The Competition Authority
An tÚdarás Iomaíochta

Information for Businesses

Bringing a Private Action for a Breach of Competition Law

March 2011

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Bringing a Private Action for a Breach of Competition Law

1. Introduction

The Competition Authority is the body appointed by law to enforce competition law in Ireland. We do so by investigating breaches of the Competition Act 2002 ("the Act") and of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("the Treaty").

However, it is often the case that a firm or business which[1] has been affected by a breach of competition law is in a better position than we are to bring an action speedily. If you have been affected in this way, you may be very familiar with the market in which the breach took place, or you may have a considerable amount of documentary evidence tending to prove the breach. Again, because you are intimately affected by that breach and that breach only, you will be able to devote your attention to it in a way that is not always possible for us.

We investigate many complaints and therefore have to prioritise those that are most important for consumers generally. We will not always be able to give your particular complaint the priority that you expect, because, although recognising that it is very important to you and to your business, we have to devote our resources to investigating those complaints that have an effect upon the wider population.

The Act recognises this reality, and it gives you, as well as the Competition Authority, the right to bring an action in the Circuit Court or the High Court. This document is intended to give you some guidance as to when it might be appropriate for you to do this, and how to go about it. It is not, however, intended to replace professional legal advice, and you should always get legal advice before beginning an action in the courts.

2. Section 14 of the Competition Act 2002

The statutory provision that gives you the right to bring an action is section 14 of the Act. The relevant sections of it say as follows:

> (1) Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5 shall have a right of action under this subsection for relief against either or both of the following, namely –
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> (a) any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse,
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> (b) any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into, or the implementation by it of, the agreement or decision, the engaging by it in the concerted practice or the doing by it of the act that constituted the abuse.
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> […]
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> (3) Subject to subsection (4), an action under subsection (1) […] may be brought in the Circuit Court or in the High Court.
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> […]
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> (4) Where an action under subsection (1) is brought in the Circuit Court any relief by way of damages, including exemplary damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of the jurisdiction of the Circuit Court in an action founded on tort.
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> (5) [...] [T]he following reliefs, or any of them, may be granted to the plaintiff in an action under subsection (1):
>
> (a) relief by way of injunction or declaration,
>
> (b) damages, including exemplary damages.

3. Advantages of taking a private action

You might wonder why you should go to the trouble of bringing a case to court, when making a complaint to the Competition Authority might seem to be a much simpler procedure.

In fact, there are three reasons why you might choose to take a court case.

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[1] While the information in this Note is primarily intended for a business audience, it might also be of interest to individual consumers in some situations. As in every case involving possible legal action, however, legal advice

First, when you take a court case, you have the possibility of being awarded damages for any harm the anticompetitive behaviour has caused you. When you complain to us, there is no such possibility. If we bring a court case as a result of your complaint, we are the plaintiff, not you, and the Act does not allow the court to award us (or you) any damages even if we win the case. To recover damages for the loss you may have suffered, you must still take a case even if the Authority has taken a case based on your complaint.

Second, when you bring a court case, you are sure of getting a decision on your complaint, or at the very least, of settling the case to your satisfaction before it gets to court. When you complain to us, you are one of many complainants, and you must take your place in the order of priority. If we decide to investigate your complaint, it may be some time before the matter gets to court. Indeed, it may never get there at all, either because we take the view that it's not a winnable case, or because, even though it's a good case, there are other cases that need to be brought more urgently. We simply don't have the resources to bring every case to court.

Third, when you bring a court case, **you** are in control. You can issue proceedings immediately if you believe you have a case and can settle that case at a time and on terms which you control. If you complain to us, things move at a different pace. We cannot go straight to court. We have a duty to investigate the matter fully and only to expend taxpayers' money when we are as certain as we reasonably can be that there is a winnable case. An investigation is a cumbersome and time-consuming process, and we may have many investigations running simultaneously.

4. When can you take a private action?

The Act says that you are entitled to bring a private action if you have been "aggrieved" by behaviour that is prohibited under section 4 and section 5 of the Act. You are also entitled under European Union law to bring an action if you have been injured by a breach of Article 101 or Article 102 of the Treaty.

This raises two questions: what behaviour is prohibited by section 4 and 5 of the Act, or by Articles 101 and 102 of the Treaty and what does "aggrieved" mean in this context?

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should be sought first.

5. What behaviour is prohibited?

Section 4 of the Act and Article 101 of the Treaty both prohibit agreements between "undertakings" – that is, businesses, including self-employed individuals – which prevent, restrict or distort competition. They also prohibit trade associations from making decisions which prevent, restrict or distort competition.

Section 5 of the Act and Article 102 of the Treaty prohibit "abuse of a dominant position". This means that a business which enjoys a dominant position in the market cannot take advantage of that position by using it to prevent, restrict or distort competition. A business enjoys a dominant position when it has enough economic strength to be able to behave without undue regard to its competitors, its customers or consumers generally.[2]

6. Are you an "aggrieved" person?

The Act doesn't tell us what it means by an "aggrieved" person. However, it is a phrase that appears in other statutes too. According to case law, it is

> a term to be generously interpreted - which is generally understood to include any person who has reasonable grounds to bring the proceedings […]The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case.[3]

In relation to competition law, you are likely to be an aggrieved person if someone's breach of the competition rules, whether Irish or EU, has caused you some economic damage. For example, you may have bought goods or services from a business that is part of a cartel where the price of the goods or service you bought was illegally fixed by the cartel and was therefore higher than the normal competitive price.

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[2] See *United Brands Continental BV v Commission* [1978] ECR 207, which defines a dominant position as one of "economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

[3] *The State (Lynch) v Cooney* [1982] IR 337

7. Time limits

Before deciding to bring a private action, you will need to consider whether you are within the time limit for doing so. Generally speaking, the time limit for bringing an action for breach of competition law is six years from the date you first suffered harm from the defendant's actions.

8. Whom can you sue?

Section 14 of the Act says that you can sue

(a) any undertaking who carried out or took part in the illegal behaviour, and

(b) any director, manager or officer of the undertaking, provided that he or she authorised or consented to the illegal behaviour.

9. Choosing your court

If (having taken legal advice) you decide to bring a private action, you will then have to decide whether to bring it in the Circuit Court or the High Court. How you choose will depend on the level of damages to which you believe yourself to be entitled, and that, in turn, will depend on how much economic harm you claim to have suffered.

The purpose of damages is to compensate you for the harm you have suffered and to put you back in the position you would have been in if you had never been harmed. So, if you calculate that you have suffered, say, €100,000 worth of injury, then you will be seeking damages of that amount. This will mean that your case will have to be in the High Court, because the Circuit Court can only hear claims of up to €38,092.14. There is no limit to the claim that can be made in the High Court.

10. What will you have to prove to win your case?

First, (if you are suing the undertaking itself) you will have to prove that the defendant's behaviour actually breached the relevant provisions of the Act or the Treaty.

If you are suing a director, manager or other officer of the undertaking, you will also have to prove that they consented to or authorised the breach of the Act. However, if you prove that the undertaking itself has breached the Act, then it will be presumed that the director, manager or other officer consented to this, and you will not have to prove it. Instead, the director, manager or other officer will have to prove that he or she did **not** consent.

Next, you will have to prove that the behaviour caused you harm in some way.

Finally, if you are seeking damages, you will also have to prove the amount of the loss you suffered as a result of the breach.

11. Remedies

The Act entitles you to seek three different types of remedy – injunction, declaration and damages. You can seek one or more of them, or you can seek all three of them. If your case is successful, you might not be awarded all the remedies you seek, but only those the court considers appropriate. On the other hand, you will not be awarded any remedy that you do **not** seek, so in most cases it will be a good idea to seek all three. Here again, as at each stage of this process, you should obtain and be guided by legal advice. We discuss each of the remedies below

(a) Injunction

An injunction is an order of the court directing the defendant to stop or amend the illegal behaviour. You may wish to seek this remedy if the anticompetitive behaviour that affects you is still happening. Even if the anticompetitive behaviour has ceased, you might wish to ask the court for an injunction directing the defendant not to do it again. If a defendant breaches an injunction, he is guilty of contempt of court and will be punished by the court accordingly.

(b) Declaration

A declaration is simply a statement by the court that the defendant has broken competition law. You might wonder what the point of this is, but in fact it's very important.

First, it states clearly as a matter of public record that the behaviour that injured you in this case is against the law. This puts everyone else on notice that they cannot lawfully engage in similar behaviour.

Second, if the defendant repeats the behaviour complained of, and the facts are identical, all you will need to prove to the court on the next occasion is that he did it. Since it will already have been declared to be against the law, you won't have to prove that (which is always difficult).

(c) Damages

As we have already explained, the purpose of an award of damages is to compensate you for the harm done to you. It is not intended to provide you with a windfall. The courts have repeatedly said that an award of damages is intended to put a plaintiff into the situation he would have been in if the defendant had never injured him.

There is one rare exception to this general principle, and that is when the court decides to make an award of **exemplary** damages. Exemplary damages can be awarded under the Competition Act when the court considers the defendant's behaviour to have been so bad as to deserve actual punishment. When this happens, the court can order him to pay damages to you over and above the amount required to compensate you. The court will award such damages only in the most exceptional circumstances and the prospect of such damages should not be a factor in the initial decision to consider an action under section 14 of the Act.

12. Concluding reminder

Finally, we remind you once again that the information in this Note is not legal advice, or a substitute for legal advice. You should think very carefully before deciding to bring an action under section 14 without at least seeking legal advice as to whether you have a good case.