Compecon - Competition & Regulatory E-Zine.

No.9 July 2012.

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Editorial.

Welcome to the latest edition of Compecon's Competition and Regulatory E-Zine.

The first article in this issue looks at the key elements contained in the Competition (Amendment) Act, 2012. The legislation includes a number of provisions aimed at strengthening enforcement. Apart from increasing the penalties for breaching the legislation, these include some novel measures such as provision for court orders in respect of agreements between the Competition Authority and undertakings that have been the subject of an investigation and *res judicata* provisions designed to facilitate private follow-on court actions.

Our second article reviews an EU commission decision in relation to the Transmission System Operator for the Scottish electricity industry.

The final article in this issue analyses the Authority's recent statement on the outcome of its investigation into certain rules of Show Jumping Ireland and asks whether the case might have implications for more mainstream sporting organisations.

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2012 Act Introduces New Legally Binding Court Orders.

1: Introduction.

The Competition (Amendment) Act, 2012, came into force on 3rd July, 2012. The Act is fairly brief with just 10 sections. The new legislation strengthens Irish competition law in several ways and includes some novel innovations.

2: Main Features of the 2012 Act. The new legislation increases the penalties for competition law infringements. The maximum fine that may be imposed on an undertaking is increased from €4m to €5m. The maximum prison sentence that can be imposed on an individual executive in respect of the "hard-core" cartel offences is increased from five to ten years. The 2012 Act also provides that a convicted party will have to pay the costs of the investigation and prosecution to the Authority.

Section 9 of the 2012 Act amends Section 160 of the Companies Act, 1990, giving the court a discretionary power to disqualify a person from acting as a director if s/he is found to have infringed the Act. Currently anyone convicted on indictment of a competition offence is automatically disqualified from acting as a director. The new provision means that the court may also disqualify an individual from acting as a director for any competition infringements outside of a conviction on indictment.

The new act also provides that the Probation of Offenders Act, 1907, no longer applies to competition law offences.

The 2012 Act amends section 14 of the 2002 Act creating a separate right for the Competition Authority to bring civil proceedings, thus distinguishing between private civil and enforcement actions brought by the Authority.

The 2012 Act includes a potentially important new provision designed to facilitate private enforcement actions. Section 8 provides that any finding by a court that a party has infringed competition law will be *res judicata* in future proceedings. A guilty plea in a criminal prosecution will also constitute a court "finding" for this purpose. In other words where cases have been successfully brought by the Competition Authority, private parties suing for damages will be able to rely on the fact that the parties have already been found to have infringed the law by the Courts and will not be required to separately prove that an infringement has occurred.

3: Court Orders.

In our previous issue we noted that the memorandum of Understanding between the Government and the Troika dated 12th February included a commitment to amend the Competition (Amendment) Bill, as it then was, by including a mechanism whereby commitments furnished to the Competition Authority by undertakings could be made legally binding.

Such a provision has been included in section 5 of the 2012 Act and is one of the more interesting provisions in the new legislation. Section 5 provides for the insertion of a new section 14B into the Competition Act 2002. This provision applies to an agreement entered into by the Competition Authority and an undertaking following an investigation

"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...in relation to any matter to which that investigation related or any findings resulting from that investigation."[1]

The Authority may apply to the High Court which may make an order in the terms of the agreement provided it is satisfied that—

a. the undertaking that is a party to that agreement consents to the making of the order;
b. the undertaking obtained legal advice before consenting;
c. the agreement is clear and unambiguous and capable of being complied with; and
d. the undertaking is aware that failure to comply with the order would constitute contempt of court.

Before making an application for an order the Competition Authority must

a. publish the terms of the agreement on its website; and
b. publish a notice, in at least 2 daily newspapers circulating throughout the State stating:—
   (i) that it intends to make an application,
   (ii) the date on which the application will be made, and
   (iii) that the agreement has been published on its website and give the address of the website.

An order shall not come into effect until 45 days after it has been made. Within that 45-day period subsection 5 provides that any person may apply to the High Court for an order to vary or annul the original order on the grounds that the agreement in respect of which the original order was made would require the undertaking concerned to breach a contract between it and the applicant or would render a term of that contract incapable of being performed. The Court may not make an order under subsection (5) if it is satisfied that the contract or term of the contract to which the application relates contravenes section 4 or 5, or Article 101 or 102 of the TFEU.

Subsection (7) provides that the High Court may vary or annul an order upon the application of either the Authority or the undertaking which is party to the agreement if:

a. the other party consents to the application,
b. the order contains a material error,
c. there has been a material change in circumstances since the making of the order that warrants the court varying or annulling the order, or
d. the court is satisfied that, in the interests of justice, the order should be varied or annulled.

Orders will cease to have effect after seven years, although the Authority may apply to have the order extended for further periods of 3 years.

Apart from making such commitments legally binding, this provision may provide greater transparency with respect to such arrangements by giving the courts an oversight role and providing some rights for third parties to object.

The provision bears some initial resemblance to the US modified final consent process, which was described in issue number 6 of our e-zine. In the US when the competition agencies reach an agreement with parties to discontinue

[1] The reference to competent authority in the Act is because ComReg has competition law enforcement powers. For convenience the present article refers to the Competition Authority.

certain practices, such agreements must be approved by a judge. This provision exists to ensure that such agreements are in the public interest and to avoid any "sweetheart" deals. Third parties may object to such settlements.

In the 1994 US Airline Tariff Publishing case, the Justice Department claimed that airlines were using computer reservation systems to provide advance signals of their pricing intentions and thus to facilitate coordinated behaviour. A number of airlines reached an agreement with the Department to discontinue such behaviour, but others objected (unsuccessfully) to the agreement before the court. Allowing third party objections in such cases recognises that undertakings may abuse competition law to try and hinder rivals' ability to compete.

It will be interesting to see how this provision will operate in practice. It might have been better if it was compulsory to have such arrangements approved by the court as happens in the US. Nevertheless, it may result in greater transparency while providing a mechanism for ensuring that settlement arrangements between the Authority and undertakings are legally enforceable.

4: Comment.

The Competition (Amendment) Act, 2012 seeks to strengthen Irish competition law in a number of ways. These include increasing the maximum level of fines and jail terms that may be imposed for competition law offences; removing the option of courts applying the Probation Act for such offences; and broadening the circumstances in which an individual may be disqualified from acting as a company director. In general measures to strengthen the enforcement of competition law are welcome. One might, however, question the decision to increase the maximum jail term for "hard-core" cartel offences from five to ten years. In the final analysis deterrence depends on a combination of the extent of the penalty and the likelihood of being caught. Doubling the maximum jail sentence will have little impact if individuals believe that the chances of being detected and prosecuted are relatively low. Given the Competition Authority's past statements that it is only likely to conduct one criminal cartel investigation per year, the odds of detection and prosecution might be considered to be relatively low. The problem is not inadequate penalties but an inadequate level of enforcement of the legislation.

The "res judicata" provisions should, in theory, enhance the scope for private follow-on actions. By definition, the potential for such actions will be limited unless there is a significant increase in actions brought by the Authority. In contrast to "hard-core" cartels, the Authority has brought hardly any civil actions for non-cartel infringements in 16 years. Given the nature of the Irish economy, it is somewhat surprising that no undertaking has yet been found by a court to have abused a dominant position on foot of a civil action mounted by the Authority. The provision allowing for binding orders in non-cartel cases, described above, is welcome in many respects but where investigations are are ultimately resolved the making of such orders, the *res judicata* provision will be of no benefit to private parties.

Scottish Electricity Transmission Arrangements Satisfy EU Unbundling Requirements.

1: Introduction.
On 14th May 2012, the EU Commission published a decision to the effect that the arrangements in respect of Scotland's transmission system operator (TSO) satisfied the requirements of Directive 2009/72/EC concerning common rules for the internal market in electricity.[2]

2: The Relevant Legislation. Directive 2009/72/EC sets out three models of unbundling for TSOs:

- Full ownership unbundling, which requires that the transmission system owner be appointed as TSO and its independence from production or supply interests.
- The independent system operator model under which an undertaking with production or supply interests may continue to own the transmission system, but appoints an independent entity to carry out all TSO functions
- the independent transmission operator model (ITO) under which an undertaking with production or supply interests may continue to own the transmission system, but with stringent ring fencing provisions based on a pillar of organisational measures and a pillar of measures related to investment. In addition there must be cooling off periods in relation to the movement of staff between the TSO and the production or supply functions of the vertically integrated undertaking.

According to the Commission each of the three alternatives should deliver effective unbundling, albeit with a different mix of structural and regulatory solutions.

The Directive requires Member States to adopt one of the three models described above. Article 9(9) of the Directive, however, provides that a Member State may chose not to apply any of the three prescribed models, provided that on 3rd September 2009 the transmission system belonged to a vertically integrated undertaking and at that date arrangements were in place which guaranteed more effective independence of the TSO than the specific provisions relating to the ITO model in the Directive.

According to Article 9(10) of the Directive, the Commission must verify that the arrangements in place clearly guarantee more effective TSO independence than the ITO provisions.

The detailed requirements of the ITO model are set out in Articles 17 to 23 of the Directive.

Article 17 sets out the essential elements of legal and functional unbundling which must apply under the ITO model. As well as being responsible for carrying out the general tasks of a TSO, the ITO model explicitly requires additional tasks to be attributed to the TSO. Personnel engaged in transmission

[2] OJ L 211, 14.08.2009 p. 55.

operation must not only be employed by the TSO, but there is also a prohibition on the secondment of personnel from the vertically integrated undertaking. The TSO is not allowed to share IT systems or equipment, share premises or security systems with the vertically integrated utility.

Article 18 provides for TSO independence. Independence includes the TSO having the ability to raise capital itself on the capital markets.

Article 19 provides for the independence of the staff and management of the TSO. In particular persons responsible for management or members of the administrative bodies of the ITO may have no other professional position or interest with the vertically integrated undertaking. Their remuneration may not depend on the activities of the vertically integrated undertaking, and a minimum four year cooling off period applies before they can take up employment with the vertically integrated undertaking.

Article 20 establishes a Supervisory Body which is responsible for decisions of the ITO which may have a significant impact on the value of the assets of the TSO shareholders. This Body may not be involved in the development of the network development plan. The same independence obligations applying to the majority of the management of the ITO apply to one half, minus one, of the Supervisory Body.

Article 21 provides for a compliance officer, to be appointed by the Supervisory Body and approved by the national regulatory authority, to whom the independence obligations applying to the management of the ITO apply. The compliance officer may not have any other professional links with the vertically integrated undertaking. The compliance officer is responsible for reporting on ITO compliance with its obligations.

Article 22 requires the ITO to develop a ten-year network development plan, which is monitored and evaluated by the national regulatory authority. The national regulatory authority has the power to require the ITO to execute the investments or take other measures to ensure the investment is made and can compel the ITO to increase its capital. The national regulatory authority can require the ITO to agree to the financing or construction of the investment by any third party.

Article 23 sets out in detail the obligations of the ITO in respect of connecting new generation to its transmission system.

3: The Scottish Electricity Industry.

The UK Government adopted a different approach for de-regulating the electricity industry in Scotland compared with England and Wales, partly because of existing differences in industry structures. In England and Wales distribution was traditionally the remit of independent regional distribution companies. Prior to privatisation of the electricity industry in England and Wales, a separate company was established to operate the transmission network. The generation business was split in three with nuclear power plants remaining in State ownership. Scotland had two vertically integrated electricity companies which were privatised without any structural changes.

In the years after privatisation, there was very little new entry in the generation business in Scotland. There was an interconnector between Scotland and

England but capacity shortages in the transmission network in North Yorkshire meant that the Scottish market was separate from that in England and Wales. In the late 1990s transmission capacity was increased leading to the creation in 2005 of a single electricity market encompassing all of Britain under the British Electricity Transmission and Trading Arrangements (BETTA). Under BETTA the TSO functions in Scotland are shared between the Scottish transmission companies and National Grid, which is the independent TSO for England and Wales.

4: The Commission Decision.

The Commission concluded that under BETTA, National Grid was effectively in charge of most transmission system operation functions in Scotland. National Grid is responsible for the day-to-day operation of the Scottish transmission system. The Scottish transmission companies have a role regarding connections but do not interact with system users. Finally, the Scottish transmission companies plan their own systems within the context of the wider development of the Great Britain system by National Grid which has a coordinating role with respect to the Scottish transmission companies, with a possibility of appeal to Ofgem.

According to the Commission the key difference between the arrangements applying in Scotland and the three unbundling models included in the Directive was the role of National Grid in the functions of the TSO alongside the Scottish transmission companies. It concluded that the fact that National Grid has overall responsibility for the Great Britain transmission system and is itself the transmission system owner in England and Wales was particularly important. This brought a level of independence, knowledge, and responsibility to transmission system operation in Scotland which would not occur under the ITO model.

For TSO functions which are shared between National Grid and the Scottish transmission companies, the involvement of National Grid was found to bring a degree of independence to the process which was missing in the ITO model.

The cooling off periods for management staff in the Scottish transmission companies, are defined on a case-by-case basis but are subject to control by Ofgem which the Commission decided provided an important protection against influence being exerted by the vertically integrated undertaking. Interestingly the decision stated:

> *"The Commission considers that the rules of Directive 2009/72/EC applicable to the independent transmission operator model represent the starting point for assessing the appropriate cooling off period."*

The Commission accepted Ofgem's conclusion that the share ownership and group wide bonus schemes which apply across the vertically integrated Scottish undertakings were relatively insignificant.

In relation to compliance officers the Scottish arrangements provide that each person appointed to this role must be reviewed on a case by case basis. The Commission noted that a compliance officer was appointed who was an employee of the vertically integrated undertaking, albeit in internal audit. However, it accepted that Ofgem had undertaken an examination of the individual and the role of internal audit in

the vertically integrated undertaking to satisfy itself that this was an appropriate appointment.

The Commission decided that bonus schemes based on group performance were counterbalanced by the more limited role of the Scottish transmission companies compared to that of an ITO.

The Commission noted that additional measures could be taken to further strengthen individual aspects of the Scottish arrangements by amending the relevant licences. It cited arrangements relating to the cooling off periods, the criteria for assessing the independence of the compliance officer and for ensuring that share ownership and group wide bonus schemes were insignificant.

It stated:

> *"Such measures would be welcomed by the Commission."*

The Commission found that more effective independence was guaranteed than would apply with the ITO model due to National Grid being responsible for day-to-day operation of the system.

> *"Of particular importance here is not just that National Grid is a fully ownership unbundled company, but that it is also responsible for the wider Great Britain system, which means it takes a Great Britain wide approach to decisions, for example in relation to balancing."*

The Commission also stated that the central role of National Grid, as a fully ownership unbundled TSO brought a Great Britain wide approach to investment decisions and connection approvals.

In relation to the limited tasks of Scottish transmission companies in transmission system operation, the possibility of bringing a dispute to Ofgem and the regulatory safeguards applying to the Scottish transmission companies were seen to provide strong guarantees of independence.

The Commission thus concluded that:

> *"The arrangements in place in relation to the vertical integration and operation of the transmission systems belonging to Scottish Power Transmission Limited and Scottish Hydro Electric Transmission Limited, existing already on 3 September 2009, meet the requirements of Article 9(9) of Directive 2009/72/EC and clearly guarantee more effective independence of the transmission system operators than the provisions of Chapter V of Directive 2009/72/EC."*

5: Comment.

Directive 2009/72/EC concerning common rules for the internal market in electricity outlines three models for the unbundling of electricity transmission operations from generation. The Directive requires Member States to apply one of the three prescribed models. A Member State may, however, chose not to apply any of the three prescribed models, provided the transmission system belonged to a vertically integrated undertaking on 3rd September 2009 and arrangements were in place on that date which guaranteed more effective independence of the TSO than the specific provisions relating to the ITO model (one of the three unbundling models) in the Directive. The Commission must verify that the arrangements in place clearly guarantee more effective TSO independence than the ITO provisions. The Commission decision accepted that the arrangements in relation to the operation of the transmission network in Scotland

satisfied these requirements. Given the structure of the industry in Scotland and the fact that many of the TSO's functions were carried out by National Grid, the independent TSO for England and Wales, either alone or in conjunction with the Scottish companies, it is unclear that this decision will have implications for the management of transmission systems in other Member States.

Rule Amendment Allows Show Jumping Ireland Clear Competition Hurdle.

1: Introduction.

The Competition Authority recently announced that it had closed an investigation into the rules Show Jumping Ireland (SJI) after the SJI had agreed to amend its rules regarding members' participation in competing unaffiliated events. [3] While the Authority's brief description of the case suggests that it was a relatively minor matter, there may be implications for larger sports organisations.

2: The Facts of the Case.

The Authority investigation concerned Article 299N of the SJI Rulebook. This rule prevented members of SJI from competing at unaffiliated show jumping events which had a prize fund in excess of €50/£50. According to the Competition Authority, members of SJI were penalised if they breached this rule.

The Authority stated that it had received a number of complaints alleging that the Rule was anticompetitive.

> *"Following an investigation which commenced in 2011, the Authority formed the opinion that the Rule amounted to a decision of an association of undertakings which was likely to restrict, on the one hand, the participation of SJI members at unaffiliated show jumping events and, on the other hand, the organisation of such unaffiliated events in Ireland."*

The Authority stated that it considered the Rule to be disproportionate in relation to SJI's stated justification. In the Authority's view the Rule was likely to infringe section 4 of the Competition Act 2002 and Article 101 of the Treaty on the Functioning of the European Union.

SJI agreed to amend the Rule in order to address the Authority's competition concerns. The amended Rule states:

> *"Members of SJI who enter unaffiliated shows with a prize fund above €50/£50 will be penalised if the show:-*
>
> *(i) Has not signed up to the specified Health and Safety Standards; and,*
>
> *(ii) Has not provided SJI with evidence of adequate insurance."*

The Authority reported that SJI had published the amendment of the

[3] Competition Authority Case Summary, Alleged Anti-Competitive Rule of Show Jumping Ireland. Available at http://www.tca.ie/images/uploaded/documents/201205%20Case%20Summary%20-%20SJI.pdf

Rule on its website and in the March 2012 *Showjumping Bulletin*.

The Authority stated that the amendment to the Rule meant that SJI members may now participate in unaffiliated events with a prize fund greater than €50/£50 without being penalised so long as the unaffiliated event concerned

(i) has signed up to SJI specified Health and Safety Standards; and,

(ii) has adequate insurance.

There was and is no restriction on SJI members participating without penalty in unaffiliated events where the price money was less than €50/£50.

3: Comment.

There are plenty of examples from around the world where the rules of sporting organisations have run into difficulties under competition law.

The concern expressed by the Authority was that the rule would prevent SJI members participating in unaffiliated events while simultaneously preventing third parties from organising and hold such unaffiliated events. The change to the rule would seem to address this issue and enable parties other than the SJI to organise show jumping events in competition with SJI affiliated events.

The outcome of this case raises some interesting issues. Other sports bodies appear to operate in ways that prevent rivals setting up in competition with them. Try setting up a new rugby or soccer league, for example. Newspaper reports in the past claimed that arrangements between the FAI and agents regarding the organisation of friendly international matches included a requirement that alternative matches that might draw crowds beyond a certain size would not be authorised leading to alleged disputes with individual clubs that sought to arrange potentially lucrative friendly matches with well-known foreign clubs. It will be interesting to see if there are further developments.

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