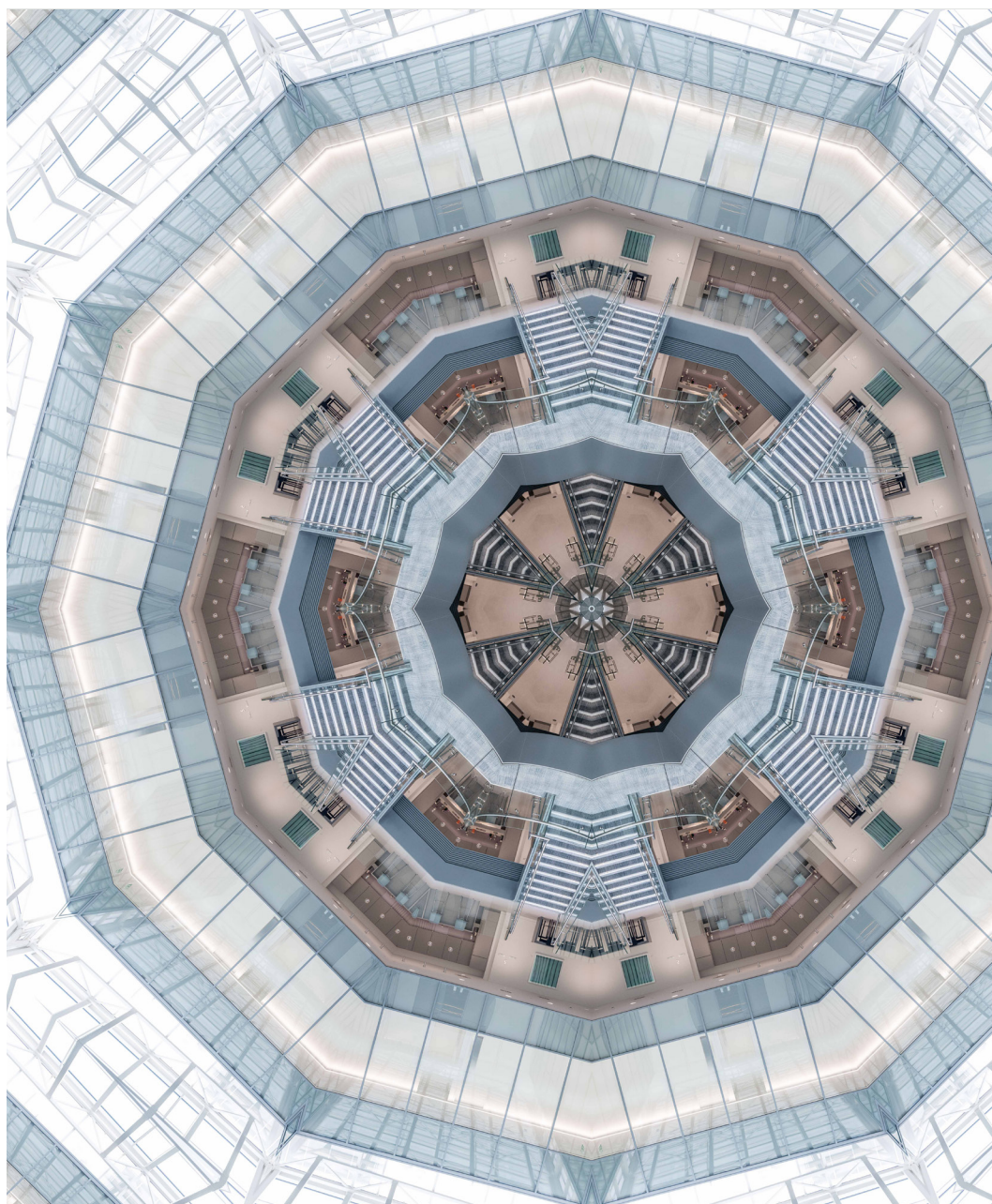


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COMPETITION AND
REGULATED MARKETS

The ECN+ Directive

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The enforcement of competition law in Ireland is set for wide-ranging reform as a result of Directive (EU) 2019/1 (known as “**ECN+**”), which is due to be transposed into Irish law by 4 February 2021. The purpose of ECN+ is to make national competition authorities (“**NCA**s”) across the EU more effective enforcers by ensuring they have the appropriate tools and resources to enforce EU competition law in a consistent manner within each Member State. In this briefing we outline the main reforms that ECN+ will introduce in Ireland and what they will mean for the future of competition enforcement here.

OVERVIEW

Background

In 2003, a de-centralised competition law enforcement system based on the direct application of the EU competition rules by NCAs was introduced. Building on the success of that reform, ECN+ has been introduced with a view to enabling NCAs to become more effective enforcers of the EU competition rules, in particular by harmonising to an extent the resources, powers and tools available to NCAs.

Why is ECN+ important?

By introducing minimum standards in relation to the enforcement of competition law at a national level, several aspects of ECN+ are likely to have a significant impact on the enforcement of competition law in Ireland (and in other EU Member States). The key changes to be introduced by ECN+ in an Irish context are discussed in further detail below.

When does ECN+ take effect?

Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with ECN+ by 4 February 2021.

What is the scope of ECN+?

ECN+ will apply whenever NCAs are applying Article 101 (the prohibition on restrictive agreements) and Article 102 (the prohibition on abuse of a dominant position) of the Treaty on the Functioning of the European Union (“**TFEU**”), including when equivalent national competition law are applied in parallel in the same case. Therefore, ECN+ has a wide scope and even cases concerning agreements or practices implemented only in Ireland could trigger the application of ECN+.

Implementation

As an EU directive, ECN+ outlines baseline requirements for Member States to achieve but leaves it at the discretion of Member States as to how to do so. This is particularly pertinent in an Irish context due to the institutional design of Ireland’s competition enforcement regime where powers are split primarily between the Competition Consumer Protection Commission (the “**CCPC**”) and the Irish courts, both of which are NCAs for the purposes of ECN+. Irrespective of how it is ultimately implemented, it is clear that ECN+ will bring forward a number of very significant changes to the competition enforcement landscape in Ireland as outlined below.

5 KEY REFORMS FOR IRELAND UNDER ECN+

REFORM		IMPACT / COMMENT
1 CIVIL FINANCIAL SANCTIONS Introduction of civil financial sanctions for breaches of competition law	ECN+ will require the introduction, for the first time, of a system for the imposition of civil financial sanctions (i.e. fines imposed either in civil proceedings by a court or in administrative proceedings by a regulator) for breaches of competition law in Ireland.	<p>The introduction of civil financial sanctions for breaches of competition law will mark a significant departure from the current regime, under which financial sanctions may only be imposed following criminal prosecution, and will have a profound effect on the enforcement of competition law in Ireland, particularly in relation to non-hardcore infringements of competition law (e.g. abuse of a dominant position or resale price maintenance).</p> <p>If the CCPC is to be given administrative fining powers, a number of changes to the CCPC's current practice and procedure, and structure would be required (e.g. the adoption of detailed procedural guidelines and the structural separation between investigative and decision-making bodies within the CCPC).</p>
2 INTRODUCTION OF A LENIENCY REFORM Introduction of a leniency programme for cartels	ECN+ will require the introduction, for the first time, of a leniency programme for cartel whistle-blowers in Ireland. This will provide for the possibility of a reduction in fines for undertakings who disclose their participation in cartels.	While it is currently possible for individuals and undertakings to apply for immunity from fines under the Cartel Immunity Programme, this is only available to the first undertaking or individual to admit its participation in a cartel. Following ECN+, other undertakings or individuals who subsequently come forward may in future benefit from leniency. As a result, ECN+ is likely to alter significantly the dynamics of cooperation between the CCPC and suspected cartel participants.
3 FINING STANDARDS Significant maximum fines for breaches of competition law	ECN+ introduces a common set of underlying standards for NCAs when fining undertakings for infringements of competition law.	By harmonising the approach to fining to a significant extent, ECN+ is likely to lead to the imposition of increasingly significant financial sanctions against companies found to be in breach of competition law. While fines have to date not been a noteworthy feature of the enforcement of competition law in Ireland, ECN+ is likely to bring the position more in line with other Member States where significant fines are more frequently imposed.
4 MINIMUM INVESTIGATIVE POWERS Minimum powers to inspect business premises	ECN+ seeks to ensure there are in place in each Member State a minimum set of investigative powers to ensure the effective enforcement of Articles 101 and 102 TFEU. This includes a "seize and sift" power pursuant to which authorities are permitted to take copies of or extracts from, documents and to continue making searches for information and the selection of copies or extracts at another location.	ECN+ provides that Member States must provide for the exercise of "seize and sift" powers, while ensuring appropriate safeguards are in place. In practice, this means that an NCA can seize material on-site and continue its search at a different location, provided that appropriate safeguards are in place that comply with general principles of EU law, the EU Charter of Fundamental Rights and the European Convention of Human Rights, including the right to privacy.
5 INTERIM MEASURES Power to impose interim measures while investigations are ongoing	ECN+ requires that NCAs provide for the possible imposition of interim measures while investigations of potential breaches of competition law are ongoing.	The possibility to impose interim measures during investigations will be a new power in the context of competition law in Ireland and is intended to ensure that a suspected infringement does not cause serious and irreparable harm to competition while an investigation is ongoing.



1. CIVIL FINANCIAL SANCTIONS

What is it?

Pursuant to ECN+, Ireland will be required to implement a system for civil or administrative fines for competition law breaches for the first time.

What is new?

a. Introduction of civil financial sanctions: Currently, only criminal fines can be imposed by the Irish courts for breaches of competition law meaning that, to secure the imposition of financial penalties, the CCPC/ Director of Public Prosecutions must prove its case before the courts to the criminal standard of proof (i.e. beyond a reasonable doubt). In this context, the CCPC generally only pursues criminal fines before the courts for the most serious competition law breaches, such as hardcore cartel offences (e.g. market sharing, price-fixing or bid-rigging), and has not done so for other competition law infringements (e.g. abuse of dominance or resale price maintenance). Following transposition of ECN+, however, Ireland will be required to implement a system for civil or administrative fines for competition law breaches, which would be proven on the basis of a civil standard of proof (i.e. on the balance of probabilities).

In August 2020, the Minister for Enterprise, Trade and Employment, Leo Varadkar, announced that the Government intends to give the CCPC the power to impose administrative fines. It remains to be seen how the legislation will approach this and the level of fines that could be imposed.

b. Increased Enforcement Role for the CCPC: EU Member States have the discretion to choose whether civil financial sanctions will be imposed by competition authorities directly in their own administrative proceedings or by courts in non-criminal judicial proceedings. However, at a minimum, the CCPC will be empowered to bring its own applications to court for the imposition of civil fines for breaches of competition law. Regardless of how ECN+ is implemented therefore, the CCPC will have increased enforcement powers, particularly in relation to non-hardcore offences, when compared to the position today.

What is the likely impact?

Given the limited remedies currently available to the CCPC for civil enforcement under the current competition law regime in Ireland and the difficulties in prosecuting non-hardcore infringements under a criminal standard of proof, the introduction of civil fines is likely to result in increased enforcement activity by the CCPC.

Overall, these changes are intended to result in a more effective competition law regime in Ireland and address the European Commission's concerns that the current regime leads to under-enforcement of non-criminal infringements.

This development is also likely to result in an increase in the frequency and scale of private follow-on damages actions relating to infringements of competition in Ireland. Such actions are facilitated by Directive 2014/104/EU on Antitrust Damages Actions, which was transposed into Irish law in 2017. For more information view our client briefing [here](#).

If the CCPC is to be given the power to impose sanctions directly in its own administrative proceedings, a number of changes to the CCPC's current practice and procedure and structure would be required. For example, the CCPC would need to develop procedures and accompanying guidance for the conduct of investigations into suspected breaches of competition law (including, for example, processes for the adoption of a statement of objections, the parties' rights to respond and the adoption of a final decision). In addition, the CCPC would need to ensure that decisions on whether to issue an infringement decision and on the appropriate amount of any penalty are taken by individuals who have not been involved in the investigation of the relevant conduct.



2. INTRODUCTION OF A LENIENCY REGIME

What is it?

ECN+ requires the introduction (or amendment, where relevant) of national immunity and leniency programmes for cartel whistle-blowers.

What is new?

a. Availability of Reductions in Fines: Currently, it is possible for individuals and undertakings to apply for immunity from fines under the Irish Cartel Immunity Programme ("CIP"). However, this is only available to the first undertaking or individual to admit its participation in a cartel and there is currently no possibility for a reduction in fines for other undertakings or individuals who subsequently come forward. The introduction of a leniency programme for cartel whistle-blowers in Ireland will provide for the possibility of a reduction in fines for undertakings who do not qualify for immunity from fines (e.g. because they were not the first to disclose their participation in the cartel) but who subsequently disclose their participation in a cartel.

b. Increased Cooperation between Member States: At the moment, there is no "one-stop shop" for leniency in the EU.

Therefore, leniency applicants whose cartel activities extend to more than one jurisdiction may have to make multiple parallel applications to the European Commission and/or to the NCAs in relevant Member States. This presents a significant challenge in the context of leniency applications where time is typically of the essence. ECN+ does not establish a single EU-wide portal for leniency applications but does facilitate the submission of parallel leniency applications to multiple competition authorities through the introduction of a summary application system. This should facilitate easier parallel submissions to multiple regulators.

c. Access to Leniency Statements: A key issue in the context leniency is the extent to which access to and use of leniency statements by parties other than the receiving competition authorities is permitted. This is particularly important in

view of the potential for follow-on damages claims against undertakings that have admitted their participation in a cartel. ECN+ goes a long way to allaying any potential fears in this respect by circumscribing access to leniency statements. In particular, access to leniency statements will only be granted to parties subject to the relevant proceedings and only for the purposes of exercising their rights of defence.

What is the likely effect?

These reforms will bring the practice in Ireland closer in line with the position under the European Commission's leniency regime and under the national competition regimes of a number of Member States. In doing so, ECN+ should increase legal certainty for undertakings who are seeking leniency in multiple jurisdictions, including in Ireland.

Given the overall emphasis on harmonisation in ECN+, it will be interesting to see to what extent the precise content of other leniency regimes will be replicated in the new Irish regime. In particular, as ECN+ does not mandate the level of reductions undertakings will benefit from relative to the fine that would otherwise be imposed, it will be a matter for the legislature to design the parameters of available reductions under the leniency programme to be introduced in Ireland.

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3. FINING STANDARDS

What is it?

ECN+ aims to harmonise the approach to fining by introducing a common set of underlying standards for NCAs when fining undertakings for infringements of competition law.

What is new?

- a. Effective, dissuasive and proportionate fines:** ECN+ introduces as a foundational concept the power for competition authorities to impose "*effective, proportionate and dissuasive fines*". While the Directive does not provide any further detail as to what level of fines might meet these criteria, it is clear that fines will need to be sufficiently high to ensure the effective and consistent enforcement of competition law.
- b. Gravity and duration of infringements:** In order to ensure that fines reflect the economic significance of infringements of competition law (e.g. increased prices for end-consumers of products or services), NCAs must have regard to the gravity and duration of the infringement.
- c. Maximum fines:** Member States must ensure that, at a minimum, NCAs have the power to impose a maximum fine of not less than 10% of total worldwide turnover of a business. The Irish Competition Act currently provides for a maximum fine of 10% of turnover but, in practice, this sanction is only sought in respect of hardcore cartel offences in criminal proceedings. Following implementation of the Directive, however, other infringements such as an abuse of dominance could attract significant fines of up to the maximum level.
- d. Periodic penalties:** The CCPC will (without the need for recourse to the courts) be empowered to impose periodic penalty payments for a number of different infringements of competition law. In particular, the CCPC will be able to impose periodic penalty payments on undertakings for the provision of false or misleading information in response to requests

for information and for the failure of representatives of an undertaking to appear for interview when requested.

- e. Enforcement of foreign fines:** ECN+ provides for increased cooperation between NCAs in different Member States through a mutual assistance programme for the enforcement of decisions imposing fines or periodic penalty payments. Therefore, undertakings will not be able to avoid paying fines in one Member State on the basis that they do not have sufficient assets located in that jurisdiction if they leave assets in another EU member state.

What is the likely effect?

To date, fines have not been a significant feature of the enforcement of competition law in Ireland with the largest fine ever having been previously imposed by the Irish courts amounting to €80,000. By contrast, fines in other European countries may be significant and well in excess of those seen thus far in Ireland (for example, in December 2019, the French competition authority imposed a fine of €157 million on Edenred France.)

Interestingly, these changes are also likely to align fining for breaches of competition law in Ireland with the enforcement regime under the General Data Protection Regulation, pursuant to which supervisory authorities (the Data Protection Commission in Ireland's case) are empowered to impose fines that are "*effective, proportionate and dissuasive*".



4. MINIMUM INVESTIGATIVE POWERS

What is it?

ECN+ requires that authorised officials carrying out dawn raids must have certain minimum powers to inspect business premises, including a power to “seize and sift” relevant material.

What is new?

a. Minimum investigative powers: ECN+ seeks to ensure that NCAs are empowered with a minimum set of investigative powers in order to be able to effectively perform their role in enforcing Articles 101 and 102 TFEU. This reflects a desire to remove disparities in the tools available to competition authorities around Europe and to align NCAs’ investigative powers with those available to the European Commission.

What is the likely effect?

Precisely how ECN+ will impact the CCPC’s dawn raid procedures and the exercise of its “seize and sift” powers is not yet clear. However, ECN+ requires that the exercise of investigative powers should be subject to appropriate safeguards that at least comply with the general principles of European Union law and the Charter of Fundamental Rights of the European Union. Such safeguards include right to good administration, the respect of undertakings’ rights of defence and the right to privacy.

In the context of “seize and sift” powers in particular, a safety mechanism such as the ‘sealed envelope procedure’ is required to guarantee protection for those fundamental rights.

Traditionally, under this procedure, documents were placed in a sealed envelope before being removed from a company’s premises and could only then be removed from the envelope and searched further in the presence of the company’s representative. In the digital age, this procedure is effectively carried out on the basis of an undertaking from the regulator not to review material unless in the presence of a company’s representative.

The issue of appropriate safeguards in the context of dawn raids came before the Supreme Court in 2017 in a case involving a challenge to the scope of documents seized by the CCPC during a dawn raid in May 2015. In a landmark decision on the scope of the CCPC’s dawn raid powers, the Supreme Court ordered that the CCPC could not access, review or make use of documents that were unrelated to the scope of its investigation and which had been seized during the dawn raid other than by agreement with the plaintiffs in accordance with their right to privacy under Article 8 of the European Convention of Human Rights. The Supreme Court decision is in line with the approach under ECN+, which ensures that appropriate safeguards are respected where an NCA exercises seize and sift powers.



5. INTERIM MEASURES

What is it?

ECN+ requires that national competition regimes provide for the imposition of interim measures while investigations of potential breaches of competition law are ongoing.

What is new?

- a. Interim measures:** ECN+ provides that NCAs will have the power to implement temporary measures to mitigate or prevent any potentially anti-competitive conduct by undertakings that are suspected of having breached competition law. Such powers are referred to as interim measures and their purpose is to prevent potential harm to competition before a competition authority has had the opportunity to fully investigate (and, if relevant, sanction) suspected anti-competitive behaviour. Interim measures do not have a prescribed form and may entail the cessation of particular conduct, the provision of access to an input or the provision of certain information.
- b. Serious or irreparable harm:** ECN+ aims, at a minimum, to align the position at national level with the European Commission's powers to impose interim measures by providing that NCAs must be able to impose interim measures "at least" in cases where there is urgency due to the risk of serious and irreparable harm to competition, on the basis of a prima facie breach of competition law. The reference in ECN+ to "at least" provides for the possibility of national legislatures introducing a lower standard for the imposition of interim measures, i.e. in circumstances where there might be a risk lower than serious and irreparable harm.
- c. Appeal:** reflecting the focus in ECN+ on the protection of fundamental rights, national competition regimes must ensure that legality, including the proportionality, of interim measures are capable of being reviewed in expedited appeal procedures.

What is the likely effect?

Traditionally, interim measures have been used sparingly by the European Commission. However, there has been a renewed focus on the use of interim measures of late, as reflected most recently in the European Commission's decision to impose interim measures on Broadcom in October 2019 during its investigation with regard to TV and modem chipsets markets. In particular, interim measures have come into focus in the context of digital markets where competition law investigations into alleged anti-competitive behaviour risk being outpaced by the rapidly evolving nature of such markets with the result that any remedy or sanction may be effectively obsolete by the time it is ultimately imposed.

While interim relief in the form of court-imposed injunctions is already potentially available in competition law investigations in Ireland, the introduction of a competition law-specific regime for interim measures through ECN+ may well be significant in the context of the CCPC's future competition law investigations.

Although the precise evidentiary standard required for the imposition of interim measures will be a matter for the legislature, the use of interim measures by other NCAs may well inform the approach here. In particular, the French Competition Authority has been particularly active in imposing interim measures in the context of digital markets and the CCPC may well advocate that it should have similar abilities in this respect.

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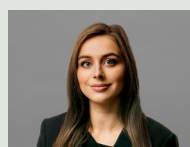
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