# AN BILLE IOMAÍOCHTA, 2001
# COMPETITION BILL, 2001

## EXPLANATORY AND FINANCIAL MEMORANDUM

The purpose of the *Competition Bill*, *2001*, is to consolidate and modernize the existing enactments relating to competition and mergers. The Bill will replace the Mergers, Takeovers and Monopolies (Control) Act, 1978, as amended, the Competition Act, 1991, and the Competition (Amendment) Act, 1996. The Bill also introduces significant changes to Ireland's competition and merger law arrangements. These changes follow mainly from the work of the Competition and Mergers Review Group (CMRG), which carried out a major review of existing arrangements over the period September 1996 to March 2000. The Bill also takes account of other developments, particularly proposed changes in EU competition law which will have important implications for the implementation of Community competition law within Member States.

### PART 1

#### Preliminary and General

This Part contains standard provisions relating to the short title, commencement and interpretation of the Act.

*Section 1* provides for the short title of the Act. The reference to ''competition'' includes matters relating to mergers.

*Section 2* contains standard commencement provisions.

*Section 3* makes provision for the interpretation of certain terms used in the Act. The term ''undertaking'' which was introduced in the Competition Act, 1991, will now also apply to the provisions relating to mergers, replacing the term ''enterprise''.

### PART 2

#### Competition Rules and Enforcement

This Part sets out the rules of competition, defines offences, sets out penalties, establishes rules for the conduct of both civil and criminal trials, in particular the rules on evidence, and maintains the right of a civil action.

*Section 4* repeats, in *subsection (1)*, the general prohibition of anti-competitive agreements, decisions and concerted practices which was introduced by section 4(1) of the 1991 Act. The system for granting individual licences or certificates under the 1991 Act, however, is being abolished. Instead, the efficiency conditions, now provided for in *subsection (5)*, will become directly applicable (in the case of EU

law when the proposed new Council Regulation takes effect), i.e. it will not be necessary for undertakings to notify arrangements in order to qualify for exemption based on these conditions. This approach is similar to that being proposed by the European Commission in relation to EU competition law. Provision is being retained in *subsection (3)* to enable the Authority to declare that particular categories of arrangements comply with the efficiency conditions. *Subsection (8)* exempts mergers for which provision is made in *Part 3* from the scope of the general prohibition in *subsection (1)*.

*Section 5* repeats the provisions of section 5 of the 1991 Act, which prohibited the abuse of a dominant position. *Subsection (3)* exempts from the prohibition mergers for which provision is made in *Part 3.*

*Sections 6* to *8* make important changes to the existing statutory provisions relating to criminal offences, penalties and related matters. The current provisions are contained in sections 2 and 3 of the 1996 Act which first introduced criminal sanctions for infringements of the prohibitions against anti-competitive arrangements and abuses of a dominant position. The changes now proposed, which are indicated in the paragraphs following, are directed at the following policy objectives—

(*a*) to reflect the seriousness of so called ''hard-core'' competition offences by increasing penalties and making certain procedural changes,

(*b*) to re-adjust penalties for the less serious offences by abolishing the penalty of imprisonment for those offences but retaining significant financial penalties, and

(*c*) to facilitate the enforcement of EU competition law in Ireland by making breaches of Articles 81 and 82 of the EU Treaty offences in Irish law, in line with recommendations of the CMRG and proposed changes in EU competition law.

*Section 6* provides for offences in respect of breaches of *section 4(1)* or Article 81(1) of the Treaty and introduces a distinction between two types of breach of those provisions. The first type is a breach involving arrangements such as price fixing, market sharing or bid rigging; these are the ''hard core'' competition offences. The second type involves arrangements which are less seriously restrictive of competition such as applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage. *Subsection (2)* introduces a new presumption which will apply in the prosecution of the more serious offences. This obliges the court to presume, unless the defendant can prove otherwise, that the object or effect of the agreement, decision or concerted practice at issue is to prevent, restrict or distort competition. *Subsection (3)* retains the defence from section 2(2)(*c*)(i) of the 1996 Act, but only in respect of the less serious offences. Further defences are provided in *subsections (4)*, *(5)* and *(6)* and these are available, as appropriate, without distinction regarding the seriousness of the offence. In *subsection (6)*, ''statutory body'' refers to the bodies listed in *Schedule 1*. *Subsection (7)* repeats section 2(9) of the 1996 Act, and makes the undertaking liable for an offence committed by any of its officers or employees operating in the course of their work with that undertaking.

*Section 7* provides for the offence of breaching *section 5(1)* or Article 82 of the Treaty. *Subsections (3)* and *(4)* follow similar provisions in *section 6*.

*Section 8* provides for penalties for offences under *sections 6* and *7* distinguishing between more and less serious offences as described above. The maximum penalty of imprisonment for conviction on indictment is increased from 2 years to 5 years for the former category but is abolished for the latter. Similar financial penalties are provided for the two categories. The provision for a 5-year maximum penalty of imprisonment automatically allows for a power of arrest under the Criminal Justice Act, 1984. Provision for continuing offences is made in *subsection (3)*. *Subsections (4)* to *(12)* are mainly technical provisions following comparable provisions in the 1996 Act.

*Section 9* repeats section 4 of the Competition (Amendment) Act, 1996, with one minor amendment, namely that it may be used in civil as well as criminal proceedings.

*Section 10* provides that the judge in a criminal trial under this Act may direct that certain documents be given to the jury and that complex technical evidence can be summarised by a suitably qualified person into a format that can be readily understood by the jury.

*Section 11* provides for certain presumptions to arise where documents are admitted as evidence in an action, whether civil or criminal, under this Act. This section gives effect to certain recommendations of the CMRG, providing for presumptions on the authorship, ownership, receipt and other matters relating to documents. These presumptions may be rebutted by the defendant or respondent. The term ''document'' is defined here as including electronic and other forms of text.

*Section 12* contains provisions on the admissibility of statements in documents which are submitted in evidence. These provide that statements made by a person who has committed an offence to the effect that another person has also committed an offence may be admitted and incorporates protections for the other person who is the subject of the statements.

*Section 13* repeats the provisions of section 6 of the 1991 Act, as amended by sections 6 and 7 of the 1996 Act, and incorporates additional matters. The right of action for a breach of *section 4* or *section 5* may be brought in either the Circuit or the High Court, whereas previously an action for a breach of section 4 of the 1991 Act could only be brought in the High Court. *Subsection (7)* empowers the court to apply structural remedies such as requiring an undertaking that has abused its dominant position to sell off part of its assets. *Subsection (9)* provides an immunity from damages where the undertaking is acting in a manner consistent with a ruling of a sectoral regulator.

*Section 14* retains the right to appeal against a category declaration of the Competition Authority, issued under *section 4*.

## PART 3

### Mergers and Acquisitions

This part provides for the merger control regulatory regime.

*Section 15* introduces a new definition of ''merger'' or ''acquisition'' adopted from the EU Merger Regulation and recommended by the CMRG. This definition essentially provides that a notifiable merger arises once control over an undertaking is acquired, regardless of how such control is acquired. However, where control is merely transferred within a group of companies, i.e. where there is

no change in ultimate control as a result of a merger or acquisition, there will be no obligation to notify such a proposal under the Act. *Subsection (4)* brings certain joint ventures under merger control.

*Section 16* clarifies that the merger examination procedure is subject to the terms of *section 22* where the merger involves a media business.

*Section 17* obliges undertakings involved in certain mergers or acquisitions to notify the Competition Authority for regulatory clearance. (Under the 1978 Act, mergers are notified to the Minister for Enterprise, Trade and Employment.) The CMRG recommended that the test for establishing which mergers are notifiable under the legislation should be determined by the level of turnover of the undertakings concerned and that no account should be taken of the size of their assets. Accordingly, the ''asset test'' is not being retained in this Act while the turnover threshold which triggers the requirement to notify is being increased from the current rate of €29,384,000 to €40m. This is in line with the CMRG recommendations. Furthermore, only ''agreed'' mergers rather than ''proposed'' mergers will be notifiable. A further new procedure is being introduced whereby mergers which do not reach the turnover threshold can voluntarily be notified to allow the parties to seek immunity from attack under *sections 4* and *5*. The power of the Minister to specify a class or classes of merger to which the financial threshold will not apply is retained.

*Section 18* provides that a merger or acquisition may not take effect until it has been notified to the Competition Authority and they have been given the statutory time to examine it. Where the Authority clears a merger or acquisition, that transaction must be completed with 12 months of the Authority's decision. This section also defines the ''appropriate date'' from which the statutory deadline for the Authority's examination procedure commences. (It essentially enables the Authority to extend the time where necessary — for example, where they require further information from the notifying parties).

*Section 19* contains the general rules which apply to all examinations of mergers or acquisitions by the Authority. These include mechanisms to enable the Authority to enter into discussions with the parties (as recommended by the CMRG) and measures intended to improve the transparency of the merger control regime. For example, the Authority is required to publish a notice of each notification it receives. *Subsection (3)* empowers the Authority to accept binding commitments from undertakings that will remove potential anti-competitive effects of the merger or acquisition.

*Section 20* provides for the initial ''first phase'' examination of a merger or acquisition by the Competition Authority. This structure is modelled on the EU Merger Regulation. Essentially the Authority makes a decision within 1 month of notification to either—

(*a*) allow the merger or acquisition to proceed or

(*b*) to initiate a full (''second phase'') investigation of the transaction.

The criterion on which the Authority makes its decision is whether the merger or acquisition will substantially lessen competition in markets for goods or services in the State. This section also obliges

the Authority to publish a notice of its determination — this is being introduced to improve transparency in the procedure.

*Section 21* provides for a full or ''second phase'' investigation by the Competition Authority. Once the Authority decides to proceed to a full investigation it has a further 3 months from the date of receipt of the notification, or a later date if the Authority requests additional information from the notifying parties, to determine that the merger—

(*a*) may take effect,

(*b*) may take effect but subject to conditions, or

(*c*) may not take effect.

As in the previous section, there is an obligation on the Authority to publish its determination.

*Section 22* contains special procedures for mergers or acquisitions where at least one of the parties involved is a ''media business'' (referred to as a media merger). The term media business is defined as the business of publishing newspapers or magazines, broadcasting (both sound and audiovisual), or providing a broadcasting services platform (such as a cable company). Where the Authority is notified of a media merger it must, within 5 days of that notification, advise the parties that it considers the transaction to be a media merger and it must also provide the Minister for Enterprise, Trade and Employment with a copy of the proposal. The Authority will then proceed to carry out an initial investigation as provided for in *section 20*. If, following this initial investigation, the Authority determines that the media merger may take effect, it advises the Minister immediately of this determination. Notwithstanding the fact that the Authority has decided not to proceed to a full investigation as provided for in *section 21*, the Minister may direct the Authority to do so. If the Authority does proceed to a full investigation, either following its own decision or at the request of the Minister, it will make a determination based on competition criteria that the merger—

(*a*) may take effect,

(*b*) may take effect subject to conditions or

(*c*) may not take effect.

The Authority will immediately inform the Minister of that determination. The Minister then has the option of over-ruling the Authority's determination by making an order within a further 30 day period. In deciding whether or not to make an order the Minister will have regard to ''public interest'' criteria rather than the ''competition'' criteria used by the Authority in making its determination. These public interest criteria are based on recommendations of the CMRG and include the strength and competitiveness of media businesses indigenous to the State and the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings.

*Section 23* provides a right of appeal to the High Court against a determination of the Competition Authority for any of the parties to a merger or acquisition, where that determination prohibits the merger taking effect or where it attaches conditions. Any such appeal must be made within 1 month of the determination of the Authority, unless the merger at issue is a media one (in which case additional

time is allowed in light of the special procedures involved). The court is obliged to determine the appeal within 2 months in so far as is practicable.

*Section 24* provides that where the Minister for Enterprise, Trade and Employment makes an order regarding a media merger, that order shall be laid before the Houses of the Oireachtas and either House may pass a resolution annulling the order within 21 sitting days. If either House does annul the order, then the original determination of the Authority stands.

*Section 25* provides for the enforcement of commitments given to the Authority by the parties to a merger or acquisition, determinations of the Authority or orders of the Minister. The Authority, or any other party, may apply to the court for an injunction to enforce compliance with a commitment, determination or order. This section further provides for penalties where a commitment, determination or order is not complied with.

*Section 26* provides that all mergers or acquisitions, which fall to be considered under this Act, must be cleared in accordance with the provisions of this Act notwithstanding the provisions of certain other Acts.

## PART 4

### The Competition Authority

This part contains the various provisions relating to the operation of the Competition Authority.

*Section 27* provides for the continuation of the Competition Authority and makes express provision for the legal personality and independence of the Authority.

*Section 28* confers specific functions on the Authority in addition to those conferred elsewhere in the Act or in other Acts. Provision for delegation of functions within the Authority is made in *subsection (3)* but this may not extend to the functions listed in *subsection (4)*.

*Section 29* provides for summoning of witnesses, examining witnesses on oath and requiring witnesses to produce documents. It sets out penalties for defaulting in attending before the Authority, refusing to take an oath, produce a document or answer any questions which legally require an answer.

*Section 30* provides that information obtained in the course of the Authority's activities shall not be disclosed by any person and for remedies where a breach of that obligation arises.

*Section 31* requires the Authority to prepare three year strategic plans within a prescribed timescale comprising the key objectives, outputs and related strategies and use of resources of the Authority. It also provides that the plan be laid before each House of the Oireachtas. *Subsection (4)* also obliges the Authority to submit annually to the Minister a work programme for the following year.

*Section 32* makes provision for co-operation between the Authority and certain statutory bodies listed in *Schedule 1.* These are bodies which have important regulatory responsibilities for specific sectors. The section requires the Authority and each statutory body to enter into a co-operation agreement for the purposes described in *subsection (1)*. *Subsection (3)* prescribes certain minimum provisions

which are to be contained in a co-operation agreement. These relate to the furnishing of information, consultation between the parties and the possibility of deferring to the other party in appropriate circumstances. The section also makes provision for various ancillary matters relating to co-operation agreements and co-operation pursuant to them. The approach taken in this section follows recommendations of the CMRG.

*Section 33* provides for the membership of the Competition Authority — a chairman and not less than 2 or more than 4 other whole-time members. It provides also for part time members. It introduces criteria to be taken into consideration by the Minister when appointing members to the Authority — the person shall possess expertise or experience in law, economics, public administration, consumer affairs or business. The section provides for the maximum term of office of any member at five years and allows reappointment; it also makes standard provisions regarding conditions of service. Other provisions relate to conflict of interest and removal from office by the Minister.

*Section 34* This is a standard provision relating to disqualification from being a member of the Authority and for ceasing to be a member in certain circumstances.

*Section 35* provides that the quorum for regular meetings of the Authority shall be 3 members and that questions shall be settled by a majority with the chairperson having a casting vote.

*Section 36* confers responsibility for managing and controlling generally the staff, administration and business of the Authority on the chairperson and provides for accountability to the Public Accounts Committee.

*Section 37* empowers the Authority to determine, subject to Ministerial approval, its staffing requirements and remuneration, terms and conditions of staff.

*Section 38* makes provision for the official seal of the Authority.

*Section 39* sets out requirements relating to the preparation of estimates, accounts, and audits. It provides for the keeping of books regarding income and expenditure and details of the property, assets and liabilities of the Authority. The section sets the financial year as the 12 months ending on the 31st day of December in any year. It provides that the accounts and auditor's report be laid before each House of the Oireachtas.

*Section 40* requires the Authority to submit to the Minister an annual report of its activities for each financial year and that this report be laid before each House of the Oireachtas.

*Section 41* provides that the Authority may be funded by a grant from the vote of the Department of Enterprise, Trade and Employment and empowers the Authority with the consent of the Minister and the concurrence of the Minister for Finance, to make borrowings where necessary for current expenditure.

*Section 42* provides for superannuation arrangements for the Authority.

*Section 43* provides for authorised officers and sets out their powers. This section also provides for warrants to be issued by the District Court. The powers of authorised officers include entering and

inspecting premises, requiring persons to produce books, documents or records, taking copies or extracts from such books, documents or records. It sets out the penalties for obstructing or impeding an authorised officer. It also elaborates on the term ''records'' to include discs, tapes, sound tracks, films and photographs.

*Section 44* enables the Competition Authority, with the consent of the Minister, to agree arrangements for the exchange of information with similar bodies abroad.

## PART 5

### Miscellaneous

This Part contains a number of miscellaneous provisions relating to this Act.

*Section 45* provides for the repeal of the whole of the Mergers, Take-overs and Monopolies (Control) Acts, 1978, certain sections of the Restrictive Practices (Amendment) Act, 1987, the Competition Act, 1991 and the Competition (Amendment) Act, 1996.

*Section 46* empowers the Minister for Enterprise, Trade and Employment to amend or revoke the Restrictive Practices (Groceries) Order, 1987.

*Section 47* empowers the Minister for Enterprise, Trade and Employment to make regulations under this Act.

*Section 48* provides that the expenses incurred by the Minister for Enterprise, Trade and Employment in the administration of the Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

*Section 49* provides that the Public Offices Fees Act, 1879, shall not apply to fees payable under this Act.

*Section 50* provides that the transitional provisions of *Schedule 2* shall have effect.

*Schedule 1* lists the statutory bodies with whom the Competition Authority shall make co-operation agreements under *section 32*. It also lists the Ministers with responsibility for those statutory bodies to whom the co-operation agreements must be notified.

*Schedule 2* makes provision for saving and transitional matters.

*Exchequer and Staffing Implications*

No direct charge on the Exchequer will arise as a result of the enactment of the Bill. As regards staffing, there may be a need to review staffing levels in the Competition Authority in view of the transfer of additional responsibilities regarding mergers to the Authority.

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