

Whats competition law law commercial essay

Law



" Competition law has a major role to play in generating continued improvements in living standards and overall economic welfare"[1]. Irish competition law is intended to safeguard fairness and freedom in the marketplace. Competition law is enforced so that consumers are not disadvantaged when it comes to the choice or availability of products, which in turn can cause them to pay additional cost, reduction of new products or services to them and can challenge the overall economic growth within that region. Competition law was first introduced to Ireland in 1953 and was only applicable to goods and their distribution. It was not until 1987 that effectively all sectors of the economy could be said to be theoretically subject to legislation. Irish competition law is " embodied in the Competition Act 2002, the Competition (Amendment) Act 2006 and the Competition (Amendment) Act 2012. The Competition Act 2002 replaced the Competition Act 1991 and the Competition (Amendment) Act 1996".[2]The Competition Act deals with Irish mergers, acquisitions and joint ventures which have two main prohibitions section 4 and section 5. Section 4 (1) " all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State"[3]. These include" Fixed pricesLimit or control production or marketsShare markets or sources of supplyApply dissimilar condition to equivalent transactions with other trading partiesAttach supplementary obligations to a commercial contract which have nothing to do with the subject of the contract."[4]Section 5 " Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited"[5]. It prohibits any company or <https://assignbuster.com/whats-competition-law-law-commercial-essay/>

individual from attempting to abuse their dominant position within the market place, so as it can be fair for the consumer and other parties. In the Competition Act 2002 (amendment), section 5, changed the way architects now go about pricing work. Up on till then the RIAI (The Royal Institute of the Architects of Ireland) had set standard pricing for architectural works, using a ratio for project size to overall cost, equal to architectural fees. However with this updating of the Act, architects would now have to price work without using the ratio set by the RIAI. There were also concerns from the Competition Authority in regards to the " influence of control given to the RIAI over the system which determines who can be called an architect"[6] (The Competition Authority, Competition in Professional Services: Architects (2006), PV). The Competition Authority proposed the establishment of the Architects Council of Ireland, which would control the regulation of architects within Ireland. However this was overruled and the RIAI control the regulation of architects within Ireland still. In more recent amendments to the Competition Act such as that in 2012, they have tried to reduce costs on the consumer with the removal of white-collar crime and strengthening of the job market within Ireland. Nevertheless how are the Competition Acts enforced? The Competition Authority is the body set up in Ireland and " is responsible for enforcing Irish and European competition law"[7]. The competition authority or an individual has the right to pursue a criminal prosecution to pursue the matter in the civil courts or criminal court depending on the nature of the matter and the seriousness of the case. The competition authority has also the right to investigate cases where they believe a person or company has broken the law, such as the DPP V Denis Manning where Mister Manning was found guilty of two charges that being "

<https://assignbuster.com/whats-competition-law-law-commercial-essay/>

adding and abetting price fixing by the Irish Ford Dealers' Association"[8]under section 4(1) of the Competition Act 1991 and under section 4 (1) and section 6 of the Competition Act 2002. Mister Manning was given 6 years in prison, with 5 years being suspended and a fine of €30, 000. Today a person, whom is convicted on indictment of participating in a cartel, " can be fined up to €4m or 10% of turnover, whichever is greater"[9]. Similar fines may also be imposed on individual managers or directors of such an undertaking together with a possible maximum of five years imprisonment.

03_ What are Joint ventures or when do they become mergers?

A joint venture can be an association of companies or individuals formed to undertake a specific business project. According to the Practical Law Company under the European Union" Joint ventures encompass a broad range of commercial operations, ranging from fully-fledged merger-like operations to co-operation limited to particular functions, such as production, distribution or research and development. This Practice noted considers the treatment of joint ventures under both the EU Merger Regulation and Article 101 of the Treaty on the Functioning of the European Union."[10]Joint ventures involve an extensive range of commercial operations. These may vary from fully functional joint mergers to limited function and time operations. Examples of these can be seen in appendix 1.

03. 01_ Article 81 and 82 renaming to Article 101 and 102

New terminology has come into effect due to the Lisbon Treaty on the 1 December 2009, under Article 81 and 82 of the EC Treaty and have been

subsequently been renamed Article 101 and Article 102 of the TFEU (Treaty on the Functioning of the European Union). These terminologies are now treated differently under the EU and Irish Competition rules, and are distinguished as: Full-function joint venture without a co-operative element This joint venture is where parties come together without the venture potentially leading to any sort of coordination of competitive behaviour between the parent companies where structural change in the market such as " the establishment of a joint owned company"[11]. This venture would neither supply or purchase materials for any of their parent company's known as horizontal or vertical overlaps. A joint venture of this kind " should be assessed entirely under the EU merger control regime insofar as the relevant thresholds are met"[12]. Full-function joint venture with a co-operative element Similar to the above, however one or more parties have a significant interest either in the same market or similar activities which are going to run hand in hand with this joint venture. " Such co-ordination is often referred to as the spill over effect of a joint venture"[13]. Such a joint venture will need to be examined under the EU merger control regime, assuming that the relevant turnover thresholds are met (see figure 2). Non-full-function joint venture This type of venture is where parties come together and agree how they will exploit the results. It allows for co-operative parties but " does not involve any structural change"[14].

03. 02_ Relevant Thresholds

Merger regulation Article 101 does not apply to joint ventures if they do not have the relevant turnover threshold (see figure 2). However any merger,

acquisition or full functional joint venture must notify the ICA (Irish Competition Authority) under the Competition Act 2002. Any joint venture in their most recent financial year " each of at least two undertakings involved must have worldwide turnover of at least €40m, or at least one undertaking involved must have turnover in Ireland of at least €40m, or each of at least two undertakings involved must carry on business in any part of the island of Ireland"[15]are compulsory to notify the ICA. The Competition Authority uses the determination of merger notification under section 21 of the Competition Act 2002 (see figure 1).

03. 03_ The Competition Authority

In 2007 the Competition Authority acted in the case dealing with architectural services where 3i Group plc (a venture capital and private equity investors) would take a minority shareholding in Foster Group (international) limited (the provision of architectural services) in a determination of merger notification M/07/025. It was analysed that no horizontal or vertical overlaps between Foster Group and any of 3i have controlled portfolio companies in Ireland. The authority therefore considered " that the proposed transaction dose not raise competition concerns in the State"[16]. As this was a merger and not a joint venture with substantial value and the taking of minority shareholdings the case had to be put before the Competition Authority. Under section 16 of the Competitions Act 2002 the creation of a joint venture " to perform on an indefinite basis, all the functions of an autonomous economic entity will constitute a merger within the meaning of the Act"[17]. Under the Competition Act 2002 full functional joint ventures are substantive to any test that is applicable to any other

mergers, namely " whether the formation of the joint venture will result in a substantial lessening of competition"[18]. There are also a number of other assessments that need to be looked at in relation to Merger Regulation, such as if the merger regulation applies, if the merger test applies and article 101 test applies to the co-operative element, and if the merger regulation does not apply and Article 101 dose apply (figure 2 & 3).

04_ Case study (Group 91 Architects Ltd/Shareholders Agreement [1995] IECA 433)

04. 01_ Introduction

Under section 4 of the Competition Acts 1991 a notification was made by group 91 (a group of architects) seeking certificate under section 4 (4) of the Act or a granting of a licence under section 4 (2) in respect of a shareholders agreement. The company was formed as a joint venture to provide architectural services on a specific competition won by the proposed group that being the Temple Bar framework plan otherwise known as the temple bar re-development plan or Temple Bar Properties Ltd.

04. 02_ Reasoning for joint venture

Due to the scale and nature of the competition none of the individuals or firms involved could compete due to restriction on the " necessary knowledge, expertise and resources"[19]. Nonetheless with the pooling of their resources the members of Group 91 could compete in the competition with their specialised architectural services.

04. 03_Arrangements

There was an arrangement between all parties of Group 91 known as the Deed of Covenant defining the business of the company. It stated that Group 91 would only supply architectural and consultancy work within the Temple Bar area of Dublin as Group 91 and not as individuals. And if any additional commissions were to arise out of the consultancy work or projects it would be decided on by the directors on a weighted Majority, meaning the Majority rule whether or not they take the work. There was also an agreement that both the commission of the allocation of works, which allows the board to relocate any commission if the practice is not providing a proper service as required by the board. The election of the Chairman, Managing Director, and Secretary were to be obtained by only a weighted majority.

04. 04_Submissions from Group 91

Group 91 submitted documents in support of a certificate, showing " that no architectural practice or individual party to the agreement would have been able to enter the Temple Bar Framework Plan Competition due to its size and nature. The parties needed to pool their knowledge, expertise and resources in a joint venture and entered and subsequently won the competition"[20]. A company was needed to be formed to advise Temple Bar Properties Ltd, given them architectural advice and service for a financial agreement. There was also a shareholder agreement and a deed of covenant in relation to all these matters. Group 91 made reference to the EU Commission Notice (O. J. 1968, C75/1) where it views cooperation between small enterprises to enable them to work in great efficiency and competitiveness was justifiable. See notice (O. J. 1968, C75/1) for reference quote. There was the submission of

the deed of covenant, which shows the limitation of freedom of action within the market place which reverts back to the Commission Notice (O. J. 1990, C203/5). Finally there was the parties claim " that the arrangements did not impose on the undertakings concerned terms which were not indispensable to the attainment of those objectives"[21]. They viewed the agreement did not eliminate competition between the parties or any other company or individual offering similar services however there was need for Group 91 to enter into the competition.

04. 05_Assessment

The assessment was done by the Competition Authority they used the relevant information received from Group 91 to ascertain their certificate under section 4(4) of the Competition Act 1991. Group 91 under section 3(1) of the Competition Act are within the meaning of the Act as they are providing an architectural service which will see them gain from the service. As all the members of Group 91 were architects or providing architectural services, they would not be horizontal or vertical overlaps. As they could not compete without this enterprise it was not seen as restriction or reduction in competition but pro-competitive. The authority seeks to view other case such as the Eurotunnel (Commission Decision of 24/10/95 in OJ No. L 311, 17/11/88, p. 36.) which was brought before the EU Commission and was a similar case to that of Group 91 which the EU Commission that the joint venture did not restrict competition. Due to the provision and restriction set by the shareholders of Group 91 it was viewed that they could be active in " providing architectural services or advice as sole practitioners or as partners in their own architectural practices outside of the company"[22] which does

not contradict Section 4 (1) of the Act. The deed of covenant formed part of a binding agreement, as so no shareholder could compete with Group 91 within the Temple Bar area. The restriction on the shareholder from competing with Group 91 does not go against Section 4 of the Act as it is essential for the business to operate. " Such a restriction is no more than is necessary to protect the goodwill of the partnership"[23].

04. 06_ Decision and Certification

The decision was view that Group 91 were within the meaning of Section 3 of the Competition Act 1991 and were not offend against section 4(1) of the Competition Act 1991. " The Competition Authority certifies that, in its opinion, on the basis of the facts in its possession, the shareholding agreement and the Deed of Covenant"[24].

04. 07_ Comments / analysing the case

It is understood why the group of shareholders came together due to the competitions size and nature of the project non were able to enter it individually nevertheless it is notice that the Group 91 did not go for their certificate under section 4(4) of the Competition Act 1991 until they had received the competition win. With this there first monition of business was to organise the shareholders and how there were going to set out the rules and regulation. These rules and regulations were set out in the deed of covenant which set out that everything must be voted on by every board member. The question would have to be asked whether the architects were working more for their original company's or Group 91?

05_ Other case study

Drocarne Limited v Seamus Murphy properties and Development Limited
2006 No. 1357 P, High court, 17 April 2008

05. 01_Background

Drocarne Limited is a company owned by Treasury Holding (two thirds) and Mr Dermot Dwyer (one thirds). Mr. Seamus Murphy has extensive interest in lands in areas such as North county Dublin, Meath and Louth, in which appears he buy zone land for agricultural use in which to get it rezoned and selling the land on for a profit. Both parties were introduced by their solicitor on which they entered into talks on a joint venture in relation to the development of lands at Tullyallen which the defendant had options in. In late 2000 both parties entered into the joint venture, known in their case as the master development agreement (MDA). At this stage the land remained zoned for agricultural use by Louth County Council. The Plaintiff is seeking specific performance of the MDA and or damages.

05. 02_The Master Development Agreement

The plaintiff was bringing his expertise as a developer while the defendant was bringing the land to the joint venture. Their MDA objective was to " to implement the development of the Scheme in accordance with the overall scheme plan in order to maximise the return therefrom having regard to all the circumstance prevailing from time to time during the currency of this agreement"[25]. There was a separate objective from the defendant, to secure in the disposal of each site by ground lease, which MDA " provides for an agreed percentage of 17. 5% of rents to the defendant"[26]. The design and development would be at the expense of the plaintiff as the defendant

<https://assignbuster.com/whats-competition-law-law-commercial-essay/>

would contribute an agreed subject at the construction stage not exceeding 15%. " Many of the steps to be taken by the plaintiff in the development have to be agreed by the defendant or failing agreement the MDA provides for determination by independent experts in relation to the specific matters. The MDA also seeks to provide a general mechanism for determining how the parties should deal with unforeseen obstacles to implementation of the MDA in accordance with its terms"[27].

05. 03_ Position Achieved by January 2005

In late 2004 the land was re zoned by Louth county Council as tourism related facilities and developments. In late 2004 a master plan scheme was draw up and presented to Mr. Murphy on which he expressed oral agreement, with the proposal being for tourist and leisure facilities and was late expressed by written agreement within an email within which the proposal was to be sent to the local authority. With this the defendant completed the purchase of Tullyallen land at an approximate cost of 16 million euros. A key date was set for the planning application to be lodge, nevertheless the application was not lodge within that date however the " obligation clause 8. 4 is to use all reasonable endeavour"[28]was used this being " an obligation to act in a diligent, efficient and prudent manner and devoting such resource as diligent, efficient and experienced property owner/property developer would having regard to all the circumstance prevailing, undertaken to achieve the relevant object"[29].

05. 04_ New Agreement Relating to a new Joint Venture

As the original agreement between both parties failed to achieve the objective set out and was seen as " defunct by virtue of failure to perform in <https://assignbuster.com/whats-competition-law-law-commercial-essay/>

accordance with key dates"[30]. A new joint venture was set up to address this with the same parties and new clause. This new venture was to speed up and stop further delaying and damages to the landowner and so both parties to realise their investment.

05. 05_Courts view

It was courts view that the MDA joint venture of 2000 was still in force. The plaintiff has sought relief for specific performance, as its primary relief. The decision was taken to " grant an order for specific performance precludes the necessity of considering any aspect of the plaintiff's claim for damages"[31]. The plaintiff did not seek any damage as such an order was granted.

05. 06_Comments / analysing the case

This case has shown that there is a need for clarity when writing clauses into contracts, whether it be the manner its wrote in or use of the wording used. This case has proven that the two parties thought the joint venture was defunct, however the court proved it wasn't. Whether it be in a case like this on the development of land or architectural practices coming together to compete in a competition, the clauses have to be understood and wrote as so it is fair for both parties. P. Elliot & Company Limited (In Receivership and in Liquidation) v FCC Elliot Construction Limited 2012 1887 S, High court, 28 August 2012

05. 07_Background

In the case P. Elliot & Company Limited (In Receivership and in Liquidation) v FCC Elliot Construction Limited, FCC Elliot Construction Limited were suing the defendant over, on grounds wheatear or not the joint venture was acted

apron " agreement refereed as the consultancy contract"[32]. FCC Construcción S. A. (A Spanish corporate) and the plaintiff entered into a joint venture to tender for to design, and construction works of a new hospital in Enniskillen Co. Fermanagh. If the tender was to be successful they were to be known as FCC Elliot Healthcare Contractors.

05. 08_Agreement

There were clauses wrote into the contract between both parties to state, if the tender was not award to them all provisions shall automatically cease. However if the tender is awarded and accepted by them, they will enter into the contract and will carry out the works of the building contract with the name P. Elliot FCC. Approximately one year after the joint venture was entered; they received advice on matter dealing with tax. They were recommended to form and Irish company to receive lower Irish corporate tax rates of 12. 5%. With this both parties started a new company from the original joint venture called P. Elliot & Company Limited which signed the building contracts.

05. 09_Courts view

Both parties agreed that P. Elliot & Company Ltd. and FCC Construcción S. A. entered into a joint venture; however the judge deemed that " the joint venture was automatically ceased due to the joint venture not entering the building contact"[33].

05. 10_Comments / analysing the case

Similar to Drocane Limited v Seamus Murphy properties and Development Limited when writing clauses into joint venture they have to suit both parties

and not make it beneficial for just one company. In the above case the contract could have been entered as a joint venture however the clauses left it open for any party to exist at differing stages. Clauses have to be written in a manner where both parties will benefit.

06_ Analysing a new joint venture with comments

From the above evidence, it is possible for architects to combine together in joint ventures to form an entity for the provision of specialised architectural services. However any joint ventures whether it is individual or firm's both combining their resources have to comply with many rules set out by the Competition Act of 2002. There are two main prohibitions that being section 4 and 5 of the Competition Act 2002, which prevents the joint venture in "prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State"[34]and prohibits the venture from attempting to abuse their dominant position with the market place as so it can be fair for the consumer and other parties. If this act is broken there are large fines and penalties to pay. Further to this under the Lisbon Treaty Article 101 and 102 of the TFEU have used new terminologies in the description of joint ventures, those being; full-function joint venture without a co-operative element, full-function joint venture with a co-operative elements and non-full-function joint venture see Article 81 and 82 renaming to Article 101 and 102. These terminologies or definition have stated what bracket your joint venture fits into and what relevant turnover threshold they can meet, before your joint venture must notify the ICA(Irish Competition Authority) and the competition Authority under the Competition Act 2002. This body will determine " whether the formation of the joint venture will

result in a substantial lessening of competition"[35] which are subject to tests, as in the case with 3i Groups plc taking a minority shareholding in Foster Group in determination of merger notification M/07/025. From the relevant case studies it has shown there is a need firstly to set out clauses within the joint venture that suite both parties. These arrangements can also be known as a Deed of Covenant and define what the joint venture can and cannot do. It can also state the length of time the joint venture runs for and what can stop the venture. In Group 91 Architects Ltd/Shareholders Agreement [1995] IECA 433 it was shown there was a need for the group to join together as to compete in the competition much like this case, however they set up a Deed of Covenant defining what the business could and couldn't do. " The Competition Authority certifies that, in its opinion, on the basis of the facts in its possession, the shareholding agreement and the Deed of Covenant"[36]. From this we can see that the Competition Authority only certified the joint venture as it had a shareholding agreement and the Deed of Covenant. In Drocane Limited v Seamus Murphy Properties and Development Limited 2006 No. 1357 P, the joint venture was known as a Mast development Agreement (MDA) was their version of the Deed of Covenant, however it was wrote in such a way as both parties had removed themselves from the joint venture, even though in the courts view that the joint venture and MDA was still in force and both parties were obliged to finish there proceedings. In this case it shows there is a need for clarity within the agreement and both parties must full understand what they have agreed to. Similar to this in P. Elliot & Company Limited (In Receivership and in Liquidation) v FCC Elliot Construction Limited 2012 1887 S, this was a need for clarity within the agreement, as it was more beneficial to one party

<https://assignbuster.com/whats-competition-law-law-commercial-essay/>

over the other. This case proved there is a need for clauses to be written in a fair manner which will suit both parties however it again proves that contracts need to be written with clarity and that both parties have a full understanding of what they are getting involved in. With this information it is possible for most individuals or companies to start a joint venture however they have to be careful in respect of the laws set out by the Competition Acts, which is enforced by the Competition Authority. However before this joint venture is started there is a need to come up with a Deed of Covenant or agreement which sets out the clauses within which the joint venture will be run successfully.

07_ Conclusion

Through this process I have learnt there is a lot more involved in a joint venture than just two businesses coming together. A joint venture is a complex business decision for a company to make and they need to understand what they are getting themselves into. By this I mean there can be large overheads for a company to set up this joint venture such as legal fees, the amount of time and effort spent on the project, and depends on its outcome whether it is profitable or not. There are numerous laws in which the joint venture has to comply with, and there is a need for the parties to understand what they are getting into when writing clauses into the agreements or contract. In saying this it can be very profitable and a worthwhile move as can be seen in Group 91's case, where architects used a joint venture to compete in a competition in which they couldn't singularly enter and after entering as a joint venture they won the competition and subsequently complete the design and were used for their architectural

services. This question was set for students of architecture to have a greater understanding of legal terms and to show how legislation is used in terms of their working area. This question was valuable for final year students whom will be working in architectural practices in the coming years. They will need to have an understanding of how law works and terms used, as they could be used as witness in case or in matters such as the proposed question were they might be in a joint venture themselves.