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# Briefing

## A New Dawn for Irish Competition Law:

### Competition (Amendment) Bill 2022



INSTITUTE OF DIRECTORS  
IN IRELAND

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A radical new enforcement architecture, proposals for big “administrative” fines, lower thresholds to prove violations, and enhanced surveillance powers, plus important reforms to Irish merger rules, are among reforms proposed by the Competition (Amendment) Bill 2022: Here's our 4 takeaways from the Bill

1. Violations will be Easier to Prove;
2. Fines will be Higher;
3. But Enforcement Will Remain Challenging; and
4. Merger Control Reforms will Increase Uncertainty for Acquisitions

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### Violations will be Easier to Prove

As a reminder, Irish and EU competition law prohibit both (i) anticompetitive agreements and concerted practices; and (ii) abuse of its power by a dominant market operator.

To date, Ireland has experimented with an exclusively criminal enforcement regime, requiring proof beyond reasonable doubt in a jury trial before fines could be imposed on cartelists and abusers of dominance. New rules, if adopted, will lower the bar by providing fines can be issued where there is proof on the balance of probabilities of breaches of competition law. Any business found to have “*intentionally, recklessly or negligently*” breached competition law may now be liable to significant fines.

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## Fines will be Higher

€10 million or 10% of worldwide turnover – the maximum fines that might be imposed following proof of competition law violations on the balance of probability, if the Bill is enacted.

In addition to the new lower standard of proof for fines, the Bill would increase the fines for violations that the regulators choose nonetheless to prove to the criminal standard. Criminal fines would increase to up to the greater of €50 million or 20% of annual turnover. Given that the single highest fine imposed on a business in 20 years of Irish criminal enforcement is €80,000 (when the maximum possible fine was €4 million),<sup>1</sup> it remains to be seen whether this increase will translate into larger sanctions for businesses and individuals following criminal trials.

New criminal offences prescribed under the Bill have also been included to deter certain specific competition breaches. For example, the Bill provides for a new bid-rigging offence, which covers agreements and/or concerted practices between undertakings concerning or relating to their “*participation or non-participation in a relevant bidding process without informing the person requesting the bids or tenders...*” Discussions with other bidders will become much more risky.

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## But Enforcement Will Remain Challenging

The Bill provides for a new and untested enforcement process, termed “*administrative proceedings*”, which is a significant departure for Irish law. The Competition and Consumer Protection Commission (the “CCPC”) (or ComReg in the telecommunications sector) case teams will investigate and build a case against cartelists. Following this, so-called adjudication officers, nominated by the CCPC and approved by the Minister, and paid “*per diem, per piece or periodically*”, will effectively determine liability for breaches, may issue “*prohibition notices*” (effectively cease and desist orders), and may order divestment or other structural remedies.

These adjudication officers will be the ones with the power to impose administrative financial sanctions of up to €10 million or 10% worldwide turnover (whichever is greater). Importantly however, any decision by an administrative officer to impose administrative financial sanctions or indeed structural/behavioural remedies must be confirmed by the High Court. In addition, companies subject to administrative financial sanctions will have a right to appeal an adjudication officer’s decision to the High Court, with a further appeal to the Court of Appeal on points of law only.

Once enacted, the Minister will make regulations setting out rules and guidelines for the appointment of adjudication officers. Notwithstanding this fact, the Bill clearly specifies that with the exception of the Chairperson of the CCPC, CCPC members

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<sup>1</sup> DPP v Patrick Duffy & Duffy Motors (Newbridge) Limited [2009] IEHC 208

may themselves be appointed as adjudication officers, a fact that could potentially present challenges for maintaining the independence of adjudication officers.

Immunity and leniency for cooperation – In tandem with this new administrative regime, the Bill also sets out an administrative cartel leniency programme, under which companies will be able to seek immunity from, and reductions in administrative financial sanctions. As with the European Commission’s leniency programme, in order to avail of the benefits of this programme companies will need to cease all engagement with the cartel, disclose to the CCPC their participation in the cartel, and cooperate fully with the CCPC’s investigation. Companies will also need to prove that they did not coerce another cartel member to join or remain in the cartel. The first successful leniency applicant will receive immunity from administrative financial sanctions. Any subsequent applicants that provide “*significant added value*” to the CCPC’s investigation can receive up to a 50% reduction in administrative fines. This programme will be separate from the existing criminal Cartel Immunity Programme, which deals exclusively with immunity from criminal sanctions.

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## Merger Control Reforms will Increase Uncertainty for Acquisitions

Although businesses should take careful note of the enhanced criminal and civil enforcement measures outlined above, the new merger control reforms outlined under the Bill are equally important.

Of interest to smaller businesses and smaller deals, the CCPC will also gain the power to intervene and review “below-threshold” transactions; that is transactions where the aggregate turnover of the undertakings involved is less than €60 million and the turnover of at least two of the undertakings is less than €10 million. In other words, the CCPC will be able to require parties to notify any transaction, no matter its size, if the CCPC believes it “*may ... have an effect on competition*”.

Under the new regime, the CCPC will also receive powers to require businesses to unwind certain completed mergers, if the CCPC believes the deal may harm competition or, if it is not possible to unwind the transaction, “*take such steps as are appropriate to achieve restoration as far as practicable of the situation prevailing before the merger or acquisition was put into effect.*”

Notably the Bill provides for a new gun-jumping offence where parties close a transaction without obtaining CCPC clearance. This offence can be prosecuted summarily by the CCPC.

Furthermore, third parties who are not directly involved in a transaction may be required to respond to third party information requests under threat of criminal sanction. Businesses may therefore need to incorporate the cost of these responding to such requests into their financial modelling.

## Surveillance Powers

The Bill is predominantly focussed on enhancing competition enforcement. In addition to the above, it ensures that the CCPC's investigative powers are significantly bolstered. For example, the Bill extends certain surveillance powers under the Criminal Justice (Surveillance) Act 2009 to the CCPC, likely including the power to intercept/record electronic communications and undertake video and audio surveillance of suspects. Despite, the broad nature of these powers, the CCPC will need to apply to the High Court for authorisation to exercise such powers.

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## Conclusions

While the Bill is still before the Oireachtas and thus may be subject to certain limited amendments, we expect it to be passed before the summer and come into effect reasonably shortly thereafter. As such, we recommend that companies and their officers become familiar with the new enforcement regime, merger control reforms and CCPC and ComReg powers sooner rather than later. While the increased level of criminal fines may not necessarily equate to more severe sanctions in practice, there are some reasons to believe that the new administrative financial sanctions are likely to lead to greater fines. It may be a good time to review the company competition law compliance policy.

It remains to be seen to what extent the CCPC and ComReg will utilise new investigative powers once the Bill is enacted. However, having received an additional €2 million in Budget 2021 and new board members in early 2022, one would certainly suspect a greater level of enforcement by the CCPC after the Bill has been signed into law.

Becoming familiar with the Bill and engaging with the CCPC in an open and accommodating manner will ensure that the risk of legal action against a company and its officers is minimised.

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