[2004] IRLHC 330

THE HIGH COURT

[2003 No. 8680P]

BETWEEN

THE COMPETITION AUTHORITY

PLAINTIFF

AND

JOHN O'REGAN, MICHAEL GORMLEY, CARMEL DOWLING, SAMUEL ADAIR, MARK BAILEY, JEROME DAWSON, DAVID EASTMENT, GERRY FOLEY, KAY GEOGHEGAN, SELENA GILEECE, MARY GRIFFIN, ANN LLOYD, JIM McMAHON, CON O'BRIEN, ANN BYRNE AND TOMMY WEIR

DEFENDANTS

DECISION of the Irish High Court (Kearns J.) made and adopted on the 22nd day of October, 2004.

Background

These proceedings were brought by the Irish Competition Authority and were heard before the High Court in Dublin over the period of 11 days from 29th June, 2004.

The plaintiff is a body corporate with perpetual succession the functions of which, *inter alia*, include investigations into any breach of the Competition Act, 2002, that may be occurring or which has occurred.

Article 3 of Council Regulation (EC) No. 1/2003 provides:

"Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 2 of the Treaty, they shall also apply Article 82 of the Treaty."

Article 3 of the European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) Regulations 2004 (S.I. No. 195 of 2004) provides that the High Court, is, as regards the State, designated as a competition authority for the purposes of Article 5 of the Council Regulation.

Article 5 of the Council Regulation provides that a competition authority of a Member State shall have power to apply Articles 81 and 82 of the Treaty in individual cases and for that purpose may take decisions which include requiring that an infringement be brought to an end, and, where appropriate, ordering interim measures.

In these proceedings, the Competition Authority seeks a declaration that the rules and/or decisions of the Irish League of Credit Unions (hereinafter called "ILCU"), which provide for the loss of access and lack of refund from ILCU's Savings Protection Scheme (hereinafter called "SPS") upon the disaffiliation of a credit union from ILCU, are contrary to s.4(1) of the Competition Act, 2002. The plaintiff further seeks an injunction to restrain the defendants and/or ILCU from introducing or implementing any scheme or arrangement which has the object or effect of supporting the rules and/or decisions of

ILCU relating to the loss of access and lack of refund from the SPS on the disaffiliation of a credit union from ILCU.

The plaintiff further contends that the defendants occupy a dominant position in the market for credit union representation services and seeks an order pursuant to s.14(7) of the Competition Act, 2002, requiring either that the dominant position be discontinued unless conditions specified in the order are complied with, or, alternatively, the adjustment of the dominant position in a manner and within a period specified in the order by a sale of assets or otherwise as the court may specify.

ILCU is an unincorporated association which has its place of business at 33/41 Lower Mount Street in Dublin. The defendants are sued in their representative capacity as officers of the ILCU, having been nominated as defendants on behalf of ILCU to represent their members.

Credit unions are individual autonomous savings and credit co-operatives established by individuals who have a "common bond". The most usual type of common bond is that of living or working within a particular community, with over 90% of all credit unions being based in a particular local community. The main objectives of credit unions are:

• The promotion of thrift,

• Helping members accumulate savings,

• Providing loans at reasonable rates of interest, and,

• The control of members' finances for their own benefit.

As set out in the 2003 Annual Report of ILCU, the vision of credit unions is:

"That ILCU, as an advocate of the credit union ethos of mutuality, volunteerism, self help, and a not-for-profit philosophy, will influence and inspire our movement and our society to achieve its social, economic and cultural objectives in a manner that respects the rights and dignity of everyone."

The mission of ILCU is expressed as being:

"To provide effective leadership for all credit unions on the island of Ireland,

• By fostering and maintaining unity and cooperation between credit unions,

• By developing a full range of top quality, safe and sound financial products and services,

• By recognising the dignity of credit unions and their members and their value to the community, and,

• By recognising the value and role of both credit union volunteers and staff to the movement and to society".

In 1960, four credit unions came together for the purpose of trying to ensure that credit unions would conduct their affairs on the basis of a set of agreed operating principles and of presenting a united front to government and state agencies in relation to the legislative problems of credit unions. The unions who thus came together became known as the Irish League of Credit Unions. In 1966, the Credit Union Act was passed, by which time there were approximately 339 credit unions in ILCU. That Act provided that credit unions should have a set of operating rules in a form approved by the Registrar of Friendly Societies, who was to regulate credit unions under the Act. Pursuant to this requirement, the members of ILCU adopted a set of standard rules under which each member credit union would operate. These standard rules were approved by the Registrar in accordance

with the Act. Later legislation introduced a new set of standard rules which were adopted by ILCU in 1998.

While ILCU was established in 1960, it set up its present Savings Protection Scheme in 1989. The SPS is a stabilisation fund which does not offer guarantees or insurance to savers, or to individual credit unions, but rather enables discretionary assistance to be given in appropriate cases by way of emergency finance for an individual credit union which may be in difficulty or a sum of up to €12,700 for any individual saver on the failure of a credit union.

The requirement for a savings protection scheme for credit unions was voluntary until the 1st August, 2001, when, by virtue of s. 6 of the Credit Union Act, 1997, it was provided as follows:

"(1) A society may be registered under this Act as a credit union if the Registrar is satisfied that each of the following conditions is fulfilled – …

(f) if registered, it will participate in a savings protection scheme approved under s. 46(1)".

Section 46 of the Credit Union Act, 1997, defines a savings protection scheme as:

"a scheme established to protect, in whole or in part, the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union and, for this purpose, 'savings' includes shares, deposits and all other funds held by a credit union on behalf of its members."

The only SPS in the State is that established by ILCU in 1989. It is not, however, a fund which has received statutory approval from the Registrar under the 1997 Act, given that the 1997 Act applies only to credit unions formed since 2001 and does not apply to credit unions formed prior to that time.

While, therefore, there is no statutory obligation on credit unions formed prior to 1st August, 2001, to participate in a savings protection scheme, it is accepted by the parties herein that it is very desirable that they do so. Participation in such a scheme creates consumer confidence in the credit union and provides reassurance for savers and depositors. It is a valuable 'back-stop' form of stabilisation.

Prior to the 1st January 2004, the SPS of ILCU was funded through a combination of commission and operational rebates from certain mandatory insurances provided by ILCU's own insurance company (which is known as ECCU), income from SPS investments and ILCU affiliation fees. The insurance from ECCU provides that when an individual member dies, his next-of-kin receives double the member's shares and any outstanding loan of that member to the credit union is cleared. The cost of paying the premium is funded by individual credit unions on behalf of their members. In turn ECCU pays commission fees to ILCU.

A new funding scheme for ILCU and the SPS came into effect on 1st January, 2004. This involved a 20% reduction in the insurance premiums for life protection and life savings (hereinafter called "LP/LS"), a new affiliation fee to cover the costs of the ILCU's core services, and a direct contribution by credit unions to the SPS which was initially set at 58 cent per €1,000 of each credit union's total assets. Under the new funding arrangements, the LP/LS insurance provided by ECCU is priced competitively. As a result, the charges supporting ILCU's activities became transparent. The change also allowed the SPS to receive dedicated and identifiable funding from credit unions based on the size of their balance sheet. These labyrinthine funding arrangements are illustrated in the following diagram:

Pre-2004

[*Diagram or picture not reproduced in HTML version - see original .rtf file to view diagram or picture*]

Post 2004

[*Diagram or picture not reproduced in HTML version - see original .rtf file to view diagram or picture*]

The high cost of LP/LS insurance cover for individual credit unions was one of a number of reasons for the growth of a measure of dissatisfaction in 2000/01 among certain credit unions affiliated to ILCU. Another was the costly failure of a computer system investment, (ISIS), undertaken by ILCU, whereof a €7m loss was borne by the SPS Fund. A number of credit unions disaffiliated from ILCU of their own volition at this time. When some other credit unions sought to obtain alternative insurance cover outside ECCU, ILCU sought to disaffiliate the credit unions concerned.

Before proceeding to consider the rules of ILCU which are relevant to the issues before the court, it might be appropriate to mention by way of background some information about ILCU and how it operates. ILCU, the representative body for credit unions, operates throughout the island of Ireland. In this State there are now 437 registered credit unions whereof 428 are members of ILCU. 21 credit unions belong to another representational body, namely CUDA, which was formed in 2001. There are also 6 credit unions which are not affiliated to either body, including Eircom and the Prison Officers Credit Union. There are 184 credit unions in Northern Ireland whereof 104 are affiliated to ILCU. 12 credit unions in Northern Ireland are non-affiliated and the balance of 68 credit unions are members of the Ulster Federation of Credit Unions (UFCU) which provides representative services to its members in the same way as ILCU and CUDA. Neither CUDA nor the UFCU have any savings protection scheme, nor are they permitted access to ILCU's SPS.

A Review Commission of ILCU published a report in April, 2002, which recognised three distinct mandates given to the League by the credit union movement as follows:

(a) trade association and central service activities

(b) business service activities

(c) self regulation

These three central mandates of the League sub-divide into certain key activities:

(1) **trade association and central service activities**

(a) government, EU and regulatory authority relations

(b) marketing/communications/public relations

(c) co-operative relations and internal development

(d) centralised planning and democratic support

(e) research and development

(f) legal and secretarial services

(g) international relations

(2) **Business service activities**

(a) insurance

(b) treasury management

(c) training

(d) credit union development

(3) **Self regulatory activities**

(a) data collection and monitoring

(b) supervision and support

(c) Savings Protection Scheme

Relevant ILCU Rules and Resolutions

The Rules of ILCU which are relevant to the issues before the court include S. 2 R. 3 which provides:

"Each member shall carry such insurances in respect of itself and for and on behalf of its own members with such insurers as may be laid down from time to time by members in general meetings."

(2) Each member shall enter into or make such arrangements for the better protection of its assets and the savings of its members as may be laid down from time to time by members in general meeting."

The 1986 AGM of ILCU achieved an agreement amongst members to the effect that they:

"Shall and will insure with their own insurance company (ECCU assurance company limited) on its commencing operation … in all risks covered by our company (i.e. LP/LS)".

Accordingly, individual credit union members were required to take out LP/LS insurance and such insurance has to be sourced with ECCU which is effectively controlled by ILCU.

Resolution 10 passed by the 1987 AGM of ILCU restricted participation in any guarantee scheme to members of ILCU and provides as follows:

"That this AGM resolves that, in any guarantee scheme set up now or in the future by ILCU, only credit unions affiliated to and under the supervision of the ILCU will be covered by or allowed participate in such a scheme."

Section 11 R. 1 of ILCU's rules provides:

"A member may be expelled from the League by resolution of a majority present at the meeting of the board of directors for any grave and sufficient reason including wilful and/or persistent breach of, or refusal to comply with, any of these rules".

Accordingly if a member credit union were to obtain its LP/LS insurance from an non-ECCU supplier, then under the ILCU rules that member could be expelled and therefore cease to have access to ILCU's SPS.

Rule 6 of Section 2 provides:

"A credit union ceases to be a member of the League:

(a) on its withdrawal from the League after payment of all dues and levies and insurance premiums for which it is liable; or

(b) on the cancellation of its registration, or

(c) on expulsion from the League

On cessation of membership no member shall have a claim on any assets of the League or any League affiliate other than investments but cessation of membership shall not relieve

the former member from any liability to the League then existing under these rules or as may be determined by the Board."

Accordingly, if a particular credit union ceases to be a member for whatever reason, it no longer has access to SPS cover, nor can it reclaim any share of the accumulated contributions previously made by it to the SPS Fund. Historically, those contributions had been written up as expenses in the accounts of credit unions.

In January 2003 ILCU moved to disaffiliate 12 credit unions for not obtaining their LP/LS insurance from ECCU. These disaffiliation proceedings were postponed by undertakings given by ILCU to the High Court following initiation of the present proceedings by the Authority.

The mandatory LP/LS cover provided by ILCU is essentially a life assurance product and does not form part of the prudential regulatory arrangements for credit unions. In any event, on the opening of this case before the court, Mr. Gallagher SC, counsel for the plaintiff, clarified that the Competition Authority was no longer making any case that the mandatory insurance requirement was in breach of the Competition Act 2002. An amended Statement of Claim has shown those portions of the original document so claiming, highlighted in red and now crossed out.

According to the 2002 Annual Report of ILCU, ILCU at that stage represented 534 credit unions on the island of Ireland. This number comprised an estimated 2.6 million individual savers with total assets in the amount of €9.58 billion. At that stage the SPS Fund had a value of €72.6 million, but its value is now closer to €90 million. All but five of the 438 credit unions within the State were members of ILCU. The only competing representation services body, as already stated, is CUDA, which in 2002 represented 21 credit unions within the State, consisting of approximately 343,000 persons, with savings assets of €1.247 billion. In 2003, two credit unions left CUDA reducing the number to 19, while in 2004 another credit union joined CUDA. No alternative insurance deposit scheme or other product resembling the SPS is available to credit unions who are members of CUDA.

Chronology of events leading to present dispute

In 1954, a number of volunteers formed the credit union extension service to promote credit unions in Ireland, and the first such unions were established in Dublin in 1958. Credit unions are essentially savings associations for small savers. The Credit Union Act, 1966, is described in its preamble as an Act to provide for the registration under the Industrial and Provident Societies Acts, 1893 – 1936, of co-operative societies (to be known as credit unions) for the encouragement of thrift and the creation of credit, to provide for the regulation of credit unions, to amend and extend the Provident Societies Acts, 1893 – 1936, to amend the Friendly Societies Act, 1896, and the Insurance Act, 1936, and to provide for other matters connected with the matters aforesaid.

The common bonds which form the basis of credit unions are set out in s.2 of the Credit Union Act, 1966, and include:

(i) the common bond of association,

(ii) the common bond of occupation,

(iii) the common bond of residence or employment within a particular locality, and

(iv) the common bond of employment by a common employer, and,

(v) the common bond of membership of a *bona fida* organisation.

Under and by virtue of the 1966 Act, the Registrar of Friendly Societies could register a society complying with the requirements of the Act which would thereafter be referred to as a credit union.

As already noted, ILCU was formed in 1960 and is an unincorporated association. It initially obtained insurance by way of life protection and life savings insurance (LP/LS) from the U.S. Credit Unions National Association Mutual Insurance Society (CUNA).

In 1968 ILCU established a stabilisation reserve fund with a transfer of moneys from the League's general reserve. This fund later became the SPS.

In 1973 ILCU members resolved that all credit unions should obtain insurance from CUNA and the operational rebate from insurance sales was placed in the stabilisation fund. However, in 1976 the member unions decided to establish their own insurance company and to insure with it. Accordingly, in 1980, ECCU Life Assurance Limited was established.

In 1988 members of the League decided to establish the SPS. The Registrar of Friendly Societies approved the SPS which was launched in 1989. Credit unions are now regulated by the Registrar of the Irish Financial Services Regulatory Authority (IFSRA). The SPS has not yet been formally approved under the new statutory code.

In 1995 the Competition Authority, by Decision 440 of 22nd November, 1995, certified that the rules of ILCU did not offend the Competition Act, 1991, insofar as the mandatory LP/LS service was concerned.

In 2001, the Credit Union Development Association (CUDA) was formed.

In that same year the Lucan and District Credit Union had complained to the Competition Authority about the insistence of ILCU that their members must use ECCU assurance company to provide their LP/LS insurance cover. They were unhappy also with the high rates charged for insurance cover.

Following this complaint, an investigation was undertaken by the Competition Authority into the mandatory requirement that credit unions take out LP/LS cover with ECCU. By letter dated 28th June, 2002, the Competition Authority notified ILCU of its decision to revoke the previously issued certificate. In short, Decision 596 revoked the earlier Decision 440. The complaint of the Lucan Credit Union had been supported by CUDA and in the aftermath of the Competition Authority's revocation, a special general meeting of ILCU member unions considered the issues of funding and insurance premia which led in 2004 to new League funding arrangements as already detailed.

However, in 2003 a process had commenced to disaffiliate credit unions who had opted to take ECCU insurance elsewhere. This led to a further investigation by the Competition Authority, who wrote to the solicitors for ILCU on 4th April, 2003, stating:

"Notwithstanding the ILCU's view that its behaviour does not breach the Competition Act 2002 (the Act) in either the market for savings and loans or the market for insurance products, the Authority is concerned that the conduct of the ILCU might constitute a breach of s.5 in the market for representation of credit unions, where the ILCU arguably holds a dominant position. In this context it is not clear that all aspects of the LP/LS ECCU arrangement and the restrictions on SPS when a credit member union leaves the ILCU can be objectively justified."

The present proceedings were commenced on 22nd July, 2003, following a lengthy interchange of correspondence between the Competition Authority and representatives of ILCU. By letter dated 27th May, 2003, the Competition Authority wrote to ILCU in the following terms:

"Based on the information and documentation in the Authority's possession, which includes, but is not limited to, that which has been supplied by the ILCU, the Authority is of the view that the conduct of the ILCU breaches s. 4 and 5 of the Act. More specifically the Authority contends that:

(1) The relevant market is credit union representation

The Authority is of the view that there is a market for credit union representation in the State. The activities in this market are usefully set out in the ILCU – sponsored April 2002 Report of the Review Commission, *Time for Change*, at p. 18, under the heading, "Trade Association and Central Service Activities", and include, but are not limited to, Government, EU and regulatory authority relations.

The Authority has argued that credit union representation is a separate market in a letter to you dated 4th April 2003. We have carefully reviewed your arguments to the contrary as set out in your letter to the Authority of 9th May 2003. However, we see no reason to change our view in this regard.

(2) The ILCU is an "undertaking"

The ILCU provides a number of services "for gain" and is thus an undertaking for the purposes of the Act. These services include:-

• loans for credit unions borrowing for premises, equipment and liquidity purposes;

• representation services for credit unions, in part in return for the payment by ILCU member credit unions of a 17.75% commission on LP/LS insurance (defined below); and

• training courses

(3) The ILCU is an "association of undertakings"

The Authority has argued on a number of occasions, and the ILCU would appear to have accepted, that the ILCU is an "association of undertakings" under the Act.

(4) The ILCU holds a dominant position in the market for credit union representation in the State

The ILCU is dominant in the market for credit union representation in the State. The ILCU "Rules" refer to one of its objects as "to represent members in contact with Government and its agencies, and to deal with the legislative problems of member credit unions". It would appear that nearly all of the credit unions in the State are members of ILCU and that ILCU credit unions account for 90-95% of all credit union assets and membership in the State. Virtually all credit unions in the State are longstanding members of the ILCU. The Authority recognises, of course, the recent formation of a new entrant in this market, the Credit Union Development Association (hereinafter, "CUDA") most of whose members are also ILCU members. However, the current disaffiliation proceedings against the 12 credit unions identified in footnote 4 *infra* is likely to seriously damage the viability and success of the rival credit union representation undertaking.

(5) The ILCU has abused its dominant position

The ILCU has abused its dominant position in the market for credit union representation in the State by enforcing and imposing membership conditions on individual credit unions that discourage the emergence of rival representative credit union organisations.

Under ILCU's rules the purchase of loan protection/life savings insurance (hereinafter, "LP/LS") for individual members on their death from the ECCU Assurance Company Limited, a wholly owned subsidiary, is mandatory. The ILCU Board is to consider a resolution on 14th June 2003 to expel 12 credit unions for failure to abide by this rule. On

disaffiliation, these credit unions will be able neither to continue to participate in the Savings Protection Scheme (hereinafter, "SPS") nor to withdraw their contributions from the SPS Fund.

The loss of access and/or lack of refund from the SPS Fund for a credit union on disaffiliation, in the Authority's opinion, reduces competition in the market for credit union representation. It imposes an exit cost on ILCU member credit unions that discourages them from leaving the ILCU to join rival credit union representation undertakings. This creates an artificial cost of exit, which in turn unlawfully raises a barrier to entry for a rival credit union representation undertaking.

In your letter of 9th May 2003, the ILCU provides no objective justification for the loss of access and/or lack of refund from the SPS Fund on leaving the ILCU save that "participation in the SPS was (and is) regarded by the credit unions which adopted the SPS as giving their members greater security in respect of savings". If this is the motivation, then there are strong grounds for allowing disaffiliated and non-affiliated credit unions to participate in the SPS, since this would increase security with a larger pool of credit unions across which to spread risk.

The Authority is not stating that the ILCU cannot make LP/LS insurance mandatory or that it cannot disaffiliate a member credit union for not complying with this rule. The breach is rather the associated loss of access and/or no refund from the SPS.

(6) The ILCU, by the disaffiliation of 12 member credit unions is breaching s. 4(1) of the Act

It is a breach of s. 4(1) of the Act for decisions of associations of undertakings to prevent, restrict or distort competition. It is the Authority's contention that the move by the ILCU to disaffiliate 12 credit unions on 14th June 2003 following a meeting of the League Board on 25th/26th January 2003 is such a breach. It does and will prevent, distort and restrict competition in the market for credit union representation for the reasons set out above.

(7) The rules of the ILCU breach s. 4(1) of the Act

The Authority has consistently argued that the rules of the ILCU constitute an agreement between undertakings and that they also constitute a decision by an association of undertakings. Under s. 4(1) of the Act, "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 … are prohibited and void".

For reasons set out above the Authority is of the view that the Rules and the decisions of the ILCU that result in a credit union's experiencing loss of access and/or lack of refund from the SPS on leaving the ILCU – whether voluntarily or involuntarily – prevents, restricts or distorts competition in the market for credit union representation.

Therefore, the Authority demands that the ILCU:-

(a) immediately suspend the disaffiliation proceedings, including the ILCU Board meeting to be held on 14th June 2003 to consider a resolution expelling 12 ILCU members, until (b) below has been resolved to the satisfaction of the Authority. Copies of the letters informing these 12 credit unions of the suspension of the disaffiliation procedure should be forwarded to the Authority immediately; and

(b) Agree to certain Authority demands, as more particularly set forth in the attached "acknowledgement and undertakings" by executing the same.

> The Authority requires that the ILCU agree to (a) above by no later than 5.30 p.m. on 3rd June 2003 and to (b) above by no later than 10th June 2003.
>
> The Authority will publish a summary of its investigation into this matter and the terms of the undertakings to be given by the ILCU, after the demands set out above have been acceded to by the ILCU. Information that the Authority considers to be confidential will of course be omitted.
>
> Should you fail to give the undertakings as set out herein by those dates, the Authority will have no option but to commence proceedings immediately."

<u>Case Management and Identification of Issues</u>

Case management procedures were put in train by the court in July, 2003, when ILCU gave certain undertakings not to proceed with the disaffiliation process of the 12 credit unions.

The directions from the court included the following:

(a) discovery

(b) the preparation of a memorandum of issues agreed and issues in dispute

(c) the exchange of expert reports

(d) the preparation of a net summary of the issues to be resolved by the court

On foot of these directions the parties settled a summary of the issues in dispute which are:-

(1) Whether ILCU constitutes (i) an association of undertakings and/or (ii) an undertaking within the meaning of the Competition Act, 2002.

(2) Whether there is a market for credit union representation services in the State and, if so, the characteristics of the market.

(3) Whether ILCU has a dominant position in the alleged market for credit union representation.

(4) Whether (i) the threat of disaffiliation from ILCU for breach of ILCU's rules/agreement which will result in the loss of access to and/or lack of refund from the SPS for credit unions on disaffiliation for breach of the ILCU agreement and/or (ii) ILCU's refusal to permit non ILCU affiliated credit unions access to the SPS constitutes an abuse of ILCU's alleged dominant position contrary to s. 5 of the Competition Act, 2002.

(5) Whether the threat of disaffiliation from ILCU for breach of the ILCU agreement which will result in the loss of access to and/or lack of refund from the SPS for credit unions on disaffiliation constitutes a breach of s.4 of the Competition Act, 2002.

A more detailed document drawn up by the parties and dated 18th June, 2004 describes the issues agreed and in dispute in the following way:

> **"1. Whether the named defendants are proper defendants to these proceedings.**
>
> (a) It is agreed:
>
> (1) that the named defendants have been replaced by the election of a new Board of the ILCU.
>
> (2) that the ILCU is an unincorporated body.
>
> (3) that the majority of affiliated credit unions which are party to the agreement between affiliated credit unions (i.e. ILCU

members) are based in the State and subject to the Credit Union Act, 1997.

(4) that the remainder of affiliated credit unions are based in Northern Ireland and covered by legislation there.

(5) that all affiliated credit unions are bound by the Rules of the ILCU.

(b) There is an issue as to:

(1) whether the acts of the defendants in question are in fact carried out as the executive organ of an agreement between affiliated credit unions.

(2) whether the proper defendants should therefore be the affiliated credit unions listed in the first schedule to the defence.

(3) whether the acts of the defendants in question constitute a decision of an association of undertakings.

(4) whether the acts of the defendants fall within s.14(1)(b) of the Competition Act, 2002.

2. Whether the Court has jurisdiction over the named defendants who reside outside of the State.

(a) It is agreed that the members of the Board identified with an asterisk in the second Schedule to the defence reside outside the State.

(b) It is agreed that part of the activities carried on by the ILCU are carried on within the State.

3. Whether the ILCU is engaged in trade in any goods or services within the meaning of the Competition Act, 2002, and if so in which goods or services.

The matters listed at heading 1(a)(2-5) and l(b)(1), above, arise in relation to this question together with the following:

(a) It is agreed:

(1) that the ILCU carries out the activities listed at paragraphs 3 and 5 of the Statement of Claim and as set out in the ILCU annual reports for 2002 and 2003 and in the Review Commission's "Time for Change" report of April 2002.

(2) that the ILCU has introduced new funding arrangements since 1st January, 2004, particulars of which have been provided.

(3) that in their Strategic Plan 2004-2006, IFSRA recognises that the credit union philosophy of encouraging savings and providing access to loans, together with their community based ethos, is an important facet of our society and recognises that it is essential to ensure that enhanced systems are in place to protect and secure deposits of members of credit unions.

(4) that the "Time for Change" report identified a need to develop a revised vision for the ILCU, which vision must recognise three distinct mandates given to the ILCU by the movement, namely trade association and central service, business and self- regulation.

(b) There is an issue as to:

(1) whether any of the activities of the ILCU constitute trade in goods or services within the meaning of s.4(l) and s.5(l) of Competition Act 2002.

(2) whether, due to the common bond criterion, credit unions do not compete with each other, and are therefore not either direct or indirect competitors.

(3) whether the credit union operating principles are based on the philosophy of co-operation and its core values of equality, equity and mutual self help and confirm *(sic)* that operating decisions are based on member needs, economic factors and sound management principles.

(4) whether the credit union operating principles confirm that the promotion of thrift and the wise use of credit are essential to the dual social and economic character of credit unions in serving member needs.

(5) whether the credit union operating principles confirm that the credit union ideal is to extend service to all who need and can use it.

4. Whether the ILCU constitutes an association of undertakings within the meaning of the Competition Act, 2002.

The matters listed under the previous headings are also relevant to this question.

It is agreed that the ILCU acts as an association of undertakings, through and by means of the ILCU rules/agreement between the member credit unions.

5. Whether there is a market for credit union representation services in the State and, if so, the characteristics of the market.

The matters listed under the preceding heading are also relevant to this question. Further:

(a)

(1) The background factual matters at sub-paragraphs 1, 2 and 7 of the particulars of the alleged market under paragraph 5 of the Statement of Claim are agreed.

(2) The background factual description of activities set out at the Authority's Reply No 1 (a) to Particulars are agreed (but not their characterisation as the market for credit union representation).

(3) It is agreed that certain of the products and services provided by the ILCU, listed at the Authority's Reply No 1(b) to Particulars, can be independently sourced by credit unions.

(4) The factual particulars regarding the independent/collective sourcing of products and services by particular credit unions set out under paragraph 9 of the Defence (as elaborated upon at the ILCU's Reply No 4 to Particulars) are agreed.

(5) It is agreed that CUDA provide the products and services listed at the Authority's Reply I (e) to Particulars.

(b) There is an issue as to:

(1) whether there is a market for credit union representation services in the State and, if so, what are the characteristics of such a market

(2) the market set out at sub-paragraphs 3 to 6 of the particulars under paragraph 5 of the Statement of Claim, although certain background, factual aspects thereof are agreed, as identified above.

(3) whether the independent sourcing of those products and services listed at the Authority's Reply No 1(c) to Particulars is an adequate substitute for the relevant product or service provided by the ILCU.

(4) the true nature of the SPS and the services provided thereunder.

(5) whether services of the type provided under the SPS can be set up and/or procured by an alternative group of credit unions coming together for that purpose.

6. Whether the appropriate market(s) in respect of those activities of the ILCU which may take place in trade is the market for credit union representation.

The matters listed under the previous heading are also relevant to this question.

7. Whether the ILCU has a dominant position in the alleged market for credit union representation.

(1) The factual particulars of alleged dominance set out in paras. 5(a)/(c) of the Statement of Claim are agreed. There are in addition a small number of credit unions that are not members of either ILCU or CUDA.

(2) The background factual matters set out in the ILCU's Reply No 5 to Particulars regarding membership of committees, information provided to unions, etc., are agreed.

(b) There is an issue as to whether:

(1) the factual particulars of dominance set out in paragraphs (a) - (c) of the Statement of Claim mean that the ILCU is dominant in the alleged market. (2) the ILCU is capable of acting independently of affiliated credit unions.

8. Whether the threat of disaffiliation from the ILCU for breach of the ILCU rules/agreement which will result in the loss of access to and/or lack of refund from the SPS for credit unions on disaffiliation for breach of the ILCU agreement constitutes an abuse of the ILCU's alleged dominant position.

(a)

(1) The factual background in respect of the SPS and ECCU given at paragraphs 6, 7 and 8 of the Statement of Claim is agreed subject to the changes in funding arrangements which took effect on 1 January 2004.

(2) It is agreed that the rules and resolutions of the ILCU identified at the Authority's Reply No 4(a) to Particulars require and enforce the purchase of insurance from ECCU by affiliated credit unions.

(3) It is agreed that on disaffiliation from the ILCU an affiliated credit union loses access to the SPS and is not entitled to any refund from it.

(4) It is agreed that certain named credit unions that are members of CUDA have refused to obtain loan protection and life savings insurance cover from ECCU.

(5) It is agreed that certain credit unions have been threatened with disaffiliation as a result of their refusal to take out LP/LS cover from ECCU.

(6) It is agreed that certain credit unions have voluntarily disaffiliated themselves from the ILCU in the knowledge that they would be threatened

with disaffiliation due to their decision to source LP/LS insurance from providers other than ECCU.

(7) It is agreed that the twelve credit unions whose disaffiliation has been threatened have contributed indirectly to the SPS Fund.

(b) There is an issue as to:

(1) whether the effects of disaffiliation constitute an abuse of the ILCU's alleged dominant position.

(2) whether the said threats constitute an abuse by enforcing or imposing membership conditions on credit unions and thereby artificially raising costs discouraging the emergence of rival representative credit union organisations.

(3) the level at which the twelve credit unions threatened with disaffiliation estimate the indirect contributions made to the SPS Fund.

(4) whether the loss of access/lack of refund from the SPS on disaffiliation reduces competition in the alleged credit union representation market.

(5) whether such effects of disaffiliation impose an exit or switching cost discouraging credit unions leaving the ILCU to join rival representative organisations such as CUDA, thereby creating an artificial cost of exit, and raising a barrier to entry.

9. Whether the ILCU's refusal to permit access to the SPS constitutes an abuse of the ILCU's alleged dominant position.

Several of the matters set out under previous headings are also relevant under this heading. Further:

(a) It is agreed:

(1) that section 6(1)(f) of the Credit Union Act, 1997, requires a credit union established after 1st August, 2001, to participate in a savings protection scheme approved by the Registrar of Credit Unions under s.46 of that Act.

(2) that the ILCU SPS has been submitted to the Registrar for approval but has not yet been approved.

(3) that no savings protection scheme has been approved under s.46.

(4) that under ILCU rules a credit union can only participate in the ILCU SPS if it is affiliated to the ILCU.

(b) There is an issue as to:

(1) whether the ILCU's refusal to continue to provide access to services under the SPS in respect of credit unions who are disaffiliated from the ILCU for breach of the ILCU agreement constitutes discrimination such as can be an abuse of a dominant position.

(2) whether new credit unions, in order to operate, will be required to join the ILCU in the event of its SPS being the only one approved by the Registrar of Credit Unions.

(3) whether the foregoing issue has any relevance to these proceedings.

10. Whether the threat of disaffiliation from the ILCU for breach of the ILCU agreement which will result in the loss of access to and/or lack of refund from the

SPS for credit unions on disaffiliation constitutes a breach of s.4(1) of the Competition Act, 2002.

The factual matters agreed herein are also relevant to this.

(a) It is agreed that:

(1) the Competition Authority determined in Decision 440 of 20 November 1995 that the Rules of the ILCU dated April 1992 did not offend against s.4(1) of the Competition Act.

(2) the Competition Authority revoked that decision on 28 June 2002.

(b) There is an issue as to:

(1) Whether threat of disaffiliation as aforesaid has the effect of preventing, restricting or distorting competition in trade in any goods or services in the State.

(2) Whether threat of disaffiliation as aforesaid and/or pursuant to the rules of the ILCU agreement satisfy the conditions referred to in s.4(5) of the Competition Act, 2002.

11. Whether the Rules, decisions/agreements and practices of the ILCU constitute a breach of s.4(1) of the Competition Act, 2002.

Matters listed under previous headings are relevant also to this question.

12. Whether the threat of disaffiliation and/or any such disaffiliation and the Rules, decisions and practices of the ILCU cause damage to the competition process and to consumers.

There is an issue as to:

(1) all of the particulars specified under paragraph 19 of the Statement of Claim;

(2) what competition process is relevant for purposes of section 4 or section 5;

(3) who are the consumers and of what service.

13. Whether, if the Rules, decision and practices of the ILCU which will result in the loss of access to and/or lack of refund from the SPS for credit unions on disaffiliation and/or the ILCU's refusal to supply access to the SPS on an open basis constitute a breach of s. 4(1), they comply with conditions referred to in s. 4(5) of the Act.

Matters listed under previous headings are relevant also to this question.

14. The reliefs if any to which the plaintiff is entitled.

There are many issues as to the appropriateness of granting certain of the reliefs sought. In particular, there is an issue as to whether they raise issues and considerations outside the pleadings, which concern only whether there has been a breach of the Competition Act."

<u>Appointment of court expert</u>

A further aspect of case management was dealt with during the trial when the court, on the fifth day of the hearing, and with the consent of the parties, decided to appoint its own expert economic assessor to clarify difficulties in economic evidence which by then had become apparent from the evidence of economists called by either side. It was agreed that the expert thus appointed should attend so much of the hearing and submissions as might be necessary to assist the court, both then and afterwards, in properly understanding and clarifying, where necessary, the economic evidence given so as to enable the court to

discharge its obligation to carry out a proper economic analysis in the case. As part of this remit, the court confirmed that if the assessor, in relation to any significant point of economic evidence, expressed or offered an opinion which was contrary to any initial assessment or preliminary view taken by the court, or put forward a view which had not been addressed in the submissions of the parties, then the court would in such circumstances reconvene to hear further submissions from the parties on any such view or opinion. Any decision or judgment on any portion of the economic evidence would at all times remain the decision of the court and not the assessor. The approach of the court was designed to be fully consistent with the recommendations contained in the final report of the Competition and Mergers Review Group published in March, 2000, which favoured the use of court appointed assessors in the conduct of competition law cases.

Accordingly, by order dated 1st July, 2004, and made pursuant to O.36 r.41 of the Superior Court Rules, or alternatively under the court's inherent jurisdiction, the court appointed as the agreed nominee Professor, Martin Cave, an economist from Warwick University, in England, for this purpose. He is director of the Centre for Management under Regulation in Warwick Business School.

The parties further agreed that Professor Cave's costs and expenses incurred while assisting the Court would form part of the costs in the cause.

Evidence in the Case

Mr. Brendan Logue, Registrar of Credit Unions of the Irish Financial Service Regulatory Authority (IFSRA) gave evidence under subpoena for the plaintiff. He described how IFSRA is a statutory body created by the Central Bank and Financial Service Authority of Ireland Act, 2003. Prior to the commencement of his statutory role, the function of Registrar of credit unions was carried out by the Registrar of Friendly Societies. He told the court that credit unions are individual legal entities under the control of their own boards. They are formed in accordance with the provisions of the Credit Union Act, 1997, and are now regulated by him as Registrar under the IFSRA structures. Each credit union has a board of directors, a credit committee, a credit control committee, a membership committee and a supervisory committee. The responsibilities of the various committees are stipulated by the provisions of the Credit Union Act, 1997.

In reality, he said, credit unions do not compete with each other. They are confined with regard to their activities to what is called the "common bond" as defined in the Act. There is thus very limited potential for competition.

The predominant service provided by credit unions for deposit holders is the receipt of money which is credited to a "share account". It is a way of saving. It may also be credited to what is called a "deposit account". The credit unions advance loan finance, generally personal finance of a short term nature, to its members under certain conditions. To some extent there is competition with the banks, but traditionally credit unions were formed to provide a service to people who did not have access to banking facilities and they did so under quite different relationship arrangements than exist with banks.

ILCU is the only representative body mentioned in the legislation. It provides a range of services, including the LP/LS services, which provides life savings and loan protection insurance for individual members. ILCU also provides an investment service through the central investment management service which receives the surplus liquidity of credit unions and which is invested on their behalf by Davy Stockbrokers. They also provide educational services, training services and a HR service to credit unions in respect of their employees. They also monitor credit unions and provide business advice and services to credit unions.

The SPS was formed in 1989 for the purpose of protecting the savings of affiliated members of the ILCU. It is a discretionary and not a guaranteed fund. It is administered by an administration committee which is a sub-committee of the Irish League of Credit Unions. The risk assessment associated with the membership of the Fund is conducted by the monitoring team of the Irish League of Credit Unions, which is a team of inspectors who visit credit unions and assess the financial wellbeing of credit unions from time to time.

The fund is used as a stabilisation fund for any affiliated credit union which might experience financial difficulty. It may also provide compensation of a sum up to €12,700 to a depositor on a discretionary basis in the event that a particular credit union of which a person is a member shall become insolvent. The fund is not available to non ILCU members.

The monitoring team of inspectors is answerable to the board of the ILCU. It is independent of the individual credit unions.

CUDA was established three or four years ago and represents about 20 credit unions. It exists purely as a representative body. It has no SPS Fund at all.

Mr. Logue was of the view that membership of an SPS Fund was a "vital component" for the stability of the credit union movement. Since 2001, any new credit union must by law have access to an approved SPS Fund.

To obtain approval from IFSRA, an SPS Fund would need to be incorporated, be under independent control and have a board of directors or trustees who are skilled in investment activities. It would need to be open in terms of its access to all qualifying members and the conditions of qualification would require to be set out in the Articles of Association. It would also need to report transparently and apply its funds solely for the purpose of the protection of savings of members of credit unions. It would also need to be regulated by IFSRA in a variety of ways.

The existing SPS Fund of ILCU is neither incorporated nor is it under independent control. Its funds are not exclusively applied for the protection of members' savings, nor did it report in a way the Regulator would wish. Most importantly, it is not open to all credit unions to qualify for access to the Fund under reasonable conditions.

An application had been made by ILCU for approval of their SPS Fund under s.46 of the 1997 Act in 2002. While certain exchanges of correspondence took place with regard to the application, the application was subsequently "parked".

Mr. Logue indicated he was aware that certain changes in the operation of the SPS Scheme came into operation in January, 2004, most notably the new transparent funding of the SPS Scheme. This was desirable as far as IFSRA was concerned. However, he regarded it as very unsatisfactory that there was still no approved scheme in the market.

There were considerable practical difficulties in setting up a new SPS Fund, especially because it would require a certain minimum number of credit unions of sufficient financial size to make a stable SPS Fund. It would take a number of years for the actual value of the fund to rise to a level which would be appropriate to the risk that might exist for individual members of the scheme. There was no statutory or regulatory reason why a non ILCU member should not have access to its SPS Fund.

In cross-examination, Mr. Logue agreed that the credit union movement had a philosophical base in that it encouraged people to come together in a collective fashion to do things for themselves and to rely on themselves. While they were not profit-making concerns, there was an implied objective in the operation of credit unions that they create a surplus and statutory provisions exist with regard to how the surplus should be applied.

Any such surplus was applied for the benefit of the borrowers and savers of the credit union itself.

He agreed with Mr. Collins SC, counsel for the defendants, that every credit union must under the 1997 Act put aside 10% of any annual surplus as a form of statutory reserve. The Act also requires that every credit union must take out a "fidelity bond" to cover misappropriation of the assets of a credit union by its officers. Finally, as a last resort, the monitoring and preventative regime under the SPS operated privately, rather than on a statutory basis, for the benefit of the members.

A saver with a credit union enjoys the right to withdrawable capital which could only be withheld if the member had extracted a loan equal to or exceeding in amount the value of the share account. The entitlement of the account holder was therefore quite different from that of a shareholder in a company.

Mr. Logue stated that he did not believe that as a regulator he had any power to require credit unions to form a savings protection scheme. His role was to either approve or withhold approval from a scheme which met the criteria set out in the Act. The existing legislation did not provide for a form of insurance to protect credit union savings. In any event, an insurance system would not necessarily provide the stabilisation element which comprises the monitoring/preventative aspect of the service.

Mr. Collins referred Mr. Logue to the three broad headings under which the ILCU operates and asked Mr. Logue that if he was talking about credit union representation services or activities, whether it would mean all of these items, or only the items under category 1, 2 or 3. Mr. Logue replied that representation services apply predominantly to category 1. He felt that the services described in categories 2 and 3 came outside the meaning of credit union representation services.

From a regulatory perspective, Mr. Logue stated that it would be preferable if all credit unions had access to some form of SPS services. In addition to ILCU and CUDA, Mr. Logue stated that there were other groups which represent credit unions, for example, the Managers' Association, the Supervisors Forum and other groups which represent the movement. There were therefore different representative bodies in the credit union movement which had been successfully set up.

Asked if it would damage an SPS Fund if a credit union on disaffiliation could withdraw its contributions, Mr. Logue replied that if the withdrawal of funds from the SPS was matched by a reduction in risk, there would be no threat to the remaining members, assuming proper risk spreading and monitoring was taking place. As far as he was concerned, he would like to see a central uniform SPS which would not be a State-run body, but an independent, monitored and regulated SPS which would both protect the credit union movement and also the independence of IFSRA as regulators in a way which was not currently possible. In other words, a single fund and a single system would be the optimum. Discussions had taken place with ILCU about the possibility of converting the ILCU SPS Fund into such a fund, but such discussions had come to a halt because of the institution of the present proceedings. IFSRA had proposed a number of mechanisms which it was felt would satisfy the Regulator's requirements, but while these had been considered by ILCU, IFSRA had not received any reaction to the proposals.

Mr. Przybelski then gave evidence on behalf of the plaintiff. He is the regional vice-president in the international enterprise of CUNA Mutual Group. He told the court that CUNA provides reinsurance services through Eagle Star Life, which is a life insurance carrier in Ireland. He described how CUNA Mutual was a financial services company the primary objectives of which were to make credit unions stronger financial institutions around the world. CUNA Mutual had originally been part of the representative

association for its members, but now served the credit union movement in an independent fashion. This involved providing a full line of credit insurances for credit unions, including corporate coverages for employees, including fidelity bond coverages, property, liability coverages and the like. The only market served by the CUNA Mutual Group consisted of credit unions, credit union members and co-operatives which performed similar functions.

Back in the late 1960s, CUNA Mutual worked with the Irish League of Credit Unions in developing the life insurance scheme which continues to exist today for loan protection and life savings coverages. CUNA Mutual also put together the fidelity bond programme and continued doing business in Ireland until 1999. When CUDA was established, CUNA Mutual agreed to offer an alternative service to that organisation through Eagle Star Life to provide loan protection and life savings coverages.

CUNA Mutual was not however in a position to assist CUDA in obtaining in the market the equivalent of an SPS in terms of some form of insurance or deposit insurance scheme. It was not obtainable. He felt there were difficulties in establishing an SPS Fund, one of the difficulties being economies of scale and, secondly, the need for strong compliance and regulation. Risk diversification was a further issue which was affected by the number of people or unions involved. Given that between 400 – 500 Irish credit unions represented about $5 billion in assets, it would require almost all of those, in his view, to participate in an alternative scheme to obtain the right balance of risk diversification and scale. He felt ILCU should allow additional members to participate in its fund, because it would give credit unions additional assets and additional members to spread the risk.

He stated that CUNA was the largest and oldest representative association for credit unions in the United States. In Great Britain, CUNA competed with many different companies on a variety of fronts. He felt that SPS coverage was important and that a core value in the framework of a good financial institution was either a deposit insurance scheme or a savings protection scheme to protect member assets.

Under cross-examination, Mr. Przybelski stated that a deposit insurance scheme would protect individual depositors. The SPS on the other hand is designed to assist the credit union in situations where it might have financial difficulties and to protect it from insolvency. He confirmed that CUNA Mutual did not offer deposit insurance because of the difficulty of risk quantification in markets around the world including Ireland. He admitted he was unaware of the risk evaluation which ILCU did or did not do in relation to its own SPS.

Mr. Martin Sisk then gave evidence. He was present as a witness under subpoena by the plaintiff. He is the Deputy Registrar of Credit Unions in IFSRA. Prior to taking up that position on 1st May, 2003, he was the Registrar of Friendly Societies between 1st April, 1985 and 20th April, 2003. He confirmed that under previous legislation, the Registrar of Friendly Societies had statutory responsibility for the regulation of friendly societies, trade unions, industrial provident societies, and co-ops within the State. He confirmed that the first legislation governing credit unions was in 1966, prior to which they were governed by the 1893 Industrial and Provident Society Act. Extensive regulatory powers were conferred on the Registrar by the 1966 Act which were extended in 1978 as part of the Industrial and Provident Society (Amendment) Act. That Act permitted the Registrar to appoint inspectors to inspect credit unions. Further extensive powers were given to the Registrar by the 1997 Credit Union Act including the right to remove members from the board of directors of a credit union.

He confirmed that an individual person could be a member of more than one credit union but that credit unions did not compete amongst themselves. However, where they had

overlapping common bonds there was a little bit more competition now than there was in the past. He confirmed that credit unions compete directly with banks in the personal loan/consumer loan area. He said that the credit union movement had 15% of the market for such loans in the Republic of Ireland. His 2001 annual report indicated that the total savings of deposit holders with 438 credit unions registered in the State was €6.4 billion. The present figure was about €9 billion.

He confirmed that ILCU was a non-incorporated entity which carried out representation functions with government, the European Commission and other such organisations. ILCU also provided a range of services to credit unions. CUDA equally provides representative services on behalf of its credit unions of a similar nature. He confirmed that ILCU employed field officers to report to the head of monitoring in ILCU and to the sub-committee of ILCU which is responsible for the SPS.

New credit unions could be set up where a group of people came together and made an application to the Registrar with rules which met with his approval. He believed that the provision of a savings protection scheme was very important and very significant. Such a scheme provides a stabilisation aspect for the credit union movement because it can make available funds by means of a loan or guarantee to help to stabilise a particular credit union. This is something an insurer would never do. He was not aware of any insurance company offering a similar product. He felt one would need at least 50 credit unions to even contemplate the idea of setting up an alternative SPS. Those credit unions would then have a heavy obligation to put a lot of money upfront to start the fund and to try and build it up quickly over a period of years. This would pose major practical difficulties. In his view, the SPS should be independent from ILCU and capable of being regulated as an entity in its own right.

He learned in early 2000 that ILCU had provided €7 million out of the SPS to assist in developing a computer scheme known as ISIS. This scheme had failed and the use of money for this purpose, as far as he was concerned, was not acceptable from a regulator's point of view. In his view, the independent scheme should be open to all credit unions irrespective of membership of ILCU. It is not satisfactory, he said, that some credit unions are not in any SPS.

As regards representative bodies, he saw no particular reason why there could not be different representative bodies besides CUDA and ILCU. If such bodies came into existence, IFSRA would communicate with them and deal with them.

In cross-examination he agreed that all significant decisions of ILCU were made at the annual conference by way of motion. He agreed that the level of premium or payments to be made in respect of insurance was voted on by members, as was the level of affiliation fee. He agreed that it was characteristic of the credit union movement to recycle their own money and provide services for themselves from within the movement. He further confirmed that in 1980 when ECCU was finally established there was a lot of discussion about whether the stabilisation reserve fund that was then in existence should be turned into something in the nature of a guarantee fund similar to a deposit insurance type facility. However following lengthy discussion, the SPS was set up.

Mr. Sisk agreed that the LP/LS scheme was a good marketing tool, because it was paid for by credit unions out of their operating surplus and individual members did not have to pay themselves directly. Equally, individual savers with the credit union did not pay anything to the SPS service. He agreed that the two services enhanced confidence in the credit union movement. He also agreed that the stabilisation scheme had saved three credit unions from financial collapse. He further confirmed that the AGM of 1987 resolved that only league affiliates would be admitted to the SPS. He agreed that the

stabilisation fund should contain about 1% of the accrued savings of its credit union members. He also agreed that there was a very effective monitoring system in place for credit unions. He also agreed that the fact the SPS was not owned by some third party company, but rather was a fund that was already part of the credit union itself, meant there was no disposal of the fund so that no issue of capital gains tax would arise on the disposal of an asset and the fund itself had a tax exempt status because of the tax status of the credit unions themselves.

Richard Dale is Emeritus Professor of International Banking at Southampton University and an economist. His specialist area of research is financial regulation. He was called as a witness on behalf of the plaintiff.

He pointed out that the SPS developed as a discretionary and informal support system within the Irish League of Credit Unions because the ILCU board decided that the scheme should not offer guarantees to savers, since to do so would require the SPS to be regulated as an insurance company. It would also have been necessary to incorporate the SPS to protect the league from potentially open-ended legal obligations and there would also have been adverse tax implications. A separate trust company, however, limited by guarantee, was established in order to take and enforce security in cases where the SPS advanced monies on a secured basis.

At its inception the SPS Fund was sufficient to cover 1.5% of the total value of protected savings consisting of both credit union shares and deposits. At the time it was noted that worldwide credit union experience indicated that a fund of at least 1% of savings would be the minimum necessary to fund the scheme but that under no circumstances should the fund fall below this level. In the event the SPS Fund had fallen steadily, reaching 1.2% in 1997, 1.1% in 1999, 0.86% in 2002 and 0.82% as of December 2003. While at inception the SPS Fund amounted to just under €12 million, it had grown to nearly €80 million by the end of 2003.

The SPS Fund belongs to the League and its activities are broadly defined. ILCU can utilise the fund for a variety of purposes other than the protection of members' savings. Thus it approved a loan facility of €8.25 million to fund the purchase of new League premises in Mount Street in Dublin, and also a loan of €7 million to finance the ill-fated ISIS computer project. It also gave routine loans to ILCU's Central Financial Service facility which lends to credit unions for a variety of purposes, including the acquisition of premises and equipment.

Prior to 2004, the SPS was funded through a combination of a commission rebate from the mandatory loan protection and life savings insurance provided by ECCU, income from SPS investments and ILCU affiliation fees. This was an opaque manner of funding which made it impossible for credit unions to judge whether the League's insurance products and other services represented value for money. Accordingly, a new funding scheme came into operation in January 2004. This involved a 20% reduction in LP/LS insurance premiums for credit unions, a new affiliation fee to cover the costs of the League's core services and a direct contribution to the SPS which was initially set at 58 cents per €1,000 of each credit union is assets. Under the new funding arrangements the LP/LS insurance provided by ECCU is priced competitively, the charges to support League activities become transparent and the SPS receives dedicated and identifiable funding from credit unions based on the size of their balance sheets.

The League conducts prudent regulation through its Monitoring Service Department, undertaking routine on-site examinations and remedial work where problems are identified. This is based on the PEARLS system which has been developed by the World

Council of Credit Unions. To date, no credit union has failed in Ireland nor has the SPS been obliged to compensate any saver.

Professor Dale distinguished an SPS Scheme from deposit insurance where a variety of different products were available, of which a product providing explicit limited coverage is considered by the IMF to be the best choice. He proceeded to deal with specific good practice guidelines for deposit insurance schemes.

He distinguished credit unions from banks in three key respects.

They are member-owned co-operatives; they do not issue capital stock but rather as

non-profit entities they build up capital through retained earnings; they also only serve an identifiable group of customers with a common bond (e.g. employees of a particular firm or members of a specific community). Reflecting their non-profit status, credit unions generally enjoy tax privileges.

They also operate in a different way. Those who have share deposits must give 60 days notice before they can withdraw their funds. This provides credit unions with protection against liquidity crises. In addition, the lending powers of credit unions are more limited. On the other hand, capital deficient credit unions cannot raise capital from the financial markets, but must instead build up capital over time through retained earnings. Also, the common bond can give rise to concentrations of credit risk as where a local employer lays off workers or fails. However, the regulatory principles for banks and credit unions are broadly similar. The SPS is not a true deposit insurance scheme because any payment to compensate savers is discretionary. In contrast, the IMF's favoured model is based on an explicit limited insurance coverage. The absence of any clear specification of saver's rights in relation to the SPS and the wide discretion given to the ILCU as operator of the SPS is in breach of the best practice guidelines. The Fund currently remains below the minimum coverage level which the ILCU had originally set at 1%. While the prudential regulatory framework appears to have been effective, the extent of self- regulation in the Irish credit union movement was unusual. Furthermore, the monitoring system could be used to introduce risk-based insurance premiums in conformity with good practice guidelines. The mandatory LP/LS cover provided by the League is essentially a life insurance product that does not form part of the prudential regulatory arrangements for credit unions. There is accordingly no necessary linkage between LP/LS insurance and membership of SPS.

Any attempt to set up an alternative to SPS would face the following problems:

(i) fragmented deposit insurance arrangements are inevitably weaker than a unitary scheme, given the importance of risk diversification and the benefits of a broad scheme membership.

(ii) withdrawals from an existing deposit insurance scheme could weaken the scheme if the exiting institutions are financially stronger than the remaining members.

(iii) it is doubtful whether groups such as CUDA with 20 members would be in a position to establish a separate self-standing deposit protection scheme given the concentration of risk involved. Similarly, private insurance would be highly problematic. The US General Accounting Office (GAO) had concluded that a credit union membership of 212 with individual membership of 1.1 million and total shares of $10.8 billion was insufficient to avoid a worrying concentration of risk exposure to the insurer. He further understood that CUNA Mutual would not find it commercially feasible to provide insurance coverage to a group such as CUDA.

He concluded that remedial action in respect of the SPS was warranted and included the following:

(1) allowing continued access to the SPS for credit unions who wish to leave ILCU.

(2) the creation of an independent stand-alone SPS to which all credit unions would be eligible to belong.

(3) the separation of the roles of credit union representation and savings protection.

Professor Dale further pointed out that in the United States the federal deposit insurance arrangements which exist for credit unions work in such a way that if a credit union wishes to leave the particular fund it can do so and get its contributions back for the purpose of transferring to another insurer. In the U.S. a contribution is made each year by the credit union which then builds up the fund which is something like 1.25% of the protected liabilities. If the fund reaches a certain level, further contributions are then suspended because the fund is considered adequate to deal with any claims that might be made upon it. The fund, however, is administered and maintained by a separate federal agency so that the members lose control over the fund, which is separately incorporated.

He felt it would be extremely difficult for a group of 20 credit unions to set up an equivalent protection fund having regard to the requirement for risk diversification. A higher level of funding, say 2% rather than 1%, might afford greater protection. However, if one CUDA member had a bad failure which left a shortfall of something like 20% of that union's balance sheet, then the whole fund could be exhausted.

Professor Dale concluded by saying that the underlying rationale behind the SPS was no different from deposit insurance, but that the Irish SPS history suggested that the SPS method had developed for historical reasons and in the absence of appropriate regulatory legislation.

In cross-examination, it was put to Professor Dale by Mr. Collins that there was a degree of complementarity between the stabilisation scheme and the LP/LS insurance scheme, because the insurance meant you could protect the individual savings of members and that it would have a knock-on effect in the sense that there would be less of a draw on the SPS Fund at the end of the day. However, Professor Dale felt they were two very different issues. SPS is about catastrophe insurance and insolvency whereas LP/LS, unless there was a sudden surge in mortality rates, could never threaten the financial security of a credit union.

It was suggested that SPS and deposit insurance had fundamentally different objectives, in that deposit insurance was focused on the actual savings, whereas SPS was focused on the institution of the credit union. Professor Dale disagreed, stating that it was possible under deposit insurance schemes for the insurer to intervene to try to save a particular institution, because by doing so it would not then be necessary to compensate depositors for losses. It would be cheaper to protect the institution than to pay out compensation. The first recourse is to protect the institution, and, if that cannot be done, only then does one move on to the second procedure, which is direct compensation to the saver. If an institution is put into liquidation, its assets are worth much less on a liquidation basis than on a going concern basis, maybe by as much as 20%. He agreed, however, with Mr. Collins that under deposit insurance the insurer must pay the full amount guaranteed whereas in an SPS situation it was discretionary assistance only. Asked if different criteria as to the size of the fund existed as between deposit insurance funds and stabilisation funds, Professor Dale stated his belief there if the clear intention is to

provide protection for depositors up to the stated maximum figure, then one would go about creating a stabilisation fund or SPS in precisely the same way as if one were a formally constituted deposit insurer. The aim of both approaches was the same even if legally an SPS Fund was not obliged to meet the maximum loss of €12,700 in every case. He agreed, however, that where there were not enough funds to meet claims, an insurance company would "go broke" whereas an SPS Fund would not, because it retained a discretion not to make payments of any particular size. Pressed to agree that this had implications for the size of an SPS Fund, Professor Dale repeated that one would have to go about funding in precisely the same way as a formal deposit insurer.

Questioned about the American deposit insurance scheme whereby withdrawing members could recoup their contributions, Professor Dale agreed that this was subject to heavy regulation and could only take place in circumstances where there would be a transfer of the contributions to another approved insurer. He agreed he was not familiar with how stabilisations scheme operated in the United States in the 60s and early 70s.

Mr. Collins further suggested to Professor Dale that a good regulatory preventative system for an SPS would reduce the requirement to have a larger fund. Professor Dale agreed and further agreed that there would be no difficulty in 20 CUDA members adopting and implementing the PEARLS updated monitoring system.

The witness was shown an extract from the balance sheets of 12 members of CUDA, showing that in 2003 the member unions involved were able to transfer thereto more than the required 10% statutory reserves, and were thus "well positioned" to set up their own SPS Fund. In most cases the excess transfer above the statutory requirement either equalled or exceeded the necessary 1% appropriate payment by credit unions to an SPS. Professor Dale agreed that if the cash flow figures were correct and not otherwise qualified, the spreadsheet would so suggest.

Asked if smaller credit unions were a bigger risk than larger ones, Professor Dale pointed out that credit unions were not like banks because of the common bond. However, it was true that large banks had more diversified risks than small banks. Mr. Collins put to the witness the fact that CUDA represents 20 credit unions with over 350,000 members and almost €1.5 billion in assets, amounting to approximately 20% of the credit union movement in Ireland and was thus well positioned to set up an SPS system. Professor Dale agreed that they could do it but queried its effectiveness. There would be diseconomies and inefficiencies of operating such a small group. Mr. Collins further suggested to Professor Dale that CUDA members were well diversified, both in different types of common bonds, geographically and industry-wide. However, Professor Dale felt this analysis was too haphazard and that it would be necessary to do credit scoring on the people to whom loans had been made to see what the quality of their assets was. He felt on balance that one would be much more worried about risk in a scenario of a group of 20 than a group of 400.

Mr. D. Michael Riley was called as a witness by the defendants. He is the President of a Washington DC based firm that specialises in strategic planning and management for credit unions. He spent 22 years with the National Credit Union Administration and from 1985 to 1994 held the position as Director of the Office of Examination and Insurance and President of the National Credit Union Share Insurance Fund, the deposit fund that ensures credit unions' deposits.

Having reviewed the material documentation in this case, he stated that in essence, the SPS, working with ILCU, protects credit unions against failure by monitoring, risk management, short term financial assistance, analysis of trends, and visits to the individual credit unions.

He stated that, in the US, stabilisation funds were common up to the mid 70s. However, once credit unions started to resort to Federal insurance, the stabilisation funds gradually disappeared. The credit union fund, National Credit Union Share Insurance Fund (NCUSIF), is ownership based. Each credit union has to deposit 1% of its savings to belong. This 1% is adjusted every year. The NCUSIF protects the members' savings, provides examination, supervision, and monitoring of members.

In Ireland, he felt the creation of the SPS was a co-operative way to set up a financial assistance entity to work with troubled credit unions, given that no single credit union could do it by itself. Theoretically, several look-alikes could be created that would copy the function of a SPS. Because the SPS is not a deposit insurer, there is not much concern about spreading risk among a large number of credit unions. The liability structure is different. Any group of credit unions, assuming they were diverse, i.e. not in the same industry or same location, could put together agreements that would allow them to create their own SPS look-alike.

The liability position of an SPS is quite different from a deposit insurer. There is no defined liability for the SPS, which gives that entity tremendous leverage and more funds to work with.

On the other hand, a scheme of deposit insurance means one has an explicit contract to pay up to the insured maximum on every account. When one has uninsured accounts, as in an SPS, one only has responsibility for the institution. One can actually let the institution go bankrupt and settle with depositors the difference between what the assets sell for, less any creditor claims. What usually happens is that one meets with the depositors and offers 85 or 90 cents on the dollar and keeps the institution afloat.

It was his understanding that no anti-trust litigation had ever occurred in the US during the period of prevalence of stabilisation funds there.

He believed it would be fairly easy for a small number of credit unions to set up their own SPS if they were seriously committed. Obviously the more credit unions involved the better, but it is not so critical a requirement when individual deposits are not insured. A new SPS would need some type of risk management system, clear guidelines for performance, clear standards for suitable activities, an understanding of how to deal with troubled credit unions and some method of paying for it.

Mr. Riley did not believe there should be a refund upon withdrawal from the SPS. Firstly the commissions were expensed along the way by the individual credit unions so there had been no asset created at the credit union level. Furthermore, the indirect manner of funding made it very difficult to assess the amount of any refund. Thirdly, it is impossible to determine who had what rights to what money. Once the funds went into the SPS, they belonged to the SPS and were commingled with other income and expenses. Any distribution might deprive another credit union of its rightful share, which could cause more damage and more litigation. There had never been provision for refunds for credit unions upon withdrawal from stabilisation funds in the US. This was for the reasons already stated, and essentially there were too many intangibles that would have to be measured to calculate any refund, such as to render it for all practical purposes impossible.

Mr. Riley explained that in the 1960s there was a tremendous growth in private deposit insurance for both State and Federal credit unions. At one time there were 22 private commercial insurance operations. However, proper regulation and State-backed insurance essentially saw off stabilisation funds and the number of private insurance concerns has dropped now to almost zero.

He felt that a deposit insurer insuring individual accounts would require much more of a fund than a stabilisation scheme would. The federal deposit insurance company which insures banks is at 1.25% and the NCUSIF is at 1.30%. Most of the stabilisation funds in America ran at about 0.1%, 0.2% or 0.3%. In his opinion, for stabilisation funds it was just not as necessary to have the size or the level of risk diversification. Stabilisation funds in America never offered guarantees to individual savers, but were institution-related.

He had looked at the annual reports of about 12 or 15 credit union members of CUDA and felt it was possible to set up an alternative SPS. One would have to ensure that the risk profiles were strong and that one was only insuring the best credit unions one could insure. There would have to be a good monitoring procedure, together with a binding agreement among the parties about what would happen if one of them got into trouble. In short, it would have to be premised on a collective agreement.

Insofar as risk profile was concerned, his experience had been that most losses came out of smaller credit unions. They were also more expensive to monitor and much of the cost in running a stabilisation fund lay in monitoring, collecting reports, visits and examinations. Also, the level of expertise in smaller institutions was usually less than in larger institutions. Insofar as the size of an individual credit union is concerned, there is an assumption that the larger the better from a risk point of view. Therefore it is not unfeasible for 15 or 20 credit unions, as long as they have a good profile, to run an adequate stabilisation fund. This would not be true for a deposit fund, because there one is committed to real dollars at a specified amount. However, if he was one of the 20, he would make sure the other 19 were "pretty good" before he would sign any agreement. Mr. Riley further confirmed that there had never been any third-party providers of representation services to credit unions in the United States other than the Leagues, nor had there ever been any third-party providers of stabilisation services other than the Leagues.

In cross-examination Mr. Riley confirmed that the present Federal insurance scheme covers credit unions which are members of a wide range of different Leagues and is independent of the Leagues.

Mr. Riley in cross-examination agreed that if the objective behind a stabilisation fund is to pay out in the event of a default, even though there is a discretion not to do so, then large numbers of credit union members are important. In the creation of a new fund, a risk profile of those making up the fund is extremely important. A vast advantage would arise if one could cherry-pick the unions involved. In the US under the deposit insurance scheme, where there is the obligation to pay out in full, there are between 8,000 – 9,000 credit unions (amounting to 98% of all unions), who are members of the deposit insurance fund. The balance are either privately insured or uninsured. Mr. Gallagher drew Mr. Riley's attention to the report which he had prepared for ILCU in March, 1996, and to Mr. Riley's note that "the current pace of growth in credit union savings and in the size of the Scheme means that the Scheme will not be sufficient to provide adequate coverage within two years". Mr. Gallagher suggested that this could be seen as meaning not only that the size of the fund was very important in terms of adequate coverage, but that the number of participant credit unions (which was 500 in Ireland at time) was also extremely important, Mr. Riley stated that there was no evidence to suggest what size was appropriate. Once the number of participant credit unions got above 100 or 200 the risk profile became less important.

In re-examination Mr. Riley emphasised that as a regulator he was more interested in the profile of the participating individual credit unions than the numbers. He would prefer to deal with 5 great credit unions than 500 poor credit unions.

In re-examination, Mr. Riley stated that his preference would be for all credit unions to be in one group, but the establishment of a new fund would provide an opportunity to set up a better system. Insofar as investment of SPS Funds were concerned, it was appropriate in his view to place the funds in safe liquid short term investments. In the US, these investments were within the credit union system for the most part.

Mr. Sisk then resumed his evidence and was taken through a large book of documents by Mr. Collins, Mr. Sisk agreed that in 1985 ILCU was debating whether it would have a guarantee scheme that would provide absolute guarantees or whether there would be a continuation of the stabilisation type service. It was noted in the report of the 1985 AGM that the fund would have to be maintained at 1 % of the total savings of the movement. It was also noted that the policy of ECCU was to return to the credit union movement as much as possible of premium income by way of claims, refunds, rebates and commission. The November 1988 Special General Meeting of ILCU was devoted to the Savings Protection Scheme, and provided that the scheme would be set up within the League itself without any beneficial transfer of funds or investments to a separate legal entity. Mr. Sisk confirmed that it was made clear to all credit unions at the time that the scheme was discretionary. It was further made clear that only League affiliates would be admitted to the scheme.

It was also noted at the time that certain disadvantages could be seen in attempting to form a guarantee scheme company within the ambit of the Insurance Acts including that:-

> the company would have to be capitalised EEC solvency margins would have to be maintained - there would be a liability to corporation tax
>
> - the company would have to operate at arms-length from the League, with consequent difficulties in the League retaining control.
>
> In those circumstances, it was agreed that the Scheme should be designed so as to:
>
> - retain the present taxation advantage - avoid the creation of a full insurance-type operation with its attendant risks avoid the need for statutory authorisation.

Mr. Sisk said it was quite clear at the time that if any credit unions left ILCU, either voluntarily or on disaffiliation for breach of the rules, they would lose the benefit of the SPS Scheme. On 18th April, 1989, Mr. Sisk indicated he was prepared to give approval to the Scheme subject to some conditions. He gave approval as part of good regulatory practice without any statutory requirement or obligation to do so.

Mr. Sisk further confirmed that on 20th November, 1995, the Competition Authority had by decision 440 confirmed that the rules of ILCU did not offend against s.4 (1) of the Competition Act.

Mr. Collins took Mr. Sisk through a review of the premium-rating structure of ECCU, noting that the board of ECCU set the premium for a particular year, and noting that the commission paid to the League by ECCU was 20% of the gross premium in contrast with a commission of about 6% of gross premium in group life insurance assurance business generally. 8% of the premiums received by ECCU were provided to the SPS by way of operational rebate. It was noted at the time that ECCU was likely to come under pressure in the future if one or a number of credit unions sought to seek quotations on the life assurance market generally.

Mr. Sisk confirmed that ILCU, in considering the SPS structure, was well aware of the tax implications and was conscious that credit unions in Northern Ireland did not enjoy the same exemption from tax as did credit unions in the Republic. Mr. Sisk pointed out that the SPS and the League itself were not taxable. Credit unions make tax returns but are not subject to income tax or corporation tax and members were conscious at the time that any sort of transfer of ownership to an independent corporation might create capital gains tax liabilities if some portions of the fund were sold or split, and there was a concern not to upset the structure, which had the informal approval of the Revenue Commissioners. Mr. Sisk confirmed there was a considerable reluctance on the part of ILCU to develop any scheme which might upset the tax-exempt status. Mr. Sisk did not believe that any approach had been made at the time to the Minister for Finance to see if the SPS could be the subject-matter of legislation which would make it an independent body and yet maintain its tax-exempt status. The 1997 Credit Union Act was the first step in terms of statutory regulation of savings protection schemes. Mr. Sisk emphasised that over a number of years he had publicly indicated his preference for a scheme to be set up that was quite independent and available to all.

Mr. Sisk confirmed that the League resolved in January, 1999, upon a motion to reduce LP/LS premium costs and to independently fund the SPS by an annual contribution from credit unions. These proposals resulted in the changes brought into effect at the beginning of 2004. Mr. Sisk emphasised that there was a keen awareness that the former funding mechanism could result in credit unions being "cherry-picked" by commercial insurers having regard to the high rates of premium paid to ECCU.

Mr. Sisk agreed with Mr. Collins that, quite apart from purely economic considerations, a very considerable value was placed by the credit unions themselves on the philosophy of co-operation which characterised the movement. This philosophy of self-help was reflected in the fact that credit unions help each other in a co-operative way, such that the bigger credit unions help the smaller unions. This philosophy enabled thousands of people to save with credit unions and to obtain small loans from small institutions.

In 2001 CUDA was established and Mr. Sisk made clear to the court that he had no objection to what it was proposing to do. He felt that he would give whatever assistance he could because CUDA wanted to set up an industrial and provident society as the legal entity that would be used. He had an exploratory-type meeting with CUDA and had no objections to CUDA setting up its own SPS Fund to the value of 1 – 1.5 % of assets. He was also prepared to give CUDA any advices relevant to the establishment of an effective monitoring system for any such fund.

Mr. Sisk noted that in 2001 the Lucan district credit union had complained to the Competition Authority that ILCU's rules were anti-competitive. Mr. Sisk was referred to a letter from CUDA dated 16th April, 2002, wherein it was stated that, as a group, CUDA credit union members had in aggregate contributed approximately €17 million to the SPS which accounted for approximately 25% of the overall fund. The CUDA letter made clear its support for the complaint by the Lucan credit union.

A number of credit union witnesses were then called. Mr. Michael McHugh is manager of the Colhar Linn credit union which represents the I.N.T.O. His union had been involved with CUDA since its foundation, but was also a member of ILCU. It had maintained membership of ILCU because the SPS gave protection to its members. If they disaffiliated from the League, they would lose that protection. His credit union was currently withholding affiliation fees until the present proceedings were resolved. His union had not received a direct threat of disaffiliation. His credit union had €100 million in assets and 15,000 members. If his credit union were to leave ILCU, it would lose the

value of its €1 million contributions to the SPS and it would cost a similar amount to participate in the establishment of an alternative similar fund. He would prefer to see a scheme in place which would be put on a statutory footing and would be independent of representative bodies.

When cross-examined, he accepted that a collective organisation must have a set of rules that people abide by, but felt that rules drawn up at a particular point in time may require to be addressed or looked at again because of subsequent events and changing circumstances. He accepted that if his credit union departed ILCU, it was no longer open to it to participate in the SPS Scheme. He also accepted that historically the payments which had been made by the credit union to ILCU had always been treated as an expense in the accounts of the credit union and don't show up as an asset on its balance sheet. He also accepted that as a consequence his credit union had no proprietary ownership in the SPS Fund. He further accepted it was extremely difficult to disentangle from past contributions made the actual value of contributions made by any one credit union to the SPS Fund.

Mr. Desmond Diver is manager of the Newbridge credit union. He is also secretary of the Management Committee of CUDA. The Newbridge credit union has 21,000 members and an asset base of €150 million.

In or around 2002, his credit union developed a number of concerns in relation to ILCU. Firstly, it was discovered that the union was paying premiums in excess of 100% more than other credit unions of similar size. This was a great disappointment as it had been assumed that there was equity with regard to pricing across the ILCU movement. As these premiums constituted over 20 % of the union's total expenditure in one year, the union felt it had to look at alternatives. The union was also dissatisfied that the SPS Fund had been availed of for a high risk technology project (ISIS) and became increasingly alarmed at the lack of accountability in ILCU. A lot of these issues were documented in the press and media at that time, creating negative publicity which had had an adverse effect on their members' confidence. Accordingly, the Newbridge credit union was one of the founder members of CUDA. CUDA was established because it was felt that ILCU was not representing credit unions in an appropriate manner across a broad range of issues. It was felt that something new was needed and now CUDA provides services which include representation, advocacy, lobbying services and LP/LS services as well. Mr. Diver explained that a decision to disaffiliate from ILCU would not be made until the issues of SPS is satisfactorily resolved. 67% of the Newbridge members are savers who have no borrowings. A lot of these are elderly, retired people with substantial savings in the credit union, and it is particularly important to these people to know the rate of return they are going to get on their savings, and that their savings are protected and safe.

He assessed his union's contribution to the SPS Fund at about €1.5 million. Setting up an alternative fund could cost double that amount, because the numbers involved would be less and the risk would be higher. Accordingly, the cost to the union could be anything up to €5 million if it were to participate in the establishment of a new SPS Fund. He felt there was an urgent need for either the Regulator or Government to legislate in this area so as to permit the development and progress of CUDA and of credit unions generally. He felt it was very much in the best interests of all credit unions to continue with a fund that everybody had access to and which all unions could continue to grow.

In cross-examination it was put to Mr. Diver that it was quite feasible for the Newbridge credit union to put aside 1% of its assets as a contribution to an SPS Fund. Mr. Diver agreed that in theory it could be done, but had a preference to see the existing fund built up and continued so that everybody could gain access to it. If the fund was put on a

statutory basis and managed by an independent body independent of ILCU, his union would be willing to contribute the same as any other credit union. His board had lost confidence in ILCU and did not wish to be associated with ILCU personnel. It was a logical extension of this position that his union did not wish to subject itself to monitoring by ILCU personnel and field officers. He felt that monitoring by a representative body from ILCU created conflicts of interest and that the same body should not be doing both. He did not feel that either ILCU or CUDA as representative bodies should be engaged in monitoring any fund. He would prefer to see inspections carried out by field officers from the Registrar's office if that was possible. He agreed that under current legislation the Registrar could only approve an SPS Scheme and did not have the power to set one up. Essentially his position was that he would like to see the SPS Fund of ILCU appropriated to a new independent body.

Mr. Collins referred the witness to the minutes of a CUDA meeting held on 27th January, 2002, which recorded that CUDA was then considering setting up an alternative SPS Fund in which contributors would give themselves ownership rights in the fund by retaining contributions as an asset on their balance sheet. Mr. Diver agreed, pointing out that this was simply an option that CUDA was exploring at the time. No definite decision had been taken on the establishment of an alternative SPS Fund. The more they researched the option, however, the greater the difficulties became. These considerations were then overtaken by events, because various credit unions received letters of proposed disaffiliation from ILCU on 31st January, 2003.

Mr. Diver also agreed with Mr. Collins that if his union did switch to another LP/LS supplier, Newbridge credit union would save €1.5 million per annum, which had to be taken into account in calculating any switching costs. He also agreed that a number of CUDA credit union members simply decided to voluntarily disaffiliate from ILCU. However, 15 members of the 20 CUDA members are still affiliated to ILCU. Nonetheless CUDA had been quite successful over a relatively short period of time. Mr. Diver further agreed that CUDA was the only legally incorporated credit union representative organisation, acknowledged by both the Central Bank and regulated by the Registrar of Friendly Societies, because CUDA had adopted the legal form of an industrial and provident society and is incorporated as such.

Mr. Diver agreed that CUDA's basic dissatisfaction was well expressed in the progress report of the CUDA Steering Committee dated 6th August, 2002, in the following terms (at p. 216):

"The deep dissatisfaction of CUDA credit unions with the manner in which the ILCU have handled the SPS Fund – a fund belonging to credit unions and of which CUDA credit unions have contributed approximately 25%, underpinned agreement in the (location of meeting stated) for the second SPS objective namely that CUDA should seek to have the SPS reconstituted and moved from under the control of the ILCU. In this regard the Steering Committee will shortly be writing to both the ILCU and the Registrar confirming that CUDA strongly shared the reservations expressed by the Registrar of Friendly Societies in his most recent report regarding the operation by the ILCU of the SPS Fund and in addition outlining that *inter alia*:

- CUDA strongly objects to the SPS Fund being held by an unincorporated body.

- The fund appears to be co-mingled with ILCU's general operating funds rather than in a protected trust fund and is therefore exposed to ISIS and any other ILCU liabilities

- The fund has been used to finance various ILCU projects (including the doomed ISIS project) rather than managed in accordance with prudent trust practice

- The fund does not act as a guarantee of credit union member savings

CUDA believes this last point to be extremely serious. A recent ILCU statement to the Competition Authority that the 'SPS Scheme is not a guarantee scheme and thus there is no right for a credit union to receive any benefit from the SPS' is alarming.

This non-guarantee status of the SPS is in our opinion completely unacceptable and a matter at complete variance with the widely held view of credit unions regarding the SPS."

Mr. Diver added that many credit unions weren't fully aware even today of the differences between a deposit guarantee scheme and a savings protection fund.

Mr. Billy Doyle is chief executive of CUDA. He stated CUDA had already achieved significant recognition, but felt overlapping representation by CUDA and ILCU was unhelpful given that some CUDA members' names would also appear on an ILCU list of names. There were also areas where there were very real differences in policy between ILCU and CUDA in representation service terms. He confirmed that there were 350,000 members of CUDA credit unions, which have assets and savings of approximately €1.5 billion.

He agreed that it would be difficult to accurately measure the contribution of CUDA members to the SPS Fund. He felt it was about €10 million.

He told the court the initial trigger for the establishment of CUDA was the ill-fated ISIS project. Some 25 unions had commissioned an independent report about this proposal which highlighted exactly the shortcomings of the project which later came to pass. However, their concerns and report were not taken on board by ILCU and the project went ahead with a loss of approximately €34 million. The main obstacle to credit unions fully committing to CUDA is the vital importance of the Savings Protection Scheme. Depositors have confidence if their savings are safe in a financial institution, and the Scheme effectively solves that confidence issue for the credit unions. Secondly, it is now a regulatory requirement for all new credit unions. Furthermore, it is also a requirement of the ILCU's that credit unions should participate in the fund. All of these factors underpin in the minds of credit unions the importance of the SPS Fund.

Mr. Doyle stressed that many credit unions around the country took the view that the Savings Protection Fund in truth belonged to the movement rather than ILCU and should be seen and perceived as the credit unions' fund. Unions therefore saw it as a very high cost to pay should they forfeit contributions in having to walk away from the Fund. There was no alternative available to disaffiliating unions by way of an SPS Fund or an insurance fund. In his view it was simply not viable or affordable for twenty credit unions to set up a comparable SPS Scheme.

CUDA's first requirement was to retain access to the current fund. Hopefully a transition period might then follow, particularly if pressure could be brought to bear on the Regulator, to bring about a change whereby the Fund would be converted into a "stand alone fund". He differed from Mr. Diver, because he felt the CUDA credit unions would regard access to the SPS Fund as currently constituted and monitored by ILCU as acceptable in the short term at least, notwithstanding the reservations expressed by Mr. Diver. He would have misgivings that ILCU might, however, apply less favourable treatment to disaffiliated credit unions where they applied for assistance from the Fund.

Mr. Doyle further explained that the CUDA fees for 2004 were set at 27.5 cent per €1,000 net worth for each credit union, by way of affiliation fee plus a once-off €1,000 subscription fee. The total figure thus raised for 2004 was €400,000.

He described how a letter was written on 7th May, 2002, on behalf of CUDA to ILCU asking the League to give its written confirmation that CUDA member credit unions which opted to place their LP/LS cover with another insurer with effect from 1st June 2002 would continue to enjoy the protection of the SPS fund, both in terms of their past contributions to the fund and their continuing right to contribute to it. However, by letter of 20th May, 2002, ILCU stated that it was not in a position to provide such confirmation to CUDA.

In cross-examination Mr. Doyle confirmed that his own credit union, Dubco, had not paid affiliation fees or SPS contributions in 2004, but had reserved the amount for 2004 on its balance sheet.

Mr. Nelius Collins is the General Manager of Bishopstown Credit Union in Cork. He described the dissatisfaction his credit union felt with ILCU, which came to a head in 1999 when the union decided to place its insurance with another company, thereby effecting a saving of about £100,000. The alternative insurance cover had a two-year span. Towards the end of the period, ILCU representatives who attended the AGM of the credit union availed of the occasion to warn members that they might lose the benefit of the SPS fund if they did not return to the League for ECCU insurance. This threat actually forced members to vote down a motion to permit the credit union to continue with the new alternative insurance arrangements and to elect instead to return to LP/LS with ILCU. His union was paying both representative bodies at present, because of the uncertainty about the SPS fund. In the current year €25,000 had been paid to CUDA, and €17,000 per quarter, apart from insurance, had been paid to ILCU. His preference in terms of representation of his credit union would be CUDA, in the sense that they are representative of a group of credit unions of like mind with Bishopstown Credit Union. His union would like to see the SPS independently controlled, outside both ILCU and CUDA, with an independent body controlling the actual fund itself. He would like to see that entity organised by an organisation like IFSRA. Pending the establishment of some sort of independent fund, his members were prepared to continue with the existing arrangements for the SPS fund.

In cross-examination Mr. Collins stated that his union accepted that money paid into the ECCU fund was not recoverable, but felt they should recover the SPS contributions. He admitted they had received a benefit from SPS, but as they had never drawn on the fund, he felt they were entitled to get the money back. Mr. Collins confirmed his preference would be to self-represented from within the credit union movement because it was part of the ethos of the movement that people come together and provide such services to themselves.

Mr. Denis Daly is Manager of Tullamore Credit Union, which has 32,000 members with assets in the region of €150 million. His union had left ILCU because of a number of concerns which had been building up over a number of years. They concerned both the representative functions and other considerations, but more primarily the single issue that drove his union to leave the League came as a result of the collapse of the ISIS project. His union had commissioned some separate research which had indicated that this project was not viable. This information had been communicated to the League at an early stage, but the project went ahead regardless. His union also felt that the actual size to which the League had grown and its annual budget was imposing a very serious burden on credit unions. They felt it was not providing value to members. The SPS issue delayed the departure of his union from ILCU for a longer period than would otherwise have occurred.

Some thought had been given by him to setting up an alternative SPS. Two years ago he would have thought it possible. However, he has spent the last few years getting much more involved in the insurance area and in various types of management risk development areas, and he was now of the view that it was not possible for a small group of credit unions to set up its own SPS scheme in terms of the spread of risk required. In cross-examination, he accepted that his union had not taken any expert advice on the feasibility of setting up an alternative fund.

Mr. Kurt Kelly is the Manager of the Coolock/Artane Credit Union which has 22,000 members and assets of €65 million euro. His union also decided to leave ILCU and join CUDA primarily as a result of the ISIS crisis. His union is in the process of being disaffiliated by the League. His members looked upon the SPS fund as a guarantee to them. His union had made no final decision with regard to membership of CUDA pending resolution of the SPS issue.

No witness as to fact was called from within ILCU, so the various complaints and contentions of the foregoing lay witnesses were not challenged or contradicted by any evidence from the defendants.

ECONOMIC EVIDENCE

Professor Paul Seabright is Professor of Economics of the University of Toulouse and was formerly Reader in Economics at Cambridge University. He has been an advisor to both public authorities and private firms in competition matters and is a member of the European Commission's Economic Advisory Group for Competition. He was called as the Competition Authority's main expert witnesses.

It was his view that ILCU is a distinct entity providing credit union representation and savings protection services in separate product markets.

He indicated he was not aware of the existence of any quantitative economic study which sought to estimate demand elasticities for the various services provided by ILCU for the purpose of establishing a market definition. Such a study would help to settle the question whether a monopoly provider of such services would be able to sustain a profitable price increase of 5 – 10% above the competitive level, and therefore whether such services constitute a distinct relevant market in which market power could be exercised without major loss of revenue to substitute products or services.

This hypothetical procedure is known as the SSNIP test ("a small but significant non-transitory increase in price") and since its introduction in the 1982 Merger Guidelines of the US Department of Justice has become the standard procedure used worldwide for undertaking market definition. A relevant market for anti-trust purposes is defined as the smallest set of products such that a hypothetical firm with monopoly control over these products could profitably raise their price by some 5 – 10% above the competitive level. For any smaller set of products such a price rise would be unprofitable because either customers would switch to substitute products (this is called "demand substitution"), or producers of other products would rapidly enter the market in question (this is called "supply substitution"). Nevertheless, even in the absence of quantitative data, Professor Seabright stated that it was reasonable to argue that both credit union representation services and the provision of savings protection be considered as distinct relevant markets.

Taking credit union representations services first, Professor Seabright stated that there is a range of activities involved in representing credit unions to the political and regulatory authorities and engaging in collective negotiations with providers of financial services which are of value to credit unions. The services in question have the characteristics of

"two sided markets" or "matching markets", which bring together parties who have something mutually to gain but who need the help of intermediaries to identify suitable counterparties. Because the gains to the parties come from being matched with suitable counterparties, there will not exist close substitute services which do not so match them. It follows, therefore, that credit union representation, consisting as it does of valuable services for which there are no close substitutes, has the characteristics of a distinct relevant market for the purposes of the Competition Act, 2002.

Insofar as SPS was concerned, Professor Seabright stated that the requirement for SPS cover was so important to credit unions that a credit union could well be willing to pay a price of even 10% above the competitive level for such services, suggesting that for the purposes of the Competition Act, 2002, the provision of savings protection can plausibly be claimed to constitute a distinct relevant market. This view was fortified by the new legal compulsion to have SPS for new unions created after 1st August, 2001.

While Mr. Massey took the view that the SPS was not a tradable service because it was an in-house service, Professor Seabright stated that a relevant analogy for the relationship between the credit unions and ILCU is that of a joint venture which has a large number of parent companies. The fact that the joint venture may be incorporated (whereas ILCU is not incorporated) is not germane to the economic nature of the relationship between them. The nature of the relationship taking place between distinct entities was, he suggested, very clear. In support of this argument he cited the case of

Airtours v. Commission (Case T-342/99) where the market for agency services was found to be distinct from the markets for the goods or services in which the agents themselves operate. For example, the package holiday market is distinct from the market for hotel services and air transport services.

He went on to describe the process of tying two services or products together. Two goods are said to be tied together when the purchase of one is made conditional upon the purchase of another. In the present case, the purchase of SPS cover (which is the "tying" good) is made conditional on the purchase of credit union representation services (which is the "tied" good). Tying may not have anti-competitive effects where the goods are complementary, such as in the case of shoes and shoe laces. However, SPS is not complementary to the other elements in the credit union representation service package and, besides, one of the goods, namely SPS, is a monopoly. In such circumstances adverse economic effects may be anticipated.

Any credit union leaving ILCU faced significant cost. Unless a significant number of credit unions were involved, it would be extremely difficult to set up alternative SPS cover. Even if a credit union did get back its share of accumulated contributions to date to the SPS, it would still not be able to use those contributions to give itself SPS cover with the same degree of value which it had while they continued to have access to the SPS fund.

The important danger signals in the present case were that rival suppliers of credit union services were unable to replace the loss to their potential customers of SPS cover and were thus unable to provide a strong competitive challenge to ILCU.

The fact that ILCU was offering a bundle of services was not of itself a concern from the competition viewpoint. Concern only arose where one element of the bundle was produced by a dominant firm and the difficulty in the instant case arose purely because of the packaging of SPS cover with the other elements.

In his opinion ILCU is clearly dominant in both the market for credit union representation and SPS cover. He felt ILCU was abusing its dominant position in the latter market

because the tying behaviour was likely to foreclose the market for credit union representation services in that it made entry into that market more difficult for other entrants. It also increased the probability that CUDA could not successfully survive in the market and would have to exit.

He had seen no evidence that there were efficiency benefits from tying SPS and credit union representation services together. In his view both services could be supplied separately and independently.

He therefore concluded:

(a) that it is reasonable to consider both credit union representation services and the provision of savings protection to be relevant product markets within the meaning of the Competition Act, 2002.

(b) on the assumption that the rules and practices of ILCU constitute a decision by an association of undertakings (or an agreement between undertakings) in denying to credit unions disaffiliated for whatever reason from the ILCU access to ILCU's savings protection scheme, the effect is to prevent, restrict or distort competition in the market for credit union representation within the meaning of s.4 of the Competition Act, 2002.

(c) that the ILCU is dominant in both the market for credit union representation services and the market for savings protection

(d) that the behaviour described at paragraph (b) is likely to restrict competition in the market for credit union representation, and therefore constitutes an abuse of dominant position within the meaning of s.5 of the Competition Act, 2002.

He concluded his direct evidence by stating that if disaffiliated credit unions could continue to access the SPS, it would meet the anti-competitive concerns, provided the SPS fund was not operated to the disadvantage of the disaffiliated members.

On cross-examination Mr. Collins suggested that the central issue to be analysed was the question of market power. The requirement to tackle the market power problem gave rise to the requirement to achieve market definition.

Mr. Collins suggested that under the SSNIP test it was necessary to carry out a quantitative analysis of pricing data to work out what were the consequences of the hypothetical 5% or 10% price increase. Professor Seabright felt, however, that most applications of the SSNIP test did not use quantitative data analysis. Quantitative evidence would be important in a borderline case where there were two rival possible market definitions which were somewhat close to each other and it was difficult to decide between them on intuitive grounds. In the instant case it was difficult to conduct an analysis based on price changes because some unions had left ILCU due to general dissatisfaction.

He agreed that the Competition Authority had not furnished him with quantitative data for the purpose of establishing demand characteristics. While he was aware that credit unions must pay for the bundle of services they obtain, he had not sought to isolate that element which makes up the credit union representation services. It was very hard to estimate the elasticity of demand for credit union representation services. It was put to him that the price of representation services was the aggregate of the affiliation fee and the ECCU fee. Professor Seabright agreed but stated that the critical question was how much was attributable to its various constituent elements. That was the task which should be undertaken here. A rival provider of credit union representation services might not provide exactly the same bundle as ILCU. Mr. Collins suggested that the transfer of business to CUDA suggested that it was possible to work out whether or not it was

profitable for ILCU to put up its prices so that the SSNIP test could be carried out on the available data. It was suggested to the witness that he had not in fact applied the SSNIP test, either qualitatively or via the analysis of any data, in his report. It was further suggested by Mr. Collins that Professor Seabright had merely asserted there was a market for credit union representation services without supplying any evidence or analysis for such assertion. Again Professor Seabright disagreed, drawing Mr. Collins's attention to paragraph 6 of his report which states that the credit union representation service is a two-sided market or a matching market. That was precisely what suggested that the credit union representation services function did not have close substitutes. The fact that ILCU had previously had monopoly power in credit union representation services had permitted it to maintain prices at least 5 -10% above the competitive level. The fact that it had lowered prices in 2004 was a very useful intuitive confirmation that there is a product market for credit union representation services and it includes both ILCU and CUDA.

Mr. Collins suggested that ILCU was carrying out vertical integration by means of self-supply of a range of services which could lead to efficiencies, and Professor Seabright agreed. It was also put that SPS was something which could only be supplied by a group of people coming together collectively. However, Professor Seabright insisted that the two services of LP/LS and SPS were very different because LP/LS was a standard product in a large market unlike SPS. However, it did not follow from that that the fund had to be itself administered by a body which was jointly set up by the credit unions concerned. Mr. Collins pressed Professor Seabright to agree that there was no question of credit unions purchasing SPS from some third party in the market place. Professor Seabright, however, stated that credit unions were purchasing SPS cover from the body which they had set up to provide representational services. It was a body distinct from its members, even though it was not incorporated. Mr. Collins suggested that the *modus operandi* was quite different from going to the Yellow Pages or the Internet and asking who would do this monitoring service for the client. Professor Seabright reiterated that the service provided by ILCU was provided by a distinct organisation in return for a payment and, post 2004, the payments had been made more explicit in relation to the services provided. The extra transparency is a sign that there is an acknowledged transaction between ILCU and its individual members.

He agreed with Mr. Collins that the SPS service was a vital and integral part of the service provided by ILCU. While it was vital for credit unions, it was not however vital that it be bundled with the provision of credit union representation services. He stated that one must distinguish the case of how valuable the product is from the issue of who should supply it. The compulsory nature of SPS for credit unions established since 1st August, 2001, means that, for such credit unions, SPS has no substitute; without it they cannot legally function. A monopoly provider of SPS that raised its price 10% above the competitive level would see no loss in business from such credit unions. It also seemed likely that the changed legislative framework due to the Act would make even credit unions established before 1st August, 2001, very cautious about reducing their demand for savings protection in response to such a price rise. A credit union lacking such cover might attract a serious loss of confidence and the fear of such an outcome would probably make the credit union willing to pay even a price of 10% above the competitive level. This clearly suggested that, for the purposes of the SSNIP test, the provision of SPS can plausibly be claimed to constitute a distinct relevant market.

Mr. Collins suggested that the opinion so expressed was based on assertions or expressions of probability rather than on any firm evidence or data. In reply, Professor Seabright replied that the fact that there was a single provider of SPS meant that one was not in a position to know whether the price of that cover is already more than 10% above

a competitive price. Further, the value of the SPS cover might be considered much more important when the economy became less robust than at present.

Professor Seabright continued to emphasise the critical distinction between the value of the product as distinct from who should supply it. It had been established in the instant case that the SPS product was very valuable for credit unions. It had not, however, been established that the product must be supplied by the same institution or entity as the supplier of credit union representation services.

In further cross-examination, Mr. Collins put it to Professor Seabright that there was no commercial firm in the market which was in the business of selling representation services to credit unions, other than organisations which the unions themselves formed. Professor Seabright did not disagree with this suggestion, but disagreed with the

follow-up suggestion that this implied that credit union service is not a service which is traded between buyers and sellers. In his view, it is traded between ILCU and its members and the question of whether ILCU is not-for-profit or incorporated is not germane to the essential economic relationship involved in the transaction of the service. The nature of the service and the distinctness of ILCU from its members were the key elements in deciding the issue of tradability. In many cases, such as hospital services, the same market contains services produced both by 'for-profit' and 'not-for profit' organisations. Mr. Collins suggested that, while elements of the service bundle might be seen as commercial, the entire bundle could not be so seen. Professor Seabright disagreed, stating that both ILCU and CUDA are offering rival versions in the market of a range of services to those credit unions that choose to take them up. It was entirely accepted in European competition law that services which are transacted between a joint venture and parent companies are traded services. ILCU and the credit unions were in an analogous relationship.

Mr. Collins then suggested that there could be no abuse of any supposedly dominant position given that the credit unions themselves in a general meeting approve the annual payment to ILCU and thus, in effect, dictate the price to the supplier. Professor Seabright felt that any such decision was made following proposals from the officers of the society. The fact that Lucan District Credit Union expressed astonishment at the price being charged for LP/LS insurance seemed similar to the reaction of any customers to the behaviour of dominant firms. He accepted, however, that he had no other examples in mind of a dominant firm which granted its consumers the power to price the service.

Mr. Collins suggested that the SPS is an example of a non-tradable asset which makes the tradable assets of the credit union work more effectively. However, Professor Seabright felt the linkage with SPS was not necessary for the purpose of undertaking effective credit union representation services

He agreed with Mr. Collins that no competition problem arose in the insurance market from the mandatory Rule and requirement of ILCU that members pay for LP/LS insurance, because the market for LP/LS insurance itself was competitive and the mandatory requirement did not distort competition in that particular market. Professor Seabright added that it did not follow that the rule was incapable of causing a competition problem. The rule that requires that a credit union must buy LP/LS insurance or be expelled from ILCU has an anti-competitive effect which it would not have if the consequence of expulsion was different. There was a clear tie between purchasing SPS and purchasing whatever else the ILCU rules required to be purchased as a consequence of membership, including LP/LS services. In some ways the services formed a bundle.

Mr. Collins suggested that if the SPS service is an integral part of the bundle of credit union representation services, then there is no tying issue. In reply, Professor Seabright

stated that the key issue was whether the goods in the bundle were complementary and whether there was a reason in terms of costs for them to be produced together. This condition would be met if hypothetically only a producer of credit union representation services would be capable of operating an SPS. But he did not agree that this was so.

He agreed that some bundling or ties are pro-competitive and the task of economics is to distinguish harmful bundling from pro-competitive bundling. However, he repeated that bundling tended to be unobjectionable where the goods were complementary, such as shoes and laces.

The tying product in the instant case is the SPS product. As a result of the tie, the supplier could see off the competitive challenge for credit union representation services, and then would no longer be obliged by competitive pressure to price services at a competitive level. Mr. Collins suggested that a tying problem only arose if there were two markets and if the supplier of the SPS market was capable of aggressively pricing the representation market product down in such a way as to drive out the alternative supplier of that market, namely, CUDA. Professor Seabright agreed. Asked for factual evidence to support any suggestion that ILCU engaged in aggressive pricing, Professor Seabright stated that the tie forced reluctant individual credit unions to pay the costs of belonging to ILCU, including LP/LS insurance, in order to get what they really wanted, namely the SPS insurance. This meant that if a supplier of the bundle could say to a rival that unless they priced credit union representation services at zero, or close to it, the rival could never persuade customers to join up. In ILCU, you pay one price for the whole bundle. That fact was likely to weaken a rival or drive it out of the market. In some markets bundles are offered in a context where the rules allow one to substitute out and replace certain elements by something else. In this case it is very simple, it is a single price for the whole thing. This analysis did not mean that the tied product had a zero value, but rather that it had a zero price. A consumer might value credit union representation services, but if he had already been offered them at a price of zero, then a rival had to offer a price of zero to be able to compete.

Mr. Collins suggested there was no complaint from the Competition Authority about either the affiliation fee or the cost of the SPS service. That missed the point, according to Professor Seabright, because the very fact of having a bundle and paying a single price for everything means that the pricing decision affects potentially all of these markets. Including compulsory LP/LS charges changes the facts of what is happening in potentially all of the markets concerned, including SPS. Obliging people to buy LP/LS insurance at an inflated price acts, in the presence of a tie, as a covert way of raising the price for SPS insurance. He agreed that this did not distort competition in the LP/LS market, but what it did was abuse the dominant position of ILCU in the SPS market.

Mr. Collins suggested to Professor Seabright that the success of CUDA to date suggested that ILCU did not leverage its monopoly power by means of tying and use aggressive pricing to drive CUDA out of the market place. Professor Seabright disagreed. The various prospectuses issued by CUDA were naturally bullish and enthusiastic, but nonetheless they contained the warning that CUDA would have to persevere with efforts to transfer the control and management of the SPS fund to an independent trustee such as the Registrar of Friendly Societies. Asked if it was not possible for 21 credit unions to create a fund by putting aside some proportion of their assets, Professor Seabright agreed but pointed out that the fewer the credit unions involved the bigger the proportion of assets which would require to be set aside to provide equivalent SPS cover.

Mr. Collins then moved to the topic of barriers to entry. A barrier to entry may be described as taking place if a new entrant into the market is facing a cost of some sort

which an existing incumbent already in the market does not have to face. Professor Seabright agreed that the fact that ILCU had a stabilisation service which somebody else wanted was not of itself anti-competitive action on the part of ILCU. The issue came down to whether or not a competitor who would find it more expensive to set up his own SPS fund should have access to the SPS service of ILCU and, if so, under what conditions. He further agreed that this was only really a concern if the only source of the SPS service was ILCU, because if the tying was undertaken by a firm which was not dominant, there would be far less cause for concern. Professor Seabright agreed that when an undertaking made substantial investment in plant or facilities it was generally entitled to keep the benefit of that plant for itself and not be forced against its will to share it with its competitors. Mr. Collins then went through the five considerations enumerated by the European Court of Justice in the case of *Oscar Bronner v. Media Print* [1998)] E.C.R. I-7791, all of which require to be fulfilled before somebody who has a particularly valuable service or facility can be obliged to share it with a competitor. The first criterion was the likelihood that such a refusal to share would eliminate competition in a downstream market. Mr. Collins suggested that that would not occur, because CUDA can set up an SPS service, albeit at a higher cost. Professor Seabright stated that it was not the Authority's case that CUDA should have access to the SPS cover, but rather that individual credit unions should have such access. For this reason, the present case was a tying case, rather than an "essential facilities" case. He had not said anything about the essential facilities doctrine in his report. His evidence was limited to the issue as to whether the tying of SPS cover to the purchase of credit union representation services had a distortionary effect on the market for such services. Whether the activity of ILCU could properly be characterised as a refusal to supply SPS services was essentially a legal argument. However, regardless of the legal characterisation of the behaviour, the economic consequences amount to the same thing. It was his view that the refusal to share the SPS facility would mean that CUDA would be unable to continue as a significant competitor in the market for credit union representation services. (Day 6. Q. 34).

Secondly, Mr. Collins suggested the *Bronner* case also required the refusal to share the asset on the part of the firm which had it had to be shown to be incapable of objective justification. He suggested there were many efficiency reasons which outweighed any distortion of competition in the present case, including the benefit to people of coming together to form a representative body, the efficiency benefits of collective purchasing and the mutual benefit of an SPS service. Professor Seabright felt it was extremely difficult to use efficiency arguments in the context of the present case. He had always accepted that there were efficiency benefits from members of credit unions coming together. However, his objection was to the inclusion in the package of services of the compulsory element of SPS cover which was the one monopolistically supplied component of the current system. It was the tying of that component which was objectionable and he saw no evidence of efficiency benefits to justify it. Mr. Collins suggested that a wide variety of social factors, rather than purely economic efficiency arguments, had also to be taken into account. Professor Seabright agreed. However, those arguments were not pertinent to the SPS issue in his view.

Professor Seabright pointed out that it was important to establish that the restrictions on competition that breach Article 81.1 were necessary to the attainment of the putative efficiencies identified under Article 81.3. The issue precisely in the present case was that the collective provision of credit union representation services did seem necessary to the attainment of efficiencies, but the tying specifically of SPS cover with the other elements did not.

Mr. Collins suggested that no harm to savers with credit unions had been identified. Professor Seabright replied that his analysis looked for evidence of disadvantage to the individual member credit unions without subsequently considering if individual credit union members would also lose out. However, if individual credit unions had to pay higher prices for SPS cover, this would eventually have repercussions for their members. Harm in this sense had to be taken as including potential or prospective harm. While he agreed that the CUDA credit unions might offer higher interest rates to their service, that did not show up the very important additional harm which lay in the reduced security of members savings.

On re-examination, Professor Seabright emphasised that the cost of changing a supplier of SPS cover in the instant case involved significant switching costs and the established literature clearly testified to the anti-competitive effects of such costs.

The fact that ILCU provided SPS services from within the movement rather than sourcing it externally made all the difference because, if it were sourced externally, then it would be open to CUDA to source such cover externally as well. It is precisely the fact that such cover is not externally available that makes the tying of it to the purchase of the other elements of the credit union representation services anti-competitive. There was a proportionality consideration involved, namely, whether the cost of leaving ILCU would be such as to make it impossible for a rival supplier of credit union representation services to exist in the market. While no one suggested that leaving ILCU should be entirely costless, the fact that the cost includes something which then has an adverse effect on competition downstream would suggest that the cost of leaving was disproportionate.

It was very difficult to actually price the cost of access to the SPS fund for an ILCU member, because the bundled nature of the services on offer made it impossible to disaggregate the prices of each of the components. The bundle was a very clever way of signalling to both customers and competitors that if you get all of the other elements of the bundle, one particular element comes free. The important point is that where one sells a bundle, then the implicit cost of any one element of the bundle if you have already agreed to buy the rest is zero, and that is the price that the competitor in the market who is only offering one of these things has to compete against. The fact of tying can be interpreted as a commitment to provide one of the elements in the bundle at zero price.

This, effectively, was where the aggressive pricing element was at work, namely, in the way ILCU tied access to the SPS fund to the purchase of other services.

Finally, Professor Seabright stated that there was a "double tie" element in the present case, because for a credit union to access the SPS market, it had to (a) avail of credit union representation services from ILCU and (b) avail of their ECCU insurance product. However, anti-competitive concerns did not necessarily arise from the insurance element because the market for such insurance was very competitive. However, there were undoubtedly multiple ties taking place.

Professor Seabright finished by saying that at least 10% of the assets of ILCU consisted of assets of unions that were located in the North of Ireland. In his view this would normally suggest that there was a significant inter state trade implication arising in the case.

Mr. Patrick Massey is an economist and a director of Compecon Ltd which provides expert advice to state bodies and private undertakings in relation to competition and regulatory matters. He was director of the cartels division of the Irish Competition Authority from June, 2000 until September, 2001. He was the defendants' main expert witness.

He disagreed with Professor Seabright's view that there is a distinct market for credit union representation in the State, or that ILCU has a dominant position in any such market. In his opinion, the contention that there is such a market is not supported by the standard economic test for defining markets. Secondly, what the Authority describes as credit union representation services include a variety of different services and there are different markets for each of these, rather than a single market. To the extent that the Authority refers to activities that may genuinely be regarded as 'representation services' it is not clear, Mr. Massey stated, that such services are traded and there appears to be no market for such activities. Alternatively, if there is a market for such services it would appear to be far wider than that for credit union representation services.

He also believed that the evidence clearly demonstrated that ILCU did not enjoy a dominant position. The plain facts are that ILCU had been forced to revise its pricing strategy as a result of the decision by a number of member credit unions to purchase LP/LS insurance cover other than from the ILCU's own insurance company, ECCU. The fact that a firm has been forced to adjust prices in this way is totally inconsistent with the view that it is dominant, a point recognised by the European Court of Justice in its judgment in *Hoffman LaRoche* [1979] ECR 461.

Nor did the evidence support the Authority's claim that the ILCU savings protection scheme constitutes a barrier to exit which serves to prevent credit unions leaving ILCU or that it therefore prevents entry of rival suppliers of credit union representation services. He based this view on the following considerations:

(1) there is no obligation on credit unions established before 2001 to operate or participate in a savings protection scheme

(2) there is nothing to stop a rival provider of credit union representation services from establishing an SPS of its own. The costs of doing so are not such as could be considered to constitute a barrier to entry.

(3) the fact that a number of credit unions chose to disaffiliate from ILCU in order to purchase LP/LS insurance from other sources indicates that loss of access to the SPS does not constitute a barrier to exiting the ILCU.

(4) he was further of opinion that the evidence demonstrated that a number of credit unions have operated successfully over a long number of years outside the ambit of ILCU and therefore without the benefit of access to SPS, demonstrating that the absence of such cover is not an obstacle to operating as a credit union. Such evidence is contrary to the Authority's claim that lack of access to the SPS would make it difficult for credit unions to attract or maintain members.

(5) the ILCU was established in 1960 but did not set up its SPS until 1989. The Authority's argument that the SPS is a barrier to entry that prevents new providers of credit union representation services from entering fails to explain why such difficulties did not occur in the 29 years before the SPS was established.

He noted that, until very recently, the Competition Authority had claimed that the obligation to purchase LP/LS insurance from ECCU constituted a barrier to entry in the life insurance market, but this case had now been dropped. It had to be dropped in his opinion because ECCU has less than 1% of the life insurance market and thus has no market power in that market and could not therefore prevent, restrict or distort competition in that market. A number of commercial insurance companies provide LP/LS insurance. Therefore, there is no need for an alternative provider of credit union representation services to provide LP/LS insurance. This meant, Mr. Massey stated, that the Authority's argument that by

restricting competition in the life insurance market ILCU could prevent entry into the market for credit union representation services was wrong. Similarly, the fact there are other providers of such services means that the LP/LS obligation cannot be said to force potential providers of credit union representation services to simultaneously enter the life insurance market, thereby raising the costs of entry.

He felt that the Competition Authority was making contradictory arguments, because the Authority acknowledged that fixed costs were minimised in a collective organisation where they were spread across a large number of participating unions. Yet it was simultaneously arguing that ILCU was preventing competition by seeking to prevent entry by rival credit union representative organisations, and that as a result credit unions would pay higher prices for such services to the ultimate detriment of individual consumers who are credit union members. If one accepted that having such services provided by a collective organisation minimised costs and that 'strength in numbers' increased the effectiveness of such an organisation, then having services provided by competing organisations inevitably would increase the cost of services and reduce the effectiveness of their provision.

He did not think ILCU should be directed to grant non-member credit unions access to SPS. Such measures reduce the incentive for firms to invest in their own facilities. They had no incentive to do so if they could simply 'piggyback' on the investment of others. The net result would be a lessening in competition because the incentive to invest in new facilities would be eliminated. Such a requirement should only be imposed where such access is absolutely essential to allow a rival firm to compete and where it is simply not possible for such a rival to develop an alternative of its own. Such requirements had not been met in the case of the ILCU SPS fund.

In his opinion, the decision to disaffiliate ILCU members who chose to purchase LP/LS insurance from sources other than ILCU did not have the effect of preventing, restricting or distorting competition in the State or any part of the State, since the loss of access to the SPS did not constitute a barrier to entry for the reasons already outlined. For any case under s.4 of the Competition Act to arise, it was necessary to identify a trade in particular goods or services which is distorted by an agreement. The Authority had made no case that trade in any of the services provided by credit unions (savings, loans etc) were distorted by the ILCU agreement. Accordingly, the agreement on foot of which ILCU exists does not distort trade in any services provided by credit unions. The ILCU agreement itself is a mechanism which permits credit unions to provide services to themselves on a collective basis which could not be provided on an individual basis.

He was further of the opinion that the case advanced by the Competition Authority had failed to show any harm to consumers. Both the ILCU agreement and the SPS provide services which are of very considerable benefit to credit unions. It provides an inspection and monitoring service to credit unions to ensure that they are kept financially and administratively sound. The SPS can also provide remedial help to any credit union showing signs of weakness in those areas, thus ensuring the continued solvency of the credit union in question with obvious consequential benefits for that credit union.

Mr. Massey gave evidence that, before considering the definition of any relevant product market in which a particular firm was operating, it must first be shown that the firm is engaged in trading (i.e. buying or selling tradable goods or services to third party buyers or sellers). If a market of this sort does not exist, then no competition issues can arise at all. In the instant case, the members of ILCU were providing services to themselves and not from third parties. It was difficult to see how the advocacy services of ILCU could be described as a tradable service. Other activities of ILCU (such as its insurance activities)

undoubtedly did constitute activities and markets for tradable services, but ILCU's share of any such market was so small that its trading in those markets could not conceivably affect the competitive process in those markets. ILCU, for example, does not sell any supposed expertise in lobbying for legislative changes or advocating the merits of any group to third parties who might wish to avail of such services – that is the province of public relations firms, marketing firms and other undertakings of that sort.

Insofar as the SSNIP test was concerned, Mr. Massey stated that in 2002 the CUDA group of credit unions switched to other suppliers of LP/LS insurance, or threatened to do so, because of dissatisfaction with the price of LP/LS insurance provided by ECCU. He felt it was reasonable to assume that CUDA members would also certainly switch to other insurers in response to an attempt by the ILCU to increase its prices by 5%.

Mr. Massey stated that the bulk of ILCU's funding came from commission paid to the ILCU by ECCU. The bulk of this was due to LP/LS insurance cover, which ILCU members were obliged to obtain from ECCU. In his view, therefore, the price of credit union representation services could be seen as being equivalent to the proportion of LP/LS premiums that went to fund the ILCU, i.e. the commission paid to ILCU by ECCU, plus affiliation fees paid by member credit unions, which were paid into the SPS. Effectively these represented the amount that credit unions could be regarded as having paid for the services provided for by ILCU, howsoever those services might be defined. In 2001 this amounted to €12.9 million. This is made up of €8.7 million commission paid from ECCU to ILCU, €2.2 million operational rebate paid from ECCU to the ILCU and then appropriated to SPS, and affiliation fees of €2 million paid by member credit unions to the ILCU and then appropriated to SPS.

The Authority had also argued that LP/LS insurance was part of the bundle of credit union representation services. In that case the price of representation services could arguably be regarded as the total cost of LP/LS insurance, which in 2001 amounted to €46.8 million.

CUDA claims to have a total of 21 member credit unions that collectively had a membership of 343,000 and assets of €1.247 billion in 2001. Effectively, this meant that CUDA members account for around 5% of ILCU affiliated credit unions in the Republic of Ireland, but more importantly this group accounted for 15% of all credit union members and 16% of total savings with credit unions in the Republic of Ireland. In 2002 this group of credit unions either switched to other suppliers of LP/LS insurance, or threatened to do so due to dissatisfaction with the price of LP/LS insurance provided by ECCU. Mr. Massey stated that it seemed reasonable to assume that CUDA members would almost certainly switch to other insurers in response to an attempt by the ILCU to increase its prices by 5%.

The total payment by member credit unions to ILCU in 2001 was €12.9 million. Total membership of credit unions was 2.6 million, which means that the price paid to the ILCU was equivalent to €4.96 per individual credit union member. A 5% increase would raise this to €5.21. If the CUDA credit unions responded by ceasing to purchase LP/LS cover from ECCU, then this would reduce the total membership of ILCU credit unions to €2.257 million, which would generate total revenues of only €11.8 million. Even if credit unions accounting for only half the total CUDA membership transferred their LP/LS insurance business elsewhere, total ILCU income would be reduced to €12.6 million. The clear implication had to be that ILCU could not impose a 5% price increase. Therefore, Mr. Massey concluded, the Competition Authority was incorrect in stating that the relevant market is that for credit union representation services.

Mr. Massey went on to describe how the fact that ILCU provides services to its members does not mean that there is a market for such services. The economic theory of 'the firm' states that firms and markets are alternative organisational structures for providing goods and services. A firm may purchase raw materials and services from other firms on the open market and then sell its products to downstream firms and rely on competition between those firms to maximise its sales. Alternatively, a firm may produce its own raw materials and provide services to itself from within. In economic terms, it may vertically integrate. In Mr. Massey's opinion, that is precisely what happened with ILCU, because its members decided that they needed a body to promote and represent their interests. In that respect it is no different from any other trade or professional associations. This choice clearly implies that this option represents the most efficient means of organising the activities of the organisation. It also means that there is no market for the provision of representation services whether to credit unions or other professional groups. The activities of PR firms and lobbyists could be distinguished from representation services, because the latter organisation identifies members concerns, monitors legal and political developments in order to identify issues which may have implications for its members, comments on such developments, formulates a strategy to promote its objectives and engages in lobbying. In the vast majority of cases, such activities are carried out by organisations as in-house activities and are not purchased through the market.

Alternatively, if representation services were actually purchased through the market, there is no reason to believe that 'credit union representation services' would constitute a distinct product market. If there was a market for such services, one would expect to see firms specialising in the provision of such services, providing them to a wide variety of different clients by assigning responsibility for a specific group to a specific staff member. This would be akin to firms which represent professional sport players. The fact is that one does not find such firms because there is no market for such services.

On the question of dominance, Mr. Massey did not believe that ILCU occupied a dominant position, given that it had been compelled to alter its pricing behaviour as a result of the decision by some credit unions to obtain LP/LS insurance cover from other sources and as a result had been forced to cut its prices sharply in 2003 when average prices for LP/LS cover fell by almost 13%. Mr. Massey added that if credit union representation services was a distinct market, then ILCU as the sole provider would logically appear to be dominant. The evidence that ILCU was not in fact dominant was therefore a further indication that the Authority's market definition was wrong.

Mr. Massey disagreed that there had been any abuse of a dominant position by ILCU in relation to the SPS fund. No member had any proprietary right in the SPS or any entitlement to withdraw any part of the assets of the fund whether on leaving ILCU or otherwise. In his view, the SPS could be viewed as a joint venture between credit unions to provide a stabilisation service for their own benefit. It was not a joint venture between parties in competition with each other. He noted that the *European Commission Guidelines on Horizontial Co-operation Agreements* (O.J C3/2 2001) provide that

co-operation between non-competitors normally does not fall within Article 81(1) at all. Such categories of co-operation could only come under Article 81(1) if they involved firms with significant market power and were likely to cause foreclosure problems vis-à-vis third parties. Mr. Massey did not accept that the denial of access by ILCU to its SPS in respect of non-affiliated credit unions constituted a barrier to entry. To begin with, credit unions that were established before August, 2001, are not legally obliged to participate in a savings protection scheme. Secondly, as credit unions do not compete with each other, a credit union which does not have SPS cover is not placed at a competitive disadvantage relative to a credit union with such cover. Furthermore, the

evidence in his view indicated that individual credit unions had operated quite successfully outside of ILCU without access to its SPS. Even if there was a need to establish an alternative SPS, this would not act as a barrier to entry by new providers of credit union representation services, because there is nothing to stop a rival supplier of credit union representation services from establishing its own SPS for its members. In order to establish a fund equivalent to 1% of the total deposits of the group, each participant would logically have to contribute 1% of its deposits. It was not clear that this constituted a barrier to exit. Rather it represented the cost of providing SPS cover and is a cost which other credit unions, including ILCU and its members, have also had to bear. Looking at the situation of CUDA, its members have total deposits of €1.247 bn. 1% of that amounts to €12.5 million. CUDA claims that its members would save €1.5 million by switching to other insurers for LP/LS cover. They would save a further €340,000 in ILCU affiliation fees. In other words, savings to CUDA members would amount to €1.84 million annually. Effectively, this meant that the start-up cost of establishing an SPS fund equivalent to 1% of assets would be recouped in 6.8 years. In his view, CUDA members could reduce the upfront costs by establishing an SPS equivalent to a lower percentage of their combined assets initially and then build it up over time.

Mr. Massey did not agree that loss of access to the SPS constituted an exit or switching cost. Members contributing to the SPS received a benefit in return for such payments. If they ceased to be members they no longer benefited. To argue that they should be entitled to their money back upon leaving was akin to arguing that someone taking out fire insurance on their house should be entitled to claim their money back if they decided to switch insurer at the end of the year and that the failure to refund the premium constitutes a switching cost. It was also relevant to note that the ILCU scheme of SPS was only established in 1989, whereas ILCU itself was established in 1960. The Authority's argument that the denial of access to the SPS represented a barrier to entry by new credit union representative bodies begs the question as to why no rival credit union organisations have emerged before the establishment of the SPS. Credit unions seeking the right to obtain LP/LS cover from sources other than ECCU while at the same time retaining membership of ILCU and enjoying the benefits of membership including SPS cover are effectively seeking a 'free ride', and it was widely recognised in the economics literature that many types of vertical restraints are not anti-competitive but exist to prevent various forms of free riding. The requirement that ILCU member credit unions purchase insurance services from ECCU can just as readily be regarded as a form of vertical restraint.

On the issue of bundling, Mr. Massey stated that economics literature recognises that strategies designed to force potential new entrants in one market to simultaneously enter another and thus raise the costs of entry may be designed to prevent such entry. Imposing and enforcing a requirement to purchase LP/LS insurance from ECCU did not artificially raise costs or discourage the emergence of rival representative credit union organisations as had originally been claimed by the Competition Authority. Mr. Massey stated that economic analysis historically had been suspicious of bundling and tying practices, seeing it as a way whereby a dominant firm could leverage power from one market into another. Tying however did not arise where one product was an integral part of the other. In other words, if the credit union representation services consisted of all of the ILCU services including SPS, then the tying argument could not arise because there was a single composite product and not two separate product markets. Mr. Massey went on to say that he was unaware until he saw Professor Seabright's report that the Competition Authority was advancing the claim that SPS was a separate market and that the tie involved SPS and hence had not addressed this particular issue in his report.

He then on to deal with the issue of objective justification, noting that an action or a decision of a dominant undertaking in a given product market will not be seen as abusive if there is an objective justification for that action or decision, as distinct from an action carried out with the intention of eliminating or harming a competitor. It was his view that the SPS, by its nature, was something which could only be set up on a collective basis and, by its nature, was something which clearly served the economic interests of credit unions individually, the credit movement as a whole and indirectly the interests of individual credit union members. As ILCU was organised on a collective basis, it can only be available to those who choose to participate in the collective arrangements which give rise to it. If members leave those arrangements (whether voluntarily or by way of expulsion for breach of the collective arrangement) there is no logical or economic reason why they should either continue to avail of the benefits of the collective organisation or have some proprietary interest in a fund which they never had whilst they were members of the collective organisation. Thus the principle that those who are expelled or disaffiliated from ILCU for breach of the ILCU rules should no longer have recourse to SPS in his view met the criteria for objective justification. The restrictions serve the legitimate ends of creating and maintaining an SPS fund and providing good value LP/LS insurance for the widest number of credit unions. The restrictions in question are matters which are indispensable to achieving these legitimate aims and serve the pro-competitive purpose of enabling credit unions to compete in the much wider markets for financial products and services where credit unions are far smaller than many of the large financial institutions with whom they compete for deposits.

He agreed that a dominant firm could control a resource which is essential to engage in a particular line of business and which potential rivals could not hope to duplicate. He also accepted that to deny a competitor access to essential facilities offended competition law in many countries. This 'essential facilities' doctrine was first expounded in the *US Terminal Railroad* case (*United States v. Terminal Railroad Association of St. Louis* 224 US 383 (1912)).

However, in order to show that a facility is essential it is necessary to show that:

(a) the essential facility is controlled by a monopolist,

(b) the competitor cannot practically or reasonably duplicate the facilities,

(c) the competitor is being denied the use of the essential facility, and,

(d) it is feasible to provide access to the facility.

Mr. Massey stated that, in his opinion, access to an SPS was not essential for a credit union to operate. It is the case that there are a small number of credit unions within the State that are not affiliated to ILCU and which do not have access to its SPS. They included Dun Laoghaire Borough Credit Union, The Prison Service Credit Union and Telecom Eireann Staff Credit Union. All three had been able to operate for many years without access to the SPS. Both the Prison Service and Eircom Credit Unions had increased their membership and the amount of savings held by those members was substantial. Furthermore, it was in his view quite feasible for a new entrant wishing to provide such services to establish its own SPS.

Mr. Massey further stated that the Competition Authority had not shown that any actual harm was being suffered by consumers as a result of the activities of ILCU. On the contrary, the Competition Authority had argued that the collective provision of such services reduces costs and that 'strength in numbers' increased the effectiveness of the representative organisation. It logically followed, Mr. Massey stated, that having rival representative groups would increase costs and reduce effectiveness. Furthermore, the

Quarterly Bulletin of the Central Bank and Financial Services Authority showed that average interest rates paid by Irish financial institutions were around 2% during 2003. However, 50% of credit unions in that year paid members a dividend of 3-3.99% on their savings, while a further 15% paid members dividends of 4-4.99% and 1.5% paid

5-5.99%. In other words, the majority of credit unions paid members interest rates significantly higher than those offered by other financial institutions. This was a further indication that credit union members are not damaged by the actions of ILCU.

In Mr. Massey's opinion there was no appreciable distortion of competition arising by virtue of the rules and practices of ILCU. Even if there was, Mr. Massey was of the view that the various conditions set out in s.4(5) of the Competition Act, 2002, had been satisfied, because the operation of ILCU and its rules contribute to improving the provision of services and promoting economic progress. This is evident by the successful development of credit unions throughout the State over a long number of years. The services provided offer to individual credit union members an alternative to services on offer by other financial institutions. Many credit unions operate in less affluent areas and are a very important provider of financial services to communities who might otherwise not be well catered for by larger financial institutions. Also, the collective purchasing power available to ILCU members for insurance and other services had also contributed to greater efficiencies. For such collective purchasing to operate successfully, all member credit unions must participate in the arrangement. If individual members could opt out, then this would reduce ILCU's ability to get the best possible deal for its members. The SPS arrangement contributed to the provision of services and to economic progress since they provided reassurance to credit union members. They have also been used to assist credit unions which have encountered difficulties, thus enabling them to remain in being, which has contributed to the continued provision of credit union services to those communities served by such unions. Furthermore, the LP/LS insurance arrangements mean that some credit unions with a higher age membership profile obtain LP/LS cover at lower cost as a result of the pooling of risk across the entire credit union movement, akin to community rating and health insurance.

The success of these arrangements depended on the ability of ILCU to disaffiliate member credit unions who refused to participate in the arrangements, as otherwise unions would be free to opt at will. Furthermore, if disaffiliated credit unions could withdraw their contributions from the SPS fund, this would completely undermine the SPS and the denial of access to non-members was indispensable to the achievement of the overall benefits arising from the ILCU arrangements, since if non-members had an automatic right to join, they could benefit from the SPS, while not contributing in any other way to the overall activities of the ILCU. Further, there is no basis for believing that an agreement or decision to disaffiliate credit unions for refusing to purchase LP/LS cover from ECCU would afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. There were various other providers of such services.

Finally, Mr. Massey noted that the European Commission had recently published *Guidelines on the application of Article 81(3)* (O.J./27.08.2004) 27th April, 2004.

At par. 17, the *Guidelines* state:

"The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition

between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand)".

In the absence of the ILCU there would simply be no SPS. Mr. Massey indicated that in his view there was no market for the sort of stabilisation service that is the SPS. The SPS service is, by nature and definition, something which is provided by a group of credit unions to themselves on a collective basis. Without them coming together (i.e. in the absence of an agreement such as the ILCU agreement) there is no stabilisation service. Thus, he concluded, there is no market in which the introduction of the ILCU agreement can restrict competition.

Mr. Massey was then cross-examined by Mr. Gallagher and agreed with him that the SPS performed a very important role by serving the economic interests of credit unions, both collectively and individually. The SPS also indirectly served the interests of individual credit union members. He further agreed that the various insurance and financial services provided by ILCU were tradable services. Asked if entrepreneurs might plausibly consider that they would enter a market selling representation services to credit unions, Mr. Massey agreed that they would be tradable services if people were prepared to buy them. When Mr. Gallagher suggested that CUDA had entered the market doing just that, Mr. Massey replied no, that CUDA was like ILCU in that respect, because it was another example of credit unions providing a service for themselves as opposed to buying those services from independent third parties. He agreed, however, that if a third party entered the market offering credit union representation services for reward, they would certainly at that stage be tradable services. He agreed that individual credit unions did pay affiliation fees to both CUDA and ILCU, and certainly in the case of ILCU the money once paid over became part of ILCU's assets. Mr. Gallagher suggested that therefore there was no distinction between ILCU providing the representation service for a fee to its members and a third party company providing it for a fee to an individual credit union. Mr. Massey disagreed, stating that credit unions, like other professions, do not go out into the market to buy services but rather provide the service for themselves. The economic explanation for this was allied to the view of the theory of the firm which, having regard to transaction costs, chooses between doing something itself and buying it in the market. If there were greater transaction costs in buying something in the market, then the firm would vertically integrate the service and provide it to itself.

Asked if CUDA and ILCU compete with each other, Mr. Massey agreed that they did compete for members, but that fact did not create a market because a market involves transactions taking place between unrelated entities.

He agreed with Mr. Gallagher that, if credit union representation services constituted a distinct market, then ILCU occupied a dominant position in that market.

Mr. Massey accepted that PR services were tradable services and that certain forms of lobbying services were also tradable services. However, bodies providing such services would not be doing so as credit union representative bodies. The fact that one model of obtaining the service was overwhelmingly favoured was an indication that that model was so far superior to the alternatives that the alternatives really were just not a viable proposition. Both ILCU and CUDA provided a service that no outside body could really provide by way of alternative. If there was a market, which in his view there was not, then one would expect an array of bodies who would be out there selling those services. The plain facts were that an industrial body or professional group, while it might occasionally go to a PR company, does not assign responsibility for representation services to an independent third party. Mr. Gallagher suggested that because representation services were, at least in the abstract, capable of being a tradable service,

and given that Mr. Massey felt ILCU and CUDA could provide those services better than any outside agency, it suggested intuitively that there is now a market for the provision of credit union representation services, before ever one applied the SSNIP test. Mr. Massey disagreed.

With regard to the SSNIP test, Mr. Gallagher suggested to Mr. Massey that it was not the exclusive and only tool for defining a relevant product market, and that a 'common sense approach' or an 'innate characteristics test' had also been applied both in this jurisdiction and by the Commission. Mr. Massey agreed that such approaches had been adopted by the Commission, but the economic literature suggested that this was inappropriate and likely to lead to mistakes. Mr. Gallagher pressed him to agree that by application of the 'innate characteristic test', one could readily recognise the difference between agency services on the one hand and individual services that might be provided directly from the supplier of those services on the other hand, as had been recognised in the *Airtours* case. Mr. Massey agreed that that could be so. It followed therefore, Mr. Gallagher suggested, that a credit union could go to ILCU on a one-stop shop basis and get those services provided either directly by ILCU, or ILCU would make the arrangements on behalf of the credit union with the service providers, and that there was a distinct advantage for the consumer of those services in not having to go to the individual provider of each of those services separately. Mr. Massey agreed that such an arrangement did provide a distinct advantage for the consumer. However, Mr. Massey went on to explain that the fact that a range of economic transactions could take place within an organisation took the issue altogether out of the market because of the economic theory of the firm. That was the case across a wide variety of industrial groups and professions who had representative bodies. Whereas the Competition Authority saw the emergence of an alternative 'shop' selling representation services, he disagreed. In his opinion, what is happening is that the members of CUDA have come to the conclusion that their interests are no longer being adequately represented by the wider organisation and their solution is to establish their own organisation, not to go to some third party to buy representation services, but to do it for themselves. That is why, in his opinion, there is no market. His opinion was that the services were provided in-house, whereas the Competition Authority saw the provision of the services as an arms-length transaction. Even if a number of groups were formed up to provide representation services to their members, this would not in his view create a market. He accepted that such a view had the inevitable consequence that, if six groups combined and reached agreements that had anti-competitive effects, there would be nothing that the Competition Authority could do about it because there was no product market. However, this view applied to core representation services only. Where add-on type services, such as insurance and other financial services were concerned, Mr. Massey agreed that they would be traded and that there would be a market for such services.

Mr. Gallagher put it to the witness that there was a fundamental distinction between a company which had vertically integrated the services it required and ILCU because, firstly, ILCU could make its own decisions in accordance with its rules, was not controlled by any one credit union, and the assets of ILCU were not the assets of the individual credit unions. Mr. Gallagher further suggested that these features showed that ILCU was a distinct entity from its members. Mr. Massey said he did not believe that that distinction should be drawn. The collective organisation existed because the market alternative just would not work in the particular circumstances.

In relation to the SSNIP test, Mr. Massey agreed with Mr. Gallagher that it was no part of the test to examine whether a price rise would lead credit unions to switch from ILCU to CUDA. The test is certainly not to ascertain whether consumers would switch their demand from one competitor to another selling the same product, but rather whether

consumers would switch their demand from the product of that firm to some other substitute. In the instant case the hypothetical consideration did not arise, Mr. Massey said, because although ILCU was in fact a monopolist the evidence indicated that it was not able to push up its price because enough of its members left to go elsewhere to buy LP/LS insurance. Mr. Gallagher suggested that a clear error in Mr. Massey's analysis under the SSNIP test was that one was not starting with a competitive price or a price that would prevail in a competitive market, but rather a monopoly price, giving rise to what is known as the 'cellophane fallacy'. This expression arose from a celebrated case in the US Supreme Court which held that cellophane was not a distinct product market, which was a fallacy because the Supreme Court wrongly approached the matter by looking at the price then being charged by the cellophane producer, which was a monopoly price, and seeing what would be the effect in terms of switching in the case of a 5% - 10% increase on that monopoly price.

Mr. Massey replied that there was no evidence that the prices were excessive or at a level which a monopolist would charge, and accordingly did not accept that his analysis was faulty for that reason. Mr. Gallagher suggested, however, that Mr. Massey carried out his investigation without checking whether ILCU was charging a monopoly price, but simply took the actual price as per his calculation at face value. Mr. Massey accepted that, if ILCU was charging a monopoly price, his analysis would not provide any useful or reliable information.

Asked if he was aware that there was general dissatisfaction about a number of issues amongst credit union members with ILCU, including the ISIS issue, which might explain why certain unions left ILCU, Mr. Massey agreed that these would not be pricing issues, although he understood that certain pricing issues formed a significant part of the dissatisfaction. Mr. Massey felt that the SSNIP test was applicable on the evidence, because there was evidence to indicate that a number of unions had gone elsewhere to buy insurance services more cheaply and had joined CUDA for that reason, suggesting to him that in such circumstances, if ILCU attempted to increase the price by a further 5%, then the member credit unions would not have paid that high a price. He accepted that both the Commission Notice and economic literature on the SSNIP test assumes that other factors are not involved, that all other matters are equal and that one is looking solely at the effect of the price increase. However, he accepted, somewhat reluctantly, that factors other than price were causing dissatisfaction within ILCU which could be a confounding, if not a negating, factor for the application of the SSNIP test.

On the issue of dominance, Mr. Gallagher asked Mr. Massey whether he was aware of any situation where a firm had an 80% share of the market and was not regarded as dominant. Mr. Massey agreed that such a situation would be exceptional. He pointed out that there were cases where market shares of even less than 50% have been held to constitute dominance.

Asked why any credit union would pay affiliation fees to both ILCU and CUDA, Mr. Massey said he didn't know. Mr. Gallagher strongly pressed him to agree that it was because of the possibility of losing access to the SPS service. Mr. Massey was reluctant to agree, stating that individual credit unions might decide to hedge their bets by opting to join a new organisation but deciding they didn't wish to "burn their boats" with the larger organisation.

Mr. Massey agreed that SPS was important and a benefit to credit unions, and that an individual credit union could not provide it for itself. He agreed with Mr. Gallagher that the more credit unions that were in an SPS fund, the better the diversification of risk and the more advantageous it was to the fund. Mr. Gallagher suggested that it was therefore

advantageous to ILCU to allow non-member credit unions continued access to the Fund. Mr. Massey suggested that a union leaving ILCU might create monitoring problems in that ILCU, which is responsible for the Fund, might be unable to ensure that proper financial and accounting standards were maintained. Mr. Gallagher suggested this objection could be met by ensuring that continued membership of the Fund is subject to compliance with objective regulatory or accounting standards. Mr. Massey felt that they might not be full substitutes for having the credit unions remain within the organisation. However, he hadn't carried out any analysis on this topic. He also agreed that SPS could not be obtained from anyone else at present.

While the SPS is a present part of the service being provided by ILCU, Mr. Gallagher suggested that there is no valid reason why the provision of that service is tied into a union being a member of ILCU and taking all the other services from it. Mr. Massey did not disagree with this proposition, but stated that the SPS was a system put in place by the ILCU for its own members.

Mr. Gallagher suggested that SPS and representation services were not complementary goods or services. Mr. Massey said that there was, however, a link, between LP/LS and the SPS, as LP/LS reduced the risk of claims on the SPS so that it could be said that there was some degree of complementarity.

When it was put to him that some strong cost complementarity was needed to justify tying SPS to ILCU membership, Mr. Massey replied that tying was 'okay' unless one can show serious harm emanating from it. Mr. Gallagher put it to him that the SPS was independent from the other services provided by ILCU, that ILCU was dominant in the provision of SPS, and that therefore it did require justification. Mr. Massey disagreed, saying that the tie in this instance would have to be shown effectively as being capable of driving out competitors and preventing any rival supplier of the service entering the market and that that was not the situation here. CUDA had already achieved a 20% market share. Accordingly, the requirement for the tie to be harmful had not been met. He agreed that the inability to retrieve funds put into the SPS was a disincentive for leaving ILCU. While he saw some inequity in that situation, that was not an issue as far as competition rules were concerned. Further, if members could leave and take their share of the Fund with them, that would undermine the very basis of the Fund and arguably would create an even more serious inequity. If a large credit union was in difficulty and withdrew its funds, it could serve as a signal for other credit unions to immediately follow suit. Mr. Gallagher argued that if that was so, it was surely all the more important that disaffiliating credit unions be allowed to remain part of the Fund.

Mr. Gallagher suggested the SPS fund is the only fund in existence which is capable of now being approved under the 1997 Credit Union Act, so that any new entrant into the market must effectively join that fund and, according to ILCU rules, avail of all the other ILCU services. Mr. Massey accepted that that was the case for so long as there was only one fund. He further agreed that a new entrant could not avail of the services being provided by CUDA where that organisation did not itself create a SPS fund which was approved. Mr. Gallagher suggested that this represented a significant distortion in the market for rival services. Mr. Massey accepted that if these assumptions were correct, then he would have to agree. Mr. Gallagher suggested that it would be in ILCU's own interests in terms of the fund to remove the tie or barrier so as to allow disaffiliating unions to continue to be part of the fund even if not availing of other ILCU services. Mr. Massey suggested that that would involve ILCU acting contrary to its own interest. Mr. Massey contended that nothing ILCU did by way of tying under its rules had the effect of foreclosing or weakening the market, which would be necessary before one could say

ILCU is acting anti-competitively. It was not sufficient to say that the effect of its rules might merely distort competition in the provision of credit services.

Mr. Massey agreed it would take years to build up an alternative fund, depending on the contributions credit unions were prepared to make. He believed CUDA and its members could establish a fund. In the meantime, disaffiliated credit unions were not suffering harm or disadvantage. Indeed the vast majority of credit unions emerged, developed and expanded their membership in the period before the SPS was ever established in 1989. The fact that it might be a good public policy consideration from a regulation point of view to have an SPS fund was not a competition issue. An alternative fund would almost certainly fall some way short of being an adequate insurance scheme, but that did not mean that the alternative scheme would not meet the concerns of the Competition Authority. However, he agreed that there was nothing as good or as secure as the protection offered by a large fund to its members.

He did not agree that the lack of a comparable protection scheme was a strong disincentive to individual credit unions leaving the ILCU. For example, the Lucan Credit Union decided voluntarily to disaffiliate, so were obviously of the view that they would be better off outside ILCU, regardless of the denial of access to the SPS fund. Accordingly, any alternative fund, in Mr. Massey's view, should suffice for the purpose of ensuring that members didn't leave credit unions.

Mr. Massey described how in his opinion an SPS was not an essential facility for disaffiliating credit unions, because it was possible to set up an alternative fund. It would only be a consideration in the case of new credit unions. The real question was whether it was an essential facility for a credit union representative body.

In Mr. Massey's view, all the advantages lay in having a single large representative body. Separate organisations would mean that the costs to the members would be increased. Furthermore, there is strength in numbers in terms of representation, so that having rival bodies who, by definition, will each have fewer members than one body means the quality of representation will be reduced. In his view, having more than one body might actually reduce the services which could only be provided at higher cost. Asked if Mr. Massey was in effect arguing that the market gives rise to a natural monopoly, Mr. Massey agreed. He agreed that natural monopolies were unusual, but they certainly do exist.

In re-examination, Mr. Massey said that there were no people out in the market buying or selling SPS services. For example, one cannot buy such cover from an insurance company. Thus it is not a tradable commodity, but rather is the equivalent of something that a company does for itself in a situation where it is not possible to actually buy it though the market. He agreed that it was extremely difficult to apply the SSNIP test in these circumstances, because it was difficult and impossible to find past market prices. The SSNIP test presupposes the existence of a market.

He was satisfied that the 'firm' versus 'market' distinction was well made in this case. This was a case analogous to those cases where out-sourcing transaction costs was so expensive as to persuade an organisation to provide the services to itself. People within the credit union movement gave up a great deal of their free time on an unpaid basis to ensure that this service was provided from within the general group. There were all sorts of efficiencies generated by this approach. Firstly, the more members in the representative body, the more 'clout' the body had. The fixed costs are spread over a wider variety of members. Further, the costs of any alternative were prohibitive.

Insofar as the non-advocacy functions were concerned, there were further efficiencies. The organisation by virtue of its size could buy products such as insurance on better

terms than the members could by acting individually. Further, obtaining the services from within from a non-profit company reduces costs because there is no requirement to pay a profit-generating premium to a commercial insurance company. Furthermore, it was inherent in the coming together of different unions in a collective that they could equalise premium levels, whereby larger unions in effect subsidise the smaller more risky units. The particular arrangements reflect the fact that in this instance there are social, as opposed to purely economic and commercial, objectives being pursued by the organisation.

In his view, the efficiencies satisfied the requirements of s.4(5) of the Competition Act, 2002.

Mr. Massey confirmed that for virtually all the years up to 2004, 84% of the revenues of ILCU were made up of the LP/LS premium and the balance was the affiliation fee from each credit union. The income going to ECCU was used to pay claims and the balance was given to the general fund. Now there is a direct contribution to the SPS of 9% that is paid along with an LP/LS premium and then a lower affiliation fee. Mr. Massey explained that he did three or four different price calculations for the price of ILCU services for the purpose of the SSNIP test. ECCU, however, did not charge a monopoly price for its insurance service, given that it was in a competitive market. It was therefore wrong to suggest the "cellophane fallacy" consideration applied to this case, not least because neither ILCU nor its individual members were profit organisations and therefore did not conform to the economists' assumption of a profit-maximising firm.

In his view, ILCU did not possess market power over the pricing of its products or services. It had, in fact, been forced to modify its prices and change its pricing behaviour, indicating it lacked such power. Further, if a supplier's prices were dictated to it by its customers, being in this case the credit unions, it was a further indication that the supplier did not have market power. Also, if a firm does not have market power, it cannot be regarded as dominant. For example, a firm could have a very high market share of 90% or almost 100%, but if there are no barriers to entry, most economists would say the firm does not have market power.

PART I: UNDERTAKING AND TRADABLE SERVICES ISSUE

It is contended on behalf of the Competition Authority that the ILCU is an undertaking or, in the alternative, an association of undertakings.

Section 3(1) of the Competition Act, 2002, defines an undertaking as:

> "A person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service."

The preamble to the Act makes reference to:-

> "the prohibition of activities which prevent, restrict or distort competition in trade in the State or which constitute an abuse of a dominant position in such trade …"

Mr. Gallagher submitted that in EU competition law it is well established that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. (*Firma Ambulaz Golckner v. Landkries Sudwestpfalz* (2001) ECR 8089 at par. 19). Mr. Gallagher submitted that the difference in the wording in the Irish definition is designed to emphasise only that the undertaking must be involved in an economic activity and that there is no difference in substance between an "undertaking" in national law and EU law. Further, the requirement of compatibility between national and EU law deriving from regulation 1/2003 and the

general principles of EU law require that the concept of "undertaking" in the Act should be consistent with the concept in EU law.

He submitted that in *Deane v. VHI* [1992] 2 IR 319 the Supreme Court declined to adopt an interpretation of the words "for gain" as equating with "for profit" and stated:

> "… the true construction of this section is that the words "for gain" connote merely an activity carried on or a service supplied, as it is in this case, which is done in return for a charge or payment and that, accordingly, the defendant does come within the definition of an undertaking in the Act of 1991".

In *Greally v. Minister for Education* [1995] 3 I.R. 481 a trade union was found not to be trading and Costello P. stated (at p. 484):

> "In the present case the trade union levies subscriptions from its members who are bound together to achieve a common purpose. But the trade union is not "trading". In *Deane v. VHI* [1992] 2 I.R. 319 it was clear that the VHI was engaged in a commercial activity in the relevant market and was an 'undertaking' even though it was not engaged in making a profit. Here the trade union is not engaged in any commercial activity, rather it is providing a service for its members for a common purpose. I am satisfied, therefore, that the fourth defendant is not an 'undertaking' for the purposes of the Act of 1991".

Mr. Gallagher submitted that the services provided by ILCU to credit unions were clearly carried out for gain in the sense that payment was received by ILCU for such services and that the services in question were commercial in nature. They were, he submitted, services provided "in the course of trade". He submitted that ILCU acts as an intermediary between its members and the various product and service markets which it accesses on behalf of its members. Furthermore, the bulk of the services are services provided by a number of operators in a commercial context.

It could not be said that ILCU performed a social or regulatory role, although the credit union movement did have a distinct ethos. It was engaged in commercial activities and competed in a commercial sense with CUDA.

Alternatively, he submitted, ILCU is an association of undertakings, or both an undertaking and an association of undertakings. ILCU can and does effectively operate as both. In *Dansk Pelsdyravlerforening v. Commission* [1992] ECR II-1931 the CFI held that the Danish Fur Producers Association was both an association of undertakings and an undertaking in itself. It stated that the fact that the association was a co-operative body could not affect the economic nature of its activity in organising auction sales of skins.

In *Wouters & Ors v. Algamene Raad Van Den Nederlandse Rado Van Advoheum* (2002) 1 ECR 1577 the ECJ considered the issue of whether an association of undertakings was an undertaking itself, and the sole criterion applied was whether or not the Dutch bar association carried on an economic activity. As the bar representative body did not carry on an economic activity the court took the view that it was not in fact an undertaking. It nevertheless accepted the principle that a body could be both an undertaking and an association of undertakings. Similarly, the Competition Commission Appeal Tribunal in the United Kingdom in the case of *Institute of Independent Insurance Brokers v. Director General of Fair Trading* ruled in 2001 that the General Insurance Standards Council was both an association of undertakings and an undertaking, noting that the rules of the body were:

> "intended to establish a system of self-regulation governing the selling, advising or brokering of general insurance carried on from a permanent place of business in the UK".

While the Tribunal did not have to decide the key question of whether or not the Council was an undertaking, it nonetheless indicated that it could see no compelling reason why GISC should not be regarded as itself an undertaking, the determining factor being that the entity engaged in an economic activity.

Individual credit unions are clearly undertakings having regard to the fact that they provide a range of financial services for their members "for gain". Accordingly, ILCU being an association of individual credit unions is an association of undertakings.

Mr. Gallagher then addressed the issue as to whether or not ILCU was engaged in tradable or non-tradable services, accepting that if ILCU engaged in non-tradable services it was not subject to Competition Authority scrutiny or competition rules.

Mr. Massey's contention that all services were supplied from within ILCU rather than out-sourced and were in consequence not tradable ignored the fact that neither ILCU or CUDA can be identified with any individual credit union. They are distinct entities in economic terms. ILCU recommends the affiliation fees paid by members and its ECCU subsidiary determines the price for LP/LS insurance. Individual credit unions must then pay these fees to ILCU in order to obtain services. Once the fees are paid to ILCU, the individual credit union has no further control over the moneys and they can then be used by ILCU for its purposes as it thinks fit. Furthermore, CUDA is a distinct legal entity from its members which has its own assets and makes its own decision. It too is distinct from its individual members, though it provides services to those members

Mr. Gallagher submitted that a market exists where there are transactions between distinct entities and consequently that the services which are the subject of those transactions are traded and therefore tradable services. The more appropriate analogy for the relationship between ILCU and its member credit unions is that of a joint venture company and its parents: while individual credit unions have a "share" in ILCU, this does not make them identical with ILCU, in exactly the same way that a firm engaged in a joint venture with other firms is not identical to the joint venture itself. More significantly, the Competition Authority relied on the emergence of CUDA to clearly establish that there is a market for the provision of services of the kind that issue in the instant case and, in theory, at least, other parties, such as public relations firms and specialist lobbyists, could also provide advocacy services of the type provided by ILCU and CUDA to credit unions.

The fact that firms have an option to provide services on an in-house basis does not prevent the existence of a market. In *Virgin/British Airways* OJ [2000] L 30/1, the Commission stated, in acknowledging the existence of a distinct market for air travel agency services (an intermediary services market similar to that contended for by the Authority in the instant case):

> "This practice in the air transport industry creates a market in air travel agency services, which are purchased from travel agents by airlines. The fact that airlines are increasing their efforts to increase to perform these activities themselves, in effect to perform these services 'in-house' rather than buying the services of travel agents, does not alter the fact that this is a distinct market. There are many markets where customers have the option of producing some or all of their requirements for a product themselves. This does not prevent there being a relevant market for these products, but does effect the market power of the various suppliers and purchasers."

Professor Seabright also pointed out that the flow charts submitted in evidence showing how ILCU charged its members before and after January 2004 clearly demonstrated that economic transactions took place between the members and ILCU which are distinct

organisations, that such services are provided and rendered for payment, and that in those circumstances, the services are clearly being traded.

Mr. Gallagher accordingly submitted that the requirement to establish that ILCU was an undertaking, or association of undertakings, or both, and was engaged for gain in the production, supply or distribution of goods or the provision of a service was clearly met on the facts of the instant case.

In reply, Mr. Collins stated that it was not in dispute that each individual credit union is an undertaking. He further accepted that as an individual credit union is a body corporate, it is also correct to regard it as "engaged for gain" in the provision of services, having regard to the wide definition of that concept as set out in *Deane v. VHI* [1992] 2 I.R. 319. Nor was it in dispute that the credit unions who had come together and who had formed the agreement that makes up the ILCU (the terms of which agreement are the rules of ILCU) were an association of undertakings. However, Mr. Collins argued that the concept of "association of undertakings" is only relevant to the case under s.4. The concept of an abuse of a dominant position under s.5 is an abuse "by one or more undertakings", but there is no reference to the concept of "association of undertakings". Secondly, insofar as associations of undertakings are concerned, the conduct prohibited under s.4(1) relates to "decisions by associations of undertakings". The only decision by ILCU challenged in these proceedings, he argued, is the decision to proceed with the disaffiliation process against the twelve credit unions who are not abiding by the rules of ILCU.

On the question as to whether ILCU itself is an undertaking, Mr. Collins submitted that a particular body may be an undertaking in respect of some of its activities but not in respect of others. For example, a local authority might sometimes act under its public law powers whereas at other times it might act as a commercial entity. A functional approach should therefore be adopted to determine whether a particular entity qualifies as an undertaking for the purpose of competition rules (Whish, *Competition Law*, 5th ed., (London 2003) at pp. 82 – 83).

Thus, Mr. Collins argued, ILCU could be seen as an undertaking when it engaged in the provision of LP/LS insurance services.

Mr. Collins accepted that the dividing line between the sort of economic activity which qualifies a body as an undertaking and non-economic activity can be a fine one. For example, the ECJ had held that the concept did not encompass organisations charged with the management of certain compulsory social security schemes based on the principle of solidarity (*Poucet v. Assurances Generales de France* [1993] ECR I-637). In *Sodemare v. Regione Lombardia* [1997] ECR I-3395 Advocate General Fennelly had defined the principle of solidarity as:

> "The inherently uncommercial act of involuntary subsidisation of one social group by another".

Mr. Collins submitted that ILCU was an association organised on the principle of solidarity, as was clear from its mission and vision statements and from its underlying philosophy. This could be seen from the risk equalisation principle which informed the premium-charging structure in ECCU. In the case of *Albany International v. SBT* [1999] ECR I-5751) Case L-67/96, ECJ held that a pension fund which had been established following a collective agreement between organisations representing employers and workers in the textile industry sector was an undertaking, but also found that the agreement between the various employers and employees organisations was not an agreement between undertakings. These agreements had a distinct social purpose which in the view of the ECJ would be seriously undermined if they were subject to the

competition rules of the Treaty and therefore they fell outside those rules. Mr. Collins also cited the decision in *Greally v. Minister for Education* [1995] 3 I.R. 481, in which Costello P. held that the Association of Secondary School Teachers as a trade union was not an undertaking because it was not engaged in trade but was merely providing a service for its members for a common purpose.

Alternatively, Mr. Collins suggested that, if the court took the view that ILCU was an undertaking, it should qualify that view by seeing it as an undertaking only for certain purposes where it engaged in economic activity. With regard to its other activities which would not be within the concept of economic activities (for example, its advocacy functions), ILCU would not be engaged in an economic activity and would not for this purpose be regarded as an undertaking for the purposes of competition law.

On the second limb of this part of the case, Mr. Collins submitted that the plaintiff must show that the services provided by ILCU are "tradable services", the price of which is of concern to consumers. In other words, the organisation must be engaged in trade in goods or services which consumers are prepared to purchase. ILCU constitutes an agreement between a large number of credit unions who had come together to enable themselves to do certain things which can be done more efficiently on a collective basis.

It is open to a representative organisation for a particular industry or sector, not merely to engage in public debate and advocacy on issues of common concern, but to engage in self-regulation and to provide services to itself by way of vertical integration. The SPS could be seen as a service which ILCU had chosen to provide to its own members as part of an integrated package. ILCU is not a body which sells advocacy services, lobbying services, insurance services or any other services to third parties. It simply provides those services to its own members.

DECISION

It is clear that neither ILCU nor CUDA can be identified with any individual credit union. ILCU does comprise all the credit unions which are members thereof, but that is quite different from saying that ILCU is identical to any individual credit union. It is not. It has its own premises and assets and the assets are only available to the member credit unions to the extent that there is a surplus in a winding-up. Decisions are made by the board of directors or alternatively, by the members in general meeting. ILCU recommends the affiliation fees which are paid by members and its ECCU subsidiary determines the price for LP/LS insurance. Individual credit unions must then pay these fees to ILCU in order to obtain services. Once the fees are paid to ILCU, the individual credit union has no further control over the moneys and they can be used by ILCU for its purposes as it thinks fit.

Insofar as CUDA is concerned, it is both a distinct legal entity and distinct from its members. It too has its own assets and makes its own decisions. It is distinct from its individual members though it provides services to those members.

The definition of an undertaking in the Competition Act, 2002, includes an unincorporated body. Furthermore, a long line of ECJ authority exists to the effect that the concept of an undertaking encompasses every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed. If Mr. Massey's proposition is correct, it would have the extraordinary consequence that the actions of unincorporated associations providing services to their members would escape scrutiny from a competition law perspective.

The mere fact that ILCU involves co-operation between individual member credit unions does not prevent it being an undertaking. In *Dansk v. Pelsdravlerforening v. Commission*

[1992] ECR II-1931 the CFI held a that co-operative association comprising fur breeders which brought together five provincial associations, and whose objects were to act as a link between the provincial associations to create a spirit of solidarity and community between Danish fur breeders, to foster the development of fur breeding in Denmark, and to represent fur breeders interests vis-à-vis the authorities and other trade sectors, was an undertaking. The CFI said:

"In the context of community competition law, the concept of an undertaking encompasses every entity engaged in economic activity … regardless of the legal status of the entity, and the organisation of public auction sales of skins is an economic activity. The fact that DPF is a co-operative organised in accordance with Danish law cannot affect the economic nature of its activity. Secondly, the court considers that DPF may also be regarded as an association of undertakings, since, according to the actual wording of s. 4(1) of its regulations, it is intended to bring together, not only natural persons, but also limited companies, partnerships and any other firm or company, which, by its nature, also carries on economic activity".

In *Hofner and Elser v. Macrotron* [1993] 4 CMLR 306 the ECJ stated:

> "It must be observed in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.
>
> The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.
>
> It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules".

While the defendants dispute that the lobbying/PR services carried on by ILCU constitute economic activities, they do not quarrel with the proposition that the financial and insurance services constitute economic activities. Furthermore, in my opinion, lobbying and representational services are also tradable services, as indeed is evidenced by the emergence of CUDA as an organisation offering similar service to its members in return for a fee or payment. While it may not be the case in Ireland, representational and lobbying services are both well established and well rewarded in other jurisdictions, notably the US, and this proposition was not contested by the defendants. Furthermore, the provision of SPS is in my view also an economic activity carried on for economic purposes with an economic objective.

In the cited case of *Albany International BV v. Stichting* [1999] ECR I-5751 the ECJ held that a pension fund charge for the management of the supplementary scheme set up by a collective agreement concluded between organisations representing employers and workers in a given sector, to which affiliation had been made compulsory by the public authorities for all workers in that sector, constituted an undertaking within the meaning of Article 82 of the Treaty even where the fund is non-profit making and despite manifestations of solidarity. The ECJ said:

> "Accordingly, by contrast to the benefits provided by organisations charged with the management of compulsory social security schemes of the kind referred to in *Poucet*, the amount of the benefits provided by the Fund, depends on the financial results of the investments made by it, in respect of which it is subject, like an

> insurance company to supervision by the Insurance Board … it follows that a sectoral pension fund of the kind in issue in the main proceedings engages in an economic activity in competition with insurance companies. In those circumstances the fact that the fund is non-profit making and the manifestations of solidarity referred to by it and the intervening governments are not sufficient to deprive the sectoral pension fund of its status as an undertaking within the meaning of the competition rules of the Treaty."

It follows, therefore, in the present case that, even if a social objective is sought to be achieved by ILCU, that does not prevent it from being an undertaking. The charges made by ILCU and the benefits conferred on its members depend on the financial results of its trading activities, including its investments, and in those circumstances, it is clearly, in my view, an undertaking. Furthermore, ILCU has no statutory or regulatory function, so cannot be seen as performing public authority type functions. In my view it is both an undertaking and an association of undertakings within the meaning of the Competition Act, 2002, and within the meanings attributed to those definitions for the purposes of EC and national law. It clearly operates commercially and for gain in the wider financial market in Ireland.

In relation to the contention that the services provided are non-tradable, the defendants' case rests entirely upon the evidence of Mr. Massey, evidence which was flatly contradicted in this regard by Professor Seabright. Mr. Massey's contention was based on the proposition that no services are being traded because the credit unions must be regarded as supplying these services to themselves. This contention, if correct, would provide a wide range of activities with a shield against competition law scrutiny.

The fact that the services are tradable, including the advocacy services, is nowhere more evident than in the emergence of CUDA, which is effectively competing with ILCU for members for the provision of representation services. As already mentioned, it is certainly possible that other parties, such as public relations firms and specialist lobbies, could also provide advocacy services of the type provided by ILCU and CUDA to credit unions.

I think Professor Seabright is correct in characterising the relationship between ILCU and its member credit unions as that of a joint venture company and its parents. While individual credit unions 'have a share' in ILCU, this does not make them identical with ILCU in exactly the same way that a firm engaged in a joint venture with other firms is not identical to the joint venture itself.

Furthermore, the fact that firms have an option to provide services on an in-house basis, and that they do so, does not prevent the existence of a market. In *Virgin/British Airways* OJ [2000] L30/1 the Commission stated, in acknowledging the existence of a distinct market for air travel agency services (an intermediary services market similar to that contended for by the Authority in the instant case):

> "This practice in the air transport industry creates a market in air travel agency services, which are purchased from travel agents by airlines. The fact that airlines are increasing their efforts to perform these activities themselves, in effect to perform these services 'in-house' rather than buying the services of travel agents, does not alter the fact that this is a distinct market. There are many markets where customers have the option of producing some or all of their requirements for a product themselves. This does not prevent there being a relevant market for these products, but does affect the market power of the various suppliers and purchasers."

Professor Seabright, whose evidence generally I prefer to that of Mr. Massey, also pointed out that the flow charts submitted in evidence showing how ILCU charged its members before and then after January 2004 clearly demonstrate that economic transactions take place between the members and ILCU, which entities are distinct from each other, and that such services are provided in return for a payment. In those circumstances, I am of the opinion that the services are clearly being traded.

PART II: APPLICABLE LAW

The court has already referred to article 3 of Council Regulation (EC) No 1/2003 which effectively provides that national courts must also apply EU law to agreements, decisions by associations of undertakings or concerted practices where trade between member states is affected. The regulation itself makes clear at par. (8) of the recitals that this is necessary in order to ensure the effective enforcement of the Community competition rules and the proper functioning of the co-operation mechanisms contained in the Regulation. If the prerequisite condition of 'trade between member states' is not fulfilled, the case will fall to be determined solely under the provisions of the Competition Act, 2002. Given that the relevant provisions of s.4 and s.5 of the Competition Act, 2002, are identical to those contained in Articles 81 and 82, the parties have been able to agree that the same economic analysis is required and the same legal principles apply. However, the distinction is not without importance, having regard to certain obligations imposed on national courts and national competition authorities under Articles 11, 15 and 16 of R.1/2003, to which I will presently refer.

Section 4 of the Competition Act, 2002, provides:

> "(1) subject to the provisions of this section, 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 are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
>
> (b) limit or control production markets, technical development or investment,
>
> (c) share markets or sources of supply,
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.
>
> (2) An agreement, decision or concerted practice shall not be prohibited under *subsection* (1) if it complies with the conditions referred to in sub-s. (5) …
>
> (5) the conditions mentioned in sub-ss. (2) and (3) are that the agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not -
>
>> (a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives.

(b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."

Section 5 of the Act provides:

"(1) 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".

Section 14 of the Competition Act, 2002, also provides:

(2) the Authority shall have a right of action under this subsection in respect of an agreement, decision or concerted practice or an abuse which is prohibited under s. 4 or 5 or by Article 81 or 82 of the Treaty.

(7) Where in an action under sub-s. (1) or (2) it is finally decided by the court that an undertaking has, contrary to s. 5, abused a dominant position, the court may, either at its own insistence or on the application of the Authority, by order either –

(a) require the dominant position to be discontinued unless conditions specified in the order are complied with, or

(b) require the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or otherwise as the court may specify."

Reference has already been made to Article 5 of R. 1/2003, which confers power on the competition authorities of Member States to apply Articles 81 and 82 of the Treaty and, for this purpose, acting either on their own initiative, or on foot of a complaint, they may take, *inter alia,* decisions requiring that an infringement be brought to an end and ordering interim measures where appropriate. As already noted, the High Court is designated as a competition authority for this purpose where R. 1/2003 is being applied.

Article 11(4) of chapter IV of R.1/2003 deals with certain procedural sequelae which follow the adoption of a decision by a competition authority under Article 5 and provides:

"No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision, or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case."

On the 30th of July, 2004 the court, because it was acting in its role as a designated competition authority, provided its envisaged decision (as it then was) to the Commission pursuant to Article 11(4) of R. 1/2003. The Commission for its part provided at that time an undertaking to the court that confidentiality would be maintained in respect thereof and that no information with regard to the content or outcome of the envisaged decision would be made available to the competition authority of any Member State, including the plaintiff herein. Thereafter on the 8th day of September, 2004 the Commission notified the court that it had no observations to make in respect of the envisaged decision.

I turn again now to the question whether inter state trade issues arise in the present case.

The Irish Competition Authority, having initially adopted the position that there was no inter state trade issue in this case, has now adopted the position that in the light of the evidence of Professor Seabright there is, as a matter of probability, the potential that inter

state trade might in this case be affected to an appreciable extent. That possibility arises due to the existence in Northern Ireland of 104 credit unions which are affiliated to ILCU, and a further 68 unions in the same jurisdiction which are affiliated to the Ulster Federation of Credit Unions.

The Commission Notice guidelines on the 'effect of trade concept' note that in the case of Article 81 it is the *agreement* that must be capable of affecting trade between member states, whilst in respect of Article 82 it is the *abuse* that must affect trade between Member States. The guidelines identify three elements which should be addressed in determining whether there is an effect on trade between member states: the concept of 'trade between Member States', the notion of "may affect" and the concept of "appreciability".

The simple fact that the agreement or practice at issue applies to more than one member state would appear sufficient to establish "trade between member states". As counsel on behalf of the defendant acknowledged, the ILCU agreement straddles two jurisdictions. Under the established jurisprudence of the ECJ any form of cross-order economic activity is sufficient to establish community law jurisdiction. Here it can be said that ILCU carries on cross border economic activity by providing its package of services to credit unions in Northern Ireland. The potential for UFCU and indeed CUDA, to offer services on a cross border basis exists also, as is clearly demonstrated by ILCU's ability to currently do so. Professor Seabright gave evidence that having regard to the number of credit unions from Northern Ireland that are members of ILCU, the potential exists for an appreciable effect on inter state trade.

The Ulster Federation of Credit Unions is clearly a potential competitor for ILCU. Thus any agreement or abuse which might dissuade it from entering the market in credit union representation services could be expected to have an appreciable effect on trade between Member States. It is also clear that in this case access to SPS could be a very important factor for such a potential competitor in deciding whether or not to enter the market for credit union representation services in Ireland.

The Commission Notice states that the function of the notion "may affect" is to define the nature of the required impact on trade between member states. The established test is that set down by the ECJ in *Societe Technique Miniere v. Maschinenbau* [1966] ECR 235, at p. 249:

> "It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as might prejudice the aim of a single market in all the Member States".

Accordingly, even though there may as yet be no immediate effect on inter-state trade, the potential or capability for such an occurrence is sufficient for the application of Articles 81 and 82. On the evidence there appears to be a sufficient degree of probability that but for the ILCU agreement regarding access to its SPS, inter state trade would develop in the market for credit union representative services. Whatever finding the court may ultimately make with regard to the practice of restricting access to the SPS, the trade patterns that would develop if that restriction were removed would, as a matter of probability, be different from those which currently exist.

As future development of trade can be taken into account, it is not necessary to show that UFCU immediately intends to compete throughout Ireland for credit union representation services so long as the probability exists. In *AEG v. Telefunken* Case [1983] ECR 3151

the ECJ held that although there was little trade between Member States in the relevant goods, it could reasonably be expected that patterns of trade in the future might change.

Finally, it must be shown that the potential effect on inter state trade would be "appreciable". The Commission Notice points out at par. 45 that "the stronger the market position of the undertakings concerned the more likely it is that an agreement or practice capable of affecting trade between Member States can be held to do so appreciably." Accordingly, the large market share held by ILCU would appear of itself indicative of the ability of the agreement/practice in question to affect trade between Member States.

The parties have agreed that ILCU has an 80% market share on the island of Ireland by reference to the size of credit union assets. There would seem to be no doubt but that there is the potential for an appreciable effect on inter-state trade if it is held that access to ILCU's SPS has been unlawfully made dependent upon membership of ILCU.

Given the size of the market share, the negative definition of appreciability set down in the Commission Notice would not apply. The test sets out criteria for determining when in principle agreements are not capable of appreciably affecting trade between member states. Firstly, it must be shown that the aggregate market share of the parties in the relevant market within the community affected by the agreement does not exceed 5%, and secondly, the turnover of the undertakings of the product in question does not exceed €40 million. Here the aggregate market share is well above 5% and the annual turnover is €54.9 million. Accordingly, this NAAT rule would not be applicable. It is therefore the court's clear view that this is a case where Articles 81 and 82 of the Treaty do apply and it will accordingly adopt the procedural measures demanded in those circumstance by R. 1/2003.

Ireland occupies a somewhat unusual position, even within the enlarged community, in designating under Article 3.5 its national courts as competition authorities responsible for the application of Articles 81 and 82 of the Treaty (S.I. 195/2004). Most of the functions under Chapter IV of R. 1/2003 are assigned in Ireland to the Competition Authority, so that the court's function and obligation under Article 11(4) of R. 1/2003 to notify a proposed or 'envisaged' Decision made under Article 5 to the Commission may be seen as an exception to the various other obligations contained in Chapter IV which, by virtue of S.I. 195, all fall on the Irish Competition Authority. Thus the court ruled that the obligation under Article 11(3) whereby the competition authority of a member state "shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure", is an obligation which falls on the Irish Competition Authority, and not the national court.

Finally under this part of its decision, the court will briefly refer to the reliefs sought in the Statement of Claim. It will do so for the purposes of underlining two salient features of this case. Firstly, the statement of claim as initially drafted alleged that ILCU was abusing a dominant position in the market for credit union representation by requiring credit unions affiliated to ILCU to take out LP/LS cover from ECCU. It was claimed that this requirement prevented and deterred third parties from entering the market to supply LP/LS, which requirement had as its object or effect the restriction of competition in the life assurance market. It was further claimed that this restriction had the object or effect of restricting the market for credit union representation and allowing ILCU to further strengthen its dominant position. This claim was abandoned prior to the commencement of the hearing before this court.

Secondly, and perhaps more importantly, the suggestion that the SPS fund formed part of a separate product market was not a case advanced by the Competition Authority in the

statement of claim. Nor was that issue an issue defined as such in either the summary of issues agreed between the parties, or in the memorandum of issues 'agreed and in dispute' dated 18th June, 2004. Quite clearly, the notion of the SPS as a separate product market emerged only following the production by Professor Seabright of his economic report in this case. However, Mr. Collins SC, counsel for the defendants, accepted that he was not prejudiced by this late adjustment to the plaintiffs claim, preferring to assert that it merely underlined the weaknesses inherent in the claims and assertions advanced on behalf of the plaintiff and served to undermine the credibility of the case generally.

Finally, with regard to s.4 of the Competition Act, 2002, it is also the common position of the parties that the agreements, decisions and/or concerted practices in this case do not have "as their object" the prevention, restriction or distortion of competition, but rather the court need only consider if this is "their effect".

PART III: THE RELEVANT MARKETS

While the Competition Authority contends that there is a relevant product market for credit union representation services, it further contends that there is a distinct but related market for the provision of savings protection to credit unions.

Mr. Gallagher submitted that the court should have regard to the Commission's *Notice on the Definition of Relevant Market for Purposes of Community L*aw (O.J. 372/5 1997), which states:

> "A relevant market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

Mr. Gallagher submitted that the product characteristics test and the SSNIP test should not be viewed as rival tests – they are merely alternative ways of reaching the same conclusion.

Taking the characteristics of the product in the instant case, he submitted that there was a clear demand on an ongoing basis for the interests of credit unions to be represented to the Irish Government, the Commission of the European Union and to regulatory authorities. There is also a demand for the interests of credit unions to be put before elected representatives. ILCU, and CUDA too, in effect operate as trade associations and provide these services. This representation can be provided more effectively by a collective organisation. Fixed costs are minimised when spread across a large number of participating credit unions, and strength in numbers increases the effectiveness of a representative association. From a demand perspective, there is no substitute available for credit union representation services. The market for such services involves the provision of a complex bundle of products and services to individual members. Mr. Gallagher submitted that, having regard to the absence of reliable data on the price of representation services, it was not open to the Authority to carry out any statistical analysis in applying the SSNIP test. However, the absence of quantitative data or statistical analysis did not preclude the conclusion that the nature of the market is such that there would not be adequate substitutes to which credit unions could switch in the event of a small but significant non-transitory increase in the price of credit union representation services, such as those provided by ILCU. Mr. Gallagher submitted that credit union representation services are currently offered on the market as a bundle or package and that this bundling of services has created a distinct market boundary. While similar representative services may be available separately from alternative suppliers, they do not represent acceptable alternatives to credit union representation services. That market can be broken down into three broad functional areas: trade association and central service activities, such as representing the interests of credit unions to political and regulatory authorities, business

service activities, such as the collective supply and purchase of services such as insurance, investment and other financial services, and self- regulatory activities, such as supervision and support. Mr. Gallagher submitted that while several of these services may constitute separate markets or are part of larger markets, this in fact points to the fact that these elements make up the credit union representation services market. The market can be characterised as an intermediary services market, matching the demands of the credit unions with individual service providers and intermediating between the credit unions and various government and regulatory agencies. Because the gains to the parties come from being matched with suitable counter-parties, there will not exist close substitute services which do not so match them. Accordingly, the Authority submitted that, consisting as it does of valuable services for which there are no close substitutes, credit union representative services has the characteristics of a distinct product market.

Mr. Gallagher submitted that Mr. Massey's attempt to carry out a quantitative SSNIP test in relation to the range of services provided by ILCU was flawed. As Mr. Massey had himself accepted in cross-examination, the SSNIP test relates to the activities of a hypothetical monopolist of a service – it does not involve analysing a switch where another competitor sells the same product. But, Mr. Gallagher pointed out, Mr. Massey had applied the test by considering the switching which took place when CUDA entered the same market as ILCU. This was switching to an alternative supplier of the relevant services and was not switching to a different product. Furthermore, Mr. Massey had not carried out any analysis to determine whether the price being charged by ILCU for its services was a competitive one. Given the monopoly position of ILCU prior to the entry of CUDA, a de facto position which Mr. Massey accepted, this left open the possibility of the 'cellophane fallacy', namely that the analysis was flawed because the price under review was a monopoly one which had been set just below the level where substitution would occur. Mr. Gallagher further submitted that this was not an appropriate case in which to place excessive reliance on the SSNIP test, because it was clear from the evidence given on behalf of disaffiliated credit unions that they were wholly dissatisfied with ILCU for a number of reasons and, in particular, because of its handling of the ISIS issue. As a result, switching was not governed by price considerations alone.

Mr. Gallagher further submitted that a number of authorities provided support for the contention that intermediary services markets could be seen as relevant product markets. In *Airtours v. Commission* [2002] ECR II-2585, the Court of First Instance confirmed the Commission's view that there was a market for package holidays to short-haul destinations, distinct from the markets for hotel services and air transport services. No quantitative SSNIP test was carried out. Similarly, in *British Airways v. Commission* (Case T-212/99, 17 December 2003) it was held that air travel agency services constitute a distinct market from the air transport market. The judgment stated (par. 100) that the services of air travel agencies represent an economic activity for which, at the time of the contested decision, airlines could not substitute another form of distribution of their tickets, and that they therefore constituted a market for services distinct from the air transport market. Again, no quantitative SSNIP test was carried out.

Mr. Gallagher submitted that it was quite clear in the present case that the credit union representation services provided by both ILCU and CUDA were quite distinct from the services provided by individual service providers whose services go to make up the bundle of services ultimately provided by ILCU and CUDA. Furthermore, in *Institute of Independent Insurance Brokers v. Director General of Fair Trading* (CCAT, unreported, September 2001), the Competition Commission Appeal Tribunal in England concluded that there was plainly a market for the provision of regulatory or certification services to

independent insurance brokers as an alternative to, and in competition with, the General Insurance Standards Council.

Insofar as the relevant geographic market was concerned, Mr. Gallagher submitted that the same was the State, as opposed to the island of Ireland, regardless of any determination as to effect on inter-state trade. However, Mr. Gallagher suggested that while it was a necessary part of the court's analysis, it posed no significant problems in the instant case, and given that the credit unions located in Northern Ireland are subject to a different regulatory regime, it was natural to identify the market with the State.

He went on to submit that the court should find there was a separate market for the provision of savings protection to credit unions. At present in the State there is only one protection scheme for credit unions, namely, ILCU's SPS. He submitted that participation in a protection scheme is 'vital' for credit unions and that loss of such cover may lead to the loss of confidence in a credit union. In some cases this protection can take the form of deposit insurance and in others a discretionary scheme such as the SPS. On the demand side, he submitted it was extremely unlikely that a 5 – 10% increase in SPS premiums by a hypothetical monopolist would bring about a switch by individual credit unions to close substitutes. Indeed, the evidence showed there were no close substitutes. On the supply side, there was little or no possibility of entry taking place in response to a 5 - 10% premium increase. In short, there was a market for the provision of savings protection to credit unions in the State, ILCU is dominant in that market and its SPS accounts for 100% of the relevant market. While it had been suggested that disaffiliated credit unions could put an alternative scheme in place, Mr. Przybelski's evidence indicated that it had not been possible to source alternative cover to the SPS on commercial insurance markets. Furthermore, Mr. Logue viewed this as 'quite a difficult proposition' and while the defendants had stressed the distinction between deposit insurance and SPS, Prof Dale was of the view that while there was a legal distinction between the two, from the point of view of the benefits offered to savers, there was very little difference.

In response Mr. Collins contended that Mr. Massey had correctly applied the SSNIP test, employing three different definitions of price to alternative bundles of services, including SPS, for the purpose of his analysis. He had examined the response of consumers to a small but significant change in the price of credit union representation services compared to another product, namely, LP/LS services. He noted that consumers had switched to this other product and concluded that ILCU, even if it were the hypothetical monopolist of credit union representation services contemplated in the circumstances by the SSNIP test, would not find it profitable to raise prices in this way. Thus the candidate product (i.e. credit union representation services) is only one product of a larger range which, at a minimum, includes the LP/LS product. Hence, Mr. Collins submitted, the definition of the relevant product market must be expanded. The plaintiff had, he argued, produced no evidence in support of the proposition that Mr. Massey had erred by not taking into account the possibility that ILCU was charging a monopoly price for its services. It was common cause between the parties that the LP/LS market (in which market ECCU operates and which accounts for a large proportion of ILCU's revenues) is a highly competitive market. ILCU does not seek to maximise its profits and does not behave like a profit-maximising monopolist. Therefore, there was no reason to think that the 'cellophane fallacy' invalidated the application of the SSNIP test. Thirdly, while admitting the ISIS problem had caused some credit unions to leave ILCU, the evidence equally established that long before that problem ever became an issue, a number of credit unions sought out and obtained cheaper LP/LS insurance in the marketplace and either voluntarily disaffiliated or were expelled from ILCU for that reason.

Mr. Collins submitted that the whole debate in the *Airtours* case was to consider whether a bundled product may, and almost certainly will, be in competition with the suppliers of the individual ingredients of the bundle. Whether the level of substitutability between the package on the one hand and the individual ingredients on the other hand is sufficient to warrant concluding all of them are in the relevant product market is the issue answered by the SSNIP test. Professor Seabright had made no attempt to apply the SSNIP test, notwithstanding his own academic writings which had been put to him in cross-examination which condemn attempts to define relevant product markets on the basis of intuition and hunches. Professor Seabright accepted in cross-examination that he had not been supplied with any data by the Competition Authority nor had he analysed any data.

No analysis had been proffered on behalf of the plaintiffs as to whether or not the SPS service was a relevant product market on its own or whether it was part of a wider relevant product market. The evidence from the plaintiff's own expert, Professor Dale, implied that SPS was merely part of a larger market which included deposit insurance. In his view, both the objectives and the means employed in SPS schemes and deposit insurance schemes are very similar and require similar techniques of risk diversification, fund size, etc. In such circumstances, if a serious attempt was to be made to say that SPS on its own represented a separate market and was not part of a wider deposit insurance market, or a wider savings protection market, one would have expected to see an attempt made to apply the SSNIP test to this product in a consideration of the other ingredients of the definition of a relevant product market such as supply substitutability etc. No such analysis had been undertaken and the Competition Authority had merely at the last moment asserted that SPS was a relevant product market. Such an assertion fell well short of the 'cogent and rigorous economic analysis' required by both the Commission Guidelines and the ECJ case law for the purpose of defining the relevant product market.

Mr. Collins submitted that a correct definition of the alleged products or services would logically precede the question of the definition of the product market. This question of definition was crucial, because products that are not distinct cannot be tied in a way that is contrary to Article 82 (*Microsoft Case*, Commission Decision/24 March, 2004/par 800).

At par 803, the Commission had stated:-

> "The distinctiveness of products for the purpose of an analysis under Article 82 therefore has to be assessed with a view to consumer demand. If there is no independent demand for an allegedly 'tied' product, then the products at issue are not distinct and a tying charge will be to no avail".

Although it was reasonable to enquire whether credit union representation services and savings protection were two distinct products in this case, the plaintiff had not carried out any analysis as to the position regarding independent demand in the marketplace. Professor Seabright instead appeared to have assessed whether the two were distinct from the point of view of the provider, stating in his report (p. 8) that:-

"In the present case it is evident that the tie between the purchase of SPS and the purchase of credit union representation services is purely commercial – there is no sense in which these two services are integrated (i.e. they can be provided independently at no additional cost)."

Mr. Collins submitted that this approach was the inverse of that adopted by the Commission, i.e. assessing whether there is an independent consumer demand for the two.

Mr. Collins submitted that the evidence overwhelmingly supported the view that the demand for credit union representation services and savings protection scheme go hand in glove. There is simply no pattern of independent demand for credit union representation and stabilisation schemes. The evidence of Mr. Riley, the undoubted expert in the area of credit union matters, was that he had never heard of a stabilisation savings protection scheme being provided other than by a league. Accordingly, Mr. Collins submitted that:

(a) the proper test for determining whether stabilisation and credit union representation services are two different products had not been applied,

(b) there is no evidence to support a pattern of trade in the market place from which a demand for credit union representation services independent of the demand for stabilisation schemes can be identified, and

(c) if the proper test had been applied, the evidence would overwhelmingly support the view that there is no such pattern of an independent demand for the two allegedly distinct products.

Mr. Collins submitted that insofar as ILCU could be seen as providing tradable services, the same had to be seen as a 'single product' to include SPS. The concept of a second market for SPS had been belatedly introduced into the case by the Competition Authority purely to support its assertion that an anti-competitive tie was operating in the instant case. SPS could have no meaningful economic existence if considered as some supposedly independent or separate market in its own right. Quite clearly, the plaintiffs argument was not sustainable if the court concluded that SPS formed part of the credit union representation services market.

Insofar as the relevant geographic market was concerned, Mr. Collins submitted that a number of credit unions which were members of ILCU or Northern Ireland credit unions were subject to the regulatory system in place in Northern Ireland in relation to credit unions. The relevant geographic market was therefore almost certainly the island of Ireland. There are in excess of 80 credit unions on the island of Ireland who are not affiliated to ILCU.

The foregoing is a brief summary of lengthy oral and written submissions, the latter of which consisted of both opening and closing written submissions delivered by both sides and which run to nearly 200 pages. These written submissions can, if necessary, be made available to the Commission. Similarly, the full transcripts of the evidence and oral submissions can also be made available to the Commission if that is deemed necessary or appropriate.

DECISION

It is appropriate to commence by considering whether or not SPS may be properly described as a 'product'. Firstly, it is undeniable that there is both a buyer (credit unions) and a seller (ILCU) for SPS and, since 2004 at least, an explicit price paid by ILCU members for SPS.

It is something which is distinct from credit union representation services in that it is a form of backstop resource akin to deposit insurance whereby help and assistance may be given to individual consumer credit unions which are in difficulty and/or reassurance may be provided for depositors with individual credit unions by its indemnity characteristics up to the sum of €12,500. It is capable of being made available to CUDA but for the rules and regulations of ILCU. The evidence in the case shows that credit unions who are not in ILCU want to buy or enjoy continuing access into SPS but cannot do so. There is further evidence that a minority of credit unions also elect to go without savings protection altogether. Thus it is clear that there can be independent demand for savings

protection from one source, as distinct from demand for credit union representation services, which can be separately sourced. They both do different things and perform different functions. It has been described by the Irish Regulator as 'vital' for credit unions to have savings protection so there is therefore a very high probability that savings protection in some shape or form will be demanded from any supplier of credit union representation services.

Essentially the services provided by ILCU may be broken down in the following way:

(a) pure representation services, i.e. advocacy,

(b) LP/LS insurance, compulsorily obtained through ECCU,

(c) SPS, compulsorily confined to ILCU members,

(d) Self regulation.

Should these services be regarded, for the purposes of analysis, as a bundle, or are they, in fact, separate markets.

In the course of submissions, Mr. Collins pointed out that in *Microsoft* the Commission stated that:-

> "The distinctness of products for the purposes of an analysis under Article 82 therefore has to be assessed with a view to consumer demand. If there is no independent demand for an allegedly 'tied' product, then the products at issue are not distinct and a tying charge would be to no avail."

Mr. Collins then enumerated a list of factors to which the Commission had had regard in that case in deciding whether the Windows operating system and the media player were separate products. These included:

(a) the fact that some operating system users would not want or need a media player at all,

(b) the functionality of operating systems and media players was different,

(c) the prices of the two products were very different,

(d) the fact that other operating systems suppliers did not include media players in their operating systems,

(e) the fact that none of the other operating system vendors link the media player to the operating system in a way which made it irremovable.

These are all factors which have a similar resonance in the instant case and which persuade me that credit union representation services and savings protection are two different and distinguishable products.

In this regard, it is instructive to look at the market shares of ILCU in respect of the three sub-categories concerned. ILCU has only 1% of the Irish insurance market generally and has been described as a 'minnow' in that market. By contrast, it has 80% of the representation market and enjoys a presumption of dominance in that market. Thirdly, it is the sole provider of SPS in the Irish market.

This clearly demonstrates that there are hugely disparate elements in the package provided by ILCU, some elements of which are very competitive, such as the insurance services, and others very concentrated, such as the SPS service, which creates obvious difficulties in treating or analysing the bundle as a market.

In concluding as I do that SPS is a separate product market, I am fortified in reaching this conclusion by virtue of the fact that ILCU, at least since the start of 2004, itself treats the

SPS component as being distinct from its other services and now charges member unions directly for that service. This suggests that ILCU itself sees SPS as a separate product.

I do not think that the composite package, including SPS, offered to its member unions can be seen as a bundle to which the SSNIP test may appropriately be applied. Firstly, as already noted, there is a separate pricing structure for SPS. Secondly, not all credit unions desire the products in the alleged bundle. Thirdly, as already noted, the competitive conditions in which the various components are supplied are completely different. Fourthly, the two products are not complementary in the sense that is normally implied by that word. There is, at most, a link.

Therefore it appears to me that any product market description (for the purposes of the SSNIP test) which characterises the bundle as including SPS is incapable of yielding up an accurate market definition. It also means that the application of the SSNIP test by Mr. Massey delivered up a distorted result in this case.

I reach this view not only for the reasons already indicated, but also because Mr. Massey's analysis does not take on board the impact of the ISIS crisis. The gravity of this crisis in the credit union movement was apparent from the graphic evidence given by numerous witnesses from different credit unions who gave evidence on behalf of the Competition Authority in this case. Their evidence on the facts was completely uncontradicted and uncontroverted because not a single witness from ILCU was called in rebuttal of their account. It revealed that there were many compelling reasons, other than price, for credit unions to abandon ILCU and go their separate ways.

Nor did Mr. Massey manage to eliminate the very real possibility in this case that the pricing structures applied by ILCU were such as to give rise to the 'cellophane fallacy' to which reference has already been made. In essence, this means that a monopolist will raise prices to a level where substitution is about to take place, creating the illusion of a larger market. The fact that credit unions drifted away from ILCU, not merely because of the ISIS problem, but also because of the huge disparity between ECCU premiums and those available on the open market, is suggestive at least that monopoly pricing was at work. Further, as we have seen, the LP/LS premium element in ILCU's charges is the vastly predominant constituent of the overall charge. It fell dramatically to competitive levels when certain member unions decided they would not put up with it any longer. No evidence or analysis was offered by Mr. Massey which would have removed a strong intuitive impression that monopoly pricing, rather than competitive pricing, was at work where some instances of abandonment of ILCU are concerned.

Overall, I prefer Professor Seabright's approach to the question of definition of relevant product markets. I appreciate he lacked quantitative data for his own application of the SSNIP test to the SPS product market, but common sense surely must indicate that ILCU as the sole supplier of SPS would be immune from a 5% - 10% price increase in its SPS charge given the absence of any alternative product such as a deposit insurance equivalent.

Having concluded, as I do, that there is a separate product market for SPS services, the requirement to identify precisely what constitutes the ILCU bundle assumes a lesser significance. For present purposes, it is sufficient to state that there is a market for credit union representation services which includes advocacy, provision of insurance and financial services, and self regulation.

I should conclude this section by saying a word in Mr. Massey's defence. Firstly, he had no opportunity to address the contention advanced so late in the day by the Competition Authority that savings protection formed a separate product market. Nothing in this judgment should therefore be taken as expressing any criticism of Mr. Massey, whose

report and evidence were thoroughly researched and presented in a manner appropriate to an expert of his standing and reputation.

However, having considered both the SSNIP test and the economic evidence regarding market definition, I prefer to adopt the 'intuitive' or 'innate characteristics' test to find that there are two markets at work in the instant case, being respectively a market for credit union representation services (excluding SPS), and the savings protection market.

Finally, in this section, the court must make a finding as to the relevant geographic market. There is no requirement for savings protection in Northern Ireland, nor have I any evidence of equivalence of competitive conditions in Northern Ireland. Credit unions in Northern Ireland are subject to a different regulatory regime, so I conclude, noting the agreement of both sides that nothing of significance hinges on the determination of this particular point, that the relevant geographic market is the State, rather than the island of Ireland.

PART IV: DOMINANCE

For the purposes of this hearing, the court invited the parties to see if they could agree the market share of ILCU in Ireland for the provision of credit union representation services. In response to that request, the parties advised the court that they had agreed that, taking the island of Ireland as a whole, ILCU's market share is 80%. Its market share in the State is 85%. It goes without saying that its market share of savings protection in Ireland, whether described as the island of Ireland, or the State, is 100%. During the course of the hearing, Mr. Collins accepted on behalf of his clients that if the court were to find that two separate product markets existed, the market shares just described indicate a presumption of dominance in each of the markets where ILCU was concerned.

For the Competition Authority, Mr. Gallagher reminded the court that Mr. Massey had accepted in cross-examination that if credit union representation services were a distinct market, the logical corollary would be that ILCU was dominant in such a market. Mr. Gallagher submitted that a high market share which is long lasting is usually considered sufficient to ensure dominance unless there are exceptional circumstances, and that high in this context means over 50%. In the recent *Microsoft* decision (Comp/C-3/37.792, 24th March , 2004, par. 435), the Commission stated:

> "Very large market shares of over 50%, are considered in themselves, and but for exceptional circumstances, evidence of a dominant position. Market shares between 70% and 80% have been held to warrant such a presumption".

There is only one other provider of representation services in the State, namely, CUDA, and it contains only 20 members. While ILCU had pointed to the emergence of CUDA to account for the subsequent fall in ILCU's market share and ILCU's falling prices to argue that it was not in a dominant position, the CFI had held in *Compagnie Maritime Belge v. Commission* [1986] ECR II – 1201) that a decline in market shares which are still very large cannot in itself constitute proof of the absence of a dominant position. Further, as regards the fall in prices, it was held in *United Brands v. Commission* [1978] ECR 207 that a "very lively competitive struggle" did not negate dominance. Furthermore, the very survival of CUDA in the medium or long term appears to be contingent on resolution of the issue of access to the SPS. Professor Seabright expressed the view that there is a high probability that without access to the SPS, CUDA will be unable to continue as a significant competitor in the credit union representation services market. Having regard to Mr. Logue's evidence that savings protection is 'vital' for credit unions, I am disposed to accept Professor Seabright's evidence as to the long-term consequences of not having savings protection, even if in the short term some CUDA members have survived without it. The fact that some credit unions have joined CUDA but retained ILCU membership in

order to access SPS speaks for itself. While ILCU had asserted that it was not in a position to act independently of its customers (i.e. its member credit unions), an examination of the facts suggests that it can so act. In particular, decisions are not all carried out by unanimity: its rules can be amended by two-thirds of those present at a meeting. Furthermore, an individual credit union can be expelled for grave and sufficient reason by a majority of those present at a board of directors meeting. Furthermore, he submitted that there is evidence of ILCU taking action independently of its members, such as the use of the SPS fund to finance its ISIS computer scheme and the acquisition of its premises at Mount Street in Dublin, which said actions were taken at executive level without any prior authorisation by the membership.

Furthermore, Mr. Gallagher submitted that Mr. Massey had failed to identify any instance where an undertaking with the market share of ILCU was not considered to be dominant and that he had accepted it would be very exceptional to find or hold otherwise. In circumstances where ILCU not only has market share but also the benefit of the SPS fund so that any member leaving ILCU loses the benefit of that fund, it is, he argued, undoubtedly in a dominant position.

On behalf of the defendants Mr. Collins submitted that market share was an important, but not a decisive, consideration on the issue of dominance. He quoted the following passage from Whish (*Competition Law*, 5th ed., London, 2003) at 180:

> "In cases where there is no statutory monopoly, market shares are an important issue in assessing market power, but not to the exclusion of other "factors indicating dominance" which must be taken into account. Market shares are not conclusive. Mere numbers cannot in themselves determine whether an undertaking has power over the market."

Mr. Collins submitted that it was not within the power of the board of ILCU to make decisions on the level of fees payable by member credit unions to ILCU. Rather, those decisions were made by the members themselves which vote on such matters at general meetings of ILCU. Therefore no question arose of ILCU acting in a way that was independent of its consumers to their detriment, such as would indicate the necessary degree of market power to give rise to a finding of dominance. The collective nature of ILCU allied to the principle on which it is run (solidarity, mutual self-help etc) plus the fact that the 'pricing' decisions for the supply of services are taken by the consumers of those services themselves - rather than some arms-length supplier - indicates that ILCU cannot be regarded as dominant.

Mr. Collins further submitted that Mr. Massey had pointed to the difficulty of defining and estimating the price which ILCU charges for its services. He had applied three different measures of estimating the price, all of which show that ILCU did not have the ability to raise its prices. Some credit unions obtained their LP/LS insurance from other firms in the marketplace, which forced a reduction in the price charged by ECCU in 2003 by almost 13%. A firm which has to respond in this way to competitive pressures is not, by definition, in a dominant position since the definition of dominance involves the ability of a firm to act independently of this competitive pressure. In *Hoffmann LaRoche* it had been noted (at par. 71):

> "The fact that an undertaking is compelled by the pressure of its competitors price reductions to lower its prices is in general incompatible with that independent conduct which is the hallmark of a dominant position".

DECISION

I have least difficulty with this portion of the case and am satisfied that the defendants are dominant in both the market for credit union representation services and the market for the provision of savings protection. The classic definition of dominance was laid down by the ECJ in *United Brands v. Commission* ([1978] ECR 207) as follows:

> "The dominant position thus referred to by Article 82 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".

The same formulation has been adopted by the court on several other occasions, e.g. in *Hoffman – LaRoche v. Commission* ([1979] ECR 461).

Let us now consider the role of ILCU in the two relevant product markets which the court has already found to be present in this case.

The SPS scheme, which has informal approval from the Regulator, is the only service on the island of Ireland. Access to that fund cannot be obtained other than through ILCU which means that any credit union wishing to avail of savings protection must purchase the entire ILCU package, including compulsory ECCU insurance for LP/LS.. There is at present absolutely no other alternative, although I will later consider whether or not it may be feasible to establish an alternative savings protection scheme.

Insofar as the market for credit union representation services is concerned, it is obvious that the larger the market share, the more likely it is that the undertaking concerned is dominant in that market (Whish, *Competition Law*, at p. 180).

In *Hoffmann LaRoche v. Commission* [1979] ECR 461), the ECJ said:

> "Furthermore although the importance of the market shares may vary from one market to another, the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time … is by virtue of that share in a position of strength …".

It is undeniable that ILCU's enormous market share has existed not merely "for some time" but without interruption until the emergence of CUDA in 2001. However, CUDA accounts for a very small percentage of ILCU credit union members in the State – less than 5%, although the size of the credit unions participating in CUDA means that if one defines share by reference to assets, the CUDA share is 15%. Nonetheless ILCU retains an enormous market share even after the emergence of CUDA.

Another relevant question to be asked on this issue is whether there are barriers to entry which prevent or would prevent anyone else entering either market. The Competition Authority relies in particular on the lack of access to the SPS. While a rival representative body such as CUDA would be able to facilitate access to many services provided by ILCU, this is not the case with respect to SPS, which is only available through ILCU. It is for this reason that 15 of 20 members of CUDA retain their membership of ILCU, although dual membership is not a long term option.

It seems to me that the ILCU's stronghold on the SPS market has marked downstream consequences in the credit union representation services market, having regard to the 'vital' requirement to have savings protection. Thus the rules and practices of ILCU which tie SPS and representation services, particularly when the former is a monopoly product, constitute significant barriers to entry and exit in the representation market.

It seems to me also that in the area of SPS at least, ILCU may be seen as occupying a position of what has been described as 'super-dominance' because, it enjoys a position of dominance in SPS which is in effect a monopoly, and likely to remain so for the foreseeable future.

No evidence has been led by or on behalf of ILCU to suggest that its huge market share is not indicative of equivalent market power, or that any other exceptional circumstances exist which would lead the court to seriously question ILCU's dominance in both markets.

PART V: TYING, REFUSAL TO SUPPLY AND ESSENTIAL FACILITIES

The Competition Authority submits that ILCU's breach of s.5 of the Competition Act, 2002 can be seen in two related ways: tying access to the SPS to membership of ILCU on the one hand, and refusal to supply SPS on an open non-discriminatory basis.

Tying, in terms of being an abuse, involves leveraging off market power in one market (in the instant case, the savings protection market, where ILCU is the only supplier) into a related market (the credit union representation services market) where the undertaking concerned expects to meet competition, thereby weakening the competitive structure of the related market and limiting the opportunity for competitors (such as CUDA in the instant case) to compete successfully in the market.

Mr. Gallagher submitted that SPS and representation services are independent in the sense that they can be provided independently of each other at no additional cost. The representative services therefore are effectively being provided by ILCU at zero cost, given that a credit union must join ILCU in order to obtain access to its SPS. This makes it very difficult for rival credit union representative service undertakings to enter that market in competition with ILCU and thus protects ILCU's position in that market.

In support of his submissions, Mr. Gallagher referred to *Tetra Pak v. Commission* [1996] ECR I-5951 wherein the ECJ upheld a Commission decision which condemned clauses whereby *Tetra Pak* tied the sale of carton packaging materials to the sale of its filling machines by requiring the purchasers of the machines to agree to purchase from *Tetra Pak* all of their supplies of cartons. While *Tetra Pak* had argued that tied sales were justified on the grounds that there was a natural link between cartons and filling machines and that tied sales of the two were normal commercial usage, this was rejected by the ECJ which stated (at par. 37):

"It must, moreover, be stressed that the list of abusive practices set out in the second paragraph of Article 86 (now Article 82) is not exhaustive. Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 unless they are objectively justified."

Mr. Gallagher further cited *Van den Bergh Foods v. Commission* Case T-65/98, 23rd October, 2003) where the Court of First Instance upheld the decision of the Commission that the appellant had abused its dominant position on the impulse ice-cream market in Ireland by tying, de facto, 40% of the outlets in the Irish market through a "freezer exclusivity" clause whereby ice-cream freezer cabinets were provided and maintained to retailers free of charge provided that competing ice-cream products were not stored there. The CFI held that this provision had the effect of preventing the retailers in question from selling other brands of ice-cream and was therefore abusive, notwithstanding the fact that many retailers could have simply purchased a second freezer cabinet.

Mr. Gallagher submitted that the evidence in the present case, not only from Professor Seabright, but from the representatives of individual credit unions, was all to the same

effect, namely, that the tying of the SPS services to the provision of credit union representation services has the effect of preventing CUDA from entering the market for the provision of credit union representation services or at least reduces its opportunity for doing so. Furthermore, contrary to the defendants claim, the present case was not an 'essential facilities' case, and it was not being suggested that ILCU must transfer the SPS fund to CUDA or provide CUDA (as distinct from individual credit unions) with access to that fund.

It was further submitted that if one compares the nature of the tie in the HB case with the tie in the present case, the differences were stark and obvious. Here the investment involved in switching supplier is considerably greater. Credit unions lose the benefit of all of the accrued contributions. They obtain a product in the SPS which is by no means comparable to any alternative product even if it is possible to set up an SPS scheme at all. The costs in setting up an SPS scheme are very considerably greater than the costs in remaining with the existing scheme. Further, as the Commission had pointed out in its recent decision in the Microsoft case, the degree of foreclosure need not be complete provided it is not insignificant. Mr. Gallagher argued that it was incontestable in the present case that ILCU's conduct was likely to have a foreclosure effect on the market for the provision of credit union representation services. Quite clearly, the very existence of CUDA depends crucially on a resolution of the SPS issue. This is clearly evidenced by the fact that 15 CUDA members still remain members of ILCU for the sole purpose of attempting to protect their SPS investment. No evidence whatsoever was called by the defendants to explain the necessity for the tie.

Alternatively, ILCU's behaviour could be seen as a 'refusal to supply' access to the SPS, which thereby creates a barrier to entry into the credit union representation services market and either risks eliminating competition in that market or weakening competition in that market. It is well established, he submitted, that there are certain circumstances in which a refusal to supply by a dominant undertaking constitutes an abuse, unless it is objectively justified. However, this was a distinct and different concept from the essential facilities doctrine. The contention of the Competition Authority is not that CUDA should have access to the SPS, or acquire its assets, but that individual members who already obtain SPS services from ILCU should not be refused continuing access to the SPS because they wish to disaffiliate from ILCU and obtain credit union representation services from CUDA, ILCU's competitor.

In *Commercial Solvents v. Commission* [1974] ECR 223, the ECJ had found that the dominant firm had engaged in a refusal to supply which was incompatible with Article 82 of the Treaty. It stated (at para. 25):

> "An undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86 (now Article 82)".

The ECJ had carried out further analysis of what constitutes a tie in the *Telemarketing Case* [1985] ECR 3261. A television station with a statutory monopoly refused to continue to supply advertising space for telesales unless the customer channelled viewers responses through its own agent. The ECJ held that it would be an abuse for the television station, if it held a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market, to refuse,

without objective justification, to supply its services to any telemarketing undertaking other than a member of its own group.

The ECJ stated (at par. 27):-

> "An abuse within the meaning of Article 86 (now Article 82) is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself … an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking."

In the present case, Mr. Gallagher submitted, the abuse takes place in the market for savings protection for credit unions while the anti-competitive effect is felt in the market for credit union representation services. The two markets were clearly linked. There is a real risk of elimination of competition. Furthermore, while not required, a factor in finding an abuse is that the refusal to supply occurred where the dominant undertaking had already been supplying the particular good or service, as was the case in both *Commercial Solvents* and *Telemarketing*. In the case of ILCU it has, of course, been supplying its SPS to the credit unions that might decide to leave and join another credit union representation services undertaking.

Mr. Collins commenced his submissions on this topic not by questioning the existence of tying in this case, but rather by focusing on the concepts of objective justification and proportionality. He contended that conduct by a dominant firm will not be regarded as an abuse of its position if there is an objective justification for its conduct and its conduct is proportionate to whatever threat it faces or its legitimate objectives. He also contended that this was an "essential facilities case" to which the principles enunciated in the *Oscar Bronner* case applied.

Accordingly, it may be seen that the defendants approach to this issue is not so much to deny the existence of a tie, but rather to argue that the plaintiff has failed to counter the evidence that:

> (a) an SPS service is both by commercial usage and by its inherent nature supplied by credit unions to themselves on a collective basis,
>
> (b) such a collective agreement must be binding as between the parties to be effective,
>
> (c) it is reasonable to expel a person for a significant breach of the agreement, and,
>
> (d) organising their affairs in a collective way brings a variety of efficiencies into play for the benefit of the credit unions.

Mr. Collins submitted that, far from disagreeing with these propositions, virtually all of the witnesses accepted them and the plaintiffs own statement of claim expressly acknowledged the efficiencies which flow from such collective organisation.

In the present case, Mr. Collins submitted, it is not in dispute that it is proper and legitimate for credit unions to come together to form an association such as ILCU, or that they may set up their own insurance company to supply LP/LS insurance on a mandatory basis to those credit unions who choose to join ILCU, and that it is not only proper and legitimate to set up a stabilisation service, but highly beneficial to do so. Furthermore, ILCU was fully entitled to require that the credit unions who join ILCU abide by the rules of ILCU. This means that, apart from the payment of fees, they must permit themselves to be monitored by their fellow credit unions through ILCU to minimise any call upon the

stabilisation fund. It followed therefore that, if a group of members indicated that they no longer wished to be bound by the rules, ILCU must be entitled to put those members to their election as to whether they wished to remain members of ILCU and enjoy the benefits of membership or leave ILCU (which they are free to do). If, however, as in the present case, the members in question refuse to make that election and seek to retain the benefit of League membership (in particular the benefits provided by the SPS) while at the same time maintaining that they are entitled to disregard the obligations of membership, then ILCU must be entitled to expel them. This could not be regarded as a non-objective justification or a disproportionate response. Even if some alternative savings protection scheme was less attractive than the SPS, this did not amount to some action by ILCU beyond what is necessary for ILCU to pursue its legitimate aims or which limits competition more than is necessary. It could hardly be right that ILCU should be penalised or found guilty of an abuse of a dominant position because it is able to provide a cheaper and more efficient SPS than another group of credit unions.

Again, the extent to which the instant case could be seen as a 'refusal to supply' case had to be analysed by reference as to whether the dominant firm had a legitimate reason for the refusal to supply in question. This may have to do with the ordinary way in which an undertaking structures its business, whether it be for efficiency or other legitimate reasons, and by 'legitimate reasons' in this context is meant reasons not referring to an intention to eliminate a competitor. Legitimate reasons may also refer to the need and entitlement to enjoy the fruits of one's own investment, hard work and efficiency, possibly over many years. Mr. Collins cited in support the following passage from *Bellamy and Child* (5th ed., (London, 2001), at pp. 734-735):

"Undertakings that are not dominant are generally free to choose for themselves the parties with whom they wish to enter into contractual relations. In the case of dominant undertakings, however, that freedom may be curtailed and refusal to deal may constitute an abuse of dominance. An offer to supply only on terms that the supplier knows to be unacceptable will be a constructive refusal to supply. The precise boundaries of the circumstances in which a dominant undertaking's refusal to deal may constitute an abuse remain to be determined. However, it is clear that, in the absence of objective justification, a refusal to supply an existing customer will be an abuse, as will a refusal to grant access to "essential facilities"; each of these areas is considered further below. In determining to what further extent a refusal to deal may constitute an abuse the courts will need to have regard to the considerations identified by Advocate General Jacobs in *Bronner*, namely, first, the need for careful justification of any incursion into the right to choose ones trading partners and freely to dispose of ones property, which are rights generally recognised in the laws of the Member States; secondly, the need to balance conflicting considerations when justifying interference with the dominant undertakings freedom to contract, in particular the desirability of preserving incentives to invest in production, purchasing and distribution facilities, which may be reduced if competitors were granted access to such facilities; and thirdly, the fact that the primary purpose of Article 82 is to prevent distortion of competition in the interests of consumers, rather than to protect particular competitors."

Mr. Collins argued that the various cases cited on behalf of the Competition Authority all involve a factual situation where the dominant supplier had singled out a particular existing customer and refused to supply him because the dominant supplier sought to favour its own business or subsidiary which was in competition with the customer, the target of the refusal to supply. In other words, the dominant supplier discriminated between certain customers which it was prepared to supply, and those customers, in competition with the supplier in some other market, which it was not prepared to supply.

Mr. Collins submitted that in each case one has to look at the relief sought by the plaintiff to see what supply is allegedly being refused. In the present case the relief sought in the statement of claim is, in essence, that credit unions who are not members of ILCU should nonetheless have access to the SPS service or facility which the ILCU members provide themselves and which they have built up for themselves over the years.

The evidence tendered on behalf of the plaintiff, Mr. Collins argued, brought this case within the "essential facilities" doctrine, because Mr. Logue, the Registrar of Credit Unions, indicated that membership of an SPS fund was a "vital component" of the credit union movement. Various representatives of CUDA and different witnesses called from various credit unions were of a similar view. Furthermore, the very survival of CUDA in the medium term had been alleged to be contingent upon the resolution of the issue of access to the SPS.

That being so, Mr. Collins argued, this was a case which the court should determine by reference to the principles laid down in *Oscar Bronner* v. *Media Print* [1998] ECR I-7791.

In the *Oscar Bronne*r case, the defendant, Media Print, had a 46.8% share of the daily newspaper market in Austria. Bronner was the publisher of a single newspaper with a 3.6% share. Media Print had a countrywide home delivery service which was a significant part of the reason for Media Print's large market share. Bronner claimed that Media Print was in a dominant position in the market for daily newspapers and that Bronner needed access to Media Print'*s* home delivery service to enable it to provide punctual morning deliveries. It argued that Media Print's home delivery service was an essential facility which Bronner could not economically reproduce itself and that access to this essential facility was necessary to enable Bronne*r* to compete with Media Print. Media Print argued that its distribution system was a result of an investment over many years and that Bronner had other methods of distributing its newspaper even if those methods were less effective or attractive than Media Print's home delivery service.

The court dismissed Bronner's claim, following the opinion of Advocate General Jacobs. The Advocate General pointed out that it was generally pro-competitive to allow a firm to retain its own facilities and the product of its own investment. Firms need incentives to invest and the court should be slow to be drawn into the regulation of prices and conditions. In his view, an essential facility only existed where the dominant undertaking had a stranglehold on the market and where the duplication of the facility was impossible or extremely difficult. It was not sufficient that control of the facility gave a competitive advantage to the dominant firm. Furthermore, the Advocate General stressed that the abuse must be an objective abuse, i.e., not merely directed to the circumstances of the individual competitor but more generally in terms of its effect in competition in the market and not just an individual competitor. Thus, he said that for refusal of access to constitute abuse, it must be extremely difficult not just for the plaintiffs but for any other undertaking to compete with the dominant undertaking without access to the essential facility.

In its judgment, the court agreed with the Advocate General and emphasised that the test was not merely whether the particular competitor in the case could set up a similar facility, but whether an undertaking of a comparable size to the dominant undertaking could set up such a facility. That is because the test is an objective one. If it is to be an abuse, it must not merely be the case that some small competitor cannot duplicate the facility, but rather that some large equally resourced competitor cannot do so. That has obvious implications for the issue as to whether the SPS should be regarded as an

essential facility (even before one gets to the issue of whether or not ILCU has committed some abuse which would warrant providing others with access to the SPS).

In short, Mr. Collins submitted, the court had said that, to constitute an abuse, a refusal to comply had to fulfil the following four conditions:

(1) the refusal had to be likely to eliminate competition in a downstream market,

(2) it must be incapable of objective justification,

(3) access must be indispensable to carrying on the other persons' business, and,

(4) there must be no actual or potential substitute for the service.

The present case, Mr. Collins submitted, satisfied none of the *Bronner* criteria. It was clear, he argued, that non-access to ILCU's SPS would not eliminate competition in the credit union representation services market. A rival representation organisation had already emerged and there was nothing in the rules of ILCU which prevented such other organisations emerging, even if composed of credit unions which were simultaneously members of ILCU. Secondly, it was clear from the expert evidence that an organisation such as CUDA could provide a savings protection service, and in reality the plaintiffs complaint was that the CUDA members would have to set aside 1% of their assets to create a comparable SPS fund, which would be a greater cost to them than the cost of the annual contribution they make to ILCU's SPS fund. However, this is a point about relative cost, not an argument that it cannot be done. There is nothing to stop CUDA members building up a fund as the ILCU members did. Secondly, there is clearly an objective justification for ILCU's rules, both generally and in relation to the SPS. Thirdly, access to ILCU's SPS is clearly not indispensable for the carrying on of the business of credit union representation services. If one took Professor Seabright's definition of credit union representation services which expressly excludes the provision of an SPS service from the bundle of services, it followed that access to ILCU's SPS services are neither here nor there since, on Professor Seabright's definition, an SPS service is not part of credit union representation services but is a different market. Fourthly, it is not the case that there is no actual or potential substitute for ILCU's SPS. A group of credit unions could set up their own savings protection fund by contributing to the setting up of such a fund and putting in place the necessary monitoring regime for their members. They could also take out various forms of deposit guarantees either in respect of their own reserves or in respect of the savings of their members. Under s.45 of the Credit Union Act, 1997, credit unions must set aside at least 10% of their annual surplus as a statutory reserve and under s.47 they must have fidelity bond cover against fraud by their officers. If the credit unions in another representative organisation feel that they want some further financial assurance of the type represented by ILCU's SPS fund, then they can supplement the existing minimum statutory protections on a voluntary basis by setting aside a greater percentage of their annual surplus as reserves or taking out bonds or insurance or by contributing to an SPS fund, or by a combination of these mechanisms. Further, the plaintiffs case was even more unsustainable when one considers the requirement of the *Bronner* case that the abuse should be an objective abuse, i.e. that no-one of comparable size to the dominant firm would be prepared to invest in the creation of the facility in issue. It is clear that if there was another representative organisation with several hundred members comparable in size to ILCU, there would be no difficulty whatsoever about such an organisation setting up an SPS.

Finally, *Whish* (p. 670) emphasises that the essential facilities doctrine must be applied with caution:

> "However, it is important to recognise that there must be limits to the essential facilities doctrine. Demanding that a dominant firm should grant access to its facilities is a major intervention on the part of a competition authority; and an excessive application of the essential facilities doctrine, can have harmful economic effects. This is not only because there is an element of ex-appropriation in requiring one firm to grant access to its property to a competitor, but also because of the prospect that third parties might be able to demand a 'free-ride' on the fruits of another's investment might deter the latter from making the investment in the first place. It is clear, therefore, that there must a sensible limit of what is to be considered an essential facility and that the circumstances in which access to it can be mandated under Article 82 should be determined with the need not to discourage investment in mind. In particular, and where the infrastructure has been established by firms acting in the private sector, without recourse to public funds and without the benefit of monopoly rights conferred by the State, sensitivity to the free rider issue is important."

By way of postscript, Mr. Collins added that the Registrar of Credit Unions and IFSRA have responsibility for the supervision and regulation of credit unions in the State. ILCU is currently in discussion with IFSRA concerning the possibility that ILCU's SPS might be restructured as a savings protection scheme which would serve the statutory purpose envisaged for new credit unions. There is thus, Mr. Collins noted, an overlap between some of the reliefs sought by the Competition Authority in the present case and the functions which IFSRA is carrying out in its capacity as Regulator of credit unions. The Authority declined ILCU's open offer to adjourn these proceedings pending the outcome of the discussions with IFSRA. His requirements will probably dictate the future form and structure of ILCU's SPS in any event. In such circumstances, and aside from the extremely restrictive conditions under which there is any scope for the application of the essential facilities doctrine, it is submitted that the court should have particular regard to these circumstances and to the nature and structure of the industry at issue. It is unlikely, Mr. Collins concluded, that on the facts of this case it was ever envisaged that competition law would be brought to bear on the activities of ILCU in relation to its SPS scheme.

Decision

The meaning of the expression 'essential facility' was dealt with by the Commission in *Sealink/B & I – Holyhead* [1992] 5 CMLR 225 where it stated (at par. 41) that:

> "A dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article [82] if the other conditions of that Article are met … the owner of an essential facility which uses its power in one market in order to strengthen its position on another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article [82] where a competitive disadvantage is imposed upon is competitor without objective justification".

This approach of the Commission has been characterised as the application of the C*ommercial Solvents* doctrine to so-called essential facilities. It was held by the ECJ in that case that a refusal to supply could, in certain circumstances, amount to an abuse of a dominant position. As *Whish* puts it (at p. 664):

> "The *Commercial Solvents* doctrine states, therefore, that it is an infringement of Article 82 for an undertaking in a dominant position to refuse to supply a competitor in a downstream market where the effect of doing so would be to eliminate all competition in the downstream markets."

The author states that the 'essential facility' doctrine is not an independent doctrine from that of 'refusal to supply', but rather one which has evolved from the principle applied in C*ommercial Solvents*, albeit with a different name and with a particular sphere of application.

The cases show that the expression 'essential facility' is particularly apt where an undertaking seeks access to a physical infrastructure such as a port, airport or pipeline where the essential requirement for access may be self evident. However, the cases also show that there may be an obligation to supply a raw material, spare parts, intellectual property rights, or proprietary information, where the expression 'essential facility' is less appropriate.

Various witnesses in the present case have described access to the SPS as 'vital' or 'beneficial', but is it an 'essential facility'?

The underlying principles are addressed by *Whish* at p. 670 where he states that the essential facilities doctrine must be applied with caution. The author sees it as a reasonable 'public policy' choice to require that infrastructures which have been established by the state or with state funding be shared with third parties. He nonetheless recognises the following important qualification:

> "However, it is important to recognise that there must be limits to the essential facilities doctrine. Demanding that a dominant firm should grant access to its facilities is a major intervention on the part of a competition authority; and an excessive application of the essential facilities doctrine can have harmful economic effects. This is not only because there is an element of expropriation in requiring one firm to grant access to its property to a competitor, but also because the prospect that third parties might be able to demand a 'free-ride' on the fruits of another's investment might deter the latter from making the investment in the first place. It is clear, therefore, that there must be a sensible limit upon what is to be considered to be an essential facility and that the circumstances in which access to it can be mandated under Article 82 should be determined with the need not to discourage investment in mind. In particular, where the infrastructure has been established by firms acting in the private sector, without recourse to public funds and without the benefit of monopoly rights conferred by the state, sensitivity to the free-rider issue is important".

While the Competition Authority characterised the present case as a tying case, the defendants have quite astutely seized upon some of the evidence given by witnesses (in which savings protection was described as 'vital', or that CUDA might not survive without access to SPS) to argue that this is an essential facilities case and thus subject to the conditions enunciated in the *Oscar Bronner* case, to which reference has already been made. However, it is no part of the plaintiff's case that SPS is an 'essential facility'. In *Van den Bergh Foods v. Commission* (CFI, 23rd October, 2003) the CFI carefully distinguished between tying considerations and those arising under the essential facilities doctrine in the *Oscar Bronner* case, stating:

> "The fact that an undertaking in a dominant position in the market ties *de facto* – even at their own request – 40% on outlets in the relevant markets by an exclusivity clause which in reality creates outlet exclusivity, constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty. The

> exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice-cream (or of reducing the opportunity for them to do so) even though there is a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market. If follows that HB's contentions set out in paragraph 149 above that the percentage of outlets potentially likely to be inaccessible only to the provision of freezer cabinets does not exceed 6% is incorrect and must be rejected.

Furthermore, HB's reference to the opinion of Advocate General Jacobs in the judgment in *Bronner* is irrelevant in the present case because, as the Commission correctly submits in its pleadings, it did not claim in the contested decision that HB's freezer cabinets were an 'essential facility', which is an issue examined and it is not necessary for HB to transfer an asset or to conclude contracts with persons which it has not selected in complying with the contested decision."

It seems to me that the very principles relied upon by Mr. Collins and to which reference is made when discussing 'essential facilities' in *Whish*, namely, that competitors should not piggy-back or enjoy a free-ride on a resource developed by some other party, operate, if at all, in support of the plaintiffs contentions in this case.

Firstly, those disaffiliated credit unions who are now members of CUDA and who seek access to the SPS have themselves over the years contributed to and built up the SPS. Secondly, there is no question of CUDA, or indeed any other representative body or credit union, seeking to expropriate the SPS or any part thereof. Thirdly, while access to the SPS is extremely important and desirable, I do not think it can ultimately be described as essential, at least not in the sense in which that word is used when describing certain infrastructural services without which a competitor simply cannot function. There is evidence in the instant case to the contrary. Firstly, it is clear that credit unions function in Northern Ireland without savings protection or deposit guarantee insurance. Secondly, CUDA credit unions have continued to grow their turnover from the time of their disaffiliation from ILCU without SPS, albeit, they say, at a significant disadvantage. Thirdly, a number of large credit unions such as the Prison Officers' Credit Union, have elected to 'go it alone' without savings protection.

For these reasons, I do not see that having access to a savings protection scheme is absolutely indispensable in the short term to the provision by a representative body of credit union representation services. Such a body may function for a time without it, just as a householder may elect to forego house insurance, or an employer may forego accident cover for employees.

The case strikes me as one more appropriately to be described as a tying case where, as Professor Seabright pointed out, there is a 'double tie' at work, namely the requirement on credit unions who seek access to the SPS to avail of ILCU's credit union representation services and also its mandatory ECCU LP/LS insurance arrangements.

The Commission Decision in the *Microsoft* case (24th March, 2004) addressed the issue of prohibited tying in, stating as follows (par. 794):

> "Tying prohibited under Article 82 of the Treaty requires the presence of the following elements: (i) the tying and tied goods are two separate products (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition".

Article 82(2)(d) gives as an example of abuse:

> "Making the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the nature of such contracts".

Whish describes a tie-in agreement (at p. 658) as:

> "One whereby a supplier causes, whether by contractual stipulation or by some other means, a buyer to purchase all or part of its requirements for a second (tied) product from the supplier of a first (tying) product. The competition policy objection to tying is that a firm that has market power in relation to the tying product uses that market power – or 'leverages' it – to induce the buyer also to buy the tied product. There is no objection to the supplier selling both widgets and blodgets to a customer; however there may be an objection where the two products are tied to one another. The offence of tying implies coercion on the part of the firm accused of infringing the competition rules which causes the customers to purchase the two products together".

Of course, a tie-in is not to be necessarily regarded as objectionable where it forms part of a composite, such as a car sold with wheels and tyres: clearly this does not involve a tie. Here one must obviously keep in mind the extent to which two products may be complementary. The court has already found that credit union representation services and savings protection, while linked or related, are nonetheless distinct products which a purchaser could seek to purchase on different markets. The Commission's *Guidelines on Vertical Restraints* state that, in determining whether two products are distinct, one should look at the demand of buyers and ask whether, from their perspective, in the absence of a tie-in they will purchase the two products on different markets.

A noteworthy element in *Tetra Pak II* was that the ECJ found that, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products, such sales might still constitute abuse within the meaning of Article 82 unless they are objectively justified.

The tie-in in the instant case is, in the view of the court, pernicious. There are both barriers to exit and barriers to entry for credit unions in the representation market because of the role of the SPS fund. A credit union which has become fed up with paying high premiums for ECCU LP/LS insurance faces expulsion from ILCU if it seeks such cover at more commercial rates elsewhere. It loses entirely the value of the contributions which it has made over many years to the growth of the SPS fund. It requires a very large number of credit unions to set up a new SPS. If it wishes to participate in the establishment of an alternative fund, either through CUDA or through some other new representative body, it must allocate at least 1% of its resources for that purpose. The savings effected in obtaining cheaper insurance do not take away from the fact that there are significant switching costs arising. Furthermore, any newly-established credit union, which must now by law have savings protection, has in reality no choice at all at present. Such a union must, if it wishes to have access to savings protection, join ILCU and arrange its insurances and also its representational services through ILCU.

It seems to the court that these are the very kinds of tie-ins which have been found to be abuses prohibited by Article 82, and which, if they do not eliminate competition in the market for credit union representation, seriously weaken that market and ultimately threaten its foreclosure.

Objective Justification

Having held that the tying-in in this case does enable ILCU, if not to eliminate CUDA in the short term, to seriously weaken competition in the market for credit union

representation services and threaten foreclosure of that market, the court must further enquire as to whether or not there is any objective justification for ILCU's assertion that its rules and practices are proportionate to legitimate co-operative aims and the further assertion that to hold otherwise would lead to an undesirable conflict with the regulatory process and be ultimately pointless since an express role in this regard is given to the Regulator to approve a suitable SPS.

Whish deals with the whole question of objective justification under the common banner of tying, refusal to supply and essential facilities. The author notes (at p. 663) that "a dominant undertaking may be able successfully to argue that a tie-in is objectively justified and proportionate. A number of examples of tying for reasonable purposes are set out as follows (at p. 659):

> "One is to maintain the efficiency of the tying product: for example, a piece of equipment may function at its best only if a particular chemical or material is used which is available solely from the manufacturer, because it has a patent or relevant know-how. Another is to enable economies of scale to be achieved: a manufacturer of a photocopying machine which also supplies ink, paper and spare parts would be able to reduce costs if all these items are delivered to customers at the same time; tying all these products to one another may lead to lower prices. A third reason for tying is to enable a producer to discriminate between its customers: the manufacturer of a photocopying machine may wish to charge high volume users more than low volume ones; this it can do by tying in photocopying paper: the customer which uses the machine the most will have to pay the most and the tie operates as a substitute for putting a meter onto the machine. Discrimination is not as obviously undesirable as might at first be thought, and anyway of the purpose of the tie is to discriminate it ought to be analysed as an issue of discrimination and not condemned simply as a tie-in".

I do not think in the instant case it can be said that the tie-in has any discriminatory aspect. Nor is it likely in the short term to eliminate competition in the credit union representation services market.

The difficulty, it seems to me, is that the sanction imposed on any credit union disaffiliating from ILCU is disproportionate. Despite the fact that such a credit union may have for many years contributed to the SPS fund, it may, for the simple reason that it sought insurance at a commercial rate, be expelled under the rules from ILCU and suffer the further adverse consequence that it loses the value of all contributions made to the SPS. It then has the additional burden of setting up an alternative savings protection scheme which, while it is not indispensable to the carrying on of credit union representation services *per se*, is nonetheless extremely important and beneficial for any representative body trading in such services. A competitor who is deprived of the ability to offer the back-stop product of savings protection is at a significant disadvantage when competing for business. It is also extremely difficult to set up an alternative.

Nor is this a case where the 'free-rider' argument makes any sense, given that the self-same disaffiliated credit unions are the very persons who by their contributions have helped build up the SPS fund to its present levels.

I accept that any collective organisation must have rules and procedures, and must have sanctions which may be applied where a member breaches those rules, but I also accept at the end of the day Professor Seabright's evidence on this point, which is to the effect that the sanction of expulsion is disproportionate when used to expel a union for not insuring with ECCU and when the further consequence is loss of access to the SPS Fund. It really serves no legitimate purpose, given that the evidence of all of the witnesses is to the

effect that the SPS is enhanced as a fund by having the greatest possible number of members. Whatever about newly established credit unions, there seems to me to be no objective justification for depriving disaffiliated credit unions from access to the SPS fund. Furthermore, one can only see the revision of its pricing policy by ILCU as a form of back-tracking on an aggressive pricing policy in the credit union representation services market which is being belatedly undertaken in an attempt to either drive out or weaken ILCU's main rival, CUDA, from that market.

I do not at all accept the submission that CUDA members "would like to get their hands on the money in the SPS fund". There is no question of expropriating any asset in this case, but rather a claim to continue having access as a 'customer' to a service in respect of which significant payment has already been made. Of course it is true to say that individual credit union members have no legal entitlement of a proprietary nature or otherwise to any part of the SPS fund by virtue of the rules and conditions of ILCU membership. The contributions, once paid, are entered up on the balance sheets of the individual credit unions as an expense. ILCU during the course of the hearing made the argument that the credit unions had enjoyed the 'benefit' of the SPS fund in return for their contributions, so that there could be no argument or justification for saying that their contributions had in some way been expropriated by ILCU.

I am unimpressed by these arguments. While it was suggested to the court that concepts of 'fair play' and 'equitable considerations' have no place in competition law, they are nonetheless concepts which must have some importance, at least where arguments on objective justification are concerned.

All of the explanations offered on behalf of ILCU of social solidarity, the dangers of repayment of contributions to SPS funds and the concept of 'strength in numbers' are arguments for continued access by CUDA members to the SPS fund.

The clear evidence in the present case is that the tying of the SPS services to the provision of credit union representation services has the effect of reducing the opportunity for competitors to enter the market. Furthermore, the nature of the tie in the *HB* case is quite different from the tie in the present case. Here the investment involved in switching supplier is considerably greater. Credit unions lose the benefit of all the accrued contributions. They obtain a product in the SPS which is by no means comparable to any alternative product even if it is possible to set one up.

Finally, as the Commission pointed out in its recent decision in the *Microsoft* case (par. 838) the degree of foreclosure need not be complete provided it is not insignificant. The Commission said:

> "In three recent judgments the Court of First Instance had an opportunity to apply Article 82 to cases which involved instances of exclusivity/foreclosure. In *Van den Bergh Fo*ods the Court of First Instance that foreclosure of competition under Article 82 in an exclusivity case need not reach the level of complete foreclosure but indicated that it must not be insignificant. In the recent Michelin and British Airways judgments which dealt with fidelity rebates the Court of First Instance stressed that the concrete foreclosure effect of abuse of conduct need not be shown as long as it is shown that the conduct in question is liable to have such an effect."

I conclude that it is incontestable in the present case that ILCU's conduct may in time foreclose the market, but already it certainly distorts and weakens it. The fact that 15 CUDA members still remain members of ILCU for the sole purpose of attempting to protect their SPS investment is the most eloquent testimony to the anti-competitive nature of ILCU's rules and procedures.

In *GB Innio BN* [1991] I ECR – 5973) the ECJ adopted a similar approach. It said:

> "The court has also held that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position in a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities in a neighbouring but separate market with the possibility of eliminating all competition from such undertaking …

Therefore the fact that an undertaking holding a monopoly in the market for establishment and operation of the network, without any objective necessity, reserves to itself in a neighbouring but separate market in this case the market for the importation, marketing, connection, maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty".

Two other factors strike me as particularly significant in this analysis. Firstly, ILCU enjoys a monopoly in the product in question, because the SPS is the only fund available in Ireland at present and for the foreseeable future. Secondly, and perhaps even more importantly in a common law jurisdiction, the failure of ILCU to call any witnesses from within its organisation to rebut, challenge or counter the evidence of many disaffiliated credit union representatives can only be seen as leading to the inescapable conclusion that the complaints of disaffiliated credit unions are well grounded and well justified where ILCU's rules and practices are concerned. An extremely serious complaint, referred to in the evidence of Mr. Nelius Collins, that ILCU representatives availed of an A.G.M. of Bishopstown Credit Union to effectively exert severe pressure on that union to revert to ILCU's LP/LS insurance went completely unanswered. No evidence whatsoever has been advanced to demonstrate why it would be harmful to the SPS to allow former ILCU members continued access to the fund. In fact, all the evidence is to the contrary effect. I therefore conclude for these various reasons that there can be no objective justification which would render unobjectionable the behaviour of ILCU in its dominant position in the SPS market. Furthermore, because of its monopoly position in that market, it has been observed by commentators that where 'super dominance' exists special responsibilities attach to the dominant undertaking not to distort competition in a downstream market (*Whish* at 189-190, 670). That fact would suggest that in this instance the court is well justified in treating any abuse by ILCU as more serious than in another where 'mere' dominance may exist.

PART VI: The Section 4 Case

The plaintiff has the burden of showing that the agreement between the credit unions in the shape of the rules of ILCU or the decision to disaffiliate those members who did not comply with the rules (a) have either the object or effect of preventing, restricting or distorting competition, and, (b) appreciably restrict competition in a relevant market.

As previously pointed out, no case has been made in these proceedings that the credit unions have any anti-competitive **object** in making their agreement. The case is purely one for consideration in respect of the suggested appreciable anti-competitive **effect** in the market.

On behalf of ILCU, Mr. Collins submitted that integral to the concept of an appreciable effect on competition is the question of harm to consumers. No evidence had been adduced, he suggested, to show that anybody other than a small minority of the 500 credit unions in Ireland who have subscribed to the ILCU agreement are dissatisfied with the agreement. No evidence had been adduced that indirect consumers (i.e. the individual members of credit unions) had suffered any harm at all.

Reference was made to the case of *Volk v. Vervaceke* [1969] ECR 295 where the court stated (at p. 302):

> "An agreement falls outside the prohibition in Article 81 when it only has an insignificant effect on the markets, taking into account the weak position which the persons concerned has on the market of the product in question. Thus, an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market and the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 81(1)".

Mr. Collins submitted that the ILCU agreement is an agreement between parties who, for the most part, do not compete with each other. That fact alone is a significant indicator that such an agreement is unlikely to give rise to any competition concerns. In the Commission's *Guidelines on Horizontal Co-operation Agreements* (OJ 3/2 2001) the Commission noted that co-operation between non-competitors would normally fall outside Article 81(1). An ILCU agreement may be viewed as an agreement under which the parties agree to co-operate by engaging in the collective purchase of certain services, although any competition concerns are further diminished by the fact that unlike most collective purchasing arrangements, the purchasers in this case are not purchasing from arms-length sellers, but are purchasing from themselves.

In *Gottrup-Klim v. Dansk Landrugs* [1994] ECR I-5641, the ECJ held that a provision in the statutes of a co-operative purchasing association, forbidding its members from participating in other forms of organised co-operation which were in direct competition with it, did not necessarily restrict competition and may even have had beneficial effects on competition. The arrangement would not be caught by Article 81(1) if it was restricted to what was necessary to ensure that the co-operative could function properly and maintain its contractual power in relation to the suppliers with which it had to deal.

Of particular relevance in that case is that part of the opinion of Advocate General Tesauro where he dealt with the argument that the very advantages of membership of the joint purchasing arrangement constituted exit barriers by virtue of which "the members are strongly dissuaded from withdrawing from the co-operative or rendering themselves liable to expulsion". In rejecting this argument he stated that Article 81:

> "Cannot be interpreted as granting the members of a co-operative the right to remain members and retain the benefits of membership whilst at the same time acting against the interests of the co-operative and of the other members. It is therefore incumbent on the members to choose, after freely weighing up their interests, whether to withdraw from the association (or take action to bring about their expulsion) or to remain within it and comply with its statutes; once that choice has been freely exercised, the member cannot complain of any disadvantages arising from its decision".

The Commission had adopted a similar approach in *P & I Clubs* (O.J. L125/12 19.05.1999) in holding that there could not be a restriction of competition where the members of a pooling agreement for insurance are not actual or potential competitors because they are unable to insure alone the risks covered by the pool. The Commission found that the restrictions imposed on the parties to the claim sharing agreement were indispensable to the proper functioning of that claim sharing and thus were not covered by Article 81(1).

Furthermore, in its most recent Guidelines on the application of A.81(3) published in April 2004, ancillary restraints were discussed (at pars. 28-31), in the course of which the Commission noted that "any alleged restriction of competition which is directly related

and necessary to the implementation of a mainly non-restrictive transaction and proportionate to it" does not breach Article 81(1).

Mr. Collins submitted that neither the requirement to participate in the SPS nor that to take LP/LS insurance from ECCU is objectionable in competition terms. Thus the 'restriction' of the benefits of the SPS to ILCU members is directly related to, necessary for and proportionate to, the legitimate aims of ILCU.

Alternatively, it was submitted on behalf of ILCU that if there was a case to answer under s. 4(1), then it was necessary to consider what might be loosely described as the "efficiency defences" under s. 4(5).

In relation to the efficiency defences under s. 4(5) of the Competition Act, 2002, Mr. Collins stressed that a breach of Article 81 could only be found following an assessment of whether the agreement or rules are restrictive of competition, an assessment which Commission Guidelines point out must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions. He submitted that if the agreement which makes up ILCU did not exist, then there would be no SPS fund. There would in fact be no competition between representative credit organisations because there would be no such organisations. Thus, he argued that there is no pre-existing competition in any relevant market liable to be distorted by the introduction of the ILCU agreement. It was inherent in the creation and the building up of the fund, its maintenance and service, that access to the service should be restricted to those who are members of the agreement, just as in *European Night Services v. Commission* [1998] ECR II-3141 the CFI had concluded that access to the services to run a night-rail service was properly restricted to the four members of the joint venture. Since the night-rail service would not come into existence at all were it not for the joint agreement, the court held that the agreement could not adversely affect some pre-existing state of competition.

Mr. Collins argued that the agreement brought about an improvement in the production or distribution of goods or in technical or economic progress as required both by the Act and by the Treaty. The stabilisation service provided by ILCU is an efficiency gain created through economies of scale. It assists in the preservation of the solvency of individual credit unions and the protection of the savings of their individual members. It does so in circumstances where it may be difficult for some credit unions to obtain deposit insurance. Mr. Collins submitted that it went beyond argument that the ILCU agreement thus contributes to an improvement in the services produced by credit unions and results in economic progress. The history of the growth of the credit union movement, the fact that it provided services to those who, in many cases, might be unable to access financial services from banks, the higher deposit rates offered to savers, all confirm the economic benefits that flow from the way credit unions have organised themselves through ILCU.

The issue of 'fair share to consumers' is normally an issue where the parties to the agreement are profit-maximising firms who have entered into some agreement which may distort competition to some extent but which increases their own profits. If, nonetheless, at least some of the gains or benefits from the improved efficiency are passed on to consumers, Mr. Collins submitted that the test had been passed. In the instant case, the issue did not even arise because the credit unions are not profit-making bodies who are driven by the profit motive, but are driven entirely by the needs and wants of their own individual members. The services whose provision has been facilitated by the ILCU agreement are, by their nature, a benefit to consumers.

Insofar as there is a requirement that any restriction must be indispensable, the Authority in the present case had failed to show why it is necessary to compel ILCU to provide

non-ILCU members with access to the SPS to prevent a restriction (namely that the benefits are confined to the members) from going beyond what is indispensable. On the contrary, he submitted, the evidence clearly showed that services such as the stabilisation service by their very intrinsic nature can only be supplied on a collective basis which means that certain people come together to supply the service to themselves and not to others and must have the sanction of expulsion for breach of the collective rules. Nor was there any question of eliminating competition in this case. The very fact that CUDA exists shows that even if it is appropriate to regard the two organisations as in competition with each other in an economically meaningful market for competition law purposes, then they are in competition with each other and competition is not eliminated.

Mr. Collins submitted that it was clear from the evidence that it was perfectly possible for CUDA to set up a stabilisation service such as the SPS. There is no difficulty, he suggested, about setting up the monitoring, advice and preventative side of the SPS. Nor is there any difficulty about CUDA members setting aside a certain portion of their reserves to start an SPS fund. Whether some credit unions might see an alternative SPS as less attractive than ILCU's SPS is not the issue.

Finally, Mr. Collins suggested that the court should be careful to avoid being lured down the path of judicial regulation, particularly in circumstances where the legislature has set up regulatory authorities with the express task of regulating credit unions, which said authorities are actively engaged in such regulation in areas which significantly overlap with the relief sought by the Authority in these proceedings.

On this aspect of the case, the Competition Authority repeated many of the arguments already adumbrated in the context of dominance and Article 82.

Mr. Gallagher submitted that the case law illustrates that disproportionate switching costs, such as those at issue in the instant case, are anti-competitive. In *Oude Luttikhuis v. Verenigde Co-operative Melkindustrie Coberco BA* [1995] ECR I-4515 proceedings had been brought by a number of dairy farmers against a co-operative association. In the event of withdrawal or expulsion from the association, farm owners were liable to pay the association 2% of the funds received for milk during the previous five years. While the ECJ was not asked to come to a conclusion as to whether such arrangements breached Article 85(1), it did state (at para. 15):

> "With regard next, to the effects of the agreements or the clauses in the statutes, a combination of clauses such as those requiring exclusive supply and payment of excessive fees on withdrawal, tying the members to the association for long periods and thereby depriving them of the possibility of approaching competitors, could have the effect of restricting competition".

Similarly, in *Re Rennet* [1980] CMLR 402, the Commission had held that a provision in a dairy co-operative's rules which provided that, on being expelled or resigning a member must pay a sum, constituted an appreciable restriction of competition within the common market and hence infringed Article 85(1). The Commission felt that the imposition of this monetary penalty was not necessary to achieving the co-operative's objectives and hence did not benefit from exemption under Article 85(3).

It was further submitted on behalf of the Competition Authority that s.4(5) was inapplicable in the instant case.

Firstly, the rules and arrangements put in place by ILCU afford the possibility of eliminating competition in the market for credit union representation services, having regard in particular to the manner in which they discourage the creation or growth of rival bodies. Secondly, the conditions concerning loss of access when a credit union leaves the

ILCU, for whatever reason, are not indispensable to the attainment of ILCU's objectives. The Competition Authority submitted that there is no reason why a credit union cannot continue to contribute premiums to ILCU's SPS and arrangements be put in place for continued inspections to ensure appropriate monitoring of the credit unions financial affairs. The evidence of the various witnesses called from disaffiliated credit unions made it clear that they would accept ILCU's field officers for the purpose of ongoing inspections and appropriate monitoring pending further steps which the Regulator might take. Finally, while the SPS protects members savings in the event of insolvency, and thus might be seen as promoting economic progress, the Authority's response on that issue was that the SPS would be a more effective scheme because of risk diversification factors if its membership included more, rather than fewer, credit unions.

Mr. Gallagher concluded his submissions by arguing that the obligation to provide the justification lies on ILCU and that such evidential requirement was a significant one. As the CFI had pointed out in *Van den Bergh*, exemption of agreements which restrict competition requires the satisfaction of a number of conditions and, in particular, a demonstration that the restriction is indispensable to the attainment of certain objectives. No evidence had been called whatsoever to show that the tie is indispensable to the attainment of any objectives. Absolutely no evidence had been adduced to demonstrate how it could be harmful in any way to the SPS to allow former ILCU members continued access thereto. Finally, if the tie was allowed to continue ILCU would be afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

Decision

For much the same reasons as have already been offered by the court for its findings in relation to alleged infringement of s.5 of the Competition Act, 2002, and Article 82 of the Treaty, the court is satisfied that the tie identified in this case does have the effect of distorting and restricting competition in the market for credit union representation services.

The arrangements put in place by ILCU distort competition in the market for credit union representation services because ILCU uses its market power to exert leverage in the market for credit union representation services. Tying imposes costs on the credit union members concerned that discourage them from purchasing on the most favourable terms the representation services which they might wish to purchase from rival credit union representation service bodies. This accordingly discourages entry into the market by rival credit union representation providers.

The court is also satisfied that the Competition Authority's arguments that there are disproportionate switching costs in this case are well founded.

As already explained, SPS cover is mandatory for new credit unions created after 1st August, 2001. For existing credit unions it is extremely desirable that SPS cover be available. On any view, it is extremely important for a credit union to be covered by an SPS.

This requirement will clearly discourage ILCU member credit unions from leaving ILCU, thus preventing, restricting or distorting competition in the market for representation services. I accept the evidence in this case that it would be extremely difficult to set up an alternative SPS. Most of the experts seem to feel that several hundred credit unions are required for this purpose, given the concentration of risk involved and bearing in mind that risk diversification is determined by the number of institutions insured rather than the aggregate volume of insured liabilities.

The few credit unions which are not ILCU members are also adversely affected, as the rules discourage the creation and growth of such rival bodies which they might wish to join. Furthermore, any credit unions formed after 1st August, 2001, are required under the Credit Union Act, 1997, to belong to an approved savings protection scheme. While no such credit unions have been formed and no scheme approved, it imposes an immediate pressure on a credit union created after 2001 to join ILCU in the expectation that ILCU's SPS will be approved, given that ILCU has requested the Registrar of Credit Unions to do so. Under these conditions, a newly formed credit union will hardly join a rival credit union representation services body since it would not have access to savings protection.

The court has some concerns that during the course of these proceedings there has been parallel developments on the regulatory side involving discussions between ILCU and the regulator. The court has been informed, however, that these discussions have been shelved or adjourned pending the outcome of these proceedings.

Be this as it may, those considerations cannot alter the obligation of the court to discharge its function *qua* competition authority under the terms of Article 5 of Regulation 1/2003.

For the reasons outlined above, the court does find that the rules and arrangements of ILCU affect competition to an appreciable degree in the credit union representation services market and that ILCU has failed to satisfy the court that it is entitled to an exemption by reference to the efficiency defences under s.4(5) of the Competition Act, 2002 or Article 81(3) of the Treaty.

PART VII: REMEDIES

It was submitted on behalf of the Competition Authority that if the court found, as it has done, that ILCU has been in breach of Articles 81 and 82 and the equivalent provisions of the Competition Act, 2002, that it could make an order amounting to a structural reform of ILCU's SPS.

S. 14(7) of the Competition Act, 2002, provides that where a court finds a breach of s.5, it may either:

> "(a) require the dominant position to be discontinued unless conditions specified in the order are complied with, or
>
> (b) require the adjustment of the dominant position, in a manner and within a period specified in the order, by sale of assets or otherwise as the court may specify".

It was originally submitted on behalf of the Competition Authority that the preferred order, if the court found in favour of the plaintiff, would be an order (i) permitting non-affiliated credit unions to participate in the SPS (ii) transferring the SPS to a body outside and independent of ILCU and (iii) requiring the SPS to operate independently of ILCU. However, as the case progressed, and indeed in the course of submissions made to the court at the conclusion of the evidence, counsel on behalf of the Competition Authority made it clear that expropriation of the assets of ILCU was not what was being sought in the present proceedings. Instead, the key issue was that of continuing access to the SPS Fund where credit union had been disaffiliated from ILCU because they had sought insurance otherwise than through ECCU, the insurance company owned by ILCU. Furthermore, while various credit union witnesses testified that they would like to see the SPS operate independently of ILCU, there was a recognition that this was a matter which could be in due course addressed and regulated in a different way, either by legislation or in negotiation with the Regulator.

The court recognises that a body such as ILCU must have rules which would in certain circumstances other than those which arise in the present case permit ILCU to disaffiliate

a credit union from membership of ILCU. It would thus be inappropriate to make a declaration to the effect that rules which permit ILCU to disaffiliate a credit union are *per se* void. However, it is clear from the findings which the court has made that the recourse made by ILCU to its disaffiliation procedures for the particular purpose and reasons which arise in the present case is unlawful. It follows, therefore, that Resolution 10 passed by the 1987 AGM of ILCU, which restricts participation in any future guarantee scheme to affiliated members of ILCU only, must now be seen as void insofar as it denies access to the SPS Fund for credit unions who later disaffiliated or were expelled for not taking LP/LS with ECCU.

For these reasons, the court is not disposed to go further at this point in time than to injunct ILCU from disaffiliating credit unions who have been threatened with disaffiliation and consequential loss of access to the SPS Fund because the unions in question have sought LP/LS cover other than through ECCU. For the sake of clarity, the court would also be of the view that those credit unions who in the past were contributors to the SPS but chose themselves voluntarily to disassociate from ILCU, or who do so in future, should also have continuing access to the SPS Fund on payment of the appropriate contributions. The court is further of the view that there should be no significant impediment in the way of existing non-affiliated credit unions, or newly-formed credit unions, should they wish to access the SPS Fund also.

The court will not preclude the parties from making further submissions in respect of any other reliefs which might now be sought in light of the court's findings and decision which it has adopted. This entitlement to make further submissions will also include the right to make submissions on the issue of costs.

Approved by: Kearns J.