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THE COMPETITION ACT 2002

1. In April 2002 the Competition Act, 2002 was enacted to consolidate and modernise the existing enactments relating to competition and mergers. It replaces the Mergers, Takeovers and Monopolies (Control) Act, 1978, as amended, the Competition Act, 1991 and the Competition (Amendment) Act, 1996. It also introduces significant changes to Ireland's competition and merger law arrangements. The Act follows the work of the Competition and Mergers Review Group (CMRG), which carried out a major review of existing arrangements over the period September 1996 to March 2000. The Act also takes account of other developments, particularly the proposed modernisation of EU competition law.

Enforcement***Prohibitions***

2. The new Act (Section 4(1)) repeats the general prohibitions of anti-competitive agreements, decisions and concerted practices that were introduced by Section 4(1) of the 1991 Act. The old Act contained a system for granting individual certificates or licences; and the existence of a certificate or licence was a defence against criminal proceedings. Under the new Act (Section 4(2)), the four "efficiency criteria" which must be met if a licence is to be granted become directly applicable – in other words, it will not be necessary for undertakings to notify agreements in order to benefit from exemption. This is similar to the approach taken in the EU Modernisation proposal. The notification system and the process for the issue of certificates/grant of licences are abolished, but there is a provision for the Authority to declare that certain categories of arrangements comply with the efficiency conditions. The result of the new provisions is that existing licences, certificates and category certificates will all lapse on 1 July. However, special provisions apply to category licences in existence at the commencement date. They continue in existence "as if" they were category declarations (Schedule 2)

3. Under the previous system, there was a certain amount of confusion as to whether the Competition Acts applied to mergers. The Authority took the view that they did, first in Woodchester/UDT (Decision No. 6 of 4 August 1992) and subsequently in Irish Distillers/Cooley (Decision No. 285 of 25 February 1994). The new Act (Section 4(3)) makes it clear that mergers which are above the threshold for notification to the Authority under the merger provisions set out in part 3 of the Act are excluded from the scope of the general prohibition in Section 4(1).

4. Section 5 of the new Act repeats the provisions of Section 5 of the 1991 Act, which prohibits the abuse of a dominant position. Again, under Section 5(3), mergers above the thresholds are excluded from the scope of the prohibition.

Offences and defences

5. Under the old legislation, a breach of Section 4(1) or 5 constituted an offence. The 1996 Act, which created these offences, provided for an "ignorance defence" – if the defendant "did not know, nor, in all the circumstances of the case, could the defendant be reasonably expected to have known, that the effect of the agreement, decision of concerted practice concerned would be the prevention, restriction or

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distortion of competition in trade alleged in the proceedings.” (or “that the act or acts concerned done by the defendant would constitute the abuse of the dominant position in trade for goods or services alleged in the proceedings”). In the case of breaches of Section 4(1), the existence of a certificate or licence also constituted a defence.

6. Under the new legislation, the ignorance defence is abolished. The Act creates new offences of breaches of Article 81(1) or 82, to facilitate the enforcement of EU competition law in Ireland (in line with recommendations of the CMRG). In Section 4(1) or Article 81(1) proceedings it is a defence to show that the four “efficiency conditions” are complied with. It is also a defence to show that an arrangement falls within an EU exemption, or that the act or acts concerned was or were done pursuant to a determination made or a direction given by a statutory body.

7. The 2002 Act introduces a new distinction between mortal sins and venial sins. “Hard-core cartel” offences are mortal sins. They are defined (Section 6(2)) as agreements, decisions or concerted practices involving 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.

8. This reflects a more economic approach, whereby certain offences are regarded as being unequivocally harmful to consumers. Others, particularly offences relating to vertical agreements, are less seriously restrictive of competition. In US antitrust law, a distinction is made between “per-se” offences, where the entering into the agreement is itself the offence; it is not necessary to prove, in every case, that the object or effect is to prevent, restrict or distort competition. Other offences are treated on a “rule of reason” basis. Under the 2002 Act, Section 6(2) introduces a new presumption, which will apply in the prosecution of the more serious offences. This obliges the court to presume, unless the defendant can prove otherwise, that the object of the agreement is to prevent, restrict or distort competition. The standard of proof for the defendant to overturn this presumption is the balance of probabilities, as per Section 3 (3) (a) of the 2002 act. All other Section 4 and Article 81(1) offences, and all breaches of Section 5 and Article 82, are treated as “venial sins”. The penalties are lower (see below), and this presumption does not apply.

Penalties

9. Under the 1991 and 1996 Acts, all breaches of Section 4(1) and Section 5 attracted similar penalties. On summary prosecution, an undertaking could be fined up to £1,500. An individual could be fined up to £1,500 or sentenced to six months’ imprisonment or both. On indictment, an undertaking could be fined up to £3m or 10% of turnover, whichever was greater. An individual could be fined up to £3m or 10% of turnover; whichever was greater, or sentenced to 2 years imprisonment, or both.

10. The new Act makes a distinction between “hard-core cartel” and other offences, with greater penalties for the former and lesser penalties for the latter. Agreements, decisions and concerted practices between competing undertakings of the type described in Section 6(2) will attract a penalty, on summary conviction, of a fine of up to €3,000 for an undertaking. An individual will be liable to a fine of up to €3,000 or six months’ imprisonment, or both. On conviction on indictment, the penalty for these breaches is a fine (for an undertaking) of €4M; the penalty for an individual is a similar fine, or five years’

imprisonment, or both. The provision for a maximum five-year penalty of imprisonment makes this an “arrestable offence” as per Section 2 of the Criminal Law Act, 1997.

11. Penalties for lesser offences (i.e. other breaches of Section 4(1) of Article 81(1), and all breaches of Section 5 or Article 82), on the other hand, include the same level of fine as for hard-core offences, but the possibility of prison sentences is removed.

Presumptions and admissibility of evidence

12. Section 4 of the 1996 Act introduced provisions enabling the court to hear expert economic evidence in criminal proceedings. This is retained in Section 9 of the new Act, which also enables such evidence to be used in civil proceedings. Section 10 provides that the judge in a criminal trial may direct that certain documents be given to the jury.

13. Section 12 of the 2002 Act provides for certain presumptions to arise where documents are admitted as evidence in an action, whether civil or criminal. This section gives effect to certain recommendations of the CMRG, providing for presumptions on the authorship, ownership, receipt and other matters relating to documents. The defendant or respondent may rebut these presumptions. The term “documents” is defined as including electronic and other forms of text.

14. Section 13 contains provisions on the admissibility of statements in documents, which are submitted in evidence. These provide that statements made by a person who has committed an offence to the effect that another person has also committed an offence may be admitted, and incorporates protections for the other person who is the subject of the statements, e.g. testing the witness’ credibility. The document in which the statements are contained cannot be written after proceedings have started or in response to an investigation.

Right of action

15. The initial 1991 Act gave the power of taking civil action to “any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited...” and to the Minister only. This power was extended to the Authority by the 1996 Act, which also enabled the Authority and the Minister to take summary proceedings for offences under that Act. The 2002 Act removes the right of action from the Minister. It also enables the Court, either at its own instance or on the application of the Authority, to order the adjustment of a dominant position, or allow its continuance only on specified conditions. Previously, the only specific provision for the break-up of a dominant position was contained in Section 14 of the 1991 Act. This empowered the Minister to request the Authority to carry out an investigation of a possible abuse of a dominant position and, having considered its report, to order its adjustment or allow its continuance only on specified conditions. This provision was never used. Section 13(9) provides immunity from damages where the undertaking is acting in a manner consistent with a ruling of a sectoral regulator.

16. Under the new legislation, an action for a breach of section 4 or section 5 may be brought in either the Circuit or the High Court, whereas previously an action for a breach of section 4 of the 1991 Act could only be brought in the High Court.

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Powers of investigation

17. Under the previous legislation, either the Authority or an authorised officer could investigate contraventions of the Acts (Section 3(5) of the 1996 Act). One member of the Authority was designated Director of Competition Enforcement, with the power to carry out investigations (either on his own initiative or as a result of a complaint) and to recommend to the Authority that it bring proceedings. Under the 2002 Act, the functions of the Authority include investigating breaches of the Act, and this function can be delegated to any member of the Authority or member of staff of the Authority. The power to summons witnesses, examine witnesses on oath and require witnesses to produce documents, which were contained in the Schedule to the 1991 Act, are retained in Section 29 of the new Act. The search powers of the Authority are strengthened, with powers to enter premises “if necessary by force”, and to search private dwellings. The Authority can now take away original documents, rather than copies, and can keep them for up to six months (longer if a court order is obtained). Search warrants obtained under the 2002 Act will, unless they state otherwise, operate to authorise members of the Garda Síochána to accompany and assist authorised officers. As under the current legislation, obstruction of an authorised officer in the exercise of their powers is an offence.

Mergers

18. Under Part 3 of the new legislation, the Competition Authority will take over responsibility for merger control from the Minister for Enterprise, Trade & Employment - with the exception of media mergers. This part of the Act will not come into force until 1 January 2003. Mergers above a certain threshold, where at least two of the merging undertakings carry on business in Ireland must be notified to the Authority (section 18(1)). Mergers below the threshold, or where only one party carries on business in Ireland *may* be notified. The trigger for notification is when a merger is “agreed or will occur if a public bid is accepted”. The thresholds have also been clarified and updated; the Minister can by order disapply the thresholds to a particular class of mergers.

19. There will be a two-stage process, whereby mergers can either be cleared at Phase 1 or subjected to a more detailed, “Phase 2” investigation (called in the Act a “full investigation”). The Authority may “determine” that a merger or acquisition may be put into effect, may not be put into effect, or may be put into effect only subject to certain conditions. The Act also makes clear that Sections 4 and 5 will apply only to mergers which have not been notified. (See new Section 4(8), Section 5(3)). In practice, this will mean only that it will apply to those mergers below the threshold, or in which only one undertaking carries on business in Ireland, which have not been voluntarily notified under the provisions of section 18(3).

20. The new timescale requires notification by each party within one month. The Authority has thirty days to clear the merger at Phase I¹. A Phase 2 determination must be made within four months of notification, and published within one month thereafter.

21. The new Act requires the Authority to approve or reject mergers based on competition criteria only. The test is whether the result of the merger or acquisition will be to substantially lessen competition in markets for goods or services in the State. The new system involves more openness and transparency: all notifications are to be published, and the Authority must consider all submissions made to it, whether in writing or orally, by the parties concerned or by any other party.

¹ Thirty days from date of notification, or from date of receipt of further information if such information is requested.

22. Again, media mergers are treated separately under the new Act. (This is not unusual: in view of the important role of the media in protecting democracy, many countries make specific provision for safeguarding plurality and diversity, and plurality of the media is one of the criteria under which a Member State can safeguard its “legitimate interest” under Article 21(3) ECMR). A “media merger” is defined as “a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State”; “media business” means “(a) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs; (b) a business of providing a broadcasting service; (c) a business of providing a broadcasting services platform.” When the Authority receives notification of a merger which it considers to be a media merger, it must inform the parties that it is of this opinion, and forward a copy of the notification to the Minister. The Minister can direct the Authority to carry out a Phase 2 investigation, and can override Authority approval with or without conditions. In other words, if the Authority blocks a media merger, the Minister cannot unblock it, but if the Authority approves a merger, either absolutely or conditionally, the Minister can block it or can apply new or stricter conditions. In making such a determination the Minister must have regard to, and only to, the “relevant criteria”, which are (Section 23(10)):

- (a) the strength and competitiveness of media businesses indigenous to the State;
- (b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and undertakings;
- (c) the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings;
- (d) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State; and
- (e) the share in the market in the State of one or more of the types of business activity falling within the definition of “media business” in this subsection that is held by any of the undertakings concerned, or by any other individual or other undertaking who or which has an interest in such an undertaking.

23. In dealing with a media merger at the Phase 2 stage, the Authority is to form an opinion on how the application of the relevant criteria should affect the exercise by the Minister of his powers, and shall inform the Minister of the opinion it has so formed on his request.

Advocacy

24. Section 30(1)(c) of the Act gives the Authority the function of studying and analysing competition matters, including developments abroad. The same section adds other functions which will strengthen the advocacy role of the Authority. These include the power to advise the Government and ministers concerning the implications for competition in markets for goods and services of proposals for legislation, including statutory instruments; the power to advise public authorities generally on issues concerning competition which may arise in the performance of their functions; the power to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; and the power to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition.

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Co-operation agreements with statutory bodies

25. Section 34 of the Act obliges the Authority to enter into co-operation agreements with the Broadcasting Commission of Ireland, the Commission for Electricity Regulation, the Commission for Aviation Regulation and the Director of Telecommunications Regulation. The purposes of these agreements are to facilitate co-operation, to avoid duplication of activities involving determinations on competition issues and to ensure consistency in decision-making. The agreements must include provisions on exchange of information, on forbearance of performance of functions by one party where the other is already performing similar functions in relation to a matter and provisions regarding consultation. The agreements must be in place at the expiry of six months from the date of coming into effect of the Act.

Arrangements with foreign competition bodies

26. Section 46 permits the Authority to enter into arrangements with competition authorities in other countries for the exchange of information and the mutual provision of assistance