

# **Competition (Amendment) Bill 2011**

## **Regulatory Impact Analysis**

Department of Jobs, Enterprise and Innovation

September 2011.

## Summary of Regulatory Impact Analysis (RIA)

|   |   |
|---|---|
| <b>Department/Office:</b><br>Department of Jobs, Enterprise and Innovation  | <b>Title of Legislation:</b><br>Competition (Amendment) Bill 2011 |
| <b>Stage:</b><br>Publication of Bill  | <b>Date:</b><br>September 2011                                    |
| <b>Related Publications:</b>  |   |
| <b>Available to view or download at:</b><br><a href="http://www.djei.ie">www.djei.ie</a>  |   |
| <b>Contact for enquiries:</b><br>Kieran Grace, Department of Jobs, Enterprise and Innovation<br>Julia O'Malley, Department of Jobs, Enterprise and Innovation | <b>Telephone:</b><br>01-6312676<br><br>01-6312659                 |

**Amendments to the Competition Acts 2002 to 2010.**

Options considered:

1. Do nothing/no policy change
2. Set out new provisions relating to penalties and sanctions

Preferred Option: Option 2

Costs, benefits and impacts of Option 2 set out below

|    | <b>COSTS</b> | <b>BENEFITS</b>                                 | <b>IMPACTS</b>  |
|----|--------------|---|---|
| 1. |              | Updated competition law regime will be in place | Level playing field for all participants in the market, enhanced consumer welfare and improved national competitiveness |
| 2. |              | More effective penalties and sanctions in place | Potential for increased private enforcement of competition law via private actions                                      |
| 3. |              | Compliance with EU/IMF commitment               | Deterrent against potential breaches of the Competition Act.  |

## **Regulatory Impact Analysis (RIA)**

### **Statement of policy context, problem and objective**

The proposed Bill provides for new and additional sanctions and penalties for breaches of competition law in Ireland.

The EU/IMF Programme of Financial Support for Ireland (revised version dated 28 July 2011) contains the following commitment:

*To increase competition*

*Government will introduce legislation to strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union as well as ensuring the effective functioning of the Competition Authority, which will be merged with the National Consumer Agency.*

Thus there is only one option open to the Department: viz. drafting legislation that will meet this commitment.

### **Current sanctions under Irish competition law**

Details of the current sanctions in Irish legislation (the Competition Act 2002) are set out in Appendix A for information purposes. These provide for quite severe sanctions by setting out a range of penalties, including fines and custodial sentences, for breaches of the Act.

### **Identification, description and analysis of costs, benefits and other impacts for each option**

Following extensive consideration of options and consultation with the Office of the Attorney General and the Competition Authority, the suite of measures contained in the Competition (Amendment) Bill 2011 will strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). This will both increase penalties for criminal offences and strengthen the range of reliefs and sanctions available for both public and private enforcement of civil offences.

In summary, it is proposed that the Bill will provide for the following:

(A) a range of amended and new penalties and sanctions that will apply for breaches of certain competition law offences. These are:

1. an increase in the level of fine for criminal conviction of hard-core offences from €4 million to €5 million;
2. the maximum imprisonment sentence on conviction on indictment of an offence relating to anti-competitive agreements, decisions and concerted practices is to be raised from 5 to 10 years;
3. an increase in the level of fine for summary conviction of certain competition offences from €3,000 to €5,000 (Class A fines);
4. an increase in the maximum daily fine applicable to a continuing contravention from €300 to €500 (Class E fines) in respect of a summary conviction and in the case of a conviction on indictment from €40,000 to €50,000;
5. a convicted undertaking will be liable to pay to the competent authority (Competition Authority or ComReg) the costs and expenses incurred by the competent authority in relation to the investigation, detection and prosecution of the offence;
6. amendment of the Companies Act, 1990 to allow the court, either on its own motion or on foot of an application to it (from either 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 sections 4 or 5 of the Competition Act 2002 or Articles 101 or 102 of the TFEU (other than indictable offences which already result in automatic disqualification);
7. Section (1) of the Probation of Offenders Act 1907 will not apply to offences in respect of anti-competitive practices or abuse of dominant position.

(B) new provisions in relation to rights of action for breaches of competition rules. These are:

1. the specific inclusion of both interim, interlocutory and permanent injunctions as reliefs;
2. provision that where a Court has determined that an undertaking, which is the subject of an action, was involved in an agreement, decision or concerted practice prohibited under sections 4 or 5 of the Competition Act 2002, or by Article 101 or 102 of the Treaty, the findings shall be *res judicata* for the purposes of any subsequent proceedings: thus it shall not be necessary for persons aggrieved by that conduct in follow on actions to also prove that the conduct was prohibited under sections 4 or 5 of the Competition Act 2002, or by Article 101 or 102 of the Treaty.

(C) The Bill will also separate the legal provisions relating to private and public enforcement of civil actions to provide a clear distinction between these two very different types of enforcement. Heretofore, they had been grouped together in one section of the Competition Act, 2002 (section 14).

It is believed that these proposed measures will strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union, will increase the effectiveness of both the Competition Authority as well as encouraging increased private enforcement of competition law.

### **Impact of the various preferred options:**

#### *National Competitiveness.*

#### *Significant policy changes in an economic market/ impact on consumers and competition.*

Competition is important in achieving high productivity and keeping prices low, making it a key part of ensuring that the Irish economy is competitive. Lack of competition, whether within internationally traded or in locally-traded areas of the economy, has the potential to undermine Ireland's move to sustainable market-based growth, which ultimately affects the consumer. Ensuring competition law is up-to-date and appropriate is vital in enhancing national competitiveness.

#### *Rights of Citizens.*

Promulgation of up-to-date competition law, and its subsequent effective implementation, will help to ensure that the rights of citizens, be they consumers or owners/ staff of businesses operating in and from Ireland, are protected from anti-competitive and illegal activities. The provisions in the draft Bill will facilitate an increase in private enforcement of competition law by way of private actions, thereby empowering citizens in enforcing their rights.

#### *Compliance Burden.*

It is not expected that the provisions of the Bill will give rise to any significant additional administrative compliance burden but it will strengthen the effectiveness of competition law enforcement.

#### *Socially Excluded or Vulnerable Groups, Environment and North-South & East-West relations.*

The proposals will not have any specific impacts on these areas.

### **Enforcement and compliance**

The proposed provisions will strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union. This will both increase penalties for criminal offences and strengthen the range of

reliefs and sanctions available for both public and private enforcement of civil offences.

### **Review**

The effect and impact of the new provisions will be kept under review by the Department of Jobs, Enterprise and Innovation.

### **Publication**

It is intended that this RIA will be made public on the Department's website, along with the published Bill, in due course.

### **Performance Indicators:**

A number of high level outputs and outcomes can be set out, which will act as performance indicators. These are set out in tabular form below.

| <b>Specific element of the Bill</b>   | <b>High-level output</b>  | <b>High-level outcome</b>  |
|---|---|--|
| Amendments to penalties and new sanctions for breaches of the Competition Acts, 2002 to 2010. | (a) Modern suite of provisions relating to competition law.<br>(b) More effective enforcement of competition law.<br>(c) Increased deterrence to potential breaches of competition law. | (a) Greater adherence to competition law<br>(b) Improved national competitiveness<br>(c) Compliance with EU/IMF commitment |

## Appendix A

### Current sanctions under the Competition Act, 2002.

The Competition Act, 2002 provides for quite severe sanctions. That Act currently provides for a range of penalties, including monetary fines and custodial sentences, for breaches of the Act.

Fines and penalties are provided for in section 8 of that Act as follows:

#### **Hard core offences (cartels, concerted practices, price-fixing, etc as set out in section 4 of the Competition Act, 2002).**

- An undertaking (that is not an individual) found guilty of a hard core offence is liable
  - on summary conviction, to a fine not exceeding €3,000 or
  - on conviction on indictment, to a fine not exceeding whichever of the following amounts is the greater - €4 million or 10% of the undertaking's turnover in the financial year ending in the 12 months prior to the conviction.
- An undertaking that is an individual found guilty of a hard core offence is liable
  - on summary conviction, to a fine not exceeding €3,000 and/or to imprisonment for a term not exceeding 6 months, or
  - on conviction on indictment, to a fine not exceeding whichever of the following amounts is the greater - €4 million or 10% of the individual's turnover in the financial year ending in the 12 months prior to the conviction and/or to imprisonment for a term not exceeding 5 years.

#### **Non-hard core offences (abuse of dominant position, applying dissimilar conditions to equivalent transactions, etc as set out in sections 4 and 5 of the Competition Act, 2002).**

- An undertaking (an individual or otherwise) found guilty of a non-hard core offence is liable
  - on summary conviction to a fine not exceeding €3,000 or
  - on conviction on indictment, to a fine not exceeding whichever of the following amounts is the greater - €4 million or 10% of the undertaking's turnover in the financial year ending in the 12 months prior to the conviction.

Section 8 also provides that each day on which the contravention occurs is a separate offence and each such offence attracts a separate daily fine of €300 and €40,000 respectively.

However, under section 14 of the Competition Act 2002, provision is also made for the right of civil action for breaches of competition rules. This has two distinct elements: private action and public enforcement. The relief that may be granted is as follows:

In relation to private action, the plaintiff may be granted relief by the Court by way of injunction, declaration or damages (including exemplary damages). The relief permitted in respect of public enforcement under this section is by way of injunction or declaration.