IRELAND

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I. Introduction

Irish competition law is modelled on European Community ("**EC**") competition law.[1] In particular, the competition rules contained in section 4 and section 5 of the Competition Act, 2002 (the "**Competition Act**") are based, by analogy, on Article 81 and Article 82 of the EC Treaty, respectively. Section 4 prohibits anti-competitive arrangements between undertakings which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in Ireland or in any part of Ireland unless certain efficiency conditions are satisfied or an arrangement satisfies any applicable Irish Competition Authority (the "Authority") declaration or notice currently in force.[2] Section 5 prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in Ireland or in any part of Ireland.

In Ireland, only the courts have the power to make enforcement decisions in respect of breaches of competition law. Decisions may be appealed to a higher court in the same manner as in other cases.[3] The Authority, which is a statutory body that was established under the Competition Act, 1991, does not have the power to make enforcement decisions in respect of breaches of competition law.

The functions of the Authority include: to study and analyse any practice or method of competition; to carry out investigations into any breach of the Competition Act; to advise the government, ministers of the Government and ministers of State concerning the implications for competition of proposals for legislation; to publish notices containing practical guidelines as to how the provisions of the Competition Act may be complied with; to advise public authorities on issues concerning competition which may arise in the performance of their functions; to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; and to inform the public about issues concerning competition.[4] In addition, the Authority may bring civil proceedings[5] and summary criminal prosecutions[6] in respect of breaches of competition law. Finally, the Authority has competence for merger review in Ireland.[7]

There have been few reported decisions concerning actions for damages in respect of breaches of EC or national competition law brought in Irish courts to date.[8] In only one action to date, *Donovan and others v Electricity Supply Board*[9], have damages been awarded to the plaintiffs involved for infringement of Irish competition law. There has been no reported case to date in which damages have been awarded for infringement of EC competition law.

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1 Please note that references to "competition law" in this report refer to both Irish and EC competition law.

2 The following applicable Authority declarations and notices are currently in force: the Declaration in respect of vertical agreements and concerted practices (Decision D/03/001), which is based on the EC Commission's Vertical Agreements Block Exemption Regulation (Commission Regulation 2790/1999, OJ L 336, 29.12.1999, page 21); and the Notice in respect of vertical agreements and concerted practices (Decision N/03/002).

3 See section II.B(i) below for more on appeals.

4 Pursuant to section 30 of the Competition Act.

5 Pursuant to section 14(2) of the Competition Act.

6 Pursuant to section 8(9) of the Competition Act.

7 Under Part III of the Competition Act.

8 See section V below for summaries of the salient reported competition cases heard before the Irish courts involving claims for damages.

9 [1994] 2 IR 305, [1997] 3 IR 573.

II. Actions for damages – status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

Sub-section 14(1) of the Competition Act provides that any person who is aggrieved in consequence of an anti-competitive arrangement or an abuse of a dominant position which is prohibited by section 4 or section 5 of the Competition Act respectively has a right of action for relief. The action may be brought against either or both of the following:

- any undertaking which is or has at any material time been a party to such an arrangement or has done any act that constituted such an abuse,

- 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 the entry by the undertaking into, or the implementation by it of, the arrangement or the doing by it of the act that constituted the abuse.

The explicit statutory basis for a right of action for damages in respect of breaches of section 4 and 5 of the Competition Act does not differ in any material manner from other actions for damages under Irish law.

Section 14 of the Competition Act does not provide an explicit basis for a right of action for damages in respect of breaches of Article 81 or 82 of the EC Treaty. However, on the basis that Articles 81 and 82 of the EC Treaty form part of Irish law[10] and are directly effective in Ireland[11], an action in respect of a breach of Article 81 or 82 may be brought by affected parties in Irish courts.[12] It is now widely recognised that the most likely basis for an action in the English courts under Article 81 or 82 of the EC Treaty would be an action for breach of statutory duty.[13] It is likely that the same approach would be applied by the Irish courts.[14] There have been no reported judicial pronouncements on point to date.

It is unclear why criminal sanctions apply to breaches of both national and EC competition law while the statutory right to damages is confined to national competition law.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

Sub-section 14(3) of the Competition Act provides that an action in respect of a breach of sections 4 or 5 may be brought in the Circuit Court or in the High Court.

On the basis that Articles 81 and 82 of the EC Treaty form part of Irish law and are directly effective in Ireland, an action in respect of a breach of Article 81 or 82 of the EC Treaty may be brought by affected parties in the District Court, the Circuit Court or the High Court.

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10 Section 2 of the European Communities Act, 1972.

11 Case 127/73, *Belgische Radio en Television v SABAM*, [1990] ECR II-309, [1974] ECR 512, [1974] 2 CMLR 238; Case T-51/89, *Tetra Pak Rausing v Commission*, [1991] 4 CMLR 334; and Case C-234/89 *Delimitis v Henninger Brau,* [1991] ECR I-935, [1991] 4 CMLR 329.

12 See, for example, *Cadbury Ireland Ltd. v Kerry Co-Operative Creameries Ltd and Dairy Disposal Co Ltd* [1982] ILRM 77; *Masterfoods Ltd. v HB Ice Cream Ltd and HB Ice Cream Ltd v Masterfoods Ltd.* [1993] ILRM 145.

13 *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130; *An Bord Bainne v Milk Marketing Board* [1984] 1 CMLR 519 (QBD Comm. Ct.); *Cutsforth v Mansfield Inns* [1986] 1 WLR 558, 563 (QBD); *Argyll Group v Distillers Co.* [1986] 1 CMLR 764, 769; *Bourgoin v Minister of Agriculture Fisheries and Food* [1986] QB 716 (CA); *Plessey Co. plc v GEC and Siemens* [1990] ECC 384 (ChD); *MTV Europe v BMG Record (UK) Ltd* [1997] EuLR 100; *The Society of Lloyd's v Clementson* [1995] CLC 117 (CA); *Arkin v Bouchard Lines* [2000] EuLR 232.

14 See O'Connor, '*Principles of Irish Law concerning Compensation for Damage Caused by Infringements of Articles 85 and 86 of the EEC Treaty*' in Germer.

Both the District Court and the Circuit Court have monetary limits of jurisdiction. The current monetary limit for the District Court is □6,348.96 and the current monetary limit for the Circuit Court is □38,092.00. Consequently, most competition law actions are taken in the Circuit Court or the High Court. It should be noted that there are proposals to increase the monetary limits of the District Court and the Circuit Court generally.

The identity of the parties has no bearing on which court an action may be brought in. The fact that the defendant in an action is a public authority has no bearing on which court an action may be brought in.

District Court decisions may be appealed to the Circuit Court or, on a point of law, to the High Court. Circuit Court decisions may be appealed to the High Court or, on a point of law, to the Supreme Court. High Court decisions may be appealed on a point of law to the Supreme Court.

There is no procedure whereby issues of a claim in a competition law action must be referred to a different court to the court in which the action is taken.

There is no specialised panel or chamber that deals with competition claims within each court. However, recently, a number of High Court judges have been given responsibility for the hearing of competition law cases that are brought before the High Court.

Apart from the statutory restriction provided by sub-section 14(3) of the Competition Act referred to above, there are no official restrictions on which courts may hear competition claims.

The rules on competence with respect to competition law actions do not differ in any way from the normal rules applicable to damages actions.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

No.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Actions under sub-section 14(1) of the Competition Act may be brought by "any person who is aggrieved". This term is not defined in the Competition Act. It is clear from case law that an aggrieved person does not need to be an undertaking or a legal person. In addition, persons from other jurisdictions may have standing to bring an action under sub-section 14(1). The Authority has stated, in relation to the equivalent term in the Competition Act, 1991[15],:

> "[w]hile the Act does not define "person who is aggrieved", this is a well-known phrase taken from administrative law. It includes a person whose legal rights or interests have been affected or threatened, but it also extends to persons who have a genuine grievance even if their legal rights have not been infringed."[16]

It should be noted that the views of the Authority have no status in law. There has been no reported judicial pronouncement to date on the interpretation of the term "person who is aggrieved" in the context of competition law.

15 The Competition Act, 2002 replaced the Competition Acts, 1991 to 1996.
16 Authority, *A Guide to Irish Legislation on Competition* (1992), at para 5.3.

In accordance with the principle of equivalence, it is likely that actions taken in Irish courts in relation to breaches of Article 81 or 82 of the EC Treaty may be taken by a similar category of persons as in actions under sub-section 14(1) of the Competition Act as described above, subject to the principle of effectiveness.[17] There has been no reported judicial pronouncement on point to date.

There is no requirement for a plaintiff to establish fault, damage or a causal link before standing may be granted.

As regards the internal aspect of jurisdiction, the District Court and the Circuit Court sit in session throughout the country. In an action brought in the District Court or the Circuit Court the plaintiff may elect to bring the action in the area where the defendant or one of them habitually resides or carries on business, trade or profession, or, alternatively, where the cause of action arose. The High Court and the Supreme Court sit in Dublin.

As regards the external aspect of jurisdiction, the jurisdiction of Irish courts to hear actions relating to breaches of section 4 or 5 of the Competition Act or Article 81 or 82 of the EC Treaty is subject to the jurisdictional rules contained in Council Regulation (EC) No 44/2001 (the "**Brussels Regulation**") where the defendant is domiciled in the European Union (the "**EU**") (with the exception of Denmark[18]). Ireland is also a party to the Brussels Convention[19] and the Lugano Convention[20], whose jurisdictional rules may apply in certain circumstances.

Where neither the Brussels Regulation, the Brussels Convention nor the Lugano Convention applies, Irish common law jurisdictional rules apply. Irish courts assume jurisdiction under common law jurisdictional rules in the following circumstances:

- where the defendant has been duly served in Ireland;
- where a defendant submits to the jurisdiction of the Irish courts; or
- where service outside of Ireland has been performed in accordance with Order 11 of the Rules of the Superior Court, 1986.

Order 11 applies to cases where a defendant is not present in Ireland but the case is so closely connected to Ireland or with Irish law that there is ample justification for it being tried in Ireland.

Irish courts have an inherent discretionary jurisdiction to stay proceedings in the interests of justice.[21] Under the principle of *forum non conveniens*, an Irish court can order a stay on Irish proceedings if, in its opinion, Ireland is not the appropriate forum for the action. For the principle of *forum non conveniens* to be invoked, the defendant must be able to show that there is another court with competent jurisdiction which is clearly and distinctly more appropriate than Ireland for the trial of the action, and it is not unjust for the claimant to be deprived of the right to trial in Ireland. The principle of *forum non conveniens* is a common law principle and is not applied by Irish courts in cases that fall within the application of the Brussels Regulation, the Brussels Convention[22] or the Lugano Convention.

17 The principle of equivalence and the principle of effectiveness are referred to in: Case C-213/89 *Factortame* [1990] ECR I-2433; and Case C-453/99, *Courage Ltd v Crehan,* ECR 2001 I-06297.
18 In relation to whom the Brussels Convention applies.
19 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was concluded on 27 September 1968 [Official Journal C 27 of 26.01.1998].
20 Signed on 16 September 1988.
21 This jurisdiction is recognised by section 27(5) of the Supreme Court of Judicature (Ireland) Act 1877.
22 See the judgment of Finnegan J. in *D.C. v W.O.C.* [2001] 2 IR 1.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

It is not possible to bring class actions in Ireland. Joint actions may be brought. A representative body may take a civil action on behalf of its members seeking declaratory or injunctive relief but it may not sue for damages on behalf of its members. Where members of a representative body have suffered injury each member may sue for damages on an individual basis. A representative body may sue for damages in its own right where it has suffered injury.

The Authority may pursue public interest litigation by reason of sub-section 14(2) of the Competition Act, which provides that the Authority has a right of action in respect of an action, a practice or an abuse which is prohibited by section 4 or 5 of the Competition Act or by Article 81 or 82 of the EC Treaty. The Authority may not be granted damages in such an action but may be granted relief by way of injunction or declaration. The Competition Act does not grant the Attorney General or any other public agents (apart from the Authority) powers to bring public interest litigation in respect of breaches of competition law.

D. What are the procedural and substantive conditions to obtain damages?

In order to succeed in an action in respect of a breach of competition law, a plaintiff must establish the existence of an infringement, causation and damages.

(i) What forms of compensation are available?

Sub-section 14(5) of the Competition Act provides that damages, including exemplary damages, are available as reliefs to a plaintiff in an action taken under sub-section 14(1). There is no specific guidance in the Competition Act as to how damages are to be calculated, so the courts have to rely on general principles.

It is well established that EC law requires that damages for breaches of the EC competition rules should be available in national courts.[23] There are no reported Irish cases to date of damages having been awarded for breaches of the EC competition rules. However, claims for breaches of Articles 81 and 82 have been considered by Irish courts in civil actions.[24] On the basis of the principle of equivalence, it is likely that the Irish courts would apply the same principles in the calculation of damages for breaches of Articles 81 and 82 as are used for breaches of sections 4 and 5 of the Competition Act.

In addition to monetary compensation, a plaintiff may seek an injunction and/or a declaration for infringement of sections 4 and 5 and, therefore, Articles 81 and 82.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Sub-section 14(7) of the Competition Act provides that where, in an action under sub-section 14(1), a court decides that an undertaking has, contrary to section 5, abused a dominant position, the court may, either at its own instance or on the application of the Authority, by order either:

- require the dominant position to be discontinued unless conditions specified in the order are complied with, or
- 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.

On the basis of the principle of equivalence, it is likely that the Irish courts could apply the same remedies in relation to actions for breaches of Article 82 of the EC

23 Case C-6 & 9/90 *Francovich & Bonifaci v Italy* [1991] ECR I-5357, [1993] 2 CMLR 66; Case C-128/92 *Banks v British Steel Corp* [1994] ECR I-1209.

24 See, for example, *Cadbury Ireland Ltd. v Kerry Co-Operative Creameries Ltd and Dairy Disposal Co Ltd* [1982] ILRM 77; *Masterfoods Ltd. v HB Ice Cream Ltd and HB Ice Cream Ltd v Masterfoods Ltd.* [1993] ILRM 145.

Treaty, where deemed necessary. There have been no reported cases on point to date.

The Competition Act does not provide for disqualification of directors as a form of civil liability with respect to breaches of section 4 or 5. However, pursuant to sub-section 14(1) of the Competition Act, directors, managers, other officers and persons purporting to act in any such capacity who authorised or consented to the acts of an undertaking that breach section 4 or 5 of the Competition Act may be personally liable in damages in addition to the undertaking. Please refer to section II.A.(i) above in relation to the statutory basis for civil claims in respect of breaches of Irish competition law.

Directors, managers and other such officers may be criminally liable in respect of breaches of Irish and EC competition law in certain circumstances. Section 6 of the Competition Act provides that an undertaking that breaches sub-section 4(1) of the Competition Act or Article 81(1) of the EC Treaty is guilty of an offence. Section 7 of the Competition Act provides that an undertaking that breaches sub-section 5(1) of the Competition Act or Article 82 of the EC Treaty is guilty of an offence. Section 8 sets out the penalties for undertakings guilty of an offence under section 6 or section 7. Such undertakings are liable on indictment to fines up to the greater of □4 million or 10% of the turnover of the undertaking in the preceding year. In addition to or as an alternative to fines, where the breach involves price fixing, limiting output or sales or sharing markets or customers (known as hardcore offences), individuals may be liable to imprisonment for up to 5 years. Sub-section 8(6) provides that where an offence under section 6 or section 7 has been committed by an undertaking and the doing of the acts that constitute the offence has been authorised, or consented to, by a director, manager or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person is also guilty of the offence and liable to be proceeded against and punished (fines and/or, in the case of hardcore offences, imprisonment) as if he or she were guilty of the breach. Sub-section 8(7) provides that in such proceedings it is presumed until the contrary is proven that such directors, managers and other similar officers consented to the doing of the acts that constitute an offence.

Although the Competition Act does not provide for disqualification of directors as a form of civil liability with respect to breaches of section 4 or 5, the Companies Act, 1990 does provide for disqualification of directors and other officers of a company in certain circumstances. Section 160 of the Companies Act, 1990 provides that where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then, on the application of the prosecutor, the director may be disqualified from acting as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company for a period of five years.

The following actions may be available to the shareholders of a company against the directors of the company in the event that the company breaches competition law.

Shareholders may bring an action against directors of a company under section 205 of the Companies Act, 1963 where the affairs of the company or the powers of the directors are being conducted oppressively or in disregard of their interests. Where shareholders cannot bring themselves within section 205 of the Companies Act, 1963, they may be able to bring a derivative action as an exception to the rule in *Foss v Harbottle*[25]. A derivative action is where a shareholder, as representative of all of the other shareholders, institutes proceedings on behalf of the company in an attempt to redress a wrong perpetrated against the company. It should be noted that these shareholder remedies are distinct from any remedies provided under the Competition Act and are not available solely in respect of breaches of competition law.

25 (1843) 2 Hare 461.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

For an action to be in breach of sub-section 4(1) of the Competition Act or Article 81(1) of the EC Treaty, it is sufficient that it has the effect of preventing, restricting or distorting competition. Consequently, in a civil action concerning a breach of sub-section 4(1) or Article 81(1) there is no need for a plaintiff to prove fault, negligence or intent on the part of the defendant.

In relation to breaches of Article 82, it has been held in *Hoffmann La-Roche v Commission*[26] that the concept of abuse is an objective concept. In *BPB Industries v Commission*[27], it was held that, on the basis that abuse is an objective concept, the conduct of a dominant undertaking may be regarded as abusive even in the absence of any fault. It is likely that the Irish courts would apply the same reasoning by analogy in relation to breaches of sub-section 5(1) of the Competition Act.

In calculating damages in a civil action in respect of a breach of the competition rules, Irish courts do not take account of the motives or the intention of the party in default unless the question of exemplary damages arises.[28] The Courts award damages on the same basis as they would award them in the case of any tort or civil wrong.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering such issues as rebuttable presumptions and shifting of burden of proof to other party etc.)

The burden of proof lies on the party attempting to assert that there has been a breach of competition rules.

Section 12 of the Competition Act provides for a number of presumptions in relation to evidence that apply in both criminal and civil proceedings under the Competition Act. Criminal proceedings under the Competition Act may be brought in respect of breaches of both Irish and EC competition law. Civil proceedings under the Competition Act may be brought in respect of breaches of Irish competition law only. Consequently, section 12 does not specifically provide that these presumptions apply in civil actions brought in respect of breaches of EC competition law. The presumptions are quite radical. Consequently, it is not clear whether the Irish courts would apply them in civil actions concerning breaches of EC competition law. There has been no reported case law to date on point.

Sub-sections 12(2) to 12(6) provide:

> "(2) Where a document purports to have been created by a person it shall be presumed, unless the contrary is shown, that the document was created by that person and that any statement contained therein, unless the document expressly attributes its making to some other person, was made by that person.
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> (3) Where a document purports to have been created by a person and addressed and sent to a second person, it shall be presumed, unless the contrary is shown, that the document was created and sent by the first person and received by the second person, and that any statement contained therein—

26 Case 85/76 *Hoffmann La-Roche v Commission* [1979] ECR 461. [1979] 3 CMLR 211.
27 Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, [1993] 5 CMLR 32, Case C-310/93P, [1995] ECR I-865, [1995] 5 CMLR 14.
28 *Donovan and others v Electricity Supply Board* [1997] 3 IR 573 at page 585.

(*a*) unless the document expressly attributes its making to some other person, was made by the first person, and
(*b*) came to the notice of the second person.

(4) Where a document is retrieved from an electronic storage and retrieval system, it shall be presumed, unless the contrary is shown, that the author of the document is the person who ordinarily uses that electronic storage and retrieval system in the course of his or her business.

(5) Where an authorised officer who, in the exercise of his or her powers under section 45 has removed one or more documents from any place, gives evidence in any proceedings under this Act that, to the best of the authorised officer's knowledge and belief, the material is the property of any person, then the material shall be presumed, unless the contrary is shown, to be the property of that person.

(6) Where, in accordance with *subsection (5)*, material is presumed in proceedings under this Act to be the property of a person and the authorised officer concerned gives evidence that, to the best of the authorised officer's knowledge and belief, the material is material which relates to any trade, profession, or, as the case may be, other activity, carried on by that person, the material shall be presumed, unless the contrary is proved, to be material which relates to that trade, profession, or, as the case may be, other activity, carried on by that person."

(ii) Standard of proof. NB any technical expressions that exist in national law such as for example "beyond a reasonable doubt" must be clearly explained

The Irish courts apply the standard of proof on the balance of probabilities in civil actions in respect of breaches of the competition rules.[29] The balance of probabilities is the civil standard of proof in Ireland. The balance of probabilities test can be explained as requiring the plaintiff to prove that his or her version of events is, on balance, more likely or more believable than that of the defendant. This is often explained to juries in court as "which story would you believe" or "which story is the more likely".

In interlocutory injunction proceedings, the court does not make a final determination on the merits of the case. Rather the court considers whether the applicant has established that there is a serious question to be tried, that the balance of convenience lies in favour of granting an injunction and that irreparable damage would follow if an injunction were refused. On the question of whether there is a serious question to be tried, the court need only be satisfied that the applicant has some legal grounds on which to institute proceedings, but does not need to be satisfied that these will be successful.

The standard of proof in criminal proceedings is "beyond a reasonable doubt". This may result, in practice, in only very obvious infringements being criminally prosecuted, i.e. price fixing.

29 See *Masterfoods Ltd. v HB Ice Cream Ltd and HB Ice Cream Ltd v Masterfoods Ltd* [1993] ILRM 145, at page 183, *per* Keane J., High Court; *Chanelle Veterinary Limited v Pfizer (Ireland) Limited (t/a Pfizer Animal Health) and Pfizer Animal Health S.A.* [1999] 1IR 365, at page 291, *per* O'Sullivan J., High Court; *Meridian Communications Ltd. and Cellular Three Ltd. v Eircell* Ltd [2002] 1 IR 17, *per* O'Higgins J., High Court.

(iii) Limitations concerning forms of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

Oral evidence is primary in Irish litigation. In the main, trials in Ireland are conducted by way of oral evidence where the witnesses are examined by their own lawyers and cross-examined by the opposing party's lawyers. Consequently, evidence does not have to be documentary to be admissible. Documents have to be proved through witnesses to be admissible as evidence, unless otherwise agreed by the parties. In addition, sworn evidence may be given in writing, in the form of an affidavit, which is a document that is sworn in solemn form by a witness before a Commissioner for Oaths. Witnesses may be called to give testimonial evidence in accordance with Irish common law rules of evidence and procedure. Witnesses located in Ireland may be compelled to give evidence by way of subpoena. Any witness may be called to give evidence in civil proceedings concerning a breach of the competition rules, subject to the requirement of being competent to give testimonial evidence. Witnesses may be deemed incompetent to give evidence for a number of reasons including physical disability or mental disability. In addition, non-national diplomats[30] and person conferred with immunity by order of the government[31] may not be compelled to give evidence.

It may be possible for evidence to be admitted and witnesses to be summoned from other jurisdictions. Under EC law, the taking of evidence in civil or commercial matters in another Member State is governed by Council Regulation 1206/2001.[32] The taking of evidence or summoning of witnesses in a jurisdiction other than a Member State of the EU will be governed by the applicable rules in place between Ireland and that other jurisdiction.

Section 13 of the Competition Act provides for the admissibility in proceedings under the Competition Act of statements contained in documents. The section provides that, if a document contains a statement by a person asserting that an act has been done, or is or was proposed to be done, by another person relating to an anti-competitive arrangement or an abuse of a dominant position, then that statement shall be admissible as evidence that the act was done or was proposed to be done by that other person. The statement must be made by a person who has done an act relating to an anti-competitive arrangement or an abuse of a dominant position. The document must have come into existence before the commencement of the proceedings and must have been prepared otherwise than in response to an enquiry made or questions put by a member or officer of the Authority, the Garda Siochana (the Irish police service), the Commission or an authorised officer otherwise connected to the proceedings.

According to general principles, hearsay evidence is not admissible, subject to certain exceptions.

Witnesses can refuse to answer questions on the basis of legal professional privilege. In addition, in civil proceedings, there is a privilege against self-incrimination.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:
- **defendants**
- **third parties**
- **competition authorities (national, foreign, Commission)**

Documentary discovery is available in Irish civil proceedings. Discovery ordinarily occurs following the close of formal pleadings. Formal pleadings are the stage of litigation in which the pleadings of the parties are exchanged between the parties. Pleadings are documents which set out the contents of the claim or defence of a party to proceedings (for example: plenary summons, appearance, statement of

30 Pursuant to the Geneva Convention and the Diplomatic Relations Immunity Act 1962.
31 Pursuant to the Diplomatic Relations and Immunities (Amendment) Act 1976.
32 OJ L 174, 27.6.2001, p. 1.

claim, defence and reply). Discovery must be requested by one of the parties; the judge cannot order discovery ex-officio. Discovery may be first sought between the parties on a voluntary basis. In the absence of agreement between the parties on voluntary discovery, discovery can be ordered by the court upon application by one of the parties. Non-party discovery can also be obtained either voluntarily or by order by the court. In all cases, parties seeking discovery must establish to the satisfaction of the court that the discovery is "necessary for disposing fairly of the cause or matter or for saving costs".[33] The meaning of the phrase "necessary for disposing fairly of the cause or matter or for saving costs" was considered by Kelly LJ in *Lanigan v Chief Constable*[34], in which he brought together a number of statements which, in his view, contained useful indications of what "necessity" means in this context. These statements were:

> "1. [Are the statements sought] "very likely to contain material which would give substantial support to [the plaintiff's] contentions? Would he be deprived of the means of proper presentation of his case? (Lord Fraser in *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394).
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> 2. [Can it be said] "there [is] a likelihood that the documents would support the case of the party seeking discovery?" [Is there] "something beyond speculation, some concrete ground for belief which takes the case beyond a mere 'fishing' expedition?" (Lord Wilberforce in *Air Canada*)."

The party seeking discovery is required to specify the precise category of documents in respect of which discovery is sought and must set out reasons why each category of documents is required.[35]

Stricter requirements have to be observed before a litigant can obtain an order for non-party discovery. The onus lies on the party seeking discovery to establish that the party named is likely to have the documents in his or her possession, custody or power, and that they are the documents which are relevant to an issue arising or likely to arise in the matter.[36] Even if the applicant can establish this to the satisfaction of the court, the court still has a discretion not to award non-party discovery if it considers that the person called upon to make discovery would be oppressed or prejudiced as a result and could not be adequately compensated by the applicant.[37]

Discovery is not available in respect of third parties outside the jurisdiction of the court. Discovery is available in respect of the Authority, subject to privilege. Discovery is not available in respect of foreign competition authorities or the Commission unless they are parties to the action.

Where a party is of the view that a document that is the subject of a discovery order is covered by legal professional privilege, the usual practice is to list the document as privileged and not to produce it to the party seeking discovery. The party seeking discovery can then challenge the claim of privilege.

It is generally accepted that documents, having been disclosed on foot of a discovery order, are subject to the implied undertaking that they will not be used for any purpose other than the proper conduct of the action.[38] To go outside such use is to commit contempt of court.[39]

Business secrets are discoverable but it is possible to restrict the use of documents containing same and the people who may have access to documents containing

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33 Order 31 Rule 12 of the Rules of the Superior Courts as substituted by Statutory Instrument No. 233 of 1999 in relation to High Court proceedings. The test under Order 32 Rule 1 of the Circuit Court Rules 2001 in relation to Circuit Court proceedings is less onerous. However, in practice, requests for discovery in Circuit Court proceedings usually meet the requirements of the High Court test.

34 [1991] NI 42, 52.

35 Rules of the Superior Courts (No. 2) (Discovery), 1999.

36 *Allied Irish Banks plc v Ernst and Whinney* [1993] 1 IR 375, per Finlay C.J.

37 *Ulster Bank Limited v Byrne*, High Court, O'Donovan J., 10 July, 1997.

38 *Countyglen plc. v Carw*ay [1995] 1 IR 208.

39 *Per* Finlay C.J. in *Ambiorix Ltd v Minister for the Environment (No. 1)* [1992] 1 IR 277, 286.

same. Discovered documents may be redacted in respect of sensitive information that is not relevant to the applicable discovery order.

Any party failing to comply with an order for discovery is liable to an order of attachment, and, if a plaintiff, to have his or her action dismissed for want of prosecution, or, if a defendant, to have his or her defence, if any, struck out.[40] In this regard, it is unlikely that a court will make an order dismissing an action for want of prosecution or striking out a defence unless there has been wilful default or negligence on the part of a litigant or where documents have been deliberately concealed.

(b) Proving the infringement

(i) Is expert evidence admissible?

Yes.

An expert is a person who is qualified to provide evidence in relation to a subject calling for expertise.[41] As an exception to the general prohibition against opinion evidence, an expert is entitled to give evidence expressing his or her expert opinion in respect of matters calling for expertise.[42] The categories of expert are not closed, but include accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists and scientists.[43] Expert evidence may be given in relation to matters of foreign law[44] but not in relation to domestic law.[45]

Persons may be considered to be experts by reason of their experience, training or knowledge.[46] Formal qualifications are not necessary provided that the judge is satisfied as to the witness's expertise, but the lack of formal qualifications does go to the weight to be attached to the testimony.[47]

Expert witnesses are appointed by the parties. Although not provided for in the Rules of the Superior Courts, courts may appoint expert witnesses, although this is rarely done.

An expert may give his or her opinion upon facts which are either admitted or proved by admissible evidence.[48] These facts may be proved either by the expert himself or by other witnesses[49] but, where the expert has no first-hand knowledge of the facts which his or her opinion is based on, he can state a hypothesis upon assumed facts.[50] These assumed facts must be proved by admissible evidence or else the expert's opinion will be given little or no weight. An expert is entitled to refer to the work of others as part of the process of reaching his or her conclusion.[51] Such material may include learned treatise, reference works, studies and other information acquired in the course of his or her profession.[52]

The weight that is given to expert evidence is a matter for the judge.

The Competition Act specifically allows for the admissibility of relevant expert evidence in proceedings concerning breaches of competition law. Section 9 of the Competition Act provides:

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40 Order 31, Rule 21 of the Rules of the Superior Courts.
41 *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185, 190.
42 Ibid.
43 *Cf.* the definition of expert given in Order 30, rule 45(1) (inserted by the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (SI No. 391 of 1998).
44 *O'Callaghan v O'Sullivan* [1925] 1 IR 90; *Sussex Peerage Case* (1844) 11 Cl & Fin 85.
45 *Society for the Protection of Unborn Children (Ireland) Ltd. v Grogan (No. 3)* [1992] 2 IR 471; *F. v Ireland* [1995] 1 IR 321, [1994] 2 IRLM 401 (HC), [1995] 2 ILRM 321 (SC).
46 *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185, 190.
47 *McFadden v Murdock* (1867) 1 ICLR 211; *R. v Silverlock* [1894] 2 QB 766.
48 *T. v P. (Orse T.)* [1990] 1 IR 545, 551.
49 Ibid, at page 551.
50 Ibid, at page 551.
51 *R v Abadom* [1983] 1 WLR 126.
52 *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415.

"In proceedings under this Act, the opinion of any witness who appears to the court to possess the appropriate qualifications or experience as respects the matter to which his or her evidence relates shall, subject to *subsection (2)*, be admissible in evidence as regards any matter calling for expertise or special knowledge that is relevant to the proceedings and, in particular and without prejudice to the generality of the foregoing, the following matters, namely—

(*a*) the effects that types of agreements, decisions or concerted practices may have, or that specific agreements, decisions or concerted practices have had, on competition in trade,
(*b*) an explanation to the court of any relevant economic principles or the application of such principles in practice, where such an explanation would be of assistance to the judge or, as the case may be, jury."

Irish courts allow expert evidence in civil proceedings concerning a breach of Article 81 or 82 of the EC Treaty.[53]

(ii) To what extent, if any, is cross-examination permissible?

Cross-examination is permissible, as in other civil proceedings, in accordance with the Irish common law rules of evidence and procedure.

Cross examination is generally regarded as a crucial element of natural and constitutional justice, and a judgment may be set aside where an adequate opportunity is not afforded to each party to test the evidence of the other by cross-examination.[54] There are two princial objects of cross-examination: (a) to elicit evidence which supports the version of events which the cross-examiner is contending and (b) to undermine the credibility of the witness. In pursuing the second of these objectives, a cross-examiner may ask a witness to explain any mistakes, inconsistencies or omissions in his or her testimony. The witness may also be questioned about his or her means of knowledge of the facts in his or her testimony and may be challenged as to the quality of his or her memory and powers of perception. He or she may also be questioned about previous inconsistent statements, previous convictions, previous misconduct, his or her reputation for untruthfulness and matters tending to show bias on his or her part.

Cross-examination takes place after examination-in-chief of a witness and may be carried out by any other party to the proceedings. Order 36, rule 37 of the Rules of the Superior Courts vests in a judge a supervisory jurisdiction and he or she may disallow any questions put in cross-examination of any witness which appear to him or her to be vexatious and not relevant to the case. The judge may also disallow questions which he or she considers to be improper[55] or oppressive and may curtail cross-examination which is excessive in length.[56]

It should be noted that section 31 of the Competition Act grants the Authority the power to summon witnesses to attend before it, to examine such witnesses on oath and to require any such witness to produce any documents in the witness's power or control. Any witness before the Authority in this regard may be cross-examined as in court but is entitled to the same immunities and privileges as if he or she were a witness before the High Court.

53 See, for example, *Masterfoods Ltd. v HB Ice Cream Ltd and HB Ice Cream Ltd v Masterfoods Ltd.* [1993] ILRM 145.
54 Cf. Kiely v Minister for Social Welfare (No. 2) [1977] IR 267.
55 *R v Baldwin* (1925) 18 CR App Rep 175.
56 *R v Kalia* [1975] Crim L R 181.

(iii) Under what conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU member state have evidential value?

A statement and/or decision by a national competition authority, a national court or an authority from another EU member state may be of persuasive value in an Irish court. In particular, due to the historically close relationship between Irish and UK law, statements and/or decisions by UK courts and authorities may be of persuasive authority.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

No. The same rules apply as would apply in the case of any tort or civil wrong. The essential principle underlying an award for damages is that the sum awarded is to be a compensatory amount that places the injured person in the position he or she was, to the extent that money can do so, before the legal wrong was committed. It is up to the plaintiff to establish the extent of the damage caused by the defendant. There is no prescribed manner in which the plaintiff may establish the extent of the damage (including future losses). Actuarial evidence is sometimes used to establish the extent of damage.

A court, with the agreement of the parties involved, may render a partial judgment on all aspects of a case except for the quantum of damages. In such a case, the quantum of damages may be decided at a later date.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

The plaintiff must establish that he/she has suffered injury by reason of the wrong complained of. The "but for" test is the test most commonly favoured by the courts in determining factual causation. In addition, the courts apply a reasonable foreseeability rule to determine the extent of a defendant's liability.[57]

F. Grounds of justification

(i) Are there grounds of justification?

There are no reported competition law cases to date which address justifications such as force majeure, act of god, act of state, consent of the plaintiff/act of the plaintiff, act of third party, act of victim, necessity, self defense/reacting to illegal conduct and protection of legitimate interests in the face of a dominant firm.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

As far as we are aware, neither of these issues has arisen in any reported Irish competition law case to date. On the basis of general principles, it may be possible, in theory, for a defendant to argue the passing on defence. On the basis of general principles, an indirect purchaser could, in theory, claim damages for breaches of the competition rules.

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57 *Overseas Tankship (UK) Ltd v Morts and Engineering Co Ltd, (Wagon Mound (No 1))* [1961] AC 388 (PC); *Overseas Tankship (UK) Ltd v Miller Steamship Co Ply Ltd, (Wagon Mound (No 2))* [1967] AC 617. *Wagon Mound (No 1)* has been approved in Ireland in several decisions including: *Riordans Travel & Riordans Shipping Ltd v Acres & Co Ltd (No 2)* [1979] ILRM 3 (HC); *Irish Shipping v Dublin Port & Docks Board* (1967) 101 ILTR 182 (SC); *Dockery v O'Brien* (1975) 109 ILTR 127 (CC); *Reeves v Carthy* [1984] 348 (SC); *Egan & Sons Ltd v John Sisk & Sons Ltd* [1986] ILRM 283 (HC). *Wagon Mound (No 2)* has been approved in Ireland in *Wall v. Morrissey* [1969] IR 10 (SC).

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

Principles of contributory negligence, benefit to the plaintiff and mitigation of damages apply under Irish law. We are not aware of any reasons why these principles would not apply in competition proceedings.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

In a civil action concerning a breach of Irish competition rules, damages are assessed on the basis of injury suffered.[58]

It is likely that damages in cases involving breaches of EC competition rules would be assessed on the same basis as for cases involving breaches of Irish competition rules, namely, on the basis of injury suffered.

There have been no judicial pronouncements to date on what heads of damages may be claimed in a competition law action. However, the heads of damages which may arise in a competition law action may include: loss of profits and loss of opportunity.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

Once a plaintiff's action is properly brought in an Irish court, there is no bar on recovering damages in respect of injury suffered within the EU.

(iii) What economic or other models are used by courts to calculate damages?

We are not aware of any reported judgments to date in which economic or other models were considered by the court.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

There have been no reported judgments to date in which ex-ante or ex-post estimates were referred to. In accordance with general principles, this will depend on the nature of the claim in each case. On the basis of general principles, if the effects of an injury continue after the cause of action accrues, damages in respect of the continuing injury will be recoverable.

(v) Are there maximum limits to damages?

The maximum damages that may be awarded will depend on the court in which the action is brought. The maximum damages which may be awarded by the District Court are □6,348.96. The maximum damages which may be awarded by the Circuit Court are □38,092.00. There is no limit to the damages that may be awarded by the High Court, as it is a court of unlimited jurisdiction.

(vi) Are punitive or exemplary damages available?

Sub-section 14(5) of the Competition Act provides that exemplary damages may be awarded to the plaintiff in an action concerning a breach of section 4 or 5.

In accordance with the principle of equivalence, it is likely that exemplary damages may also be awarded to the plaintiff in an action concerning a breach of Article 81 or 82 of the EC Treaty.

58 *Donovan and others v Electricity Supply Board* [1997] 3 IR 573 at page 585.

Exemplary damages may be awarded where there has been a conscious and deliberate violation of rights or where the court is satisfied that the wrongdoer intended to make a profit over and above what would be awarded to the injured party. In *Donovan v Electricity Supply Board*, Barrington J. stated that, in compensating injured parties for damage suffered as a result of a breach of Irish competition law, "[the court] is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises". [59]

Exemplary damages are rarely awarded in Ireland and are, usually, relatively modest.[60]

(vii) Are fines imposed by competition authorities taken into account when settling damages?

The Authority does not have the capacity to impose fines for breaches of competition law.

There have been no reported cases in which fines imposed by foreign competition authorities have been taken into account by an Irish court in assessing damages.

(b) Interest

(i) Is interest awarded from the date

- **the infringement occurred; or**
- **of the judgment; or**
- **the date of a decision by a competition authority?**

Pursuant to sub-section 22(1) of the Courts Act, 1981, plaintiffs in Irish proceedings can seek interest on damages from the date on which the cause of action accrued.

(ii) What are the criteria to determine the levels of interest?

In proceedings in which a judge makes an order for damages, the judge may also award interest if he or she thinks fit.[61] The rate of interest is set by statute.[62] The Minister for Justice may make an order varying the rate of interest from time to time if he is satisfied that the rate of interest ought to be varied having regard to the level of rates of interest generally in Ireland.[63] The current rate of interest is 8%.[64]

(iii) Is compound interest included?

No.[65]

H. Timing

(i) What is the time limit in which to institute proceedings?

As a breach of sections 4 or 5 constitutes a civil wrong, the period of limitation is six years from the date on which the cause of action accrued.

It is now widely recognised that the most likely basis for an action in the English courts under Article 81 or 82 of the EC Treaty would be an action for breach of statutory duty.[66] It is likely that the same approach would be applied by the Irish

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59 [1997] 3 IR 573 at page 585
60 Eg, *Kennedy v. Ireland* [1987] IR 587.
61 Pursuant to section 22(1) of the Courts Act, 1981.
62 *Ibid.*
63 Pursuant to section 20(1) of the Courts Act, 1981,
64 Pursuant to Courts Act, 1981 (Interest on Judgment Debts) Order, 1989.
65 Section 22(2) of the Courts Act, 1981.
66 *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130; *An Bord Bainne v Milk Marketing Board* [1984] 1 CMLR 519 (QBD Comm. Ct.); *Cutsforth v Mansfield Inns* [1986] 1 WLR 558, 563 (QBD); *Argyll Group v Distillers Co.* [1986] 1 CMLR 764, 769; *Bourgoin v Minister of Agriculture Fisheries and Food* [1986] QB 716 (CA); *Plessey Co. plc*

courts.[67] There have been no reported judicial pronouncements on point to date. In relation to breaches of statutory duty, the period of limitation is six years from the date on which the cause of action accrued.

(ii) On average, how long do proceedings take?

The length of proceedings varies depending on the complexity of the matters at issue in each case. The speed of competition litigation is determined, primarily, by the parties. Competition cases tend to be lengthy, and can take in the region of at least two years to reach the full trial of the action. It is not possible to estimate the average length of proceedings, but it would be exceptional for a case to last more than six years.

(iii) Is it possible to accelerate proceedings?

It is possible to apply for interlocutory injunctions in competition proceedings.

As stated above, the speed of competition litigation is determined, primarily, by the parties. There are ongoing developments to introduce case management by Irish courts.

We are not clear on what is meant by summary judgment proceedings. However, it is not possible to apply for strike out of parts of a pleading. At close of pleadings it is possible to apply for preliminary issues to be decided provided that the issues are determinative of the action.

(iv) How many judges sit in actions for damages cases?

The District Court, the Circuit Court and the High Court each sit as a one judge court.

The Supreme Court, which is primarily an appellate court, usually sits as a five judge court in cases having a constitutional connection,[68] but may also sit as a seven judge court.[69] The Supreme Court may sit as a three judge court in any other case on direction from the Chief Justice, or, in his or her absence, the senior ordinary judge of the time being available.[70]

(v) How transparent is the procedure?

Article 34.1 of the Irish Constitution provides that the courts must, in general, sit in public, "save in such special and limited cases as may be prescribed by law." The courts have emphasised that the general rule is that justice is to be administered in public.[71]

It should be noted that media reporting of court proceedings is considered an important aspect of the constitutional principle that justice is to be administered in public.[72] In *Irish Times Ltd v Ireland*[73], the Supreme Court held that a trial judge had no general power to impose a ban in contemporaneous reporting of court proceedings.

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v GEC and Siemens [1990] ECC 384 (ChD); *MTV Europe v BMG Record (UK) Ltd* [1997] EuLR 100; *The Society of Lloyd's v Clementson* [1995] CLC 117 (CA); *Arkin v Bouchard Lines* [2000] EuLR 232.

67 See O'Connor, '*Principles of Irish Law concerning Compensation for Damage Caused by Infringements of Articles 85 and 86 of the EEC Treaty*' in Germer.

68 Articles 12 and 26 of the Irish Constitution and the Courts (Supplemental Provisions) Act, 1961, s 7(5) (as amended by the Courts and Court Officers Act 1995, s 7) require the Supreme Court comprise at least five judges in cases having a constitutional dimension.

69 In 2001, the Supreme Court sat for the first time as a seven judge court , in *Sinnott v Minister for Education*, Supreme Court, unreported, 12 July, 2001.

70 Courts (Supplemental Provisions) Act, 1961, s 7(3) and (4) (as amended by the Courts and Court Officers Act 1995, s 7).

71 See, for example, *Re R Ltd.* [1989] IR 126, at 134 and *Irish Time Ltd v Ireland* [1998] 1 IR 359. Section 45(1) of the Courts (Supplemental Provisions) Act, 1961 provides for a number of cases in which justice may be administered otherwise than in public, included applications of an urgent nature for injunctions and proceedings involving the disclosure of a secret manufacturing process. The main justifications for excluding the public from such hearings are either the urgency of the case or the sensitivity of the material being discussed in court.

72 Article 34.1 of the Constitution.

73 [1998] 1 IR 359.

There is no statutory basis for case reporting in Ireland. The Incorporated Council of Law Reporting for Ireland was set up in the 1880s with the function of publishing the Irish Reports, which are the official reports of record in Ireland. The Incorporated Council of Law Reporting for Ireland, which is a private company limited by guarantee, is a not-for-profit charitable organisation that is run as a joint venture between the judiciary, members of the Bar and members of the Law Society of Ireland. The case reports contained in the Irish Reports are written by barristers. There are also a number of commercial enterprises that publish Irish case reports, including the Irish Law Reports Monthly (published by Round Hall Sweet and Maxwell) and the Irish Times Law Reports (published by the Irish Times).

I. Costs

(i) Are costs paid up front?

Filing costs of proceedings are paid up front. Legal costs are a matter for the parties and their respective legal advisors.

(ii) Who bears the legal costs?

In general, where a party is successful in his or her civil action, the court will order that the losing party pay the successful party's legal costs. This is referred to as the rule that 'costs follow the event'. The losing party must also pay his or her own costs, including the fees charged by his or her lawyers as well as any other professional fees.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

No.

Sub-section 68(2) of the Solicitors (Amendment) Act, 1994 provides:

> "A solicitor shall not act for a client in connection with any contentious business (not being in connection with proceedings seeking only to recover a debt or liquidated demand) on the basis that all or any part of the charges to the client are to be calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client, and any charges made in contravention of this subsection shall be unenforceable in any action taken against that client to recover such charges."

Fees on a "no foal, no fee" basis are permissible in Ireland. Fees on a "no foal, no fee" basis are distinguished from contingency fees on the basis that such are not calculated as a percentage or proportion of any damages or other moneys that may be payable to the client.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Parties bear their own legal costs for proceedings but may obtain a court order for costs subsequently. Costs are recoverable pursuant to an order for costs on a 'party to party' basis, which are costs that are regarded as necessary for the conduct of the action. These may be contrasted with 'solicitor and client' costs, which are fees arising from the use of more lawyers and experts than were necessary for the correct conduct of the action. There may be certain elements of costs which are not recoverable by a successful party.

(v) What are the different types of litigation costs?

Litigation costs may include court fees, lawyers fees and additional fees for professional witnesses. Lawyers fees are split between fees for solicitors and fees for barristers as, in Ireland, the profession is split.

(vi) Are there national rules for taxation of costs?

Yes. In the event of a dispute between the parties concerning the level of fees charged in a case, the losing party may require that these be reviewed by an officer attached to the courts. In the High Court, the officer is the Taxing Master and, in the Circuit Court, the officer is the County Registrar. The Taxing Master will only 'tax' (order that the losing party must pay the fee involved) 'party to party' costs.

(vii) Is any form of legal aid insurance available?

A party may obtain private insurance in relation to litigation.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

It is not possible to estimate the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law. Costs will depend, in each case, on the complexity of the proceedings, the amount involved and the stage at which the issue is resolved. Consequently, costs will vary on a case by case basis.

In a claim for □ 1 million that involves the engagement of solicitors, junior counsel and senior counsel and a two week trial, where infringement and damages are relatively easy to establish, costs are likely to be in the region of □ 150,000, assuming the use of the full range of pre-trial procedures, including discovery and the retention of expert witnesses.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

There are no material differences that make bringing competition actions more difficult.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

Competition rules are equally regarded as being of public policy under Irish law. This has a bearing on standing in relation to actions concerning breaches of the competition rules. The Competition Act provides that "any person who is aggrieved" by a violation of Irish competition law has standing to bring an action in respect of that violation.

(iii) Are there any differences according to whether defendant is public authority or natural or legal person?

The competition rules equally apply to public authorities, natural persons and legal persons that fall within the definition of 'undertaking', within the meaning of the Competition Act and Articles 81 and 82 of the EC Treaty.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

The Authority, in conjunction with the Director of Public Prosecutions ("**DPP**") launched its cartel immunity programme on 20th December, 2001. Under the programme, the DPP may grant full immunity from prosecution in criminal cases under the Competition Act. There is no interaction between the immunity programme and civil claims for damages under the competition rules.

However, the question arises whether seeking immunity under the cartel immunity programme may be used as evidence of an admission of guilt in a subsequent civil action against an undertaking or individual. While there is no reason why seeking immunity may not be used as evidence in subsequent civil proceedings, such evidence would be unlikely to be regarded by a court as bearing as much weight as a plea of guilty or a conviction in previous criminal proceedings. It would be open for the undertaking or individual to argue that seeking immunity under the immunity programme was not an admission of guilt.

To date, the Authority has not published the contents of any agreements that it has entered into with applicants of the cartel immunity programme, and is unlikely to do so in the future.

(v) Are there differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

There are no material differences, either substantial or procedural, from region to region within Ireland as regards damages actions for breach of national or EC competition rules.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

Ireland is a party to the EC Convention on the Law Applicable to Contractual Obligations of 1980 (the "**Rome Convention**"), which was brought into force in Ireland by The Contractual Obligations (Applicable Law) Act 1991[74]. Once Irish courts assume jurisdiction of a dispute concerning a contract, they are bound to apply the rules of the Rome Convention in deciding the applicable law of the contract unless the contract falls into one of the categories of exclusion set out in Articles 1(2) and 3 of the Rome Convention or the contract was entered into prior to 1st January, 1992.

Where the Rome Convention does not apply, Irish common law conflicts of law rules apply. The modern approach developed by the common law to determine the proper law of a contract is to ascertain the law which the parties intended to apply. The intention of the parties is determined by the intention expressed in the contract itself, if any, which will normally be conclusive. If no intention is expressed, the intention is presumed by the courts from the terms of the contract and the relevant surrounding circumstances. The following cases may be instructive.

In *Cripps Warburg v Cologne Investments Limited*[75], Justice D'Arcy stated that the proper law of a contract is "the law which has the closest and most real connection with the contract and transaction or, put another way, *is the system of law by which the parties intended the contract to be governed* or, where their intention is

74 This Act was brought into effect from 1st January, 1992 by Statutory Instrument No. 303 of 1991.
75 [1980] I.R. 321, at 333.

neither expressed not to be inferred from the circumstances, the system of law which the transaction has its closest and most real connection" (emphasis added).

In the earlier English Privy Council case of *Vita Food Products Inc. v Unus Shipping Co.*[76], Lord Wright (for the Judicial Committee) said that "where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy." In a subsequent English case, Lord Denning stated that it "is clear that, if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy consideration to the contrary."[77]

In the Supreme Court case of *Kutchera v Buckingham International Holdings Ltd*[78], Walsh J. said that the proper law was "quite clearly Irish law because that is the express provision of the contract according to the agreement of the parties…Irish law is applicable because the parties have chosen it". In that case none of the parties had a connection with Ireland and the contract concerned an Alberta company.

As regards non-contractual competition based claims, the Irish courts appear to favour a flexible approach in deciding the question of applicable law. Walsh J. stated in *Grehan v Medical Incorporated and Valley Pines Associates*[79], "In my view, the Irish courts should be sufficiently flexible to be capable of responding to the individual issues presented in each case and to the social and economic dimensions of applying any particular choice of law rule in the proceedings in question".

(v) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

No statistics are available.

III. Facilitating private enforcement of Article 81 and 82 EC

(i) Which of the above elements of claims for damages (under section II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Competition law is a relatively new area of law in Ireland. Prior to 1991, there was no general domestic legislation concerning competition law. In addition, the economic principles underlying competition law are complex and are relatively new in the context of Irish litigation. To date, the actions taken before Irish courts concerning alleged breaches of the competition rules have been lengthy and, consequently, the costs involved have been significant. There have been relatively few actions taken for alleged breaches of the competition rules to date.

Although there has been relatively little civil competition litigation to date, this may change, particularly given the increasing emphasis placed upon enforcement by the Authority and the increasing public awareness of competition law. In addition, there are on-going attempts by the courts system to streamline and manage competition law cases more effectively in order to save time and costs. As part of the process, a number of High Court judges have recently been appointed to deal with competition law cases that are brought in the High Court.

The following proposals may provide scope for facilitating the private enforcement of Articles 81 and 82 in Ireland.

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76 [1939] A.C. 277, at 290.
77 *Tzortzis v Monark Line A/B* [1968] 1 W.L.R. 406, at 411 (CA).
78 [1988] ILRM 501.
79 [1986] I.L.R.M. 627 (Supreme Court).

- With a view to increasing transparency, clarity and publicity in relation to competition law, the Authority could issue explanations of the competition law rules and set out the remedies available to individuals and undertakings in the event of a breach of the competition rules. In addition, the Authority could issue an explanation of how to go about bringing a civil claim.

- The publication of judgments and awards in competition law cases on one easily accessible database would increase transparency and clarity.

- The availability of class actions and/or collective claims would offer potential plaintiffs the option of sharing the risk of litigation.

- The establishment of a specialised competition law court or panel to deal exclusively with competition law cases could result in increased judicial expertise in this area. Such a specialised court could also deal with appeals in relation to merger control determinations of the Authority. The Competition Appeal Tribunal in the UK could serve as a model in this regard.

- Allowing for court-appointed experts to assist judges with analysing complex issues could offer a valuable aid to judges in competition law cases.

- A relaxation in competition law cases of the requirements a plaintiff has to fulfil to be granted discovery would make it easier for plaintiffs to obtain evidence.

- Allowing the courts in competition law cases to call for an expert report on the evaluation of damages would assist judges in quantifying damages.

- Reducing the length of proceedings would help reduce costs in competition law cases. This could be achieved in part by tighter procedural timeframes, stricter application of procedural deadlines and more effective case management by the courts.

- Increased use of written evidence by way of affidavit and less reliance on oral evidence in competition law cases could assist in speeding up competition law litigation. The Competition Appeal Tribunal in the UK could serve as a model in this regard.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Aggrieved parties may, in addition to bringing an action in court in respect of breaches of the competition rules, seek redress by agreement through arbitration or mediation. An arbitration agreement may be entered into either before a dispute arises or after the dispute has arisen, in which case it is called a submission agreement. We are unable to comment on the success of these forms of dispute resolution as there are no publicly available statistics in this regard.

In addition, settlement between the parties before the court reaches final judgment is an alternative means of dispute resolution. Again, we cannot comment on the success of this form of dispute resolution as there are no publicly available statistics in this regard.

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V. National case law summaries

Set out below are summaries of the salient reported competition cases heard before the Irish courts involving claims for damages.

***Cadbury Ireland Ltd v Kerry Co-Operative Creameries Ltd and Dairy Disposal Co Ltd* [1982] ILRM 77**

Facts and legal issues

An objective of Dairy Disposal was to acquire creameries in private ownership and invest them in co-operative societies of farmers. Dairy Disposal had statutory powers and was under the control of the Minister for Agriculture. Cadburys are chocolate manufacturers and maintain a factory at Rathmore, Co. Kerry, where milk is converted into chocolate products. Dairy Disposal, with the endorsement of the Minister, undertook to adequately supply Cadburys should they expand their Rathmore operation and expansion followed.

In 1973 Dairy Disposal entered into negotiations with Kerry Co-Op for the sale to it of certain creameries in Co. Kerry. At the end of 1973, Kerry Co-Op and Dairy Disposal entered into an agreement under which the creameries were transferred to Kerry Co-Op. Clause 19 of this agreement was an undertaking from Kerry Co-Op to Dairy Disposal that adequate milk supplies would continue to be supplied to Cadburys's factory at Rathmore subject to stipulations as to price and total supply. In February 1980, Kerry Co-Op wrote to Cadburys in relation to supplies to Rathmore and suggested either a reduction of supplies or maintenance of the supplies with a price increase. Cadburys rejected this proposal, relying on clause 19. Kerry Co-Op then proposed to maintain supplies if Cadburys paid a price comparable to that which North Kerry Milk Products, a subsidiary of Kerry Co-Op, might pay. The parties were unable to agree and Cadburys issues proceedings claiming a variety of reliefs and relying upon Clause 19 of the Agreement. Cadburys also pleaded that, by their conduct, Kerry Co-Op had violated Article 86 of the Treaty in Rome.

Held

Held by the High Court, in dismissing Cadburys' claim, that, *inter alia*, on the facts Kerry Co-Op was not in breach of Article 86 principally because Cadburys had failed to show that the area concerned was a substantial part of the common market or that Kerry Co-Op had been guilty of an abuse of any dominant position which it may have held.

***Deane and others v The Voluntary Health Insurance Board* [1992] 2 IR 319**

Facts and legal issues

The defendant was established pursuant to section 3 of the Voluntary Health Insurance Act, 1957, to fulfil the function assigned to it thereunder. The plaintiffs were trustees of a religious order and, in that capacity, the owners of a private hospital. Proceedings were issued concerning the continued inclusion of the plaintiffs' hospital in the defendant's schemes of health insurance and the payment of monies allegedly due for the treatment of the defendant's subscribers in the plaintiffs' hospital. The plaintiffs claimed, *inter alia*, that the defendant was in breach of a duty owed to them by virtue of section 5 of the Competition Act, 1991. Prior to the hearing of the action, the defendant sought declarations that it was not an undertaking within the meaning of section 3 of the Competition Act, 1991 in that it was not "engaged for gain" and that, therefore, the Competition Act, 1991 had no application to it. The High Court granted the declarations.

Held

On appeal by the plaintiffs it was held by the Supreme Court, in allowing the appeal, that, *inter alia*:

1. The word "gain" was not limited to "pecuniary gain" or "profit".

2. The true construction of section 3 of the Competition Act, 1991 was that the words "for gain" denoted an activity carried on or a service supplied in return for a charge or payment, and that, accordingly, the defendant was an undertaking for the purpose of the Competition Act, 1991.

3. Had the word "gain" been found to be ambiguous, it would have been appropriate and desirable to consider the long title of the Competition Act, 1991, and that, had "gain" been limited to "pecuniary gain" or "profit", the probable consequence in Ireland would be that the Competition Act, 1991 would be of very limited application.

4. What would be saved from the application of the Competition Act, 1991 by the words "engage for gain" would be a charitable association providing for the spending of money for the supply of goods or services free of any charge or payment.

***Masterfoods Ltd. v HB Ice Cream Ltd and HB Ice Cream Ltd v Masterfoods Ltd.* [1993] ILRM 145; Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369; *Van den Bergh Foods Ltd* OJ 1998 L246/1*;* Case T-65/98 *Van den Bergh Foods Ltd v Commission*, judgment of Court of First Instance of 23 October, 2003**

Facts and legal issues

Van den Bergh Foods Ltd (formerly HB Ice Cream Ltd) ("**HB**") is the main manufacturer of impulse ice-cream products in Ireland. For a number of years it has supplied retailers with freezer cabinets, in which it retains ownership, for no direct charge on the condition that the cabinets are used exclusively for the sale of HB products.

In 1989, Masterfoods Ltd (a subsidiary of Mars Inc) ("**Masterfoods**") entered the Irish ice-cream market. Some Irish retailers started to include Masterfoods' products in the HB freezers and this led HB to enforce the exclusivity provision in its distribution agreements. Masterfoods launched an action in the Irish High Court claiming that the HB exclusivity clause infringed Irish competition law and Articles 81 and 82 of the EC Treaty. Masterfoods also lodged a complaint with the Commission.

The Irish High Court rejected Masterfoods's action and, on appeal, the Irish Supreme Court referred certain questions to the ECJ. The ECJ found that where a national court is considering issues that are already subject to a Commission decision, the court must not reach a judgment which conflicts with that decision.

The Commission adopted a decision in March 1998, in which it found that the exclusivity provision in HB's distribution agreements relating to the use of its freezers infringed both Article 81 and Article 82. The Commission also refused to grant the distribution agreements an exemption under Article 81(3). The Commission decision required HB to release the retailers from the exclusivity provision.

HB lodged an appeal with the Court of First Instance (the "**CFI**") seeking the annulment of the Commission decision. In July 1998, the President of the CFI made an order suspending the application of the Commission's decision pending the CFI's judgment.

Held

On 23 October, 2003, the CFI rejected HB's appeal of the Commission decision. An appeal has been lodged by HB to annul the CFI decision. The Irish Supreme Court has stayed the appeal before it, pending the outcome of the European proceedings.

Donovan and others v Electricity Supply Board **[1994] 2 IR 305, [1997] 3 IR 573**

Facts and legal issues

The defendant was the sole producer and supplier of electricity in Ireland. With a view to securing the safety of installations to which it supplied power, a register of electrical contractors was established by "The Register of Electrical Contractors of Ireland Limited" ("**R.E.C.I.**"). The plaintiffs were electrical contractors who were not registered with R.E.C.I..

In 1992, the defendant changed its conditional supply of electricity (to take effect from 1 September, 1992) stating that it would supply electrical power to installations carried out by electrical contractors on production of a completion certificate signed either by (a) an electrical contractor on R.E.C.I.'s Register, or (b) in the case of installations carried out by non-registration contractors, an inspector employed by R.E.C.I..

The plaintiffs instituted proceedings against the defendant claiming that the "R.E.C.I. regime" amounted to an abuse of a dominant position by the defendant as it imposed unfair trading conditions upon them. Damages were sought. An interlocutory injunction was granted by the High Court against the defendant preventing it from implementing the new scheme on 2 November, 1992.

Held

The High Court found the defendant had unintentionally abused its dominant position contrary to section 5 of the Competition Act, 1991 and that, accordingly, the plaintiffs were entitled to damages in respect of the losses which they had sustained during the period for which the scheme was in place. The defendant appealed on the basis that the trial judge failed to correctly identify the market on which the defendant was alleged to be dominant and that an award of damages was not appropriate.

Held by the Supreme Court, in dismissing the defendant's appeal, that:

1. While Article 85 (sub-section 4(1) of the Competition Act, 1991) and Article 86 (section 5 of the Competition Act, 1991) of the Treaty of Rome were complementary in their joint aim to eliminate the distortion of competition, they were independent as they addressed two different problems.

2. The fact that an undertaking had obtained a licence or certificate in respect of an agreement prohibited by sub-section 4(1) of the Competition Act, 1991 did not authorise it to abuse its dominant position as no exemption could be granted in respect of such an abuse.

3. An undertaking which was in a dominant position on one market and used this dominance so that it affected competition in a sub-market where it was not dominant could be guilty of an abuse contrary to section 5 of the Act of 1991 even where the undertaking gained no competitive advantage by its actions.

4. The effect of the defendant's trading conditions was, by virtue of its dominant position in the market for the supply of electricity, that it imposed, directly or indirectly, unfair trading conditions in a sub-market for low voltage installations in which the plaintiffs operated.

5. An award of damages was justified pursuant to sub-section 6(3) of the Competition Act, 1991, as the defendant had been guilty of abusing a dominant position regardless of the fact that such abuse was unintentional. In litigation *inter partes*, the court's function was to compensate injured parties for damages suffered as a result of the abuse complained of. Such damages were to be awarded as in any case involving a tort or civil wrong.

Competition, an Irish publication, has reported[80] that the solicitor representing the plaintiffs confirmed to the publication that in or around September 2001, the ESB paid cheques to the plaintiffs totalling, approximately, ▫ 360,000. In addition, it was reported by the publication that the ESB paid the plaintiffs' legal costs, which came to, approximately, the same amount as the damages.

***Chanelle Veterinary Limited v Pfizer (Ireland) Limited (t/a Pfizer Animal Health) and Pfizer Animal Health S.A.* [1999] 1 IR 365**

Facts and legal issues

The plaintiff was a wholesale distributor appointed by the defendant group of companies to distribute their products in Ireland. The first defendant was the second largest supplier of animal pharmaceutical products on the Irish market. Some time after the plaintiff's appointment as a distributor, the patent expired on a successful product produced by the defendant. A sister company of the plaintiff launched a rival product onto the Irish market. The plaintiff was notified some weeks later by the first defendant that the plaintiff was no longer to be a listed distributor for the first defendant. The plaintiff claimed that the defendant's range of products, many of which held a special position in the market, was an essential part of its business and that the decision to de-list it amounted to a concerted practice which violated the provisions of sub-section 4(1) of the Competition Act, 1991 and Article 85 of the Treaty of Rome. In addition, the plaintiff claimed that the decision constituted an abuse of a dominant position contrary to sub-section 5(1) of the Competition Act, 1991 and Article 86 of the Treaty of Rome.

Held

Held by the High Court, in refusing to grant the reliefs sought, that:

1. To establish a breach of sub-section 4(1) of the Competition Act, 1991, it was necessary to show, on the balance of probabilities that competition has been or would be prevented, restricted or distorted, the assessment of which must be made by reference to the competition on the markets in question rather than the competitor.

2. In order to prove that de-listing the plaintiff would appreciably impact upon competition in the wholesale distribution market, it was necessary to demonstrate that at least some of the defendant's products had no close comparator.

3. There was no evidence to show, on the balance of probabilities, that any agreement or concerted practice had or would have had the object or effect of preventing, restricting or distorting competition contrary to sub-section 4(1) of the Competition Act, 1991 or Article 85 of the Treaty of Rome.

4. The essence of a selective distribution system was the imposition of a restriction on the members of the distribution system in relation to onward sales. There was no restriction on the number of potential competitors at the wholesale level as a result of the wholesale system operated by the defendants.

80 Whitaker, *Competition,* Volume 12, Edition 6, page 105.

5. As the evidence did not establish that a separate market existed for the defendant's products, the question of dominance and the abuse of dominance did not arise.

The Plaintiffs appealed to the Supreme Court. Held by the Supreme Court, in dismissing the appeal, that:

1. To successfully invoke section 4 of the Competition Act, 1991 the plaintiff must satisfy the Court that the action or activity complained of was multilateral and not simply the activity of the defendant.

2. The dismissal of the plaintiff and its exclusion from the distribution network represented the unilateral decision and action of the first defendant and, accordingly, it did not fall within the ambit of section 4 of the Competition Act, 1991 or Article 85 of the Treaty of Rome.

3. The essence of a selective distribution agreement was the desire of manufacturers or suppliers of sophisticated consumer products to limit the resale of those goods to dealers who possessed the necessarily technical expertise to handle the goods or provide related after-sale service.

***Meridian Communications Limited and Cellular Three Limited v Eircell Limited* [2002] 1 IR 17**

Facts and legal issues

The plaintiffs were competitors of the defendant in the mobile telephony market. They entered into a volume discount agreement with the defendant for the purpose of expanding their business and then rented the lines at greatly reduced rates to customers. When the defendant realised that it was the intention of the plaintiffs to expand in the market place, it stopped supplying transfer books to the plaintiffs. Shortly thereafter, the defendant conceded that the plaintiffs were entitled to make such transfers under the agreement and reinitiated the supply of transfer books to the plaintiffs, but not in the quantity sought by the plaintiffs.

The defendant sent a process letter to each of its customers that sought to change over to the plaintiffs. This letter stated, *inter alia*, that the agreement under which the plaintiffs were receiving this discount would not be renewed and that the customers number would be transferred to the plaintiffs and might not be returnable from them in the future. It also stated that, if they had entered into a contract with the plaintiffs, they were legally obliged to honour it.

The plaintiffs bought proceedings against the defendant on the grounds, *inter alia*, that it was abusing its dominant position within the relevant market and that the sending of the process letter amounted to an inducement of breach of contract, a breach of confidence and constituted injurious falsehood. At the hearing, the plaintiffs argued that the defendant's position was dominant given a structural analysis of the relevant market. The analysis considered the large market share of the defendant, the low number of competitors, the high barriers to entry of the market, the level of vertical integration of the defendant and the considerable influence it exercised over the route to market. The plaintiffs claimed that the analysis explained the high prices within the relevant market and supported their contention of dominance on the part of the defendant.

The defendant argued that behavioural aspects of the market indicated that it was not dominant. In this regard, the defendant argued that with the entry of Digifone on the market there was a fall in prices, a dramatic decline in market share, evidence of leap-frogging and tariff reduction and a tendency towards price convergence. In addition, the defendant referred to evidence of incentives to compete, many new and therefore independent subscribers and the number and scale of innovations.

Held

Held by the High Court that, *inter alia*:

1. The essence of dominance was the ability to profitability act to an appreciable extent independently of rivals and, ultimately, of consumers.

2. The defendant was not dominant within the relevant market since the structural analysis was inconclusive and did not take account of the low barriers to expansion within the market and did not, on balance, account for the high level of prices which existed. The behavioural analysis strongly suggested the defendant was not dominant. As a result, the claims of abuse of dominance and breach of section 5 of the Competition Act, 1991, failed.

Held, *obiter dictum*, that, if the defendant was dominant, the matters complained of would still not have constituted an abuse of that dominance since they did not distort competition nor could they have had any significant effect upon trade between Member States.