



Number 18 of 2012

COMPETITION (AMENDMENT) ACT 2012

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[No. 18.] *Competition (Amendment) Act 2012.* [2012.]

ACTS REFERRED TO

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Number 18 of 2012

COMPETITION (AMENDMENT) ACT 2012

AN ACT TO AMEND THE COMPETITION ACT 2002; TO AMEND THE COMPANIES ACT 1990; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH.

[20th June, 2012]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—In this Act “Principal Act” means the Competition Act 2002. Definition.

2.—Section 8 of the Principal Act is amended—

Amendment of
section 8 of
Principal Act.

- (a) in paragraph (a) of subsection (1), by the substitution of “class A fine” for “fine not exceeding €3,000”,
- (b) in paragraph (b) of subsection (1), by—
 - (i) the substitution of “€5,000,000” for “€4,000,000” in each place that it occurs, and
 - (ii) the substitution of “10 years” for “5 years”,
- (c) in paragraph (a) of subsection (2), by the substitution of “class A fine” for “fine not exceeding €3,000”,
- (d) in paragraph (b) of subsection (2), by the substitution of “€5,000,000” for “€4,000,000”,
- (e) in paragraph (a) of subsection (3), by—
 - (i) the substitution of the following subparagraph for subparagraph (i):
 - “(i) in paragraph (a), ‘class E fine’ were substituted for ‘class A fine’ and references to imprisonment were disregarded, and”,
- and
- (ii) the substitution of “€50,000” for “€40,000” in subparagraph (ii)(I),
- (f) in paragraph (b) of subsection (3), by—
 - (i) the substitution of the following subparagraph for subparagraph (i):

“(i) in paragraph (a), ‘class E fine’ were substituted for ‘class A fine’, and”,

and

(ii) the substitution of “€50,000” for “€40,000” in subparagraph (ii),

(g) in subsection (10), by the substitution of “section 14 or section 14A” for “section 14”, and

(h) by the insertion of the following subsections:

“(11A) Section 1(1) of the Probation of Offenders Act 1907 shall not apply in relation to an offence under section 6 or 7.

(11B) Where a person is convicted of an offence under this Act the court shall order the person to pay to the relevant competent authority a sum equal to the costs and expenses, measured by the court, incurred by that competent authority in relation to the investigation, detection and prosecution of the offence, unless the court is satisfied that there are special and substantial reasons for not so doing.

(11C) Any sum paid to the competent authority pursuant to an order under subsection (11B) shall be disposed of by that competent authority in such manner as the Minister for Public Expenditure and Reform directs.”.

Amendment of
section 14 of
Principal Act.

3.—Section 14 of the Principal Act is amended by—

(a) the substitution, in subsection (1), of “prohibited under section 4 or 5, or by Article 101 or 102 of the Treaty on the Functioning of the European Union,” for “prohibited under section 4 or 5”,

(b) the deletion of subsection (2),

(c) the deletion, in subsection (3), of “or (2)”,

(d) the substitution, in subsection (5), of “The following reliefs, or any of them, may be granted to the plaintiff in an action under subsection (1)” for “Without prejudice to subsection (7), the following reliefs, or any of them, may be granted to the plaintiff in an action under subsection (1)”,

(e) the substitution, in paragraph (a) of subsection (5), of “declaration (including a declaration in respect of a contravention of section 4 or 5 or Article 101 or 102 of the Treaty on the Functioning of the European Union that has ceased)” for “declaration”,

(f) the deletion of subsection (6),

(g) the substitution of the following subsection for subsection (7)—

“(7) Without prejudice to subsection (5), where in an action under subsection (1) it is finally decided by the

Court that an undertaking has, contrary to section 5, or Article 102 of the Treaty on the Functioning of the European Union, abused a dominant position, the Court may, by order, either—

- (a) require the undertaking to discontinue the abuse, or
- (b) require the undertaking to adopt such measures for the purpose of—
 - (i) its ceasing to be in a dominant position, or
 - (ii) securing an adjustment of that position,

as may be specified in the order (including measures consisting of the sale of assets of the undertaking) within such period as may be so specified.”,

(h) the deletion, in subsection (8), of “or (2)”, and

(i) the insertion of the following subsection:

“(10) In this section ‘injunction’ means—

- (a) an interim injunction,
- (b) an interlocutory injunction, or
- (c) an injunction of definite or indefinite duration.”.

4.—The Principal Act is amended by the insertion of the following new section:

Right of action of competent authority.

“14A.—(1) The competent authority shall, in respect of any agreement, decision, concerted practice or abuse that is prohibited under section 4 or 5, or by Article 101 or 102 of the Treaty on the Functioning of the European Union, have a right of action under this subsection for relief against either or both of the following:

- (a) any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse;
- (b) any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into, or the implementation by it, of the agreement or decision, the engaging by it in the concerted practice or the doing by it of the act that constituted the abuse.

(2) An action under subsection (1) may be brought in the Circuit Court or in the High Court.

(3) Relief by way of injunction or declaration (including a declaration in respect of a contravention of section 4 or 5 or

Article 101 or 102 of the Treaty on the Functioning of the European Union that has ceased) may be granted to the competent authority in an action under subsection (1).

(4) Without prejudice to subsection (3), where in an action under subsection (1) it is finally decided by the Court that an undertaking has, contrary to section 5, or Article 102 of the Treaty on the Functioning of the European Union, abused a dominant position, the Court may, by order either—

- (a) require the undertaking to discontinue the abuse, or
- (b) require the undertaking to adopt such measures for the purpose of—
 - (i) its ceasing to be in a dominant position, or
 - (ii) securing an adjustment of that position,

as may be specified in the order (including measures consisting of the sale of assets of the undertaking) within such period as may be so specified.

(5) Where in an action under subsection (1) 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 of the undertaking and person employed by it whose duties included making decisions that, to a significant extent, could have affected the management 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.

(6) In this section ‘injunction’ means—

- (a) an interim injunction,
- (b) an interlocutory injunction, or
- (c) an injunction of definite or indefinite duration.”.

Applications to High Court for orders in relation to certain agreements.

5.—The Principal Act is amended by the insertion of the following section:

“14B.—(1) This section applies to an agreement entered into by the competent authority with an undertaking—

- (a) following an investigation referred to in paragraph (b) of subsection (1) of section 30, and
- (b) that requires the undertaking to do or refrain from doing such things as are specified in the agreement in consideration of the competent authority agreeing not to bring proceedings under section 14A (inserted by section 4 of the *Competition (Amendment) Act 2012*) in relation to any matter to which that investigation related or any findings resulting from that investigation.

(2) The High Court may, upon the application of the competent authority, make an order in the terms of an agreement to which this section applies if it is satisfied that—

- (a) the undertaking that is a party to that agreement consents to the making of the order,
- (b) that undertaking obtained legal advice before so consenting,
- (c) the agreement is clear and unambiguous and capable of being complied with,
- (d) that undertaking is aware that failure to comply with any order so made would constitute contempt of court, and
- (e) the competent authority has complied with subsection (3).

(3) Where the competent authority proposes to make an application for an order under subsection (2) in respect of an agreement to which this section applies, it shall, not later than 14 days before the making of the application—

- (a) publish the terms of that agreement on a website maintained by the competent authority, and
- (b) publish a notice, in not fewer than 2 daily newspapers circulating throughout the State—
 - (i) stating that it intends to make such application,
 - (ii) specifying the date on which such application will be made, and
 - (iii) stating—
 - (I) that the agreement to which the proposed application relates is published, in accordance with paragraph (a), on a website maintained by it, and
 - (II) the address of that website.

(4) An order under subsection (2) shall not have effect—

- (a) until the expiration of the period of 45 days from the making of the order, or
- (b) where an application is made to the High Court under subsection (5) in respect of the order, until the making of a final determination in relation to that application.

(5) The High Court may, upon the application of any person (other than the competent authority or the undertaking to which an order under this section applies) made during the period referred to in paragraph (a) of subsection (4), make an order varying or annulling an order under subsection (2) if it is satisfied that the agreement in respect of which the order was made requires the undertaking to which the order applies to do or refrain from doing anything that would result in a breach of any contract between the undertaking concerned and the applicant or that would render a term of that contract not capable of being performed.

(6) The High Court shall not make an order under subsection (5) if it is satisfied that the contract or term of the contract to which the application for such order relates contravenes section 4 or 5, or Article 101 or 102 of the Treaty on the Functioning of the European Union.

(7) The High Court may, upon the application of the competent authority or an undertaking to which an order under subsection (2) applies, make an order varying or annulling the first-mentioned order if—

- (a) the party (other than the applicant for the order) to the agreement to which the first-mentioned order applies consents to the application,
- (b) the first-mentioned order contains a material error,
- (c) there has been a material change in circumstances since the making of the first-mentioned order that warrants the court varying or annulling the order, or
- (d) the court is satisfied that, in the interests of justice, the first-mentioned order should be varied or annulled.

(8) Subject to any order under subsection (9), an order under subsection (2) shall cease to have effect upon the expiration of 7 years from the making of the second-mentioned order.

(9) The High Court may, upon the application of the competent authority made not earlier than 3 months before the expiration of an order under subsection (2), make an order extending the period of the first-mentioned order (whether or not previously extended under this subsection) for a further period not exceeding 3 years.

(10) Paragraphs (a), (b), (c) and (d) of subsection (2) shall apply in respect of the determination of an application referred to in subsection (9) as they apply in respect of the determination of an application referred to in subsection (2).

(11) In this section ‘undertaking’ includes an association of undertakings.”.

Amendment of section 30 of Principal Act.

6.—Section 30 of the Principal Act is amended, in paragraph (b) of subsection (4), by the substitution of “section 14A” for “section 14”.

Amendment of section 45 of Principal Act.

7.—(1) Section 45 of the Principal Act is amended—

- (a) in subsection (7), by the substitution of “35” for “14” in each place that it occurs, and
- (b) in paragraph (a) of subsection (13), by the substitution of “section 14A” for “section 14”.

(2) The amendment of subsection (7) of section 45 of the Principal Act effected by *paragraph (a) of subsection (1)* shall not apply as respects books, documents or records seized or obtained under that section before the commencement of this section.

8.—(1) Where, in proceedings under Part 2 of the Principal Act, a court finds, as part of a final decision in relation to the matters to which those proceedings relate, that an undertaking contravened section 4 or 5 of that Act, or Article 101 or 102 of the Treaty on the Functioning of the European Union, then, for the purposes of any subsequent proceedings (other than proceedings for an offence) under that Part, the finding shall be *res judicata* (whether or not the parties to the said subsequent proceedings are the same as the parties to the first-mentioned proceedings). *Res judicata.*

(2) In this section “finding” includes a conviction for an offence, whether or not that conviction is consequent upon a plea of guilty by an accused person.

9.—Section 160 of the Companies Act 1990 is amended by— *Amendment of section 160 of Companies Act 1990.*

(a) the insertion, in subsection (2), of the following paragraph:

“(hh) a person has contravened section 4 or 5 of the Competition Act 2002 or Article 101 or 102 of the Treaty on the Functioning of the European Union; or”,

and

(b) the insertion of the following subsection:

“(6B) An application to which paragraph (hh) of subsection (2) applies may be made by the competent authority (within the meaning of the Competition Act 2002).”.

10.—(1) This Act may be cited as the Competition (Amendment) Act 2012. *Short title, commencement, collective citation and construction.*

(2) This Act shall come into operation on such day or days as the Minister for Jobs, Enterprise and Innovation may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or provisions.

(3) The Competition Acts 2002 to 2010 and this Act (other than section 9) may be cited together as the Competition Acts 2002 to 2012 and shall be construed together as one Act.