Submission to the Office of Fair Trading

Response to Discussion Paper on Private Actions in Competition Law: Effective Redress for Consumers and Business

S/07/002

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The Competition Authority
An tÚdarás Iomaíochta

Table of Contents

1. INTRODUCTION

1.1 The Office of Fair Trading ("the OFT") has issued a Discussion Paper entitled *Private actions in competition law: effective redress for consumers and business*, to which it has invited comment.

1.2 The Irish Competition Authority takes the view that, because of the great diversity in legal systems throughout the EU and the difficulty of convincing every Member State that private actions for a breach of EC competition laws should be afforded a more favoured place in the national litigation system than other types of private actions, the Commission should establish rules and policies to ensure that the right of private actions is effective in each Member State. It comments below on certain aspects of the OFT's Discussion Paper. For a full understanding of the Competition Authority's views, please see its submission to the Commission on the *Green Paper on Damages Action for Breach of EC Antitrust Rules.*[1]

2. REPRESENTATIVE ACTIONS

2.1 The Competition Authority supports the idea that Member States should be obliged to introduce some form of effective collective action. We also support the idea that the nature of the action should be left to the Member States themselves. For that reason, we think the action should be described as "collective" rather than "representative" It may be that some member states already have or would wish to introduce a class action system, whereas others would prefer a representative system. Both systems would be covered by the description "collective action".

3 EVIDENTIAL ISSUES

3.1 We would have serious reservations about making infringement decisions of NCAs binding on the courts of member states. We believe that only decisions of the CFI and the ECJ should be binding upon the national courts.

[1] See www.tca.ie

4. INTERFACE WITH PUBLIC ENFORCEMENT

4.1 We agree that means which achieve effective claims resolution should be pursued and encouraged.

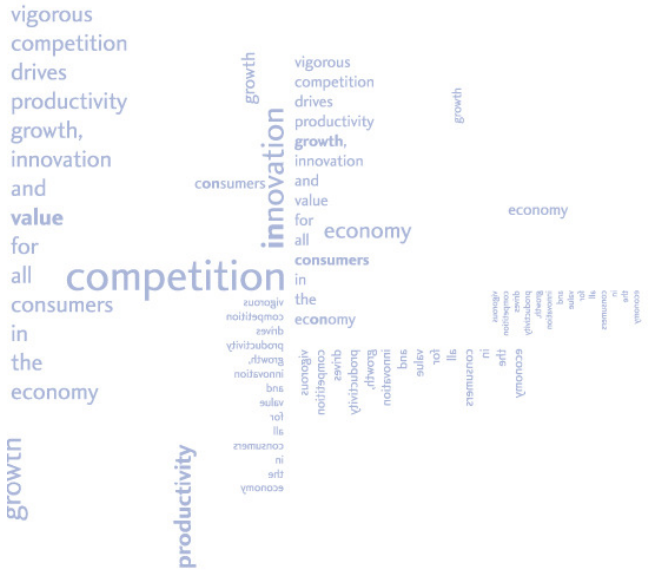
4.2 We agree with the two propositions put forward by the OFT, namely, that, in defending an action for damages, a leniency recipient should be in the same position as he would have been if he had not applied for leniency, and that those who have suffered loss should not find it more difficult to obtain redress where one or more of the defendants has obtained leniency.[2]

4.3 We are doubtful about the merits of the premise that if a leniency applicant is exposed to damages, it may prevent undertakings or individuals seeking leniency, thus undermining public enforcement.

4.4 We believe that, weighing up the pros and cons of applying for leniency, it will always be to an undertaking's or individual's advantage to come forward for leniency. If he does, and if leniency is granted, then, although he may subsequently be exposed to damages, his risk will be less than if he did not apply for leniency, in which case he would risk both substantial penalties and damages. We do not believe that anything ought to be done to favour a leniency applicant – provided always that damages are defined as compensatory.

4.5 We do not believe that as a matter of policy a leniency applicant should in effect be "rewarded" for coming forward by having his exposure to damages limited or excluded. He is already benefiting from either immunity from prosecution or some other form of leniency. As a corollary of this, we believe that a plaintiff who has proved his case should not be disadvantaged because one of the defendants is a leniency applicant. The Competition Authority submits that if the leniency applicant's unlawful behaviour has caused injury to the plaintiff, he should be liable to compensate him, whether singly, or jointly and severally.

[2] We use the term "leniency" here to include immunity.



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