



**AN BILLE IOMAÍOCHTA (LEASÚ), 2011
COMPETITION (AMENDMENT) BILL 2011**

EXPLANATORY MEMORANDUM

Introduction

The purpose of this Bill is to strengthen competition law enforcement by providing for new and increased sanctions and penalties.

Provisions of the Bill

Section 1 — Definition

Section 1 defines “Principal Act”, as mentioned in this Bill, as meaning the Competition Act 2002.

Section 2 — Amendment of section 8 of Principal Act

Section 2 provides for the amendment of section 8 of the Competition Act 2002 which will increase the levels and range of sanctions available to the competent authorities (Competition Authority and ComReg) in their enforcement of competition law.

Paragraph (a) provides for an increase in the fine for conviction on summary offences under section 6(1) of the Competition Act 2002 (being offences involving an agreement, decision or concerted practice to which *subsection 6(2)* of that Act applies) or Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU) by inserting “class A fine” (i.e. up to a maximum of €5,000 but greater than €4,000) for a “fine not exceeding €3,000” in *paragraph (a)(i)* of *subsection (1)*.

Paragraph (b) provides for an increase in the fine for conviction on indictment under section 6(1) of the Competition Act 2002 (being offences involving an agreement, decision or concerted practice to which *subsection 6(2)* of that Act applies) or Article 101 (1) of the TFEU by inserting “€5,000,000” for “€4,000,000” in *paragraph (b)(i)* of *subsection (1)*.

Paragraph (b) also provides for an increase in the maximum term of imprisonment for conviction on indictment under section 6(1) of the Competition Act 2002 (being offences involving an agreement, decision or concerted practice to which *subsection 6(2)* of that Act applies) or Article 101 (1) of the TFEU by inserting “10 years” for “5 years” in *paragraph (b)(ii)* of *subsection (1)*.

Paragraph (c) provides for an increase in the fine for conviction on summary offences under section 6(1) of the Competition Act 2002 (other than offences involving an agreement, decision or concerted practice to which *subsection 6(2)* of that Act applies) or section 7 of the Competition Act 2002 or Article 101 (1) or 102 of the TFEU by inserting “class A fine” (i.e. up to a maximum of €5,000 but greater than €4,000) for a “fine not exceeding €3,000” in *paragraph (a)* of *subsection (2)*.

Paragraph (d) provides for an increase in the fine for conviction on indictment under section 6(1) of the Competition Act 2002 (other than offences involving an agreement, decision or concerted practice to which *subsection 6(2)* of that Act applies) or section 7 of the Competition Act 2002 or Article 101 (1) or 102 of the TFEU by inserting “€5,000,000” for “€4,000,000” in *paragraph (b)* of *subsection (2)*.

Paragraphs (e) and *(f)* provide for increases in the daily fine that may be imposed where a contravention continues by inserting “class E fine” (i.e. up to a maximum of €500) for “€300” in *paragraphs (a)(i)* and *(b)(i)* of *subsection 3* and by inserting “€50,000” for “€40,000” in *paragraphs (a)(ii)(I)* and *(b)(ii)* of *subsection 3* respectively.

Paragraph (g) inserts a new *subsection (11A)* which provides for the dis-application of section 1(1) of the Probation of Offenders Act 1907 to offences under sections 6 or 7 of the Competition Act 2002. That provision provides that a judge may dismiss a proven case based on the trivial nature of the offence and in such a case a conviction is not recorded against the defendant. Under *subsection (11A)* the benefit of the Probation of Offenders Act 1907 will not be available.

Paragraph (h) inserts a new *subsection (11B)* which provides that where a person is convicted of an offence under the Competition Act 2002, the court shall order the person to pay a sum equal to the costs and expenses (as measured by the court) incurred by the competent authority in relation to the investigation, detection and prosecution of the offence unless the court is satisfied that there are substantial reasons for not doing so.

It also inserts a new *subsection (11C)* which provides that any sum paid to the competent authority pursuant to an order under *subsection (11B)* (as inserted) shall be disposed of by that competent authority in such manner as the Minister for Public Expenditure and Reform directs.

Section 3 — Amendment of section 14 of Principal Act

In section 14 of the Competition Act 2002 private enforcement is combined with public enforcement provisions. In the interests of clarity, this Bill provides for the separation of the provisions relating to private and public enforcement of civil actions.

Section 3 amends section 14 of the Competition Act 2002 to limit its provisions to those applying to the rights of aggrieved persons only to take action in consequence of any agreement, decision, concerted practice or abuse which is prohibited under sections 4 or 5 of the Competition Act 2002. Public enforcement provisions are provided for under section 4 of the Bill.

Paragraphs (a), *(b)*, *(d)* and *(f)* provide for deletions relating to public enforcement from the original section 14 consequent on the separation of public and private enforcement provisions.

Paragraph (c) amends the provisions of *subsection (5)* consequent on the separation of public and private enforcement provisions, and removes provisions relating to public enforcement.

Paragraph (e) amends the current *subsection (7)* to add the requirement for discontinuation of the abuse of any dominant position to the list of requirements that the Court can order in its decision.

Paragraph (g) inserts a new *subsection (10)* which sets out what the term “injunction” means for the purposes of section 14 of the Competition Act 2002. It means an interim injunction, interlocutory injunction or injunction of indefinite duration.

Section 4 — Right of action of competent authority

Section 4 inserts a new section 14A to provide for separate public enforcement provisions. Section 14 of the Competition Act 2002 (as amended by section 4 of this Bill) will relate solely to private enforcement. New section 14A is based largely on the relevant provisions of the original section 14.

The section inserts *subsection 14A(1)* which gives the competent authorities the right to take action in consequence of any agreement, decision, concerted practice or abuse which is prohibited under sections 4 or 5 of the Competition Act 2002 or Articles 101 or 102 of the TFEU.

The section inserts *subsection 14A(2)* which gives the competent authorities the right to take action in either the Circuit Court or the High Court as is the case in the original section 14.

The section inserts *subsection 14A(3)* which gives the competent authorities the right to relief by way of injunction or declaration as is the case in the original section 14.

In inserting *subsection 14A(4)*, the Bill amends the current *subsection (7)* of section 14 to add the requirement for discontinuation of the abuse of any dominant position to the list of requirements that the Court can order in its decision that are in the original section 14.

The section inserts *subsection 14A(5)* which repeats the provisions under the current section 14(8) and provides that where it is proved that the act complained of was done by an undertaking it shall be presumed, until the contrary is proved, that each (if any) director, manager and similar officer of the undertaking, and any other person who purported to act in any such capacity at the material time, consented to the doing of the said act.

The section inserts *subsection 14A(6)* which sets out what the term “injunction” means for the purposes of the section. It means an interim injunction, interlocutory injunction or injunction of indefinite duration.

Section 5 — *Res judicata*

Section 5 provides that where a Court has determined that an undertaking, which is the subject of an action, was involved in an agreement, decision, concerted practice or abuse prohibited under sections 4 or 5 of the Competition Act 2002, or by Article 101 or 102 of the TFEU, the findings shall be *res judicata* for the purposes of any subsequent proceedings i.e. it shall not be necessary for persons

aggrieved by that conduct in follow on actions to also prove that the conduct was prohibited.

Section 6 — Amendment of section 160 of Companies Act 1990

Section 6 provides for the amendment of section 160 of the Companies Act 1990 which will allow the court, either on its own motion or on foot of an application to it (from either of the competent authorities (the Competition Authority or ComReg)), to order that a person shall not be appointed as a company director as a result of an infringement of offences under the Competition Act 2002 (other than indictable offences which already result in automatic disqualification).

Paragraph (a) inserts a new *paragraph (hh)* in *subsection (2)* of section 160 of the Companies Act 1990 which provides for a person who has contravened section 4 or 5 of the Competition Act 2002 or Articles 101 or 102 of the TFEU to be disqualified as a company director.

Paragraph (b) inserts a new *subsection (6B)* in section 160 of the Companies Act 1990 which provides for the making of applications by the competent authorities to make application for the disqualification provided for under the new *paragraph (hh)* in *subsection (2)*.

Section 7 — Short title, collective citation and commencement

Section 7 provides for short title, collective citation and commencement.

An Roinn Post, Fiontar agus Nuálaíochta,
Meán Fómhair 2011.