Possibility to Notify Earlier

A notification of a proposed merger may now be made where the undertakings involved demonstrate a good faith intention to conclude an agreement. Under the current regime, a notification can only be made upon the conclusion of an agreement, which is taken to mean a legally binding agreement (albeit subject to conditions) thereby necessitating a split signing and completion. The change will allow for a notification to be made upon the signing of a non-binding Heads of Agreement/Letter of Intent, meaning the approval process could run parallel to the negotiation of a final share/asset purchase agreement. This more closely reflects the position under the EU Merger Regulation.

New Procedures for Media Mergers

Media mergers are now subject to a more involved process with the introduction of a dual notification to the CCPC and the Minister for Communications, Energy and Natural Resources. The CCPC will look to the competition aspects while the Minister will review the merger from the perspective of media plurality in Ireland (e.g. diversity of ownership/content). A merger which has an EU dimension and requires notification to the Commission in Brussels under the EU Merger Control Regulation will still require notification to the Minister for Communications, Energy and Natural Resources if it amounts to a media merger under Irish law.

New CCPC Investigative Powers

The 2014 Act adds significant new investigative powers to those that already exist to combat serious white-collar criminal and competition offences. The additional enforcement powers include:

Under section 33 of the 2014 Act, the CCPC may compel parties to disclose information to it even if such information may turn out to be privileged legal material. Such a disclosure may only be done by means whereby the confidentiality of the information can be maintained pending a determination by the High Court of the issue as to whether the information is privileged legal material.
Under Section 89 of the 2014 Act, the CCPC may make a request for data retained by a telecommunications service provider under the Communications (Retention of Data) Act 2011 where the CCPC is satisfied that the data are required for the prevention, detection, investigation or prosecution of a competition offence.
Section 90 of the 2014 Act amends the Criminal Justice Act 2011 (2011 Act) so as to bring cartel offences within the full scope of that Act. The 2011 Act makes it an offence for a person not to report to Gardaí information which they know or believe might be of material assistance in preventing the commission of certain offences or, amongst other things, securing the conviction of any persons for those relevant offences.
Section 24 of the 2014 Act provides for the CCPC to share information, which in the opinion of the CCPC may relate to the commission of certain offences, with other authorities including An Garda Síochána, the Director of Corporate

Enforcement and the Revenue Commissioners.
Section 37 of the 2014 Act sets out further provisions which grant the CCPC and its officials increased rights and powers to contribute to, and participate in, the Gardaí's investigation and questioning of individuals regarding suspected competition offences.

New Provisions for the Grocery Goods Sector

The Competition and Consumer Protection Act will introduce significant new investigation and enforcement powers for the CCPC to ensure fairness between suppliers and retailers in the grocery goods sector. In an update to the Consumer Protection Act of 2007, the 2014 Act makes provision for the introduction of ministerial regulations covering new legal requirements for record-keeping and the inclusion of certain terms in written contracts. The 2014 Act also grants the CCPC strong powers to ensure the enforcement of these regulations.

Conclusion

This all illustrates the breadth of the 2014 Act and gives an indication of the important role to be played by the CCPC in the enforcement and advocacy of competition and consumer law in Ireland.

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