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**The Standard and the Burden of Proof in Competition Law Cases – Note by Ireland**

5 December

This document reproduces a written contribution from Ireland submitted for Item 7 of the 144<sup>th</sup> OECD Competition Committee meeting on 5-6 December 2024.

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## Ireland

### 1. Introduction

1. This submission has been prepared by the Irish Competition and Consumer Protection Commission (the “CCPC”) to inform the discussion at the OECD Roundtable on “The Standard and Burden of Proof in Competition Cases” on 5 December 2024.
2. Ireland is somewhat unusual among its fellow EU Member States in that, until recently, it effectively had only a criminal enforcement regime for breaches of competition law.<sup>1</sup> Arising from the ECN+ Directive<sup>2</sup>, however, Ireland now also has a parallel administrative enforcement regime for breaches of competition law.<sup>3</sup>
3. Ireland is a common law jurisdiction, which impacts both the standard and burden of proof that apply in competition cases. In this submission, we will discuss the Irish approach to the standard of proof and burden of proof in conduct cases and in merger cases.

### 2. Competition law: relevant legislative provisions in Ireland

4. The CCPC has responsibility for enforcing EU and national competition law in Ireland. The substantive provisions of Irish competition law are contained in the [Competition Act 2002, as amended](#) (the “2002 Act”).<sup>4</sup>
5. The 2002 Act contains two main prohibitions, which largely mirror Articles 101 and 102 of the Treaty on the Functioning of the EU (“TFEU”):

*Section 4(1) of the 2002 Act (which largely mirrors Article 101 TFEU) prohibits and renders void “all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the*

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<sup>1</sup> Prior to the entry into force of the Competition (Amendment) Act 2022 on 27 September 2023, certain civil remedies were also available to the CCPC in respect of breaches of competition law. The CCPC could (and continues to be entitled to) seek a declaration of illegality (i.e. a court ruling that a particular arrangement or behaviour was unlawful) and/or injunction (i.e. a court ruling requiring a particular arrangement or behaviour to be terminated) before the Irish courts (see section 14A(3) of the 2002 Act). The CCPC could also (and continues to be entitled to) apply to the Irish civil courts for certain structural remedies in abuses of dominance cases (see section 14A(4) of the 2002 Act). However, Irish law did not – prior to the 2022 Act – provide for the imposition of civil fines for competition law infringements.

<sup>2</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

<sup>3</sup> This enforcement regime is “administrative” in that, under it, decisions as to whether competition law has been breached, and – if so – as to what sanction should be imposed, are made in the first instance by the CCPC, an administrative body (more particularly, by the CCPC’s independent “adjudication officers”), and not by a judicial body. It can also be described as a “civil” enforcement regime in that it is non-criminal.

<sup>4</sup> The principal Acts that have amended the 2002 Act include the Competition (Amendment) Act 2006, the Competition (Amendment) Act 2012, the Competition and Consumer Protection Act 2014 and the Competition (Amendment) Act 2022.

*prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State”. Section 4(1) lists some specific types of behaviour which are expressly prohibited. These include agreements which:*

- *directly or indirectly fix prices,*
- *limit or control production, markets, technical development or investment,*
- *share markets or sources of supply,*
- *apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,*
- *attach supplementary obligations to a commercial contract which have nothing to do with the subject of the contract (e.g. tying), or*
- *are concerned with bid-rigging.*

*Section 5 of the 2002 Act (which mirrors Article 102 TFEU) prohibits the abuse of a dominant position.*

## **2.1. Criminal sanctions for breaches of competition law**

6. In Ireland, it is a criminal offence to breach section 4<sup>5</sup> or 5 of the 2002 Act or Article 101 or 102 of the TFEU.<sup>6</sup>

7. The criminal penalties for breaching section 4 or 5 (or Article 101 or 102 TFEU) are set out in section 8 of the 2002 Act. In less serious cases (which are prosecuted by the CCPC itself on a summary basis in the District Court), the District Court may impose criminal fines of up to €5,000 on the business or individual concerned and/or a prison sentence of up to 6 months on an individual.

8. In cases involving more serious breaches (e.g. agreements between competitors to fix prices, share markets or limit output), following prosecution on indictment by the Director of Public Prosecutions (“DPP”) and conviction by a jury, the Central Criminal Court may impose fines on a business or individual. In addition, in the case of “hardcore” breaches of competition law (i.e. cartel offences involving, for example, horizontal price fixing, market sharing or bid-rigging), the Central Criminal Court can impose a term of imprisonment. In the case of these ‘hardcore’ breaches of competition law, the criminal fines and prison sentences are as follows:

- A business can be fined up to €50 million or 20% of its annual business turnover, whichever is greater, if convicted on indictment.
- An individual found guilty of an offence on indictment can be fined up to €50 million or 20% of his or her annual individual turnover, whichever is greater. An individual can also be imprisoned for up to 10 years.

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<sup>5</sup> A breach of section 4 cannot be prosecuted as a criminal offence unless it involves one of the following: (i) price fixing, (ii) market sharing, (iii) output restrictions, (iv) bid-rigging, (v) collective boycott agreements, (vi) sharing information concerning future prices and future quantities of production, or (vii) restricting the ability of undertakings to carry out research and development or to continue to use their own technology for future research and development. This limitation arises by virtue of section 7A of the 2002 Act.

<sup>6</sup> See sections 6 and 7 of the 2002 Act.

## 2.2. Administrative sanctions for breaches of competition law

9. The Competition (Amendment) Act 2022, which transposed the ECN+ Directive in Ireland, amends the 2002 Act by introducing a new administrative enforcement regime for breaches of competition law. As a result, there are now two separate and parallel enforcement routes in Ireland for breaches of EU and Irish competition law i.e. criminal<sup>7</sup> and administrative<sup>8</sup>.

10. Under the new administrative enforcement regime introduced by the 2022 Act, the CCPC – through specially-appointed independent adjudication officers – has the power to make a finding that an undertaking has breached competition law and to impose administrative fines<sup>9</sup> of up to €10 million or 10% of the undertaking’s worldwide turnover, subject to confirmation by the High Court.

## 3. Standard of proof in competition conduct cases in Ireland

11. The standard of proof is broadly defined as the probability or certainty required to establish a case as ‘proven’: in the instance of competition law, it is the standard required to conclude that anti-competitive behaviour to the extent of violating the relevant legislation occurred.

### 3.1. Standard of proof in criminal cases

12. Under Ireland’s criminal enforcement regime for breaches of competition law, less serious cases are tried in the District Court before a judge alone while more serious cases are tried in the Central Criminal Court before a jury. The relevant standard of proof imposed on the prosecutor in all criminal cases in Ireland is “beyond a reasonable doubt”. In other words, the guilt of the accused must be proved beyond a reasonable doubt.

13. This criminal standard of proof is not enshrined in any piece of legislation. Rather, it is an accepted fact in Irish law that, where a matter is prosecuted on a criminal basis, the standard of proof is that of “beyond a reasonable doubt”. Murdoch and Hunt’s Encyclopaedia of Irish Law states that “*In criminal cases, where the burden of proof rests with the prosecution, the guilt of the accused must be proved beyond reasonable doubt.*” The requirement in criminal cases to prove the guilt of the accused “beyond a reasonable doubt” is a fundamental feature of many legal systems throughout the world. This Irish Court of Appeal observed as follows in a recent case:

*“Proof is required in a prosecution to a high standard, namely, beyond a reasonable doubt. But that standard does not amount to mathematical or philosophic certainty, assuming that such exist. It is not proof beyond the possibility*

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<sup>7</sup> See sections 6 to 11 of the Competition Act 2002.

<sup>8</sup> See Parts 2C and 2D of the Competition Act 2002, as inserted by the Competition (Amendment) Act 2022.

<sup>9</sup> This administrative fining regime derives from Article 13 of the ECN+ Directive which requires all Member States to ensure that national administrative competition authorities may either impose by decision in

their own enforcement proceedings, or request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU.

*of any theoretical doubt that could be considered to arise or to be possible. It is proof beyond reasonable doubt. That means proof beyond a doubt based in reason. If the doubt is fanciful or extravagant or not based in reason, it is not a reasonable doubt.*<sup>10</sup>

14. It should be noted that the 2002 Act imposes a different standard of proof in instances where the burden of proof is on the defendant (rather than the prosecutor). As discussed below, in certain instances the 2002 Act reverses the burden of proof by placing the onus on the defendant to prove certain matters. Section 3(3)(a) of the 2002 Act states that where “*proof of any matter is, by any provision of this Act, placed on the defendant in the proceedings concerned it shall be sufficient, for the purposes of that provision, for the defendant to prove the matter on the balance of probabilities*”. Therefore, where the 2002 Act imposes the burden of proof on the defendant to prove a particular matter, the defendant must prove that matter on the balance of probabilities.

### 3.2. Standard of proof in administrative cases

15. By contrast with the criminal regime, in cases dealt with under Ireland’s new administrative competition enforcement regime, the independent adjudication officer must decide whether “on the balance of probabilities” the relevant undertaking has breached competition law.<sup>11</sup> In other words, the standard of proof under the administrative enforcement regime is the conventional civil standard of proof i.e. on the balance of probabilities. Where the defendant does not appeal against the decision, the adjudication officer’s decision must be confirmed by the High Court before it can take effect.<sup>12</sup>

16. Where the adjudication officer makes a finding of infringement of competition law and imposes a fine, the defendant is entitled to appeal. On appeal, the High Court can annul the adjudication officer’s decision where it is satisfied that “*a serious and significant error of law or fact, or a series of minor errors of law or fact which when taken together amount to a serious and significant error, was made in making the decision, or that the decision was made without complying with fair procedures*”.<sup>13</sup> As one legal commentator has noted, this requirement to establish a “*serious and significant error of law or fact*” in the adjudication officer’s decision means that the appeal court must treat the decision of the adjudication officer with a degree of deference, and can annul it only in specific circumstances.<sup>14</sup>

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<sup>10</sup> *DPP v Murphy* [2017] IECA 6 at paragraph 23.

<sup>11</sup> See section 15X(2) of the 2002 Act, as inserted by the Competition (Amendment) Act 2022.

<sup>12</sup> See section 15AZ of the 2002 Act, as inserted by the Competition (Amendment) Act 2022. The High Court can decline to confirm the adjudication officer’s decision where it finds that: (a) the decision contains an error of law which is (i) manifest from the record of the decision, and (ii) fundamental so as to deprive the decision of its basis; or (b) the sanction or remedy imposed was manifestly (i) disproportionate, (ii) in excess of the sanction or remedy required to be dissuasive, or (iii) in excess of the sanction or remedy required to be effective.

<sup>13</sup> See section 15AY(10)(b) of the 2002 Act, as inserted by the Competition (Amendment) Act 2022.

<sup>14</sup> Barry Doherty, “Are we there yet? Administrative financial sanctions under the Competition (Amendment)

Act 2022”, *Irish Journal of European Law*, Vol. 25, September 2023, 23-62.

### 3.3. Choice of enforcement regime

17. The CCPC’s primary role in relation to EU and Irish competition law is as an investigator. The different standards of proof in criminal and administrative cases lead to an interesting dichotomy. The CCPC can decide at any point in its investigation whether to: (i) pursue a matter criminally and prepare a file for the DPP, with a view to meeting the higher criminal standard of proof of “beyond a reasonable doubt”; or (ii) pursue a matter under the auspices of its own administrative enforcement regime with a view to meeting the lower civil standard of proof i.e. “on the balance of probabilities”.

18. The CCPC has adopted a Guidance Note on the CCPC’s Choice of Enforcement Regime for Breaches of Competition Law<sup>15</sup> which provides information on the high-level principles that the CCPC may consider when selecting an appropriate enforcement regime for suspected infringements of competition law. The factors that the CCPC may take into account include: (i) the nature of the suspected breach of competition law; (ii) the likelihood of successful enforcement action / prosecution; and/or (iii) the CCPC’s Prioritisation Principles.

### 3.4. *Mens rea* for breaches of competition law

19. The “mental state” of the accused/defendant that must be proved (i.e. the *mens rea*) differs in competition cases in Ireland depending on whether the case is being dealt with under the criminal or administrative enforcement regime. In criminal cases, the prosecutor must show that the accused acted “*intentionally or recklessly*”<sup>16</sup> to prevent, restrict or distort competition. In administrative cases, the adjudication officer must be satisfied that the defendant acted “*intentionally, recklessly or negligently*”.<sup>17</sup>

## 4. Burden of proof in competition conduct cases in Ireland

20. As noted above, Ireland is a common law jurisdiction; the law on the burden of proof applicable to competition law cases is derived both from statute (i.e. the 2002 Act) and from case law.

### 4.1. Standard rule: burden of proof on prosecutor / CCPC

21. Under both the criminal and administrative competition enforcement regimes in Ireland, the burden of proof generally falls on the party bringing the case. This means that in criminal cases the burden of proof is on the CCPC (for less serious cases prosecuted summarily), or the DPP (for more serious cases prosecuted on indictment). In administrative cases, the burden of proof is on the CCPC. Accordingly, in both criminal and administrative cases, the onus or burden is on the party bringing the case to prove that the case they bring and the facts they allege meet the standard of proof. The burden of proof

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<sup>15</sup> This Guidance Note was published by the CCPC on 1 August 2023 and is available [here](#).

<sup>16</sup> See sections 6(1) and 7(1) of the 2002 Act, as substituted by the Competition (Amendment) Act 2022.

<sup>17</sup> See section 15X(2)(a) of the 2002 Act. Article 13 of the ECN+ Directive provides for the imposition of non-criminal fines where the defendant has committed an infringement intentionally or negligently.

remains on the prosecutorial body regardless of whether the alleged breach of competition law is based on vertical or horizontal conduct or an abuse of dominance.

## 4.2. Reversal of burden of proof in certain instances

22. There are, however, some instances in which the 2002 Act itself reverses the burden of proof in respect of certain matters i.e. the burden shifts to the defendant.

23. The primary example of this is section 6(2) of the 2002 Act which states:

*“In proceedings for an offence under subsection (1), it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to—*

*(a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice,*

*(b) limit output or sales, or*

*(c) share markets or customers.*

*has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State or within the common market, as the case may be, unless the defendant proves otherwise.” [emphasis added]*

24. It should be noted that at least one legal commentator in Ireland has questioned whether section 6(2) of the 2002 Act constitutes an unconstitutional reversal of the burden of proof. The commentator questioned whether a reversed burden (such as that contained in s.6(2)) which casts an obligation on an accused to disprove a factual matter that is an essential part of the offence with which the accused is charged amounts to an unwarranted violation of the presumption of innocence.<sup>18</sup> However, this issue has not to date – as far as we are aware – been litigated in the Irish courts in the context of any criminal prosecution for offences under the 2002 Act.

25. In the case of administrative – as opposed to criminal – proceedings, section 7B of the 2002 Act contains a similar presumption (and reversal of the burden of proof) to that set out in section 6(2).

## 4.3. Presumptions

26. Section 12 of the 2002 Act contains some specific presumptions in relation to documents. These presumptions apply in all criminal or administrative enforcement proceedings for breaches of competition law in Ireland. The presumptions are aimed at easing the burden of proof on the prosecutor. Sections 12(2) to (6) of the 2002 Act provide as follows:

*“(2) Where a document purports to have been created by a person it shall be presumed, unless the contrary is shown, that the document was created by that person and that any statement contained therein, unless the document expressly attributes its making to some other person, was made by that person.*

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<sup>18</sup> See Andrews, Gorecki & McFadden, *Modern Irish Competition Law*, Wolters Kluwer (2015), pp.95-96.

(3) *Where a document purports to have been created by a person and addressed and sent to a second person, it shall be presumed, unless the contrary is shown, that the document was created and sent by the first person and received by the second person, and that any statement contained therein—*

*(a) unless the document expressly attributes its making to some other person, was made by the first person, and*

*(b) came to the notice of the second person.*

(4) *Where a document is retrieved from an electronic storage and retrieval system, it shall be presumed, unless the contrary is shown, that the author of the document is the person who ordinarily uses that electronic storage and retrieval system in the course of his or her business.*

(5) *Where an authorised officer who, in the exercise of his or her powers under section 37 of the Competition and Consumer Protection Act 2024, has removed one or more documents from any place, gives evidence in any proceedings under this Act that, to the best of the authorised officer’s knowledge and belief, the material is the property of any person, then the material shall be presumed, unless the contrary is shown, to be the property of that person.*

(6) *Where, in accordance with subsection (5), material is presumed in proceedings under this Act to be the property of a person and the authorised officer concerned gives evidence that, to the best of the authorised officer’s knowledge and belief, the material is material which relates to any trade, profession, or, as the case may be, other activity, carried on by that person, the material shall be presumed, unless the contrary is proved, to be material which relates to that trade, profession, or, as the case may be, other activity, carried on by that person.”*

27. As a result, in the circumstances set out in section 12 of the 2002 Act, the burden of proof shifts from the prosecutor to the accused in criminal cases (or from the CCPC to the defendant in administrative cases) in relation to the documents or material in question i.e. the onus is on the accused/defendant to rebut the relevant presumption.

28. Finally, section 8(7) of the 2002 Act contains a specific presumption that applies in criminal competition cases. It provides that a person proved to be “*a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity*” is presumed to have consented to the offending acts. Section 8(6) provides that any executive “*being a director, manager, or other similar officer*” of a company that has authorised or consented to an offence by the company shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence. This principle of criminal liability of individuals for corporate acts under Irish competition law has been endorsed by the Irish Supreme Court in *DPP v Hegarty*.<sup>19</sup>

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<sup>19</sup> *DPP v Hegarty* [2011] IESC 32.

## 5. Standard and burden of proof in merger cases

### 5.1. Statutory background

29. The CCPC’s merger review function is provided for in Part 3 of the 2002 Act. A transaction which comes within the definition of the term “merger or acquisition” in section 16 of the 2002 Act is required to be notified to the CCPC where the undertakings involved in the transaction exceed certain turnover thresholds. Certain media mergers are also mandatorily notifiable to the CCPC, irrespective of the turnover of the parties involved.<sup>20</sup> Furthermore, section 18A of the 2002 Act now gives the CCPC the power to ‘call in’ and review a proposed merger that would not otherwise be required to be notified where the transaction “*may, in the opinion of the [CCPC], have an effect on competition in markets for goods or services*” in Ireland.

30. When a proposed merger is notified to the CCPC,<sup>21</sup> the CCPC will first carry out a preliminary or “Phase 1” assessment of the likely effects of the merger on competition under section 21 of the 2002 Act. At the conclusion of this phase, if the CCPC finds that the merger will not result in a substantial lessening of competition in markets for goods or services in Ireland (“SLC”), the CCPC will clear the merger; otherwise, the CCPC will make a determination to carry out a full (“Phase 2”) investigation pursuant to section 22 of the 2002 Act.

31. On completion of the full Phase 2 investigation, the CCPC must conclude that the merger or acquisition: (a) may be put into effect; (b) may not be put into effect; or (c) may be put into effect subject to conditions specified by it being complied with. In making this determination the test upon which the authorisation or prohibition of the proposed transaction turns is whether the merger or acquisition will result in a substantial lessening of competition in markets for goods or services in Ireland (i.e. an “SLC”).

32. In addition to the statutory framework, the CCPC’s Merger Guidelines<sup>22</sup> set out in detail the steps which it takes and the criteria and tests which it uses in analysing the apparent effects of the proposed merger with a view to assessing whether it will result in an SLC.

### 5.2. CCPC merger determination vs appeal stage

33. Given the legal context in which the Irish merger review regime operates, it is important to keep in mind the stage of the process in question (e.g. whether the matter is currently before the CCPC or before a court) when considering the concepts of the burden of proof and the standard of proof. The burden and/or standard of proof may differ depending on the stage of the process and it is important to keep the burden and standard of proof applicable to each stage of the process conceptually separate.<sup>23</sup> This submission

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<sup>20</sup> See the Competition Act 2002 (Section 18 (5) and (6)) Order 2007 (S.I. 122/2007).

<sup>21</sup> Such mergers may also be notified to the CCPC on a voluntary basis by at least one of the undertakings involved in the merger, pursuant to section 18(3) of the 2002 Act.

<sup>22</sup> Guidelines for Merger Analysis dated 31 October 2014, available [here](#).

<sup>23</sup> See, by way of contrast, the judgment of the General Court of the EU in Case T-342/07 *Ryanair Holdings plc v*

*European Commission*, where the Court stated that there is a burden of proof on the European Commission when carrying out its review of a merger such that, in order to block a merger, the European Commission “*has to prove [...] that the implementation of the notified concentration*

sets out the burden and standard of proof that apply in the context of: (i) the CCPC’s own review of the merger; and (ii) the High Court’s consideration of the CCPC’s decision on appeal.<sup>24</sup>

### 5.3. Burden and standard of proof during the CCPC’s own review of a proposed merger

34. Where the CCPC is carrying out its own review of a proposed merger, there is, strictly speaking, no burden of proof on any party. Pursuant to the general principles of Irish administrative law, the CCPC is required to give reasons for its decisions, and section 22(4) of the 2002 Act also specifically provides that the CCPC’s Phase 2 determinations (including any determination to block a merger) must be reduced to writing and published. The CCPC is also obliged under Irish administrative law to reach its decisions reasonably, on the basis of the evidence, and in accordance with fair procedures. However, the CCPC’s role when carrying out its merger review function is investigative: its role is to find whether the merger will result in an SLC on the basis of the results of its investigation, not to prove that the merger will (or will not) result in an SLC.

35. Similarly, there is strictly speaking no burden of proof on the parties to the proposed merger at this investigative stage of the process. If evidence gathered by the CCPC shows, in the opinion of the CCPC, that the proposed merger will not result in an SLC, it does not matter whether the relevant evidence has been provided by the parties to the proposed merger or has been obtained by the CCPC from other sources. However, this basic position is subject to some caveats. First, the parties to the proposed merger must provide the CCPC with “full details” of the proposed merger when making the merger notification under section 18 of the 2002 Act and must comply with all requests for information (RFIs) issued by the CCPC under section 20(2); if the parties do not comply with these obligations, the CCPC may find that the merger notification is void under section 18(12), which requires the parties to restart the process. Second, as a matter of practice, the CCPC’s Merger Guidelines require<sup>25</sup> merging parties to provide the CCPC with evidence of the likely competitive effects of the proposed merger, particularly when raising arguments to counter competition concerns – e.g., paragraph 1.19:

*“The Commission’s review of a notified merger or acquisition is evidence-based. This means that the Commission requires sufficient reliable evidence from the merging parties regarding the likely competitive effects of the merger. This is particularly important when the parties wish to present merger defence arguments (i.e., arguments to counter competition concerns). The most common of such*

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*would significantly impede effective competition in the common market or in a substantial part of it...”* (paragraph 1). Notably, no distinction was drawn by the General Court between that burden on the European Commission when carrying out its own review and the burden on the European Commission when defending its decision before the General Court; while this approach may make sense when applied to the legal framework of the EU institutions, attempting to apply the same approach to the Irish merger review regime would create conceptual confusion.

<sup>24</sup> There is a notable lack of case-law of the Irish courts dealing specifically with the Irish merger review regime, since decisions of the CCPC (and of its predecessor, the Competition Authority) in merger review cases have very rarely been challenged before the Irish courts. There has only been one substantive judgment of the Irish courts on such a case, namely the judgment of the High Court in *Rye Investments Limited v Competition Authority* [2009] IEHC 140 on appeal from the Competition Authority’s decision to block the proposed merger.

<sup>25</sup> The CCPC’s Merger Guidelines do not have force of law but do serve as an indication to merging parties of how the CCPC approaches its merger review function in practice.

*arguments include ease of entry, countervailing buyer power, efficiencies and the failing firm.”*

36. As regards the standard of proof in merger cases, the CCPC has in some merger determinations used the language of the “standard of proof” as a shorthand for how sure the CCPC must be of its conclusion that an SLC will or will not occur. The CCPC’s position is that the “standard of proof” in this context is the same as that applicable in ordinary civil litigation, namely the “balance of probabilities” test. So, in order to decide that the result of the merger or acquisition will be an SLC, the CCPC must decide that an SLC is more likely than not to occur.<sup>26</sup>

#### **5.4. Burden and standard of proof in appeals to High Court against CCPC merger decisions**

37. Under section 24 of the 2002 Act, a notifying party may appeal a determination of the CCPC to block a merger, or to approve a merger subject to conditions, to the High Court. On the hearing of such an appeal, the High Court may annul, confirm or modify the CCPC’s determination, or may remit the matter to the CCPC directing the CCPC to make a new determination taking into account the High Court’s findings.

38. In such an appeal, the burden of proof is on the appellant to show that the CCPC’s determination should not be upheld.

39. As regards the standard of proof, the Irish High Court held in *Rye Investments Limited v The Competition Authority*<sup>27</sup> that the standard was that identified in a different statutory context by the Supreme Court in *Orange v Director of Telecommunications Regulation*, namely that the appellant—

*“will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors.”*<sup>28</sup>

40. The High Court exercises a degree of curial deference towards the findings of the CCPC when hearing an appeal against a CCPC merger determination. In particular, section 24(4) of the 2002 Act specifically provides *inter alia* that the High Court on hearing such an appeal “shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be fact by the [CCPC] in exercising the relevant powers under section 22 were correctly so accepted or found”. Further, the *Rye Investments* judgment indicates that the High Court will also exercise some deference towards the CCPC as regards the CCPC’s inferences/conclusions from primary facts:

*“5.20 Accordingly, in a case such as the present, where primary findings of fact have not been put in issue, the Court considers that a determination by the Authority that a merger or acquisition will result in a substantial lessening of competition ought not to be set aside by this Court unless:-*

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<sup>26</sup> See, e.g., paras 3.5-3.14 of the CCPC’s determination in M/21/021 – [Bank of Ireland/Certain Assets of KBC](#) and paras 1.58-1.63 of its determination in M/23/011 – [DAA plc / Certain Assets of Mr Gerard Gannon](#).

<sup>27</sup> [2009] IEHC 140, paragraph 5.14.

<sup>28</sup> [2000] 4 IR 159, at page 185.

- (a) *The Authority is shown to have committed a serious error in drawing inferences or conclusions from facts, such that the inferences or conclusions become untenable or unsound by reason of the error having been made; or*
- (b) *It is demonstrated that the Authority has failed to take into consideration or adequately to consider, relevant information or data such that an inference or conclusion material to the determination is unsupported by or is rendered inconsistent with the clear force and effect of the available evidence taken as a whole; or*
- (c) *A significant appraisal of economic or technical factors material to the functioning of competition in the relevant market is shown to be so inconsistent with the available evidence as to be manifestly unreasonable and unsound; or*
- (d) *The Authority's statement of its reasons for reaching conclusions material to the basis of the determination is lacking in cogency or coherence or is contradicted by the evidence which was available to it; or*
- (e) *The Authority has made a material error of law either in the construction and application of the Act or by otherwise infringing some applicable principle of constitutional or natural justice.*

*5.21 In other words, where the Authority has, without committing significant error, exercised its specialist expertise in making judgments as to the prospective consequences of the economic and commercial factors which govern or influence competition in the relevant market, this Court should not intervene even if it is demonstrated that an opposite conclusion might plausibly have been reached by placing weight on different aspects of the available evidence or data or by attributing different or greater significance to other pertinent factors in the economic assessment. Nevertheless, the Court will be entitled and obliged to intervene to set aside a material economic conclusion if it is shown to be incorrect because it is unsupported by or inconsistent with the clear effect of the evidence, information or data upon which it is based.”*