

Client Alert

Business Litigation & Antitrust Practice Group

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Ireland Toughens its Competition Law Enforcement

On September 29, 2011, Ireland's Minister for Jobs, Enterprise and Innovation, published a new competition bill (The Competition (Amendment) Bill 2011). This bill includes measures aimed to further enhance the Irish Competition Authority's competition law enforcement powers. Among the key changes are an increase in the criminal sanctions for hardcore anticompetitive practices from five to ten years imprisonment, director disqualification and an increase in the maximum amount of fines.

Background on competition law enforcement in Ireland

Criminal penalties for competition law infringements were introduced in Ireland in 1996 by an amendment to the Competition Act 1991 which provided for fines and imprisonment of up to two years for competition law infringements. The Competition Act 2002 (Competition Act) replaced these and increased the maximum penalties that may be imposed for cartel activity to a fine of euro 3,000 and/or six months imprisonment on summary conviction; and a fine of euro 4 million or 10 percent of turnover (whichever is the greater) and/or five years imprisonment for conviction on indictment. Not only did this raise the prospect of jail terms for those involved in cartel activity, but strengthened enforcement by enabling under Irish criminal law the arrest and questioning by the Irish police of those suspected of such activity.

Irish law has no system of administrative penalties under the Competition Act. The EU competition law prohibitions under Article 101 and 102 of the Treaty on the Functioning of the EU (dealing with anticompetitive agreements and abuse of a dominant position) and sections 4 and 5 of the Competition Act which mirror these are enforced through the Irish courts. Offences by both undertakings and individuals are prosecuted as crimes and must be proved beyond reasonable doubt.

The Competition Act provides that the Irish Competition Authority may bring summary prosecutions before the District Court, while prosecutions on indictment are brought by the Director of Public Prosecutions (DPP) in the Central Criminal Court (a division of the High Court) where the defendant is tried by a jury.

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The criminalisation of competition law in Ireland must be seen against the increasing proliferation of criminal sanctions in competition cases globally. The introduction of criminal sanctions tends in part to be motivated by recognition that administrative penalties on corporations alone may not be an effective deterrent against serious competition law infringements.

In Europe, at the Member State level criminal sanctions for competition law infringements are not the norm but exist for example in the Czech Republic, Estonia, Finland, France, Iceland, Norway, Slovak Republic and the United Kingdom. Elsewhere, internationally, there are criminal sanctions for competition law infringements in both the newer and more established competition regimes, for example in Australia, Brazil, Canada, Japan, Peru, Russia, South Korea, Tanzania, Thailand and the U.S.A. Mexico adopted criminal sanctions for hardcore cartel conduct (*i.e.* price fixing, restricting output/ limiting production, bid-rigging and customer/ market allocation) only in May 2011.

Strengthened enforcement

The 2011 measures are intended to meet Ireland's commitment to the European Commission and International Monetary Fund, in return for their financial support. The Irish government committed to bolster competition law enforcement to assist the nation's economic recovery. The resulting legislation is probably more expansive than was needed to meet the country's duties and some commentators have questioned whether the changes were really needed.

The main changes include the following:

- Increasing criminal convictions for competition law infringements from five to 10 years.
- Increasing fines for criminal convictions for hardcore offences from a maximum of euro 4 million to euro 5 million and from euro 3,000 to euro 5,000 for summary convictions.
- Director disqualification for competition law infringements.
- Interim relief and injunctions.
- Provisions for convicted parties to bear the costs of court cases and investigations.
- It will be easier for private individuals affected by anticompetitive practices to prove an action for damages against a cartel, once public enforcement proceedings have successfully been taken.

A further enforcement area which has been under discussion in Ireland has been the imposition of administrative fines for competition law infringements. However, this raises a number of constitutional, legal and policy issues and it may be that, with the recent reforms, the prospect of such penalties may be some years away.

Conclusions

Competition law enforcement and how best to achieve the goal of eliminating cartels remain at the top of the regulatory agenda globally. The increased sanctions in Ireland are intended to further strengthen enforcement of the nation's competition law. However, in an era of budgetary cutbacks, resourcing for the Competition Authority's enforcement efforts remains limited. Hence, questions remain as to its effectiveness in practice both in terms of enforcement and the stated aim of assisting economic recovery. These Irish developments reflect a trend of increasing criminalisation and severity of competition law enforcement globally. Effective enforcement is dependent on tailoring competition

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enforcement to the laws and procedures adopted by a particular jurisdiction and on active implementation. The range of approaches worldwide illustrates that there is no uniform practice. Regulators are becoming increasingly sophisticated in their approaches; companies must match that in their preventative and defensive risk management strategies.

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