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The Troika's Influence on Irish Competition Policy

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I. INTRODUCTION

When extending the bailout facility availed of by Ireland, the International Monetary Fund ("IMF"), European Central Bank ("ECB") and Commission of the European Union ("EU"), now known as "the troika," insisted that a number of measures be taken in respect of the Irish economy. While many of these related to reducing the costs of the public sector and the reduction of the country's social welfare costs, some related directly to Irish competition law.

A review of the Irish economy led the troika representatives to conclude that there were sectors of the Irish economy that were sheltered from competition, that the Irish Competition Authority needed greater enforcement powers, and that greater penalties were required for the effective enforcement of Irish competition law.

So one consequence of Ireland's loan facility from the troika was the passing of the Competition (Amendment) Act, 2012. That piece of legislation essentially does three things:

1. The Act increases the levels of sanction for breaches of Irish and EU competition law provisions,
2. The Act encourages greater private enforcement of competition law, and
3. It better facilitates the work of the Irish Competition Authority.

Ironically, another consequence of the reviews of Ireland's finances since 2008 has been a plan, by Government, to reduce the number of State agencies. So, the Competition Authority will merge with the National Consumer Agency. The new Consumer and Competition Authority has not yet been officially constituted and legislation establishing the new body is awaited with interest.

II. STRENGTHENING IRELAND'S COMPETITION LAWS—A TERM OF IRELAND'S LOAN PROGRAMME

The EU/IMF Programme of Financial Support for Ireland includes a Memorandum of Understanding between the European Commission and Ireland, which in turn includes a Memorandum on Specific Economic Policy Conditionality. Certain structural reforms were advised therein:

"To increase growth in the domestic services sector Government will introduce legislative changes to remove restrictions to trade and competition in sheltered sectors including:

- the legal profession,
- medical services, and

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- the pharmacy profession

To enhance competition in open markets Government should introduce reforms to legislation to (1) empower judges to impose fines and other sanctions in competition cases in order to generate more credible deterrence and (2) require the competition authorities to list restrictions in competition law which exclude certain sectors from its scope and to identify processes to address those.”

III. TO ENHANCE COMPETITION IN OPEN MARKETS

The Competition Act, 2002 (“the 2002 Act”) repealed previous competition Acts and restated Irish competition law and, as such, is the Principal Act. In sections 4 and 5 it mirrors the provisions of Articles 101 and 102 of the TFEU. Sections 6 and 7 create criminal offenses for anticompetitive conduct and abuse of dominant position, respectively.

Section 8 then states the applicable penalties for those offenses. Section 14 of the 2002 Act provides for civil liability for breaches of Irish competition law and that right of action is created in favor of persons aggrieved by those breaches. A civil right of action is also provided for the Competition Authority for breaches of Irish or European competition law.

1. Increasing Sanctions

a. The Competition (Amendment) Act, 2012 (“the Amendment Act”) amends various provisions of the 2002 Act. In the first instance, section 2 of the Amendment Act increases amounts of fines provided for and doubles the maximum custodial sentence which a court can give upon conviction on indictment for certain “hard-core” offenses.

b. The Probation of Offenders Act, 1907 is disapplied for offenses under sections 6 or 7 of the 2002 Act. The effect of this is that courts no longer have discretion to dismiss a proven case against an individual for a section 6 or 7 offense. Previously, a court could have exercised that discretion and no conviction would have been recorded against that individual. In that sense the legislation goes further than the requirement “to empower” judges to impose other sanctions.

c. Section 2 of the Amendment Act also inserts a provision that relates to bearing the costs of enforcement. It compels the court to order a convicted person to reimburse the costs, as determined by that court, of the investigation, detection, and prosecution of the offence to the relevant competent authority. However, a court may avoid doing this where there are “special and substantial reasons” not to do so.

2. Encouraging Private Enforcement of Competition Law

a. Section 3 of the Amendment Act amends Section 14 of the 2002 Act so that it deals with private enforcement actions; it creates a right of action for individuals, only, in respect only of breaches of Irish competition law. Section 3 also identifies the reliefs that can be granted by a court. Section 14 already provided for aggrieved persons to have a right of action against an undertaking or its director, manager, or other officer “or a person who purported to act in any such capacity.”

b. Section 8 of the Amendment Act may also render private actions for damages to be a more realistic possibility. Section 8 provides that where a court, in proceedings under Part 2

of the 2002 Act, finds that a breach of Irish or European competition law has taken place, an aggrieved person who takes civil proceedings for damages pursuant to Section 14 of the 2002 Act, may rely on that finding. That finding is to be *res judicata* whether the parties to the two actions are the same parties or not.

3. Facilitating the Work of the Authority

Section 4 of the Amendment Act inserts a right of action for the competent authority and amends the 2002 Act by adding a section 14A to detail this and the reliefs available. Section 14A deals exclusively with public enforcement of competition law. The right of action is created in respect of any breach of Irish or European competition law.

The Amendment Act also gives statutory recognition to a new tool of enforcement—the court-endorsed commitment agreement. Within a commitment agreement, an undertaking can undertake to do certain things as an alternative to legal proceedings being taken by the Authority. Section 5 of the Amendment Act inserts section 14B, which allows the Authority to apply to the High Court to have a commitment agreement made an order of court. A breach of the commitments would then amount to contempt of court.

The High Court must be satisfied that certain conditions are met before making such an order. These include being satisfied that the undertaking in question got legal advice before agreeing to the making of the order and being satisfied that the agreement is clear, unambiguous, and capable of being complied with.

IV. ADEQUATE STAFFING LEVELS

The legislative changes are positive but the Competition Authority had suffered a significant reduction in staff numbers since 2009. In the Annual Report for 2012, the Authority reported that its staffing level had been capped at 39 posts under the Government's Employment Control Framework—as compared with 59 posts at the time of the introduction of the moratorium on recruitment to the public service in March 2009.

However, at the beginning of 2012, in the context of the EU/IMF Memorandum of Understanding, the Government committed to review the adequacy of resource levels in the Authority. On April 25, 2012, in the course of the Committee Stage Senate debate on the Competition (Amendment) Bill 2012, Minister of State Fergus O'Dowd announced that following that review, the Minister for Jobs, Enterprise and Innovation had approved an additional ten posts for the enforcement function of the Competition Authority. In September 2012 the Public Appointments Service launched a recruitment campaign to fill the posts. It is understood that a number of these additional posts have been filled in the first half of 2013, with the recruitment of three assistant solicitors, an economist, and a forensic investigator.