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Trinity College Dublin



Damages Actions in Competition Law in Ireland: Why and How?

Ph.D. Thesis

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Submitted 21st March 2010
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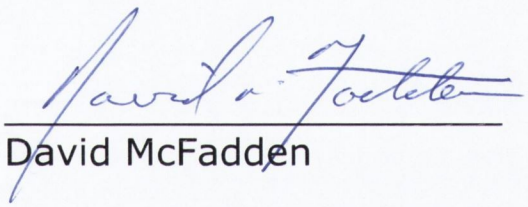
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Summary

The Methodology employed in the research for this thesis involved reading the vast literature available in various law journals, as well as in reports, speeches, submissions, studies and so forth. The starting point for this research was the Green and White Papers on antitrust damages and the accompanying Staff Working Documents published by the European Commission, together with the various Studies, Reports, National Reports and Submissions made to the Commission during its antitrust damages initiative. This exercise was repeated with regard to the recent review of antitrust law in the United States which resulted in the publication of the Antitrust Modernization Commission ('AMC') Report in 2007. The AMC consultation and its Report started an equally wide ranging debate to that carried out in Europe by the Commission, and helped generate a wealth of materials which were a rich source for this thesis.

The Office of Fair Trading's publications, including that office's various Submissions and Reports on damages actions, were an essential component of the research undertaken in this thesis. This in turn opened up further areas and sources for research, including the Reports prepared for and by the Civil Justice Council on collective redress. Irish sources included (amongst others) the various submissions made by the Competition Authority to the Commission and to the Law Reform Commission which this author worked on in his capacity as legal advisor in the Competition Authority.

The major competition journals were carefully sifted through as they were a source of material on this developing area of the law. The textbooks on competition law proved less helpful on the subject. Internet research, and in particular the use of such online resources as Heinonline and Westlaw through Trinity College Library were invaluable to the research undertaken for this thesis.

The research resulted in a number of findings. The first of these findings is contained in Chapter 2 which addressed the purpose that private actions are meant to serve in competition law. Although private

actions in antitrust serve an enforcement function in other jurisdictions, it was argued that this would be an inappropriate function for private 'follow-on' actions in Ireland. Only in standalone actions could it be argued that an enforcement function arises.

Thereafter, the central finding in the thesis is that the right to sue for most consumers in Ireland who have suffered competition related injury is at best theoretical. Ireland has failed to put in place procedures such as effective collective redress to safeguard citizens' rights under domestic and European law. Ireland's laws relating to lawyers fees and litigation funding are both archaic and contradictory and are a further obstacle to consumer redress in competition cases. Furthermore, policy makers in Ireland do not appear to understand the problems that are preventing competition damages actions being taken in Irish courts. In fact policy makers do not realise there is a problem that requires solution. It has been argued in this thesis that policy makers mistakenly believe that Irish law is more than fit for the purpose of allowing plaintiffs sue for damages in a competition case. For this reason amongst others it is clear that Ireland is paying lip service to the idea that claimants can sue for damages in domestic and European competition law.

Finally, a number of recommendations are made in the thesis. Principally, these recommendations involve reform of the law that will allow an effective form of collective redress in competition damages cases. Reform of the laws in relation to legal fees and litigation funding are also necessary whilst there may also be a need to incentivise damages actions in competition law by legislating for the introduction of double damages awards.

Damages Actions in Competition Law in Ireland: Why and How?

David McFadden

Abstract

The Court of Justice of the European Union has recognised the right of citizens to damages for infringements of competition law. The Court has also said that '...it is a matter for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...'

There has been a private right of action in Irish competition law since the enactment of Competition Act 1991. Irish citizens therefore have a right to damages for breach of both domestic and European competition law. However, as this thesis will explain, the right to sue for most consumers who have suffered competition related injury is at best theoretical. Ireland has failed to put in place procedures such as effective collective redress to safeguard citizens' rights under domestic and European law and Ireland's laws relating to litigation funding are both archaic and contradictory and are a further obstacle to redress.

The Commission initiative on damages actions provided an opportunity to participate in a debate that could lead to reform of domestic law. Unfortunately, policy makers in Ireland do not appear to understand the issues, do not realise that there is a problem that requires solution, and believe that Irish law is more than fit for its purpose as it currently stands. For this reason, amongst others, it is clear that Ireland is at present only paying lip service to the idea that claimants can sue for damages in domestic and European competition law. Until there is a change in thinking amongst policy makers, the best hope for claimants in Ireland at this time is that the Commission perseveres with its damages initiative and legislates for change at a European level.

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Stephen Lalor deserves special praise and thanks for his kind help. Stephen set up the templates used in the thesis for Chapter titles, the section and sub-section headings and the footnotes and then combined the entire work into a single document.

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DEDICATION

To my wife Caroline, and to our children Kate, Jimmy, Conor and Alex.

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CHAPTER 1: INTRODUCTION AND METHODOLOGY

Introduction

This chapter gives an overview of the layout of the thesis and provides a methodology. In the thesis the current state of the law in Ireland in relation to competition damages actions is examined. As a first step in that examination, the purpose of private actions for damages is given consideration and in particular, the function that private actions are intended to serve is reviewed. Next, an overview of some of the many difficulties that have accompanied private damages litigation in other jurisdictions is provided. That overview is necessary as these difficulties have yet to be encountered in Ireland where there has been, as yet, very little private competition litigation.

Thereafter, the various obstacles to the development of private antitrust[1] litigation in the State will be examined. These obstacles principally include the problem of allowing large groups of claimants with small, scattered, low value claims to recover damages, and the difficulty of funding private antitrust litigation, which can be particularly expensive. Finally, the possibility of encouraging private actions for damages by creating incentives for plaintiffs will be studied.

The starting point of the thesis is the European Commission's (the 'Commission') initiative on private actions for damages. On December 19th 2005, the Commission published a Green Paper[2] on Damages actions for breach of the EC antitrust rules[3] ('the Green Paper'). With the publication of the Green Paper the Commission initiated a debate on private actions for damages in competition cases under Community

[1] The terms competition law and antitrust law will be used interchangeably in this thesis. The Commission referred to its initiative using the term antitrust. Each chapter of the thesis involves some level of examination or comparison of the situation in Europe and Ireland with that in the United States and therefore the word antitrust will repeatedly appear in that context as well.

[2] A definition of a Green Paper is provided by the Commission on its website. That definition is as follows: 'Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.' This was obtained from the Commission website at http://europa.eu/scadplus/glossary/green_paper_en.htm and accessed on the 4th October 2010.

[3] Green Paper on Damages actions for breach of the EC antitrust rules; Com (2005) 672, SEC (2005) 1732, accessed on the 4th October 2010 and available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF

law. It is hoped that this thesis will contribute to the debate from an Irish perspective.

In essence, this thesis asks in a competition context, 'Private actions for damages in Ireland: Why and How?' As a subtext, the thesis also questions whether the Irish legal system merely pays lip service to the right to sue in damages in competition cases – whether under Community or domestic law. Linked to this is the further question of whether the legal system in Ireland is geared to allow effective redress for plaintiffs with small claims in competition cases.

The focus in Chapters 4 – 6 will be on two central pillars in private damages actions in competition law: collective redress for plaintiffs with small claims and litigation funding. It is of course true that wealthy corporate undertakings can, and do, sue in competition cases in Ireland. Indeed, private competition cases have been litigated before the Irish courts on a few occasions.[4] However, there have been very few private actions in Ireland and only one case that resulted in damages being awarded.[5] This author is unaware of the initiation of any private action involving consumers who have suffered small and dispersed losses.

It is said that a by-product of competitive markets working well is consumer welfare.[6] Former European Commissioner Neelie Kroes said in 2005...

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[4] See for example the cases of *Masterfoods t/a Mars v. HB Ice Cream Ltd.*, [1993] ILRM 145 and *Nurendale Limited T/a Panda Waste Services v Dublin City Council & Ors* [2009] IEHC 588. In relation to the *Mars v. HB* case, Connery and Hodnett in *Regulatory Law in Ireland* (Tottel Publishing Ltd. Haywards Heath, West Sussex, 2009) argue that this is the '...landmark private enforcement action in Ireland...' (para 7.139, page 365). They also point out at para 7.141, page 366 that: 'In April 2007, almost 15 years after the original High Court judgement, the Supreme Court instructed that the case be returned to the presiding competition judge in the High Court...to assess damages that could be due to Mars. It is understood that the matter then went to arbitration.' See para's 7.139 – 7.142 of Connery and Hodnett, *Regulatory Law in Ireland*, for a discussion of the history of this case.

[5] *Donovan and others v Electricity Supply Board*, [1997] 3 IR 573. This case will be returned to in Chapter 3.

[6] See for example the Competition Authority booklet: 'Guide to Competition Law and Policy for Consumers', where the Competition Authority's mission statement is given as 'to ensure that competition works well for consumers and the Irish economy.' The Authority then explains: 'Consumers are at the core of the Competition Authority's mission statement, and we are striving to make sure that competition works for the benefit of all consumers who buy products and services in Ireland...' at page 2, accessed on the 4th October 2010 and available at

> Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare...[7]

Two years later, the Irish Supreme Court had similar words to say...

> The entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose.[8]

There is some debate in the literature about whether the sole purpose of competition policy is consumer welfare.[9] However, it is undoubtedly the case that consumer welfare is recognised, in the Irish courts at least, as being of some relevance to the outcome of competitive markets working well. This indicates that the interests of consumers in competition law are recognised not just in the literature, but by policy makers in the Commission and by the Irish judiciary.

Unlike wealthy corporate undertakings, consumers with small and scattered claims rarely have the resources or the incentives to sue to recover what are essentially small individual claims, but which collectively could run to many millions of Euro. This inability of consumers with small claims to sue in competition cases is a central theme in the thesis. Section 14 of the Competition Act 2002 (the '2002 Act') creates a right of action for any person aggrieved by a breach of the 2002 Act. It is questionable if the Irish legal system provides consumers, who have small claims, with mechanisms to vindicate their rights before the courts. Indeed it is questionable whether the right for

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http://www.tca.ie/images/uploaded/documents/Booklet%20-%20Guide%20to%20Competition%20Law%20and%20Policy%20for%20Consumers.pdf

[7] Neelie Kroes: *European Competition Policy – Delivering Better Markets and Better Choices* (Speech/05/512 of 15th September 2005) delivered at the European Consumer and Competition Day in London and available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/512&format=HTML&aged=0&language=EN&guiLanguage=en and accessed on the 4th October 2010.

[8] *The Competition Authority v John O'Regan & Ors* Supreme Court, [2007] 2 I.L.R.M. 161, at para 106, (also known as the ILCU case).

[9] See for example the discussion in Whish on the Goals of competition law in *Competition Law*, (6th edn, Oxford University Press, Oxford, 2009) at pages 19 – 23.

consumers with small claims to sue in damages under either domestic or Community competition law before the Irish courts is real, or can be vindicated.

The Court of Justice of the European Union (the 'CJEU')[10] had found as far back as the *Van Gend en Loos*[11] case that citizens could sue to protect the rights that they derive from the Treaties. Even so, the question as to whether damages were available in competition cases remained somewhat in doubt.[12] However as Professor Richard Whish points out...

> In 2001 the ECJ's judgement in *Courage Ltd v Crehan* clarified the position, emphatically establishing a right to damages. A subsequent judgement of the ECJ in 2006, *Manfredi*, was equally emphatic.[13]

Despite the Court's recognition of the existence of this right in Community law, the Ashurst Report,[14] a study commissioned by the Commission in 2004, showed that private litigation in the enlarged EU was 'one of astonishing diversity and total underdevelopment.'

In a press release accompanying the publication of the Green Paper on damages actions, former Commissioner for Competition, Neelie Kroes was quoted as saying...

> Businesses and individuals who suffer losses because of illegal activities such as cartels have a right to

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[10] Formerly the European Court of Justice or the 'ECJ' but renamed at Article 251 of the Treaty on the Functioning of the European Union ('TFEU') effective from December 2009. Article 281 TFEU states that The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol. That Protocol is Protocol No. 3 and titled: 'On the Statute of the Court of Justice of the European Union can be found at', accessed on the 4th October 2010 and available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:EN:PDF

[11] Case 26/62 [1963] ECR 1, van *Gend en Loos / Netherlands Inland Revenue Administratie.*

[12] According to Whish, *Francovich v Italy* Cases C-6/90 and 9/90 [1991] ECR I – 5357 and the opinion of Advocate General van Gerven in *HJ Banks v British Coal Corporation* Case C – 128/92 [1994] ECR I – 1209, '...pointed towards the possibility of an action for damages;' R. Whish, *Competition Law*, (6th edn, Oxford University Press, Oxford, 2009) at page 292.

[13] R. Whish, *Competition Law*, (6th edn, Oxford University Press, Oxford, 2009), at page 293.

[14] 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (Comparative Report), (31st August 2004) (referred to as the 'Ashurst Report') prepared by Waelbroeck, D., Slater, D. and Even-Shoshan, G. of the Law firm Ashurst , accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

> compensation. Currently, this right is all too often theoretical because of obstacles to exercising this right in practice. This Green Paper sets out options for making that right a reality, and so making companies that break the competition rules pay for the harm that they do.[15]

Kroes spelled out that the intention of the Commission in its damages initiative was to make the right to compensation 'a reality', in circumstances where it had been shown to be at best underdeveloped and at worst theoretical. This is a clear indication that the Commission intended to legislate, if that proved necessary, to ensure that citizens' rights under the Treaty could be vindicated. The decision of the Court of Justice in *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ('*Manfredi*') which came after publication of the Green Paper strengthened the Commission initiative. In *Manfredi*, the Court stated...

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[16]

The question whether the right to damages in competition cases under Irish and Community law is real or theoretical in Ireland will form the

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[15] Press Release dated 20th December 2005 entitled: 'Competition: Commission launches consultations on facilitating damages claims for breaches of EU competition law', available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1634&format=HTML&aged=0&language=EN&guiLanguage=en and accessed on the 4th October 2010.

[16] Joined cases C-295 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, [2006], ('*Manfredi*').

backdrop to this thesis. It will be argued that there is a need for legislative reform in the area of collective redress and litigation funding if the rights citizens derived under domestic and Community law are to be enforced. It will also be seen that unless there is reform in Ireland, the right to damages for small claims that citizens enjoy under both domestic and Community law will remain at best theoretical.

Structure of the Thesis

This thesis is divided into eight chapters. Chapter 1 introduces the thesis, provides a layout and the methodology used in the thesis. The substantive matter of the thesis begins in Chapter 2, which deals with the purpose of private actions for damages while in Chapter 3 an overview of some of the problems that may arise in Ireland in competition damages actions is given. How some of the obstacles to private actions might be overcome, both in domestic and Community law is the subject of Chapters 4 - 6. Chapter 4 will consider the question of collective redress and in particular the model proposed by the Commission. Collective redress will be taken up again and examined in relation to the current legal position in Ireland in Chapter 5. That Chapter will also explore the need for effective collective redress for consumers in competition cases in Ireland. Litigation funding is the subject of Chapter 6, whilst double damages in the context of incentivising private actions is dealt with in Chapter 7. Finally, Chapter 8 concludes the thesis and points to what this author has learned through his research. In what follows, the contents of Chapters 2-7 are considered in greater detail.

Chapter 2: Private actions, Why?

The function of private actions for damages will be explored in Chapter 2. In that chapter the question is asked whether private actions have an enforcement function that complements public enforcement, or whether private actions merely serve a compensatory role for claimants that have suffered loss due to an infringement of competition law. In other words, the question that is asked in that chapter is: 'Private actions: Why?' This is an important question as the answer will

indicate why the Commission and Member States, including Ireland should take steps to encourage private litigation in competition law. For instance, it will be seen that the Commission's view on the role of private actions shifted over time.

In the Green Paper the Commission saw private actions playing an important role in enforcing competition law. This view derived, at least in part, from the United States. The Commission initiated the review of private actions with the Green Paper as it wanted to enhance this 'private pillar'[17] of enforcement.

However, by the time the Commission published its White Paper[18] on Damages actions for breach of the EC antitrust rules[19] ('White Paper') it had changed its view somewhat, and the emphasis was no longer totally on enforcement.

It will also be shown in Chapter 2 that in Ireland, private litigation by claimants was considered an appropriate method of enforcing competition law when the Competition Act 1991 (the '1991 Act') was enacted. In a short space of time, this position altered quite radically with the enactment of the Competition (Amendment) Act 1996 (the '1996 Act'). The 1996 Act provided for a system of criminal and civil public enforcement of competition law in Ireland. However, the private action provision in the 1991 Act was retained and no changes were made to it. This leaves open the question: what is the purpose of the private action in competition law in Ireland now? Is it a method of enforcing competition law alongside the public enforcement provisions

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[17] The phrase 'private pillar' was used, for example, by Emil Paulis in 'Policy Issues in the Private Enforcement of EC Competition Law', in Jurgen Basedow (ed) *Private Enforcement of EC Competition Law*: Volume 25 of International competition law series, (Kluwer Law International BV, The Netherlands, 2007).

[18] A definition of White Paper is provided by the Commission on its website. That definition reads: 'Commission White Papers are documents containing proposals for Community action in a specific area. In some cases they follow a Green Paper published to launch a consultation process at European level. When a White Paper is favourably received by the Council, it can lead to an action programme for the Union in the area concerned.' This was obtained from the Commission website at http://europa.eu/scadplus/glossary/white_paper_en.htm and accessed on the 4th October 2010.

[19] White Paper on Damages actions for breach of the EC antitrust rules, Com 2008 (165) Sec (2008) 404 – 406.

in the 2002 Act or is it solely a method of allowing redress for injured parties?

It will also be questioned in Chapter 2 whether it is appropriate to view private actions as a mechanism for enforcing the law. This question is a complex one and as will be seen, the answer is not simple.

Chapter 3: Complex Issues yet to be addressed in Ireland

An overview of a number of problems that will arise in private competition litigation if such litigation becomes a more common feature in Ireland will be given in Chapter 3. Both the judiciary and policy makers will have to deal with questions such as who exactly is injured by anti-competitive conduct and therefore, who can or should be allowed to sue for damages. Should the passing-on defence be allowed? Should indirect purchasers such as consumers, be allowed to sue for harm caused to them by anti-competitive conduct carried out at some remove from them? The experience gained from private competition litigation in other jurisdictions, notably the experience in the United States, will be studied in this context. This will show that there are numerous and complex issues involved in private competition damages actions, issues barely considered to date by Irish policy makers.

Questions connected to the type of damages that should be recoverable and how those damages should be quantified in what will be very complex litigation will also be addressed in Chapter 3. Defining damages impacts on the level of damages a court can award in a competition case. There are suggestions that the definition of damages should be broad enough to include restitution and/or restitutionary damages.

Chapters 4 – 7: Private actions: How?

The Commission initiative on private actions has revealed the extent of the underdevelopment of private damages litigation amongst the Member States in the European Union. That initiative has also clarified

the reasons for that underdevelopment. Competition damages cases involve degrees of complexity met in few other areas of the law.

Earlier, a question was posed that this thesis attempts to answer. That question was 'Private actions for damages in Ireland: Why and How?' In Chapters 4 – 7 this author attempts to address the 'How?' part of that question. Two of the major aspects of how to make private actions more effective are addressed in Chapters 4 - 6. Those chapters deal with collective redress and litigation funding, viewed from the perspective of small claimants who encounter particular difficulties in bringing damages actions. Of course, collective redress can be used by groups of small businesses and is not limited just to end consumers. Funding complex and risky litigation is an issue for all claimants, whether they are a large group of consumers, a smaller group of businesses or indeed a wealthy corporate undertaking.

Chapters 4 – 5: Collective Redress

One of the core problems in competition damages actions is presented when the injured parties are consumers that have suffered small and scattered losses. Competition cases can be complex and expensive. If the losses suffered by consumers are in very small amounts, claimants will have no incentive to sue – especially if the defendants are large and well funded corporations, as is frequently the case. This may mean that undertakings that have infringed competition law will be allowed to enjoy their ill gotten gains and may not be deterred from infringing competition law again. Undertakings that have infringed competition law may have made substantial illegal profits. As will be seen in Chapters 4 and 5, without effective mechanisms of redress, claimants will not be able to recover their losses and undertakings will be able to keep their illegal gains.

The Commission recognised that collective redress is essential if claimants are to be able to sue for damages in competition cases. In the Green Paper, it sought views from interested parties on how this issue should be addressed. In the White Paper the Commission suggested solutions to the problem. Those suggested solutions are

examined in Chapter 4 against models currently used in the United States and in the United Kingdom. The review in Chapter 4 of class actions will also look at the American class action model to see what aspects of it (if any) might be used in Ireland (and in Europe under the Commission's proposed model) to allow recovery for plaintiffs with small claims in antitrust cases.

Finally, the mechanisms of collective redress that are available in the United Kingdom will be reviewed in Chapter 4. That review will encompass the lively debate that has taken place in Britain in recent years in this area. Various reports and studies as well as numerous academic articles have been produced in recent years in the United Kingdom in relation to collective redress in competition law as well as more generally. Parliament considered introducing a novel form of collective redress in the Financial Services Bill in the run up to the British General Election in 2010, but the election intervened before that new model could be introduced.

Chapter 5 will deal specifically with the problems that claimants with small and dispersed claims in Ireland have in recovering damages. It will be shown that though there is a right of action contained both in Irish law and under the Treaty, that right is more apparent than real. The law on various forms of collective redress in Ireland will be reviewed. It will be seen from that review that policy makers in Ireland have difficulty understanding the need for collective redress in competition cases, and in consequence, difficulty understanding the need for reform.

Chapter 6: New Ground, Litigation Funding

Problems of funding litigation, especially private actions for damages are without doubt a major issue in Ireland. However, this funding problem is not restricted to Ireland. It is an issue that arises elsewhere and as will be seen in Chapter 6, it is a source of concern for policy makers in both the United Kingdom and the United States. Strangely, despite the fact that litigation funding is such a major issue in competition litigation, it is one area that the Commission barely

touched in its damages initiative. It will be seen in Chapter 6 that litigation funding is an area that is not currently under review in Ireland and is therefore unlikely to be the subject of (much needed) reform.

Whilst Irish policy makers appear unconcerned by the problem, there have been enormous, almost revolutionary developments in the field of litigation funding in the United Kingdom in recent years. Both Parliament and the Judiciary have been pro-active in developing and encouraging the new industry of litigation funding there. Archaic laws on maintenance and champerty, still in force in Ireland, have been repealed in the United Kingdom and a new breed of litigation venture capitalist has emerged. Chapter 6 will reveal how out-dated, contradictory and ineffective the current laws and arrangements on legal fees and litigation funding are in Ireland.

Chapter 7: Incentivising private actions

In Chapter 7 we will take a second look at a proposal that the Commission made in the Green Paper to incentivise private actions. That proposal involved the introduction of double damages in private actions as a way of encouraging claimants to bring cases. The purpose of private actions will be revisited in Chapter 7 in the context of incentivising them and it will be argued that the idea of incentivising private actions has some merit and should be considered by policy makers in Ireland. It will also be argued that the proposal made by the Commission in the Green Paper on damages actions was incorrectly directed at 'hard-core' infringements only. In fact, if private actions are to be encouraged, especially if they are to play a role in enforcing the law, then the incentives should be directed at 'standalone' cases, which are often the most difficult to bring.

Some issues not addressed in this thesis

In a thesis dealing with an area as broad as private actions for damages in competition law, it is simply not possible to deal with all issues that touch upon either their effectiveness or their rationale.

Indeed, it is fair to say that each of the issues addressed in Chapters 4 – 7 could easily form the topic of separate theses in their own right. However, given that those topics are addressed in this thesis in the context of private antitrust litigation, discussions on those topics are necessarily curtailed and reviewed in the narrow context of this thesis, rather in a broader context that a separate thesis on those topics would command. There is no doubt that there is a need for further research on the areas of collective redress, litigation funding and incentivising complex civil litigation in Ireland.

One of the most important of the issues not addressed in the thesis is the issue of access to evidence. It is clear from reading the Green and White Papers (together with the accompanying staff working documents, studies and so forth) that access to evidence is a very serious problem in private actions in European (civil law) jurisdictions. The discovery rules available in Common law jurisdictions such as Ireland, England and Wales and in the United States, are almost unknown in civil law jurisdictions.[20] The Commission recognised the need to enhance procedures that allowed plaintiffs gain access to evidence through discovery and aspired to the system that is already found in Ireland. For instance, in the Staff Working Paper accompanying the Green Paper, and referring to the Ashurst Report, the Commission pointed out...

> The Study points out that in most Member States, the powers of national courts to order production of documents are very limited. In addition, very few Member States have mandatory pre-trial disclosure requirements. Parties are thus not obliged to produce relevant documents unless the requesting party can expressly identify the individual document he seeks, which makes it more difficult to obtain the evidence necessary to support a claim. The Study finds that restricted power on the part

[20] See for example the comments on page 108 of the Ashurst Report on this point, (n14).

> of the claimant to demand production of evidence constitutes an obstacle to successful claims.[21]

As Ireland already has what is viewed by the Commission as the optimum rule in relation to access to evidence,[22] it was therefore deemed unnecessary to devote time in this thesis to dealing with that issue.

Another area that the thesis avoids entirely is the question of Human Rights law and access to justice. Chapters 4 – 6 of the thesis deal with the problem of allowing small, sometimes impecunious claimants recover damages in competition cases. Gaining access to justice in competition cases is particularly difficult for such small claimants and undoubtedly arguments could be made that Human Rights law is infringed by not ensuring that those rights to civil justice can be vindicated effectively before the courts.

However, this thesis deals with the narrow area of damages actions in competition law with a view to showing how some steps could be taken that would greatly enhance the rights that claimants derive under both domestic and Community law. Allowing for effective collective redress and novel funding mechanisms would greatly enhance the rights of claimants, not just in competition damages cases, but more generally. The argument made in the thesis is that the rights of claimants in competition infringement cases in Ireland are more apparent than real. In order to comply with the case law of the Court of Justice and to make the private right under section 14 of the 2002 Act effective, it will be necessary to remove obstacles to taking private actions for damages in competition cases. This thesis therefore addresses the issue of access to justice strictly from a competition damages perspective by looking at the removal of obstacles to private actions

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[21] Commission Staff Working Paper Annex to the Green Paper: Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005, SEC (2005) 1732, {COM(2005) 672 final}, at para 34, page 13, available at http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf and accessed on the 4th October 2010.

[22] See for example the Ashurst Report (n14) at page 108, where it states: 'Rules on discovery vary considerably ranging from pre-trial discovery ... in the UK, Ireland and Cyprus, through to jurisdictions where (third) parties can only be requested (but not compelled) to produce more or less specifically identified documents.'

and at specific means of enhancing the ability of claimants to seek damages in Court. Even so, the issue of access to justice returns from time to time in this thesis and is most obviously present in the deliberations of the English Courts in the area of litigation funding.

Methodology

This author is a solicitor and has been a legal advisor to the Competition Authority in Ireland since July 2000. In that capacity the author assisted in compiling the Competition Authority's submission[23] to the Law Reform Commission on Multi-Party redress and the Authority's submission[24] to the European Commission's Green Paper on damages actions. It will be clear from reading those earlier submissions and then reading this thesis that the author has undergone something of an epiphany, especially in the area of collective redress. Oblique reference is made to the emergence of this change in the author's views in Chapter 5.[25]

In reading for this thesis, it was necessary to become immersed in the materials produced as part of the Commission's initiative on damages actions. The Green Paper was the starting point in the debate in Europe on damages actions. That debate generated a flood of materials from commentators, academics, government agencies and so forth. Involvement in that debate exposed the author to the ideas and arguments of a community of persons concerned with and interested in the rights of claimants in competition damages actions.

The Commission's work in the area of private actions has been immense. The Commission produced either by itself or through the submissions made to it by interested parties, a vast array of materials

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[23] Competition Authority, Submission to the Law Reform Commission on its Consultation Paper on multi-party litigation (class actions), Submission No. S/03/005, dated 30th October 2003, available at http://www.tca.ie/images/uploaded/documents/s_03_005%20Class%20Actions.pdf and accessed on the 4th October 2010.

[24] Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (Submission) (20th April 2006) S/06/001, accessed on 4th October 2010 and available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S06001.aspx?page=3&year=0

[25] D. McFadden, 'Consumer Actions for Damages for Anti-Competitive Violations', (presentation slides) available at http://www.tca.ie/EN/Promoting-Competition/Speeches--Presentations/David-McFadden-Consumer-Actions-for-Damages-for-AntiCompetitive-Violations.aspx?page=1&year=2007 and accessed on the 4th October 2010.

on various aspects of damages actions in competition cases. These materials included the Green and White Papers and accompanying staff working documents[26] and various reports and studies[27] prepared for or by the Commission. These materials provided a treasure trove of information and an excellent starting point to commence research.

As mentioned, the Commission website recorded numerous submissions made to it by a variety of interested parties. Those interested parties included the National Competition Authority's (the 'NCA's') of the Member States,[28] which of course are agencies specialising in the enforcement of national competition laws as well as the competition provisions in the Treaty. Other submissions were made by groups such as the American Bar Association (the 'ABA')[29] and the International Bar Association (the 'IBA'),[30] as well as the Federal Trade Commission, to name but a few.[31] Each of these is expert in the area of competition law enforcement, and in some cases, expert in antitrust damages actions including class actions. The clarity of some of the submissions on the need for mechanisms that allowed for 'opt-out'

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[26] For example, the Staff Working Papers on damages actions that accompanied the Green and White Papers, the Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules: Impact Assessment, COM (2008) 165 SEC (2008)

[27] For example the Ashurst Report (n4) and the Report For The European Commission, Contract DG COMP/2006/A3/012, December 2007, (External Impact Assessment Report) available on the Commission website at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441 and accessed on the 4th October 2010.

[28] See for example Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on "Damages actions for breach of the EC antitrust rules", July 2008, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf and accessed on the 4th October 2010, and the submissions of the Office of Fair Trading on both the Green and White Papers.

[29] Joint Comments Of The American Bar Association Section Of Antitrust Law, Section Of International Law, And Section Of Business Law On The Commission Of The European Communities' White Paper On Damages Actions For Breach Of The EC Antitrust Rules, June 30, 2008, 50, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf and accessed on the 4th October 2010.

[30] International Bar Association Antitrust Committee Working Group On Private Antitrust Litigation In Europe, 'Submission Regarding The European Commission's Green Paper On Damages Actions For Breach Of The EC Antitrust Rules', available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/iba.pdf and accessed on the 4th October 2010.

[31] Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission: Damages actions for breach of the EC antitrust rules, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/bundesministerium_fur_wtb_en.pdf and accessed on the 4th October 2010.

collective redress for example, was persuasive, as the contrary arguments, when put forward, rarely spoke with authority on how the interests of injured parties could be vindicated without 'opt-out' collective redress.

The experience of the consumer group *Which?* in its follow on class action in the *JJB Sports*[32] case was also powerfully persuasive of the need not only for class actions in competition cases but of the need for an 'opt-out' provision in class actions. That case and the various academic studies and reports in the United Kingdom on the class action made a strong case for the introduction of class actions in Ireland which would include an 'opt-out' provision as well as the ability for the Court to apply excess funds cy-pres.

This author's research then spread further afield. It was clear from the outset that it would be necessary to examine the position regarding private antitrust damages actions in the United States. One reason for this was that the private bar in America has litigated damages cases in antitrust for over a century and there is therefore a wealth of case law on damages actions in that jurisdiction. Another reason was that, like Ireland, the United States is a common law jurisdiction with a public enforcement regime that includes both civil and criminal sanctions. Finally, it was clear from reading the Green and White Papers and the associated documents that there was a fear of introducing a U.S. style litigation culture into Europe. It was therefore necessary to see what was so terrible in the American system that needed to be avoided in Europe.

It also became clear from the various materials on the European Commission's damages initiative and from reading the journal articles referenced throughout this thesis, that the United States was also undergoing an in depth and far reaching review of its antitrust laws at about the same time as the European Commission's damages initiative was under way. Congress established the Antitrust Modernization

[32] *Consumers Association v JJB Sports plc*, Competition Appeals Tribunal (CAT) case number: 1078/7/9/07.

Commission (the 'AMC') in 2004 and it reported to the President and Congress in 2007.[33] The process engaged in by Congress in its review of the antitrust laws in the United States was wide ranging and dealt with both public and private enforcement of competition law. In the field of private antitrust actions, a wealth of material was produced by the AMC and by the many parties that made submissions or statements to the various hearings that the AMC conducted. That report alone was a mine of information that threw up numerous further sources for research.

The contributors to the AMC's final report came from many different backgrounds, and included academics, lawyers in private practice and public law enforcement officials. Their contributions, cited throughout the thesis, reveal a depth of knowledge and experience in various aspects of private antitrust litigation that is simply unknown in Ireland. These contributors drew not only on their own knowledge and experience but also on the vast reservoir of knowledge that has been built up in the United States in this field. This is visible in the literature including journal articles, cases and texts that they cite.

From reading this vast literature on antitrust damages actions in the United States, it became clear that whilst there were excesses and abuses, many of the concerns expressed during the Commission initiative were either exaggerated or unfounded.[34] In fact, without drilling into the literature and caselaw available in the United States on antitrust damages actions, it would be easy to believe some at least of the myths that have grown up around the private antitrust litigation in the United States. The research conducted in this thesis has opened the eyes of the author to an alternative world where not all things in

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[33] Antitrust Modernization Commission Report and Recommendations (the "AMC Report"), (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf and accessed on the 4th October 2010.

[34] Nan Ellis wrote an article on how the Class Action Fairness Act 2005 was introduced because of a campaign of misinformation, where complaints of abuses in the American class action were either exaggerated or just made up. See Nan S. Ellis, 'Class Action Fairness Act of 2005: The Story behind the Statute', 35 Journal of Legislation 77 (2009) 76 – 112. Andrew Gavil also debunked claims of an exponential and uncontrolled growth in class actions. See Statement of Professor Andrew I Gavil, 'Before the Antitrust Modernization Commission Panel II: "State Indirect Purchaser Actions: Proposals for Reform" Federal Trade Commission, Washington, D.C. (June 27, 2005).

American antitrust are excessive or bad. In fact it was apparent that there were many aspects of the American approach to private litigation in antitrust that could be adapted for use in an Irish legal context. These, it will be seen, include the 'opt-out' class action with the possibility of applying excess funds cy-pres as well as multiple damage awards to incentivise private actions where they would not otherwise be taken and where they would act as both sanction and deterrent in standalone cases.

The American experience in identifying claimants, the passing on defence and quantifying damages offer an opportunity to learn from the experience gained from over a century of private litigation and therefore to prepare for and hopefully avoid the pitfalls that have arisen there. This will become clearer in Chapter 3.

Developments in private actions in competition law in the United Kingdom were another obvious and necessary area that needed to be studied for this thesis. Indeed, developments in this area in Britain, of which there have been many, proved fertile ground as a source of comparison to the position currently found in Ireland. This was particularly obvious, as already mentioned, in the area of class actions. In the United Kingdom, steps have already been taken to allow for collective redress in consumer and competition cases. The form of collective redress in the United Kingdom is under active review and reform is being considered. Policy makers and the judiciary in the United Kingdom are learning from the weaknesses in their collective redress model. That debate is not happening in Ireland. This is unfortunate as there is much that can be learned from the British experience in affording claimants the opportunity to sue in damages in competition cases.

The United Kingdom is our nearest neighbour. Many of the cases cited by the courts in Ireland are English and indeed, the policy of the law especially in the area of litigation funding (as will be seen in Chapter 6), was drawn from the United Kingdom.

In some respects, the developments that have taken place in recent times Britain have shown up more than anything else how out of touch and antiquated the approach of policy makers and the judiciary in Ireland is to damages litigation in antitrust. This is most obvious in the area of litigation funding where the law in Ireland in relation to maintenance and champerty, to take just one example, is trapped in the early Middle Ages from whence it first came.

The judiciary in Britain have played their part in developing and modernising the law. For example, the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd and others*[35] reveals an understanding by the judiciary of the necessity to encourage access to justice and therefore avoid killing off a fledgling litigation funding industry that is emerging in the United Kingdom.

The extraordinary debate underway in the United Kingdom on collective redress reveals a willingness and understanding by policy makers to consider reform. As will be seen in Chapter 4, an 'opt-out' class action was close to being introduced in the Financial Services Bill until the British General Election intervened in April 2010. The reports drawn up by and for the Civil Justice Council[36] and the Office of Fair Trading[37] provided a rich source of material to draw upon when examining the current position in Ireland in relation to private actions, and especially in relation to collective redress and litigation funding.

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[35] *Arkin v Borchard Lines Ltd and others*, Court Of Appeal, (Civil Division) [2005] EWCA Civ 655, [2005] 3 All ER 613.

[36] For example, see Civil Justice Council, 'Improved Access to Justice – Funding Options and Proportionate Costs: The Future Funding of Litigation – Alternative Funding Structures, A Series of Recommendations to the Lord Chancellor to Improve Access to Justice through the Development of Improved Funding Structures', (June 2007) available at http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf and accessed on the 4th October 2010 and Mulheron, R., 'Reform of Collective Redress in England and Wales – A Perspective of Need', a research paper submitted the Civil Justice Council for England and Wales, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf and accessed on the 4th October 2010.

[37] For example, see Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', (Recommendations) (November 2007) OFT 916 resp, available at http://www.oft.gov.uk/news/press/2007/162-07 and accessed on the 4th October 210 and Office of Fair Trading, 'Response to the European Commission's White Paper, Damages Actions for breach of the EC antitrust rules', (Submission) (July 2008) OFT 1006, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/oft_en.pdf

The lack of debate in Ireland on private litigation in competition cases revealed itself in the dearth of information on many of the topics touched on in this thesis. However, the work carried out by the Law Reform Commission (the 'LRC') on collective redress, producing a consultation document[38] in 2003 and a report[39] in 2005 on multi-party litigation in Ireland proved a noble exception. It is unfortunate that the LRC's work in this field has lain dormant since.

Curiously, text books on competition law devoted little attention to the topic. A notable exception was Professor Whish's *Competition Law* 6th edition which devoted an entire chapter to the topic.[40] However, there have been many academic articles published in numerous journals in the area and this will be obvious throughout this thesis. As part of the process of reading for this thesis it was necessary to carefully review the major journals in Community competition law so as to be aware of commentary on damages actions. This meant sifting through the European Competition Law Review, the European Competition Journal, the online Competition Law Review and World Competition.

Further afield, there is an extraordinary wealth of law journals published in the United States and beyond. One of those journals deserves special mention. The author learned during his research that the Loyola Consumer Law Review had been established through funds assigned cy-pres by a judge in an antitrust damages case. This is mentioned in Chapter 4 of the thesis. The Loyola Consumer Law Review, along with many others has proved a very rich source of academic articles in this field of research.

The library resources at Trinity College must be commended for the extraordinary access that they allowed, particularly internet access to the various journals and cases referred to in the thesis. In this regard, it must be noted that Heinonline and Westlaw proved particularly

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[38] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation (Class Actions)' (LRC CP 23-2003).

[39] Law Reform Commission, 'Report Multi-Party Litigation' (LRC 76-2005).

[40] R. Whish, *Competition Law*, (n13) at Chapter 8, pages 290 – 322. See also I. Van Bael and Jean-Francois Bellis, *Competition Law of the European Community*, (5th ed., Kluwer Law International, Wolters Kluwer, AH Alphen aan den Rijn, 2010), pages 1209 – 1258.

useful in accessing the various law journals from the United States, Australia and elsewhere that are cited in the thesis.

Through reading the various reports, submissions, cases, journal articles and so forth that are cited in the thesis, the author's views, particularly on collective redress, were developed and shaped (indeed altered as already mentioned). The result is a thesis that hopefully not only shows how underdeveloped the law on private damages actions in Ireland is, but also identifies some of the areas that need to be addressed to rectify this underdevelopment.

CHAPTER 2: DAMAGES ACTIONS: ENFORCMENT OR COMPENSATION

Introduction

With the publication in December 2005 of its Green Paper[1] on Damages Actions in antitrust cases, the European Commission (the 'Commission') started a debate on whether there was need for reform to encourage damages actions in competition cases. It was clear from the Green Paper that the Commission believed there was such a need. At the outset, one of the principal reasons given by the Commission for encouraging damages actions was to strengthen the private pillar of antitrust enforcement.

In this chapter it will be seen that the Commission actively promoted damages actions as an enforcement mechanism until publication of its White Paper.[2] In the White Paper the emphasis shifted noticeably from enforcement to compensation. Nevertheless, the Commission continued to maintain that damages actions perform an enforcement function in competition law.

The first part of this chapter will trace the Commission's philosophy on damages actions as an enforcement mechanism from its source in European legislation and jurisprudence. The chapter will then examine the American philosophy of private enforcement in antitrust law, and will examine the influence that this has had on the Commission's initiative. This will be followed by a brief examination of the development of Irish competition enforcement philosophy from its beginnings in private actions under the Competition Act 1991 through to the mixed model of competition enforcement that exists today under the Competition Act 2002 (the '2002 Act').

The second part of this chapter will examine whether it is really correct to speak of private actions as having an enforcement function in competition law. It will take into account the rationale for enforcing the

[1] Green Paper on Damages actions for breach of the EC antitrust rules; Com (2005) 672, SEC (2005) 1732.

[2] White Paper on Damages actions for breach of the EC antitrust rules, Com 2008 (165) Sec (2008) 404 – 406.

law, including deterrence and punishment, together with development and clarification of the law, and will attempt to address the question whether, if it is the case that private actions have an enforcement function, they constitute an effective mechanism for enforcing the law or whether public enforcement is always superior.

The Purpose of Private actions: Enforcement Privatised?

The Commission Initiative

In December 2005 the Commission commenced a public review to examine how private actions for damages under Articles 101 and 102 of the Treaty could be strengthened. The Commission published a Green Paper[3] to initiate a debate in which it identified issues that it perceived militated against the bringing of private actions. The Green Paper and the Staff Working Paper[4] that accompanied it were intended to '...address the conditions for bringing damages claims for infringement of EC antitrust law.'[5] The two documents identified '...obstacles to a more efficient system for bringing such claims and ... options for solving these problems.'[6] All of this forms part of a project undertaken by the Commission in order '...to improve the enforcement of competition law after the modernisation of the procedural law...'[7] The Green paper explains the Commission's purpose from the outset...

> Facilitating damages claims for breach of antitrust law will not only make it easier for consumers and firms who have suffered damages arising from an infringement of antitrust rules to recover their losses from the infringer but also strengthen the enforcement of antitrust law.[8]

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[3] Green Paper on Damages actions for breach of the EC antitrust rules; (n1).

[4] Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules Com (2005) 672 Final.

[5] Ibid 3.

[6] Ibid.

[7] Ibid. The modernisation of the procedural law referred to here was the introduction of Council Regulation 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ LI/I (Regulation 1/2003).

[8] Ibid.

The Commission's initiative was one that had potential to lead to major reform in how private litigation for damages in competition cases are conducted before national and community courts. The Green Paper was preceded by a substantial study commissioned by the Commission. The English law firm Ashurst undertook this study for the Commission and produced a report[9] (the 'Ashurst Report') on the position at that time of claims for damages in EC competition cases. Based on the Ashurst Report, the Commission argued that there was a need for reform because...

> While Community law ... demands an effective system for damages claims for infringements of antitrust rules, this area of the law in the 25 Member States presents a picture of "total underdevelopment."[10]

Private actions to enforce competition law

Paragraph 1.1 of the Green Paper is titled: 'Damages claims as part of the enforcement system of Community antitrust law.'[11] This is immediately followed by a statement that clarifies that the Commission viewed private actions as having a role in enforcing competition law...

> The antitrust rules in Articles 81 and 82 of the Treaty are enforced by public and private enforcement. Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.[12]

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[9] Study on the conditions of claims for damages in case of infringement of EC competition rules, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

[10] Green Paper 4 (n1).

[11] Ibid 3.

[12] Ibid.

The language of the Green Paper is imbued with the concept of private actions playing an enforcement role parallel to public authorities, including the Commission. Take, for example, the following passage...

> Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community' (deterrence). By being able effectively to bring a damages claim, individual firms or consumers in Europe are brought closer to competition rules and will be more actively involved in enforcement of the rules. The Court of Justice of the European Communities (ECJ) has ruled that effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss arising from an infringement of Articles 81 or 82 have the right to claim damages.[13]

The Commission's view was clear: injured parties are entitled to seek compensation for any loss incurred or damage caused by the anti-competitive behaviour of undertakings, but, when seeking redress, they '...will be more actively involved in enforcement of the [competition] rules.'[14] The same point was made by the Court of Justice of the European Union (the 'CJEU' and formerly the European Court of Justice or 'ECJ') in the cases *Courage v Crehan*[15] and *Manfredi*.[16] The threat of private actions for infringement of Articles 101 and 102 TFEU helps deter undertakings from engaging in anti-competitive behaviour. Private actions for damages by injured parties helps nurture a pro-competition culture in business.

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[13] Ibid, 4.

[14] Ibid.

[15] Case C-453/99 *Courage –v- Crehan* [2001] ECR I-6297.

[16] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

Views of the Commissioners and Staff of the Commission

At about the time the Green Paper was being prepared and published various people within the Commission, including the then Commissioner, made speeches and published articles setting out their views on the purpose of encouraging private actions for damages. For example, at a conference in Fiesole in September 2004, the then Commissioner Mario Monti explained his view of the importance of private actions in the enforcement of the competition rules...

> I believe that greater private enforcement of Community competition law would bring clear benefits for the functioning of the internal market and the competitiveness of the European economy:
>
> The threat of such litigation has a strong deterrent effect and would lead to a higher level of compliance with the competition rules.
>
> Increased private action would further develop a culture of competition amongst market participants, including consumers, and raise awareness of the competition rules, and
>
> Private litigants may take action against infringements which the Commission and the national competition authorities would not pursue, or do not have sufficient resources to deal with.[17]

According to Monti, private damages actions by injured parties play a central role in the enforcement of competition rules and help strengthen public enforcement. These goals are achieved through cases being taken by private actors where an overstretched

[17] Speech/04/403; 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the New Merger Regulation', delivered at the International Bar Association, 8th Annual Competition Conference at Fiesole, 17th September 2004, available at http://europa.eu/rapid/pressReleaseAction and accessed on the 4th October 2010.

enforcement agency cannot act (standalone actions) and through the deterrent effect that such actions have.

Monti's successor, Commissioner Neelie Kroes showed an equal determination to encourage private enforcement and was also clear as to its purpose...

> Let me make it clear from the outset that I am convinced that there is great potential in advancing damages cases for breach of the European competition rules...because I think Europe and its businesses and citizens would profit from a stronger competition culture, and an appropriate degree of **private enforcement can promote this**...[18] (Emphasis added).

In the same speech Kroes also said...

> ...national courts can rule on both substantive infringement and subsequent damages claims. Facilitating the bringing of [private actions] before national courts can considerably increase the overall enforcement of the European competition rules and thus the likelihood of competition law infringements being discovered and sanctioned.[19]

It can be seen that there is a consistency in the use of language to describe the enforcement function of private actions. Kroes saw private antitrust litigation playing an enforcement role under the Treaty. Private enforcement helps to ensure compliance with the competition rules enshrined in Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU').[20] In 2007, one of Kroes'

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[18] Speech/05/613 'Damages Actions for Breaches of EU Competition Rules: Realities and Potentials', Opening speech at the conference 'La reparation du prejudice cause par une pratique anti-concurentielle en France et à l'étranger: bilan et perspectives Cour de Cassation Paris, 17th October 2005 available at http://europa.eu/rapid/pressReleaseAction and accessed on the 4th October 2010.

[19] Ibid.

[20] Formerly Articles 81 and 82 respectively of the Treaties of the European Community (TEC) but renumbered as Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') effective from December 2009.

senior staff at the time, acting Deputy Director General of the Directorate General for Competition in the Commission ('DG Comp') Emil Paulis, referred to private actions as the 'private pillar' of EC antitrust enforcement. [21]

The views of those working within DG Comp are consistent with the views expressed by their Commissioners. For example, in an article in the Competition Policy Newsletter[22] co-authored by Donncadh Woods, Ailsa Sinclair and David Ashton the authors make the following point...

> It is anticipated that **greater private enforcement of Community competition law would have inter alia the following advantages**:
>
> • It would **increase deterrence** against infringements and increase compliance with the law.
>
> • The victims of illegal anticompetitive behaviour would be compensated for loss suffered.
>
> • **Private enforcement** is an effective way to deal with certain types of cases, especially those involving a commercial dispute between two parties and those where the claimant has close access to evidence concerning the defendant's business activities.
>
> • The Commission and the national competition authorities do not have sufficient resources to deal with all cases of anticompetitive behaviour.
>
> • Actions before the courts can offer speedier interim relief to undertakings than public proceedings...

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[21] E Paulis, 'Policy Issues in the Private Enforcement of EC Competition Law', in Jurgen Basedow (ed) *Private Enforcement of EC Competition Law*: Volume 25 of International competition law series, (Kluwer Law International BV, The Netherlands, 2007). Paulis stated in that Chapter: '...I think we need to add to the public pillar, we need to add a private pillar. The private pillar is not there to substitute the public pillar. It is to be added. It is a complement to the public enforcement...' at page 9.

[22] D Woods and others, 'Private enforcement of Community competition law: modernisation and the road ahead' [2004] 2, from the Commission website http://ec.europa.eu/competition/publications/cpn/ and accessed on the 4th October 2010. The authors are recorded as being staff unit A-I of the Directorate-General Competition.

Woods and his colleagues argue that private actions are an effective form of competition enforcement. They refer to the deterrent effect of private competition litigation and indicate that there are instances where private claimants will have access to information and evidence in a case that the Commission might never obtain. They also point to the fact that public enforcers such as the Commission and national competition authorities do not have sufficient resources to deal with all cases of anti-competitive behaviour. Private enforcement therefore fills a gap left where public enforcement falls down. It is clear from the foregoing that the Commission and its staff assume that private actions for damages have a role to play in the enforcement of competition law.

Sven Norberg, a former director at DG Comp advocated the role that private actors might have in complementing the enforcement of competition law by public authorities. He saw that Regulation 1/2003 was a step in the process towards facilitating private enforcement before national courts...

> Promoting private action would to me seem a logical complement to Council Regulation 1/2003 which pursued the objective of facilitating private enforcement before national courts by removing the Commission's exclusive power to apply Article 81(3). This was a necessary but not sufficient condition to promote private action in Europe. Further steps should in my view now be contemplated.[23]

Philip Lowe, former Director General of DG Comp more recently made the same point as Woods. He argued that...

> ...facilitating private enforcement would help ensure that those damaged by infringements of EC competition law can exercise their right to compensation, as well as

[23] S. Norberg, 'Competition Policy of the European Commission: In the Interest of Consumers?' Speech made at Leuven (20 June 2003) available at Commission website at http://ec.europa.eu/competition/speeches/text/sp2003_021_en.pdf and accessed on the 4th October 2010

> adding to overall sanctions and deterrence, as a complement to public enforcement.[24]

The point that private enforcement fills a gap left by public enforcement is frequently made to support the argument that private actions for damages play a role in enforcing the law. Whether this position is correct and whether it is appropriate to effectively privatise competition law enforcement are questions that will be addressed later in this chapter.

The White Paper: A shift in Emphasis?

In 2008, the Commission published its White Paper[25] on damages actions. The primary objective of the White Paper according to the Commission is...

> ...to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. **Full compensation** is, therefore, the first and foremost guiding principle.[26] (Emphasis in original)

In the White Paper, the Commission shifted its emphasis from that of private action as an enforcement mechanism to that of compensation of the plaintiffs in private actions. Nevertheless, encouraging private damages actions to assist in law enforcement remained a priority, although the language in the White Paper was not so clear or strident in this regard as it had been in the Green Paper...

> Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of

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[24] P Lowe, 'The design of competition policy institutions for the 21st century the experience of the European Commission and DG Competition' [2008] 3, from the Commission website http://ec.europa.eu/competition/publications/cpn/ and accessed on the 4th October 2010.

[25] White Paper on Damages actions for breach of the EC antitrust rules (n2).

[26] Ibid at page 4.

> competition will be detected and that the infringers will be held liable.[27]

The Commission appeared concerned to ensure that the public enforcement role enjoyed both by it and by the competition authorities in the members states would not be watered down by private enforcement...

> ...the Commission's policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and the competition authorities of the Member States.[28]

For this reason the Commission stressed that its proposals in the White Paper were '...designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement.'[29] Private actions could still play an enforcement role, albeit a subservient role to the public enforcement of the law by the Commission and the national competition authorities ('NCA's').

In its Staff Working Paper accompanying the White Paper the Commission was almost defensive in explaining the enforcement role it envisaged for private actions ...

> ...the aim is not to substitute public enforcement, or parts thereof, with actions for damages. The role of the public authorities will continue to be of crucial importance in detecting anti-competitive practices such as cartels, where the special investigation powers vested in the public authorities are indispensable for effective and efficient enforcement of competition law...the Commission

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[27] Ibid.

[28] Ibid.

[29] Ibid. This shift in emphasis is also obvious from the two accompanying staff working papers to the White Paper: The Commission (EC), 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', Brussels 2.4.2008, SEC (2008) 404 and Commission (EC), 'Commission Staff Working Document accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules: Impact Assessment', Brussels 2.4.2008, {COM(2008) 165 final}, SEC (2008) 405.

> has borne in mind the need to maintain a strong and effective public enforcement system.[30]

What had happened to cause this apparent shift in emphasis by the Commission? It appears that many of the submissions that it had received in response to the proposals on the Green Paper raised concerns in relation to private actions somehow usurping the public enforcement function of the Commission and the NCA's.

One such response came from the Law Society of England and Wales. In their submission they made clear their view that...

> ...it is the responsibility of the public authorities, both the Commission and Member State authorities, to take enforcement action designed to punish infringers, whether this be by means of fining, imprisonment or otherwise. We do not regard private damages actions for breach of competition law as primarily an instrument of deterrence.[31]

Similarly, the German submission, prepared jointly by the Justice, Agriculture and Economics ministries together with the Bundeskartellamt argued that...

> The differing purposes of private damages claims on the one hand and public enforcement measures on the other need to be maintained ... The guiding principle of a strong public enforcement, however, should not be challenged.[32]

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[30] Commission (EC), 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', para 18, page 11, (n29).

[31] 'White Paper on damages actions for breach of the EC antitrust rules: Response of the Law Society of England and Wales' July 2008, available on the Commission website at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/lawsoc_en.pdf and accessed on the 4th October 2010.

[32] Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on "Damages actions for breach of the EC antitrust rules", July 2008, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf

Professor Jeroen Kortmann and Christoph Swaak pointed out that in response to the concerns expressed in submissions made by Member States and others ...

> ...the White Paper commences with several reassuring (conciliatory?) gestures towards the Member States. The Commission took as its "guiding principle" that "the legal framework for more effective antitrust actions should be based on a genuinely European approach"...In the Staff Working Paper that accompanies the White Paper, the phrase "private enforcement" is now almost avoided. Instead the Commission's catchphrase has become "full compensation" a phrase that was not used at all in the Green Paper or the accompanying Staff Working Paper...[33]

Jindrich Kloub, in attempting to explain '...why the Commission's current initiative is carried out not under the barrier of strengthening private enforcement...'[34] offered this explanation...

> ...the Commission is acting strategically and actually engaging in window dressing by using 'damage actions' as a politically acceptable euphemism for private enforcement, which is a tainted term for many in the EU due to the perceived excesses of private enforcement in the US.[35]

Kloub is of the view that despite these concerns '...the Commission's initiative [is] aimed at enhancing private enforcement of antitrust rules, notwithstanding its official title.'[36] The Commission itself appears to acknowledge this in the White Paper...

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[33] Prof J Kortmann and C Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic', [2009] Vol 30, Issue 7, European Competition Law Review, 340 – 351.

[34] Jindrich Kloub, 'White Paper on Damages Actions for breach of the EC Antitrust Rules: Plea for a more holistic approach to Antitrust Enforcement' (2009) European Competition Journal, 532.

[35] Ibid.

[36] Ibid.

> The Commission followed the further guiding principle that the legal framework for more effective antitrust damages actions should be based on a genuinely European approach. The policy choices proposed in this White Paper therefore consist of **balanced measures** that are rooted in **European legal culture** and **traditions**.[37] (Emphasis in original).

Kortmann and Swaak are in agreement with Kloub on this point...

> ...a more careful study of the White Paper and the accompanying documents suggests that, notwithstanding the change in emphasis towards the compensatory function of tort law, the Commission remains determined to deploy tort law as an enforcement tool.[38]

Though the Commission appeared to tone down the enforcement aspect of its damages initiative by the time of the White Paper, it did not abandon the concept altogether. It remained committed to strengthening the private enforcement pillar through enhancing damages actions...

> Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore **inherently** also produce beneficial effects in terms of **deterrence** of future infringements and greater compliance with EC antitrust rules.[39] (Emphasis in original)

Community Law on the Concept of Private Enforcement

The Commission's initiative in the Green and White Papers to strengthen private enforcement of the competition rules has had a long

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[37] White Paper on Damages actions for breach of the EC antitrust rules, at page 3, (n2).

[38] Kortmann and Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic', 342 (n33).

[39] White Paper on Damages actions for breach of the EC antitrust rules, at page 3, (n2).

lead in. The Commission's view that private litigation can assist in competition enforcement is based in part on the case law of the European Courts together with legislation such as Regulation 1/2003.[40]

Recital 7 of Regulation 1/2003 reads...

> National courts have an essential role to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example, by awarding damages to the victims of infringements. The role of national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.[41]

Referring to Regulation 1/2003, the Commission Notice on Complaints[42] when emphasising the complementary nature of public and private enforcement of the competition rules pointed out that public enforcement could not capture every breach of the competition rules and that private actions had a role to play in competition enforcement. Paragraph 8 of the Notice states that...

> While national courts are called upon to safeguard the rights of individuals and are thus bound to rule on cases brought before them, public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases.

As already shown, the Commission used more forthright language in the Green Paper when connecting private actions to an enforcement function. The Commission drew inspiration for this from various decisions of the Court of Justice. For example, as far back as 1963 in *Van Gend en Loos*, the Court signalled that the competition rules in the

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[40] Regulation 1/2003 (n7).

[41] Ibid.

[42] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27/04/2004 P.

Treaty are not solely safeguarded by public enforcement. The Court felt that in order to ensure the effectiveness of the whole system, other individuals had an enforcement role to play by way of private actions to protect their own rights...

> ...the vigilance of individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted to the diligence of the Commission and of the Member States.[43]

The development of this philosophy in the particular area of competition law can be seen from a number of cases. In *BRT v SABAM*,[44] the Court of Justice held that individuals enjoyed actionable rights under Articles 101 and 102 TFEU which could be vindicated before national courts. Weiler in his book on the Constitution of Europe[45] pointed to the 'judicial doctrine of direct effect introduced in 1963'[46] which '...created enforceable rights not just between Members States and individuals but also among individuals *inter* se.'[47] Weiler then argued, under the judicial doctrine of direct effect...

> ... individuals in real cases and controversies ... became the principal 'guardians' of the legal integrity of Community law within Europe similar to the way that individuals in the United States have been principal actors in ensuring the vindication of the Bill of Rights and other federal law.[48]

Weiler's point is that from an early stage, deriving from the doctrine of direct effects, individuals played a role in enforcing community law within Europe just as is the case in the United States. The American

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[43] Case 26/62 *van Gend en Loos / Netherlands Inland Revenue Administratie* [1963] ECR I.

[44] Case 127/73 *Belgische Radio en Televisie and Societé Belge des Auteurs, Compositeurs et Editeurs de Musique v SV SABAM and NV Fonior* [1974] ECR 51, (*'BRT v SABAM'*).

[45] JHH Weiler, *The Constitution of Europe, 'Do the New Clothes have an Emperor?' and Other Essays on European Integration*, Cambridge, CUP, 1999.

[46] Ibid at page 19.

[47] Ibid.

[48] Ibid at page 20.

example of private individuals enforcing the law will be returned to shortly.

In *Courage v Crehan* the Court of Justice made clear the importance of the right of parties to bring actions to vindicate their rights, even in instances where they have been party to the illegal agreement themselves...

> The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition ... indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.[49]

Paragraph 29 of the judgment makes clear that there is an obligation on the legal system of each member state to...

> ... lay down the detailed procedural rules governing actions or safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (Principle of effectiveness).[50]

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[49] Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297, paras 26 & 27 (n15).

[50] Ibid 29.

In *Manfredi*[51] the Court of Justice reiterated its thinking regarding the rights of individuals to seek damages for harm caused by anti-competitive behaviour...

> Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.[52]

The Court continued in the same paragraph of the judgement with what appears to be a directive to the member states concerning their legal systems...

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of causal relationship, provided that the principles of equivalence and effectiveness are observed.[53]

The Court recognised that there is a deficiency in the Community's rules governing the exercise of the private right of action to recover damages. It is this deficiency that the Commission was trying to address through the Green and White Papers. It is also clear that the Court felt that it has had to make up for this ongoing deficiency in the rules governing private actions...

> ... since the Court of Justice made clear (in BRT/I 1974) that national law had to provide remedies for the victims of antitrust infringements, neither the Treaty nor Regulation I/2003/EC ... have provided any legal rule explicitly granting damages throughout the Community. So far, any procedural and substantive problem related to

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[51] *Manfredi v Lloyd Adriatico Assicurazioni SpA*, (n16).

[52] Ibid at paragraph 2.

[53] Ibid.

> the *vactio legis* has been solved from Luxembourg through the application of the effectiveness, equality and proportionality principles.[54]

However, it is important to maintain a balanced view on how the Court perceives the various roles of the Commission and private individuals in competition enforcement. For example in *Musique Diffusion Française v Commission*[55] the Court pointed to the enforcement role that the Commission is tasked with. The enforcement role is a duty and that duty is to investigate and punish infringements...

> In that connection it must be remembered that the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Articles 85(1) or 86 of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.[56]

It is clear that in cases such as *Musique Diffusion Française* and *Limburgse Vinyl Maatschappij* the Court has recognised the role that the Commission plays in enforcing the competition rules and that this role involves a duty to investigate and punish illegal conduct. However, these cases predate the introduction of Regulation 1/2003 on the 1st

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[54] M. Carpagnano, 'Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04, Manfredi', Volume 3 Issue 1, The Competition Law Review.

[55] Joined cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR I-1825.

[56] Ibid para 105. The Court reiterated this view in joined Cases T-305/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR where it stated *inter alia*...'The supervisory role conferred upon the Commission in competition matters includes the duty to investigate and penalise individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.

May 2004 which removed the Commission's monopoly to grant exemptions under the Treaty. Regulation 1/2003 now makes Article 101(3) TFEU directly applicable in the national courts of the member states. This means that private actors now have the right to enforce Community competition law before national courts through private action. In any event, these cases, though emphasising the Commission's role in enforcement, do not negate or indeed address the role that private actors might have in enforcing competition law. *Crehan* also predates Regulation 1/2003 and therefore represents a development in the Court's thinking on the roles of private actors in competition cases. *Manfredi* develops that thinking further.

As has been shown here, the case law of the European Courts has emphasised the rights of injured parties to damages for breaches of Articles 101 and 102 TFEU. The case law of the court has also shown that private actions play a role in enforcing the competition rules under the Treaty. In *Crehan*, the Court emphasised that '[t]he full effectiveness of Article 85 of the Treaty ... would be put at risk if it were not open to any individual to claim damages.'[57] The Court also emphasised that the existence of the right to claim damages for breach of competition law '...strengthens the working of the Community competition rules and discourages agreements or practices ... which are liable to restrict or distort competition.'[58]

Private Antitrust Law Enforcement: The American Model

The Commission's review of the conditions of claims for damages for infringements of the EC competition rules may lead to procedural change. Procedural change, if it happens, is intended to encourage more private litigation in competition cases. In looking at how private litigation might be encouraged in the European courts, the Commission has had before it the example of the United States. While there has been a dearth of private actions for damages in competition cases in

[57] *Courage -v- Crehan* (n15).

[58] Ibid.

the EU, the reverse is true of private actions in antitrust cases in the U.S.

The United States Supreme Court has stated that the Sherman Act[59]...

> ... was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.[60]

That court has described the antitrust laws as the '...Magna Carta of free enterprise.'[61]

It is worth quoting in full here a passage from the judgment of the U.S. Supreme Court in *Northern Pacific.* It gives a flavour of the importance attached by the courts in the U.S. to the antitrust rules...

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination or conspiracy, in restraint of trade or commerce among the several States.[62]

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[59] The Sherman Act, 15 U.S.C.

[60] *United States v Northern Pacific Railroad Co.*, 356 U.S. 1, 78 S. Ct. 514 (1958).

[61] *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 n.38 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)).

[62] Ibid.

From the beginning a central feature of antitrust enforcement was the private right of action. Donald Baker[63] explains that the reason for this was that Congress neither created an agency to enforce the law nor provided the funds for public enforcement of the Sherman Act...

> Awarding treble damages in antitrust cases was intended by Congress in 1890 to encourage private enforcement of a new law for which no appropriation for public enforcement had been provided. Fear of non-enforcement or minimal enforcement by the Attorney General was certainly an appropriate political concern back then.[64]

From its inception, the philosophy of enforcing antitrust law in the United States was a philosophy of self help by private actors. Of course as Baker also points out...

> Today, the United States has adequately funded and staffed federal antitrust enforcement agencies and most of the largest private antitrust damage cases are follow-on cases in the wake of the Department of Justice ("DOJ") prosecutions of major cartels.[65]

In their casebook on antitrust law[66], Gavil, Kovacic and Baker explain the rationale of decentralising enforcement amongst a variety of prosecutors. First of all it should be noted that these prosecutors include '...an executive department (the Department of Justice), an independent administrative agency (the Federal Trade Commission), the attorneys general of the 50 States and the District of Columbia, and aggrieved individuals, including consumers and competitors of the alleged violator.'[67] The authors explain that there are three reasons for

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[63] DI Baker, 'Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) Loyola Consumer Law Review 16.

[64] Ibid 382.

[65] Ibid.

[66] Andrew Gavil, William Kovacic and Jonathan Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, (American Casebook Series, Thomson West, St. Paul, Minnesota, 2003).

[67] Ibid at page 54.

this decentralisation, of which the first two are relevant to private actions...

> The first is to guard against default by any single prosecutorial agent. For example, a private right of action might ensure that the law is enforced if public officials, due to neglect, capture, inadequate resources, or a shift in the ideology in public enforcement bodies, do not attack behavior otherwise forbidden in the antitrust statute or by well established judicial precedent. A second rationale is the relative efficacy of private lawsuits. Compared to a government bureau, the victim of a price-fixing cartel may be closer to the relevant information about a violation and may have stronger incentives to attack such conduct aggressively.[68]

Section 7 of the Sherman Act first introduced the idea of treble damages in antitrust cases. However, today treble damages are awarded pursuant to section 4 of the Clayton Act.[69] That section allows any person injured or threatened with injury by antitrust violations to sue for treble damages. Section 4 of the Clayton Act reads...

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

In the *Mitsubishi v Soler Chrysler* case the U.S. Supreme Court said of the treble damages provision in the Clayton Act...

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[68] Ibid 55.

[69] The Clayton Antitrust Act, 15 U.S.C.A. § 12 [1914].

> The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.[70]

Indeed, in the *American Society of Mechanical Engineers*[71] case, the Supreme Court, quoting the decision in *Reiter v Sonotone Corp.*,[72] pointed out the significance of private actions in strengthening public enforcement...

> Congress created the treble-damages remedy ... precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.

Kevin E. Grady, referring to treble damages for breaches of U.S Federal antitrust law, pointed out that...

> The treble damage award is designed in part to punish past violations of antitrust law and in part to deter future violations. Proponents of treble damages in antitrust suits assert that such damages serve an important public policy role by encouraging strict compliance with antitrust laws and promoting prosecutorial efficiency, based on the belief that government antitrust enforcers have limited resources ... it is estimated that private actions account for 90 percent of antitrust enforcement in the United States.[73]

Joseph Bauer outlined the advantages of private actions as an effective way to enforce antitrust law...

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[70] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[71] *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

[72] *Reiter v Sonotone Corp.* 442 US. 330. 334 (1979).

[73] Paper entitled 'U.S. Private Enforcement of Competition Laws: An Overview' Presented at Competition Litigation Workshop British Institute of International and Comparative Law London, England October 15, 2004.

> The reasons for incorporating private suits as an essential part of the regime for enforcing the antitrust laws are familiar. The potential specter of paying treble damages, plus attorneys fees and costs, in the event of an antitrust violation greatly enhances the deterrence component of the antitrust laws. Payment of those damages compensates the victims of those violations. Those victims are likely to be among the first to learn of the violations, and they may have better access to evidence thereof. The treble damage component of the potential award serves to recognize **the punishment function of the private remedial scheme**. And, **private lawsuits not only increase the volume of enforcement**, but **shift the expense of enforcement away from the governmental agencies, thereby conserving public resources**. Indeed, because private enforcement is a vital supplement to governmental actions, plaintiffs are frequently referred to as "private attorneys general.[74] (Emphasis added)

Bauer's argument is to the effect that public agencies cannot take action for every breach of the antitrust laws. For this reason private action by injured parties remains an essential component in the antitrust law enforcement arsenal and needs to be encouraged. In essence, enforcement remains, at least in part, privatised in the United States. The reference by Bauer to plaintiffs in private actions as private attorneys general is quoted from *Atlantic Richfield Co. v USA Petroleum Co.*[75] which involved resale price maintenance. In that case the U.S. Supreme Court made the point that...

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the

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[74] J. Bauer, 'Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?' (2004) 16 Loyola Consumer Law Review, 303.

[75] *Atlantic Richfield Co. v USA Petroleum Co*, 495 U.S. 328 (1990).

> justification for allowing a more remote party ... to perform the office of a private attorney general.

Both Grady and Bauer refer to the treble damages provision in the Clayton Act as having a punishment function. This moves private enforcement of antitrust on from being a mere deterrent of illegal behaviour. The private action in U.S. antitrust is clearly geared towards an enforcement role where the courts in a civil case can punish violators with a penal sanction. There is an underlying philosophy of private action as an enforcement tool that allows for punishment as well as deterrence in American antitrust law.

Other commentators support this argument. For example, William Kovacic, then General Counsel to the Federal Trade Commission, in a paper delivered to the British Institute of International and Comparative Law made the point thus...

> As the academic literature on law enforcement points out, a system that relies exclusively on public enforcement may fail if the public prosecutor is slothful, corrupt, or lacks adequate resources. Private rights of action can serve as an antidote to all of these conditions.[76]

Gavil, Kovacic and Baker in their casebook on antitrust law[77] refer to the experience of the 1980's in the United States under the Reagan administration...

> In the 1980's, the Reagan administration significantly retrenched several of the federal government's antitrust programs ... Some observers point to the experience in the 1980's as demonstrating the value of diversifying the field of potential antitrust plaintiffs. By allowing private individuals and companies to bring cases under the

[76] WE Kovacic, 'Private Participation in the Enforcement of Public Competition Laws', British Institution of International & Comparative Law, Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue. (May 15 2003) London. Available at http://www.ftc.gov/speeches/kovacic.shtm and accessed on the 4th October 2010.

[77] Gavil and others, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, (n66).

> federal antitrust laws, the U.S. competition policy system contains an important safeguard against inadequate enforcement by the national antitrust authorities ... class actions initiated on behalf of injured consumers or businesses constitute important elements of the U.S. enforcement scheme today...[78]

In its submission to the European Commission on the White Paper on damages actions, the American Bar Association (the 'ABA') commented...

> ...private damages actions are an integral part of an effective competition law enforcement regime and, when structured properly, they can advance the goals of compensation and deterrence.[79]

Antitrust Modernization Commission

In 2004, Congress charged the Antitrust Modernization Commission (the 'AMC') to undertake a '...comprehensive review of U.S. antitrust law to determine whether it should be modernized.'[80] The AMC reported to the President and Congress in 2007. The AMC undertook a far reaching review of the antitrust laws of the United States. On the whole the AMC found that '...the state of the U.S. antitrust laws as "sound."'[81] The report made various recommendations for reform of the law. However, as regards the enforcement role that private actions for damages play in antitrust law in the United States, the AMC had this say...

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[78] Ibid at pages 55 - 56.

[79] Joint Comments Of The American Bar Association Section Of Antitrust Law, Section Of International Law, And Section Of Business Law On The Commission Of The European Communities' White Paper On Damages Actions For Breach Of The EC Antitrust Rules, June 30, 2008, 50, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf

[80] Antitrust Modernization Commission Report and Recommendations (the "AMC Report"), i (Apr. 2007), accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf The AMC was established pursuant to the Antitrust Modernization Commission Act, 2002, Pubic Law Number 107-273, 116 Stat 1856.

[81] Ibid i.

> Uniquely in the United States, private litigation has been a key part of antitrust enforcement. Under current rules, private plaintiffs are entitled to recover three times their actual damages, plus attorneys' fees. Defendants are jointly and severally liable for alleged conspiracies ... On balance, the current scheme appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensates victims.[82]

In the chapter of the report dealing with treble damages, the AMC listed the 'five related and important goals' that treble damages serve. These are...

> (1) Deterring anticompetitive conduct;
>
> (2) Punishing violators of the antitrust laws;
>
> (3) Forcing disgorgement of the benefits of anticompetitive conduct from those violators;
>
> (4) Providing full compensation to victims of anticompetitive conduct; and
>
> (5) Providing an incentive to victims to act as "private attorneys general."[83]

The AMC then explained further under the heading 'Punishment of violators' that...

> The second recognized purpose of treble damages is to punish offenders, similar to punitive damages under the common law and other statutes. This reason is closely related to the deterrence justification...[84]

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[82] Ibid at page v.

[83] Ibid at page 246. Treble damages are a controversial remedy both in the United States (which is the only jurisdiction that currently avails of the remedy) and elsewhere in the world, when the American model of private antitrust litigation is debated. The issues surrounding the use and possible introduction of multiple damages (double damages) into private competition litigation in Ireland will be debated in Chapter 7 of this thesis. For example, there are arguments to the effect that treble damages provide over-compensation of plaintiffs, whilst there are also compelling counter-arguments to the effect that treble damages at best, only equate to single damages.

[84] Ibid.

The AMC is clear on the role of private litigation in enforcing the antitrust laws in the United States and insists that it is necessary to retain the private enforcement of antitrust. Indeed towards the end of its report and despite making recommendations for some reform in other areas of the law, the AMC issued a rallying call to keep treble damages for antitrust actions, giving the following reason...

> We are in an era of diminished federal enforcement of the antitrust laws. The states too have been relatively inactive over the last few years. The key enforcement mechanism today and at other periods in our history has been the private action. We send a very troubling message about our faith in the antitrust laws as the means for guiding our economy if we say we are going to cut back on the treble damages action, the foundation of private enforcement. The Modernization Commission soundly declines to do so.[85]

The litigant in a private action for damages is viewed by the United States Courts, the AMC and by commentators as playing an essential role in enforcing antitrust law. Indeed as a 'private attorney general', the private litigant in effect becomes a law enforcer; a role also assigned to the Department of Justice and Federal Trade Commission. There is interplay between both public and private enforcement in U.S. antitrust, with private actions doing the work that public enforcers either cannot or will not do.

Private enforcement is achieved through the deterrent and punitive effect of the treble damages award. Private litigation ensures that cases the public authorities might not take are litigated. The view expressed by both Brady and the court in the *American Society of Mechanical Engineers* case is reminiscent of the point made by former EC Competition Commissioner Mario Monti in his speech at Fiesole in September 2004 where he said that...

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[85] Ibid at page 417.

> Private litigants may take action against infringements which the Commission and the national competition authorities would not pursue, or do not have sufficient resources to deal with.'[86]

Commission following the American Model?

It is clear from the foregoing that the Commission was influenced to some degree by the American model of private action when it saw private actions playing an enforcement function in competition law. However, as outlined earlier, the Commission shifted its position on the role of private action from enforcing competition law to primarily compensating victims of competition infringements. It may have been the experience of the American antitrust enforcement model in practice – in particular, the treble damages element – that caused the Commission to temper its views. A hint of this appears in the White Paper...

> The policy choices proposed in this White Paper therefore consist of balanced measures that are rooted in European legal culture and traditions.[87]

The Commission suggested in the Green Paper the possibility of double damages[88] as a possible remedy in horizontal cases before the European courts. In its Staff Working Paper accompanying the Green Paper the Commission explained its motive for considering this option...

> ...the US system of antitrust litigation offers strong incentives to bring actions and thus addresses the difficult risk/reward balance in antitrust cases. The most notable features in the US system which have the effect of providing strong incentives to litigation include the availability of treble damages...[89]

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[86] Monti, Speech/04/403 (n17).

[87] White Paper on Damages actions for breach of the EC antitrust rules (n2).

[88] Green Paper on Damages actions for breach of the EC antitrust rules, Option 16, 7 (n1).

[89] Staff Working Paper accompanying the Green Paper, at para 46, 15, (n4)

Unfortunately, the Commission did not pursue this somewhat novel proposal for encouraging private actions when it published its White Paper. In the Staff Working Paper that accompanied the White Paper, the Commission gave a very brief reason for not pursuing it...

> The majority of respondents to the Green Paper argued that damages should be regarded as a compensatory instrument. They therefore oppose a system that would result in damages that are higher than the loss suffered by the victim.[90]

The incentivising aspect of double and treble damages awards in private competition cases will be returned to in Chapter 7.

Private enforcement of the competition rules in Ireland

The U.S. model of antitrust enforcement started out as an almost exclusively privatised function with actions for damages being incentivised by, amongst other things, the availability of treble damages. Today, despite having two well funded agencies to enforce antitrust law, the FTC and the DoJ, the private action is still clearly seen as forming a central part of the antitrust enforcement regime in the United States. Indeed, as pointed out earlier, it is estimated by some commentators that private actions in the United States account for up to 90% of antitrust enforcement.[91] The Commission commenced a process to examine how it could strengthen this pillar of competition enforcement. That process led to a far reaching debate on damages actions for breaches of the competition rules in the Treaty. The debate has led some commentators to question if it is appropriate to consider private actions as having an enforcement role, rather than merely serving a function of compensating those who have suffered antitrust injury. Before looking at that aspect of the debate it would be useful to examine where Ireland fits in the debate on private actions being used

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[90] Commission Staff Working Paper accompanying the White Paper, para 182, 55, (n29).

[91] See for example C. A. Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the U.S.', in Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, (Oxford/Portland, Hart, 2003). See also K Holmes, 'Public enforcement or private enforcement? Enforcement of competition law in the EC and UK', European Competition Law Review, (2004) 25 (1) page 25.

to enforce competition law. To do this, it will be necessary to trace the development of the model Ireland has adopted to enforce competition law.

The Competition Act 1991 and Competition (Amendment) Act 1996

The Competition Act 1991 (the '1991 Act') introduced Ireland's first prohibition-based system of competition rules under domestic Irish law. Before the 1991 Act, there had been a variety of legislation that passed for competition law. These included the common law with its doctrine of restraint of trade[92] and the various Trade Practices Acts.[93] The common law and the various Trade Practices Acts had proved inadequate for creating a pro-competitive environment for both business and the consumer. Enforcement of competition rules under Irish law prior to the 1991 Act was next to non-existent.

The 1991 Act did not allow for public enforcement of the competition rules by a specialist agency even though the Competition Authority was established under that Act. This did not mean that these rules were not meant to be enforced. On the contrary, much thought had been given to the type of enforcement model that would be both appropriate and effective. Enforcement of the competition rules was seen as a necessary element of the new competition regime to be established under the 1991 Act. In the Dail debates on the 1991 Bill, the then Minister for Industry and Commerce Mr. Desmond O'Malley T.D. said...

> ... it can be said that the provisions of the Bill open up business to some danger of being sued. However, there is a balance struck in the Bill. For example, it provides the

[92] See V. Power, *Competition Law and Practice*, (Butterworth, Ireland 2001) for a discussion of the common law doctrine of restraint of trade. In *United States v Addyston Pipe & Steel Co*, 29 C.C.A. 141, 85 F. 271 (1898), Sixth Circuit. In that case Justice William H. Taft stated that: "From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract..." He then further pointed out that, "the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

[93] For a discussion of the history of the various Trade Practices and Restrictive Practices Acts see P. Massey and D. Daly, *Competition and Regulation in Ireland: The Law and Economics* (Oak Tree Press, Cork, 2003), at pages 27 – 34, and also I. Maher, *Competition Law: Alignment and Reform* (Round Hall Sweet & Maxwell, Dublin, 1999).

> freedom for someone suffering damage to seek a direct remedy without relying on any organ of the State, such as a Minister or an authority.[94]

Enforcement was therefore necessary. However it was envisaged that enforcement of the competition rules was to be by way of private actions brought by injured parties. It was the view of the Minister at that time that private enforcement of competition law was the best model to pursue...

> It is correct that the emphasis be placed on the initiative of those who are affected by anti-competitive behaviour. Who is better placed to judge whether that action is justified than the one who suffers its consequences?[95]

The 1991 Act introduced in sections 4 and 5 prohibitions (the competition rules) closely based on Articles 101 and 102 TFEU respectively. Enforcement of these rules was envisaged by the legislators. However, the model of enforcement chosen by legislators was private actions for damages by claimants who have suffered competition related injury. This suggests that the Irish legislature contemplated introducing in 1991 a model first introduced in the Sherman Act in the United States over one hundred years earlier. However, it is there that the analogy ends. There was no provision in the 1991 Act for treble damages or for class actions so the incentives for private litigants were meagre.

It should also be noted here that the minister[96] had a right of action as was set out at section 6 (4) of the 1991 Act. That right of action for the minister was quite limited. It allowed only for relief by way of injunction or declaration. Public enforcement of sections 4 and 5 of the 1991 Act by a specialist agency was discounted as an option under the 1991 Act.

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[94] Dail debate on the Competition Bill 1991, 2nd May 1991, at column 1929.

[95] Ibid.

[96] Section 3, the interpretation section of the Competition Act 1991: "'Minister' means the Minister for Industry and Commerce."

The 1991 Act was followed by the Competition (Amendment) Act 1996 ('the 1996 Act'), which allowed for public enforcement of domestic competition law in Ireland by a specialist agency, the Competition Authority, for the first time. Under the 1991 Act, the Competition Authority had a limited role. This was principally in the area of issuing licences for otherwise illegal contracts and/or certificates to the effect that certain notified agreements were not in breach of the 1991 Act.

The 1996 Act brought about a complete change in direction by the State in its chosen method of enforcing competition law. For the first time a state agency was empowered to investigate and enforce breaches of sections 4 and 5 of the 1991 Act.

Section 7 of the 1996 Act conferred a right of action on the Competition Authority. Public enforcement of competition law was to be by way of both criminal and civil process. The criminal offence created under the 1996 Act was indictable at the suit of the Director of Public Prosecutions.[97] The Authority could institute summary prosecutions in its own name for minor offences. The criminal offence was coexistent with the power of the Authority to bring civil proceedings for breaches of the Act. This meant that the Competition Authority could decide to institute civil proceedings alleging a breach of the Act and thereby obtain declaratory and or injunctive relief. Alternatively, the Competition Authority could refer more serious breaches of competition law to the Director of Public Prosecutions recommending that the case be prosecuted on indictment.

The then Minister for Enterprise and Employment, Mr. Richard Bruton explained to the Senate the reasons for empowering the Competition Authority with a public enforcement role...

> The second major new element in this Bill introduces criminal offences and penalties in respect of competition law violations. Ireland has stood out for a number of years as having a weak competition law. When that was

[97] Sections 2 and 3 of the Competition (Amendment) Act 1996, and Section 3, Prosecution of Offences Act, 1974.

> corrected by the 1991 Act we provided legislation that only introduced the notion that the Competition Authority would certify and licence certain agreements. We also allowed for third parties to take court action. However, we did not introduce, like other countries, enforcement procedures where an independent third party, such as the Competition Authority, could take enforcement actions and investigate third party complaints and on foot of those investigations, take the necessary steps to deal with alleged abuses of competition. The reliance of the 1991 Act on private actions by individuals in the court has proved less than fully effective and this Bill is changing that.[98]

Two years earlier, when speaking at the second stage of the Competition (Amendment) Bill 1994 in the Dail, Minister Ruairi Quinn spelled out the reason for bringing forward this change in the law...

> ...the Bill provides for public independent enforcement of the competition rules. The existing system, whereby the principal means of enforcement was through private actions by individuals in the civil courts, has proved, in the period of operation, to be less than fully effective.
>
> We have seen very few actions in the courts and there has, to date, been no award of damages to an aggrieved party. To strengthen the application of the law I propose to introduce public enforcement of the competition rules. The power to make investigations and to take actions will be given to the Competition Authority.[99]

The 1991 Act had allowed the Minister to take action, albeit in a limited form, for a breach of the competition rules. That mechanism was never invoked. The principal mechanism for enforcing the competition rules

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[98] Seanad debates, cols 1370-1371, 5th June 1996.

[99] Dail debates, col 972, 28th June 1994.

chosen by the Oireachtas under the 1991 Act was the private action. Yet, only 3 years after its enactment, the Oireachtas began the process of amending the legislation governing competition enforcement. The Minister admitted to the Oireachtas that the private enforcement model had been a failure. A public enforcement model was now required. Indeed, the proposed change to the 1991 Act was very radical. Behaviour that only three years previously was considered suitable for private actions for damages and other reliefs was now to be criminalised, with the possibility of individuals being imprisoned for their illegal anti-competitive conduct.

Competition Act 2002

The 2002 Act repealed and replaced both the 1991 Act and the 1996 Act. The 2002 Act established the rules by which business in a competition context is conducted in Ireland. When undertakings[100] and business executives[101] break the rules contained in the 2002 Act that Act also sets out how the law is enforced and the transgressors punished. The 2002 Act allows for both public enforcement and private actions for damages. Public enforcement of the Act is vested in the Competition Authority (the 'Authority'). Offenders can expect to face either criminal and/or civil sanctions under the 2002 Act.

The competition rules in the 2002 Act are found at sections 4 and 5 of the Act. The rules are identical to the competition rules found under the previous competition regime established under sections 4 and 5 of the 1991 Act and are almost identical to the provisions contained in Articles 101 and 102 TFEU. Indeed the 2002 Act states in the preamble

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[100] Undertakings are defined at Section 3 of the 2002 Act. That section states that an undertaking '...means a person ... engaged for gain in the production, supply or distribution of goods or the provision of a service.' See also decision in *Deane & Others v VHI* [1992] 2 IR 319, where then Chief Justice Finlay, giving the decision of the Court stated: '...the words 'for gain' connote merely an activity carried on or a service supplied ... which is done in return for a charge or payment.' Undertakings need not only include incorporated entities but also can include unincorporated bodies of persons such as business partnerships, or indeed sole traders. See P Massey and D Daly, *Competition and Regulation in Ireland: the Law and Economics*, (Oak Tree Press, Cork, 2003) at pages 105 – 108 for a discussion on the definition of undertaking in both Irish and European Law. See also R Whish, *Competition Law*, (6th edn, Oxford University Press, Oxford, 2009) at pages 82 – 91 for an excellent discussion on the definition of undertaking.

[101] Section 8(6) of the Act captures directors, managers or other similar officers of the undertaking charged with a breach of the Act, and make that individual liable as a principal offender under the Act along with the undertaking.

that it is 'An act to make new provision by analogy with articles 81 and 82 of the Treaty establishing the European Community...'

Enforcement of the Irish competition rules involves overlapping layers of criminal and civil public enforcement by the Authority together with a private right of action for individuals harmed by anti-competitive conduct. That private right of action allows the Court to award individuals damages, including exemplary damages. The 2002 Act anticipated the adoption of Council Regulation 1/2003[102] by also allowing the enforcement of Articles 101 and 102 TFEU in the Irish Courts. The 2002 Act therefore, creates a spectrum of enforcement and litigation options available both to the public enforcer and to an injured party who can sue in damages on foot of anti-competitive behaviour.

Ireland post 2002 Act: A mixed model with a hole in it

The private right of action was retained both in the 1996 Amendment Act, and in the 2002 Act. Having admitted that there was a need for public enforcement of competition law by a specialist agency, the Oireachtas did not discard the private right of action. However, the private right of action was retained unchanged from the 1991 Act through to the 2002 Act. This means that the private right of action, initially intended as an instrument to enforce competition law, was kept, even though a new public enforcement model had been adopted. It is not clear if the Oireachtas intended the private right of action to continue to have an enforcement function after the enactment of the 1996 Act. Indeed it is not clear if any thought had been given by the Oireachtas during and after the enactment of the 1996 Act to the role and function of the private action once public enforcement was allowed.

It should be noted that the suite of sanctions available to the courts in an action taken by the Competition Authority does not include either civil fines imposed by a court or European style administrative fines.

[102] Council Regulation 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ LI, 4/1/2003.

This author has argued elsewhere[103] that the inability of the courts in Ireland to impose fines on undertakings in civil proceedings taken by the Competition Authority leaves a hole in the range of sanctions that the courts can impose. The author's thesis was to the effect that the Oireachtas, when crafting a more nuanced set of sanctions in the 2002 Act, was clearly desirous of retaining the possibility of fining undertakings (and individuals) for non hard-core breaches of the Act. However, the Oireachtas feared at the time of the introduction of the Competition Bill 2002 that it might not be constitutionally permissible to impose fines in civil proceedings. Therefore, the Oireachtas retained the criminal sanction for 'rule of reason' type breaches of the 2002 Act. As these types of cases, including abuse of dominance and illegal vertical agreements could never be prosecuted to the criminal standard, this meant, according to the author, that fines would never be imposed for breaches of these provisions of the 2002 Act. The only sanction remaining to the Competition Authority in such cases was declaratory and injunctive relief. This author pointed to clear instances of prolonged recidivist anti-competitive behaviour, uncovered and investigated by the Competition Authority involving the Irish Times[104] and the Irish Independent[105] that in effect went unpunished owing to the inability of the legal system to apply appropriate sanctions. The irony in this is the fact that a private action in such cases might have resulted in the award of damages including exemplary damages if the court was of the view that the anti-competitive behaviour merited punishment.[106]

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[103] D. McFadden, 'Two Tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement', forthcoming in *Regulatory Crime in Ireland*, pages 193 – 215 (Blackhall Publishing, Dublin, 2010).

[104] Ibid, citing: Competition Authority Enforcement Decision No. E/03/004, dated 24th July 2003 which is available on the Competition Authority website at http://www.tca.ie/EN/Enforcing-Competition-Law/Decisions-and-Notices/Enforcement-Decisions/Decisions/E03004.aspx?page=2&year=0 and accessed on the 4th October 2010.

[105] Ibid, citing Competition Authority Enforcement Decision No. E/03/003, dated 10th November 2003 which is available on the Competition Authority website http://www.tca.ie/EN/Enforcing-Competition-Law/Decisions-and-Notices/Enforcement-Decisions/Decisions/E03003.aspx?page=1&year=0 and accessed on the 4th October 2010.

[106] See further D. McFadden, 'Two Tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement' (n103) on the need to introduce civil fines for civil public enforcement of competition law.

This also leaves open the question, what purpose is the private action in section 14 of the 2002 Act meant to serve if its enforcement function was seen to have failed? Did public enforcement of competition law with both criminal and civil sanctions replace private enforcement entirely? If so did this mean that private actions now only serve a private compensatory function in competition cases?

Private action as enforcement tool: Is it an appropriate and/or an effective concept?

During the recent debate on the Commission's Green and White Papers, it has been asked by some commentators whether it is appropriate to view private actions as anything other than a method of compensating those that have suffered harm because of anti-competitive behaviour. For example, John Pheasant asked...

> ...whether and, if so, in what circumstances it is appropriate to speak of private "enforcement" of the antitrust laws in Europe. For many ... enforcement is the preserve of the public authorities; private litigation is a means of recovering compensation for losses suffered as a result of an antitrust infringement. The damages awarded in private litigation should compensate the successful claimant but not further penalise or punish the defendant.[107]

Pheasant then explained that if we are to accept that private actions should have no part to play in competition enforcement, the member states of the EU, together with the Commission would have to vastly expand their public enforcement programmes.

> Whilst there are sound intellectual arguments to support the proposition that antitrust enforcement should be the preserve and responsibility of the public agencies, a

[107] J Pheasant, *Interaction between Public and Private Enforcement*, Cartel Enforcement and Antitrust damage actions in Europe, presented jointly by the International Bar Association and the European Commission 7-9 March 2007, Hotel Conrad, Brussels, Belgium. A copy of this article is available at http://www.vartotojuteises.lt/apie_lnvf/veikla/konkurencijos_gd_vartotoju_darbo_grupe/interaction_between_public_and_private_enforcement and was accessed on the 4th October 2010.

> consequence of a decision by the policy makers to accept such arguments is that greater public funding would be required to pursue the competition culture goals...[108]

Pheasant asks whether it is appropriate that private litigation take the place of public enforcement of the law in those instances where public enforcement is not possible. He then points to a consequence of reserving the enforcement role solely to public enforcers. Competition Authorities would require greater public funding to allow them to expand and take on this role, in the absence of private enforcement. His arguments are in line with those often used to defend the American model of private enforcement as seen in such cases as *American Society of Mechanical Engineers* and *Reiter v Sonotone Corp.* [109]

The question as to whether it is appropriate to view private actions for damages as having an enforcement role in competition law is intrinsically tied up with other questions that include for example; the purpose that is served by enforcing competition law; how this purpose is best served and who is best placed to enforce competition law. Amongst the purposes served by competition enforcement is the deterrence and punishment function. Karen Yeung argued in her paper 'Private Enforcement of Competition Law'[110] the following...

> One of the principal aims of competition law is to regulate commercial behaviour by discouraging firms from engaging in behaviour which distorts the competitive process ... Firms can only be expected to modify their behaviour if faced with appropriate incentives. Where a firm expects to reap the benefits from non-compliance with the law, it is unlikely to be deterred from infringing

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[108] Ibid.

[109] (n71) and (72)

[110] K Yeung, 'Private Enforcement of Competition Law', in Christopher McCrudden (ed) *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Clarendon Press, Oxford 1999).

> the law unless the costs of so doing outweigh the accompanying benefits.[111]

The optimal achievement of the goals of antitrust enforcement may involve a mixed model of private and public enforcement. This is clearly the model chosen in the United States. It was a model that the Commission had in mind in its Green Paper on damages actions and which was not entirely lost in the White Paper. Commentators generally perceive private actions playing some role in enforcing competition law, even if only through the added deterrence that private actions for damages bring.

Added to this mix in an Irish context, is the inadequacy of the current model of public enforcement through the inability of the courts to impose civil fines in cases brought by the Competition Authority. Public enforcement of competition law in Ireland is reliant on the criminal process and criminal sanctions for a narrow set of hard-core (cartel type) anti-competitive practices. The remaining competition rules under the 2002 Act that require 'rule of reason' analysis before deciding whether or not a breach has occurred, can only be punished by way of declaratory or injunctive relief in a case taken by the Competition Authority. Punitive sanctions in a civil case are available to a private litigant at the discretion of a judge if the judge decides it appropriate to award exemplary damages under section 14 of the 2002 Act.

Wils' three tasks of antitrust enforcement

Wouter Wils in an article in *World Competition*[112] takes the view that although private actions have a role in enforcing competition law, public enforcement of the law is superior to private actions for a number of reasons. In his supporting arguments for those reasons, Wils lists the three principal tasks of antitrust enforcement. These are according to Wils: (a) clarification and development of the law; (b)

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[111] Ibid 40 -41.

[112] Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) World Competition, Vol 32, Pt 1.

preventing violations of the law through deterrence and punishment; and finally, (c) dealing with the consequences of a violation of the law after it has happened. These three headings on the principal tasks of antitrust enforcement are a useful route map to explore the appropriateness and relative value of private actions enforcing competition law. We will now deal with each of them in turn.

Clarifying and developing the law

Karen Yeung, in her paper 'Private Enforcement of Competition Law'[113] discussed the comparative advantages and disadvantages of private enforcement of competition law. Yeung argues that private litigation can help to clarify and develop the law...

> Where actions are pursued to judgement, then litigation also contributes to the elucidation of the law and the reinforcement of social values. Private actions can raise issues of importance which benefit the general public. In other words, private litigation has the capacity to generate a positive externality.[114]

Wils takes a different view to this in respect of follow-on actions for damages. Wils bluntly states that...

> With respect to the clarification and development of the antitrust prohibitions, follow-on actions for damages are useless, as they do not add anything to the preceding public enforcement decision.[115]

Wils of course is correct in this regard. A follow-on action by its very nature comes after there has already been some form of public enforcement of the law. In that public enforcement action, the issues have already been debated and clarified, or the case has been settled without the need for a debate on the finer legal points as they have

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[113] Yeung, 'Private Enforcement of Competition Law', (n110).

[114] Ibid 42.

[115] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 5, (n112).

been accepted by the parties. There is nothing further to clarify as the matters at issue are then broadly settled. The follow-on action is therefore solely an action to recover damages. Issues might arise in a follow-on action as to who should be eligible to recover damages and how those damages should be quantified and so forth. However, issues such as deciding whether a breach of competition law has occurred, or what constitutes such a breach, are already disposed of in the preceding public enforcement action.

However, a complexity arises where a public enforcement action ends in acquittal. Here, the private parties may still be allowed to sue for compensation in a follow on action, though the likelihood of success in those circumstances appears to be remote given there has been a negative finding in the related public enforcement case already taken. A follow-on action in this instance would be unlikely to offend the rule against double jeopardy as the plaintiffs would be attempting to recover compensation.[116] If the plaintiffs are successful in their action then it is arguable that the private action could help develop and clarify the law given that in this instance the public agency has failed in its action.

Wils accepts that standalone actions '...can contribute to the clarification and development...'[117] of the law as such cases are taken where there has been no public proceeding. However, even here Wils believes that '...public enforcement generally appears superior to this task, for essentially two reasons.'[118]

Superiority of Public over Private Enforcement

The first reason given by Wils is that '...competition authorities are better equipped for this task than courts judging private actions for

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[116] See P.A. McDermott, *Res Judicata & Double Jeopardy*, (Butterworths Ireland Ltd., Dublin, 1999) at Chapter 29, pages 267 – 274. McDermott states the position in Ireland as follows: 'In general, the existence of a criminal acquittal or conviction will not bar subsequent civil proceedings against the defendant arising out of the same incident...' (at page 267).

[117] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 5, (n112).

[118] Ibid 5–6.

damages.'[119] Though Wils' argument on this point may be true in a civil law jurisdiction it is not applicable in a jurisdiction such as Ireland. In a civil law jurisdiction, the NCA, like the Commission, will frequently be the agency that both investigates an alleged infringement and then make findings on completion of the investigation. If the finding of the NCA at completion of the investigation is that an infringement has occurred, then the NCA can proceed to impose a penalty. In a common law jurisdiction such as Ireland, the situation is often quite different. In Ireland, both public and private enforcement decisions are made by the courts. The Competition Authority must appear in the lists before the courts to make its case in a civil enforcement action in much the same way as any private litigant.[120] Wils' first reason does not apply in Ireland.

The selfish purpose of private litigation and the abuse of the antitrust laws

The second reason put forward by Wils for the proposition that public enforcement is superior at clarifying the law is that private actions are '...inevitably driven by the private gains and expenses of the parties concerned.'[121] Wils' point is that the interests of the public enforcement agency and that of the private litigant usually diverge. This is most obvious when private actions settle.

Assimakis Komninos makes a contrary argument to Wils on this issue...

> The existence of private actions, in particular the availability of damages to the victim of anti-competitive practices, is perfectly consistent with the public interest that is inherent in competition norms, notwithstanding the confusion in some authors who see the private interest, which is the dominant motivation in a private suit, as

[119] Ibid 6.

[120] Section 14(2) Competition Act 2002, right of action of the Competition Authority for breaches of sections 4 and 5 of the Competition Act.

[121] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', (n112).

being at variance with the public interest pursued by the competition norms.[122]

Komninos reminds us that the European Courts have...

> ...recognised that private antitrust suits strengthen the working of the Community competition rules and discourage practices that are liable to restrict or distort competition, thus making a significant contribution to maintaining effective competition in the Community ... this is a case where the private interest contributes to the safeguarding of the public interest, so no antinomy exists.[123]

However, the argument made by Wils regarding the divergent interests of the public and private enforcer is more nuanced and has some merit to it. For example, Christian Diemer, though arguing in favour of the Commission's efforts to promote more private actions, outlines the downsides of private actions and has this to say about the motivation of the private litigant...

> The implicit problem here is the unsurprising fact that private enforcement is much more influenced by costs and benefits for the individual than public enforcement, which is why it is not always aligned with the general objective to maximise compliance.[124]

In essence the divergence in interests that is being pointed to here comes down to the selfish interests of the private party in bringing an action. Yeung argues in her paper[125] that...

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[122] AP Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (December 2006) The Competition Law Review, Vol 3, Issue 1, 11, available at http://www.clasf.org/CompLRev/downloads/Vol3Issue1.htm and accessed on the 4th October 2010.

[123] Ibid.

[124] C Diemer, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules', European Competition Law Review (2006) 312.

[125] Yeung, 'Private Enforcement of Competition Law', (n110).

> Although there is a strong prima facie case in favour of private enforcement ... it suffers from certain limitations: the free rider problem,[126] excessive deterrence and strategic behaviour.

The third limitation referred to by Yeung involves the most extreme example of the selfish behaviour of the private plaintiff in bringing competition litigation. According to this theory, private antitrust cases, or the mere threat of them, can lead to an abuse of the antitrust laws and have a counter effect to that intended. McAfee and Vakkur in an article entitled *The Strategic Abuse of the Antitrust Laws*[127] make this point...

> The nature of antitrust lawsuits is that it can be much more expensive to defend against a lawsuit than to bring a suit, although the threat of countersuits makes this more symmetric. This feature - more expensive to defend than to bring - makes the antitrust laws a useful strategic tool in attacking a rival.[128]

McAfee and Vakkur then list seven strategic uses that have been made of the antitrust laws by private parties suing other private parties...

> Such private litigation creates a potential tool for harassing, harming and extorting payments from other firms. In our review of cases, we have identified seven distinct purposes, all unrelated to the social goal of promoting competition, to which the antitrust laws can be put.[129]

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[126] The free rider problem in this instance occurs when potential claimants stand back from taking action as they wish to avoid expending resources to pursue their claim but wish to participate in the benefits of an action taken by someone else at that other persons expense. If all potential claimants are free riders, there is a stand off with no one willing to initiate proceedings as they will be the person responsible for expending resources that others will benefit freely from.

[127] RP McAfee and NV Vakkur, 'The Strategic Abuse of the Antitrust Laws', Journal of Strategic Management Education 1(3) (2004).

[128] Ibid 3.

[129] Ibid.

The seven strategic uses to which the antitrust laws can be put according to McAfee and Vakkur are...

1. Extorting funds from a successful rival.

2. Changing the terms of the contract.

3. Punishing non-cooperative behavior.

4. Responding to an existing lawsuit.

5. Preventing a hostile takeover.

6. Discouraging the entry of a rival.

7. Preventing a successful firm from competing vigorously.[130]

Notwithstanding the extreme examples that McAfee and Vakkur give to support their arguments that private litigation can lead to an abuse of the antitrust laws, Yeung simply states that these limitations...

> ...do not warrant the rejection of private enforcement, but suggest that it should be complemented by public enforcement.[131]

Wils is correct in saying that the private litigant is motivated to bring an action in the hope of making personal gain, or more properly, recovery. An injured party that has suffered loss usually wants to recover their money and will trade off the benefits of settling a case on agreeable terms against the risks of running a case that will be costly and which they might lose. Even so, as Komninos points out, the existence of private litigants can discourage illegal practices if there is a reasonable chance that the wrongdoer will be detected and sued and then have to pay huge sums in compensation plus various costs. There is of course the possibility that private actions for damages could be open to abuse as is pointed out by some commentators such as

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[130] Ibid 3 -4.

[131] Yeung, 'Private Enforcement of Competition Law', page 43 (n110).

McAfee and Vakkur. However, knowing that there is the possibility that the antitrust laws could be used for strategic behaviour counter to their purpose of promoting and enhancing competition means that it is possible to at least try to guard against such behaviour when designing a private litigation system. Admittedly, this will be a difficult task. As Diemer points out...

> If assumed that private parties are generally driven by private gain, the number of court actions would naturally increase the more incentives are given to them to invest resources in private litigation ... On this account one needs to consider that incentives given to private parties require fine tuning, which ... must take the according motives into consideration.
>
> While some motives certainly are to be supported, any rules to that effect should nevertheless be designed to curb detrimental motives...[132]

Even McAfee and Vakkur acknowledge that '...plaintiffs would generally consider that there were legitimate antitrust violations, and sometimes there are such violations...'[133] and '...the case will be decided on its own merits.'[134] There should be at least some faith in the courts to see through abusive litigation, though of course many cases settle before getting that far.

Clarifying and developing the law in sum

Wils' point that public enforcement is superior to private enforcement in clarifying and developing the law runs into trouble, at least in an Irish legal context, when he argues that competition authorities are better able to deal with these cases than courts are in private actions. In Ireland, it will always be the court that will make a finding on the substantive law in a case brought either by a public agency or by a

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[132] Diemer, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules', 312 – 313 (n124).

[133] McAfee and Vakkur, 'The Strategic Abuse of the Antitrust Laws', 5 (n127).

[134] Ibid.

private plaintiff. Wils' argument is valid where a public enforcement agency, such as the Commission, is allowed to make infringement findings and follow this by imposing sanctions.

Wils argument that there is a divergence in the interests of public and private enforcers which therefore makes public enforcement superior to private action in clarifying the law is also problematic. It is of course true that the law is not clarified or developed when private actions are settled before coming to trial. Where there is a settlement there is no court judgement, and therefore no guidance for the future. It is also true that the threat of litigation in antitrust cases may lead to some abuse of process. However, where the courts have the chance to hear such cases, they will be able to see whether there is merit to a competition case or not. Abuse is not a problem restricted solely to antitrust law.

However, private actions can lead to both development and clarification of the law. For example, the recent decision in the High Court in the *Panda*[135] case and the *Oscar Bronner v Mediaprint*[136] case, though not actions for damages, have certainly advanced our understanding of competition law.

Deterrence and Punishment

Wils' second task of enforcement is the deterrent and punishment task. He believes the 'central task of antitrust enforcement is to prevent violations of the antitrust prohibitions.'[137] In his view the most important way to minimise breaches of competition law is to '...impose penalties on the undertakings and individuals responsible when such violations are committed.'[138] Wils argues that the public punishment of those who break the law has '...moral effects, in that it sends a message to the spontaneously law-abiding, reinforcing their

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[135] *Nurendale Limited T/a Panda Waste Services v Dublin City Council & Ors* [2009] IEHC 588.

[136] Case C - 7/97 *Oscar Bronner v Mediaprint* [1998] ECR I – 7817.

[137] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' at 7 (n112).

[138] Ibid.

commitment to respect the antitrust rules.'[139] It is his view that as far as deterrence and punishment is concerned, 'public enforcement is ... superior to private actions for damages.'[140]

Follow-on Actions and the Principle of non bis in idem

Wils believes that follow-on actions for damages have 'some additional deterrent effect in that the damages add a cost to the fines or other penalties imposed in the preceding public enforcement.'[141]

It is here that Wils' argument runs into some difficulties. It is of course true that a follow-on action for damages after a prior finding of illegality and punishment adds a further consideration for other would-be offenders to bear in mind. In other words, general deterrence is enhanced when potential offenders see that they might not only be fined but might also have to pay compensation to their victims. The Commission acknowledged this in their Commission Staff Working Document: Impact Assessment when they said...

> Rendering the right to compensation more effective will therefore create additional deterrence.[142]

However it is also clear that if there has already been public enforcement against an infringement of the antitrust rules a follow-on action can only be viewed as an action to recover compensation. The enforcement function is already spent. If the purpose of a follow on action was to further enforce the law by trying to punish the wrongdoers again, then this would offend the civil law principle of *non bis in idem*, or in the common law, Double Jeopardy. In other words, the private plaintiff in a follow-on action must only take such an action to recover compensation and not seek to punish the wrongdoer again.

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[139] Ibid.

[140] Ibid 8.

[141] Ibid.

[142] Commission Staff Working Document: Impact Assessment accompanying the White Paper, para 59, page 22, (n29).

The Court of Justice of the European Union has recognised the *non bis in idem* principle as a fundamental principle of Community law in *Limburgse Vinyl Maatschappij NV (LVM) and others v Commission*[143]...

> ...the principle of non bis in idem, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.

In *Aalborg Portland A/S v the Commission*[144] the Court of Justice held that...

> ...the application of [the principle of ne bis in idem] is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset.

This point was clarified in the English case of *Devinish Nutrition & others v Sanofi Aventis SA*.[145] In that case, the defendants had been fined by the European Commission for entering into a worldwide cartel in respect of various vitamins in breach of the prohibition contained in Article 101 TFEU. The plaintiffs, who were vitamin purchasers, sued the defendants in 'follow-on' proceedings claiming compensation for damage suffered as a result of the unlawful cartel. A preliminary issue that arose in this case was whether the claimants would be entitled to

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[143] *Limburgse Vinyl Maatschappij NV (LVM) and others v. Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C - 250/99 P to C-252/99 P & C-254/99, § 59, 15 October 2002.

[144] Case C-204/00P *Aalborg Portland A/S v the Commission* [2004] ECR I-123.

[145] *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2007] EWHC 2394 (Ch); [2008] 2 All ER 249.

all or any of the relief claimed, including, exemplary or punitive damages (additional to compensation for the victim's loss) and restitutionary damages (assessed by reference to the wrongdoer's gain rather than the victim's loss). The defendants argued that the claim made by the plaintiffs for exemplary or punitive damages was precluded by the principle of double jeopardy both at common law and at Community law under the principle of *non bis in idem.*

The Court explained that '...the purpose of exemplary damages is ... to punish and deter.'[146] In defining the meaning of exemplary and punitive damages, the Court cited an earlier decision of Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary* where he said...

> Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.[147]

Lewison J in *Devinish* then made clear his view on the purpose of exemplary damages in competition cases...

> In my judgment in antitrust cases the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anti-competitive behaviour.[148]

The finding of the Court in *Devinish* in relation to exemplary and punitive damages was that the...

> Community rules precluded the award of exemplary damages in the instant case. The principle of non bis in idem precluded the award of exemplary damages in a case in which the defendants had already been fined (or

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[146] Ibid 47.

[147] Ibid, citing Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29 at [51], [2001] 3 All ER 193 at [51], [2002] 2 AC 122.

[148] Ibid 48.

had fines imposed and then reduced or commuted) by the European Commission. That principle **prohibited the same person from being sanctioned more than once for the same unlawful conduct** in order to protect one and the same legal interest ... Moreover, the Commission had decided on the adequacy of punitive measures that should be taken against the defendants as a result of their participation in the vitamin cartels. If the national court awarded exemplary damages that could only be because the national court had concluded that the fines imposed by the Commission (including those fines that had been reduced or commuted) were insufficient to punish and deter, a decision which would 'run counter' to the decision adopted by the Commission, contrary to the modernisation regulation.[149] (Emphasis added)

The decision of the Court in *Devenish* therefore clarifies that exemplary damages which are damages additional to an award fully compensating the claimant for his loss, and which are intended to punish and deter, will not be available in follow-on actions for breach of competition law. The Court found that the principle of *non bis in idem* specifically '...prohibited the same person from being sanctioned more than once for the same unlawful conduct in order to protect one and the same legal interest.' Furthermore the Court referring to Article 16 of Regulation 1/2003 which dictates that Commission decisions will be binding on national courts, also clarified that national courts '...could not take decisions which would run counter to the decision adopted by the Commission.'[150] In other words, national courts could not second guess the reasoning of the Commission in deciding to fine, or not to fine as the case may be, and then vary that Commission decision in some way. Also, if the Commission has taken enforcement action, then the enforcement function is spent and cannot be re-visited in a follow-on private action.

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[149] Ibid.

[150] Ibid.

The Court in *Devenish* further clarified that the plaintiffs in that case were not entitled to an award of restitution...

> On the basis of the decisions of the Court of Appeal in *Stoke-on-Trent City Council v W & J Wass Ltd* and *Halifax Building Society v Thomas* I conclude that whatever the law ought to be, it is not (yet) the law that a restitutionary award is available in all cases of tort. In my judgment a restitutionary award is not an available remedy in an antitrust case ... Moreover, even where a restitutionary award is available, it is generally awarded where an award of more traditionally-based compensatory damages would be inadequate to compensate the claimant for the invasion of his rights. Yet in the present case, Dr Veljanovski says that the measure of restitutionary damages is the same as the measure of compensatory damages. If that is so, then on the assumed facts compensatory damages would be an adequate remedy.[151]

In *Devenish* it was clear therefore that the only damages available to the claimants were compensatory damages. Exemplary damages would be a form of further punishment that would offend the principle of *non bis in idem*. Article 16 of Regulation 1/2003 precluded the national court in a follow-on action from second guessing or re-visiting a finding made by the Commission where the facts are the same. Finally, the purpose of a follow-on action such as the *Devenish* case is to allow compensation to injured parties for their loss and nothing further.

The Commission came close to acknowledging that this was the position when, in its Staff Working Document Impact Assessment which accompanied the White Paper, it expanded on its understanding of the roles of public enforcement and private actions in the context of deterrence...

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[151] Ibid.

> Since the primary objective pursued is full compensation of victims, the damages to be awarded should not influence the level of fines imposed by competition authorities in their public enforcement activities... Public fines and purely compensatory damages serve two distinct objectives that are complementary: the main objective of public fines is to deter not only the undertakings concerned (specific deterrence) but also other undertakings (general deterrence) from engaging or persisting in behaviour contrary to Articles 81 and 82. The main objective of private damages is to foster corrective justice by repairing harm caused to individuals or businesses. Of course, as mentioned earlier, this by no means precludes that effective systems for provision of damages also have positive side-effects on deterrence.[152]

Standalone actions

Devenish undoubtedly clarifies the position regarding follow-on actions especially in relation to the type of award that is available to the court. However, it remains the case that standalone actions could fulfil an enforcement function through deterrence and punishment.

Wils argues that though 'Standalone actions for damages can contribute to deterrence ... public enforcement appears superior for at least two reasons.'[153] The two reasons Wils gives for saying that public enforcement is superior, be it in standalone or follow-on cases are as follows.

State Power to investigate and sanction v Private Power

Firstly '...public enforcement through its reliance on state power, benefits from more effective investigative and sanctioning powers.'[154]

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[152] Commission Staff Working Document: Impact Assessment accompanying the White Paper, at para 61, page 22 (n29).

[153] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 8, (n112).

[154] Ibid.

Wils argues that NCA's are generally better at both discovering anti-competitive behaviour and at proving that an infringement has occurred, than are private parties.

This is not always necessarily the case. Persons involved in business may well be aware of illegal anti-competitive behaviour that the NCA could not know about unless it was reported to the NCA. For example, the business person might be suffering the direct consequences of anti-competitive behaviour such as coercion to enter illegal horizontal or potentially illegal vertical agreements in contravention of section 4 and/or Article 101 TFEU for example. This behaviour most likely will be secretive as the coercer will not want his illegal behaviour discovered either by his customers or by the public authorities. In this instance, detection by the NCA of the illegal behaviour might never occur, let alone its investigation and eventual prosecution. This is the argument made by Gavil, Kovacic and Baker quoted earlier in this chapter and repeated here...

> Compared to a government bureau, the victim of a price-fixing cartel may be closer to the relevant information about a violation and may have stronger incentives to attack such conduct aggressively.[155]

A recent example of this from an Irish perspective can be seen in the Competition Authority's submission[156] to the Department of Enterprise, Trade and Employment on the proposal to introduce a Code of Practice in the groceries sector. The Competition Authority opposed the introduction of a Code of Practice and as an alternative, encouraged the Department to consider mechanisms to incentivise injured parties to take actions themselves. The reason for this is given in the submission...

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[155] Gavil and others, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, at (n66).

[156] 'Submission to the Department of Enterprise, Trade and Employment: Code of Practice for Grocery Goods Undertakings, Consultation Paper Submission' S/09/003 (September 2009), available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S09003 accessed on the 4th October 2010.

> Certain industry sources have indicated that suppliers are reluctant to bring actions or make complaints under Part 2A of the Act out of fear of being delisted by retailers.[157]

Suppliers are aware of the illegal behaviour as they are allegedly the victims of this behaviour. However, they are not instituting proceedings themselves out of fear of retaliation by retailers and they are not bringing the existence of the illegal behaviour to the attention of the Competition Authority for the same reason.

More effective Public sanctions and Public control of those sanctions

The second reason given by Wils for the proposition that public enforcement is superior to private actions is that '...because more effective sanctions are available and because the level of sanctions can be better controlled.'[158] Wils expands on this argument by claiming that '...effective deterrence of cartels requires a combination of monetary sanctions on companies and individual penalties, in particular imprisonment.'[159] Wils continues by arguing in relation to monetary fines that '...public enforcement has the additional advantage of allowing better control in setting the optimal amount of the sanction.'[160]

Wils' argument on the control and level of sanctions is problematic in Ireland. In Ireland it is the court and not the NCA that decides on the level of sanction in a case brought by either the Competition Authority or by the DPP. The prosecutor is restricted on the detail and input that he can have in sentencing, including sentencing in cartel matters. The principal reason for this is that judicial plea bargaining is unknown, and indeed, unacceptable in the Irish legal system.

This author in an article on *The Law on Plea Bargaining in Cartel Cases*[161] in Ireland sets out the extreme limitations that the prosecutor

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[157] Ibid para 2.9, 4.

[158] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 8, (n112).

[159] Ibid.

[160] Ibid.

[161] D. McFadden, 'The law on plea bargaining in cartel cases', *Competition* Vol 14, Ed 10, 215 – 219.

must operate under in criminal cartel cases in Ireland. In that article the author explains that...

> Judicial plea bargaining refers to discussions that take place involving the prosecution, defense and the trial judge in the judge's private chambers before trial commences or during a trial. The purpose of these discussions is to seek an indication from the trial judge of the type of sentence that might be imposed if the accused is convicted. This type of plea bargain is conducted in private.[162]

The Prosecutor's Guidelines[163] published by the DPP specifically prohibit prosecutors from participating in any form of judicial plea bargaining. Those guidelines refer to the case of *DPP v Heeney*[164] in which the Supreme Court said the following...

> ...there was no question of any form of plea bargain being entered into in private which would determine in advance the sentence the court would impose. The concept of plea bargaining was unacceptable in Irish law.[165]

In fact it is clear from the author's article, from the DPP's Guidelines for Prosecutors and from the Supreme Court decision in *Heeney* that the prosecution does not ordinarily play any part in the sentencing process in criminal cases in Ireland. The Supreme Court in *Heeney* quoted approvingly the comments of Lord Scarman when he said...

> Plea bargaining has no place in the English criminal law. It is found in some systems of law in which the prosecution are entitled to make submissions as to the character or length of the sentence. In such systems of law it is

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[162] Ibid 215.

[163] Director of Public Prosecutions, Guidelines for Prosecutors, [2006], available at http://www.dpp.ie/publications/general_information/ and accessed on the 4th October 2010.

[164] *The People (Director of Public Prosecutions) v Frank Heeney*, Supreme Court 2001 1 IR 736.

[165] D. McFadden, 'The law on plea bargaining in cartel cases', 216 (n161), citing *DPP v Heeney* 2001 1 IR 736.

> possible for a bargain to be driven between the defence and the prosecution, but never, so far as my researches have gone, with the court itself. **In our law the prosecution is not heard upon sentence**. This is a matter for the court, after considering whatever has to be said on behalf of an accused man.[166]

Of course, this is less of a problem for the Commission or most other NCA's in the EU where the NCA investigates breaches of competition law, makes a finding and impose a sanction which it has chosen. Wils' argument on the ability of public enforcers to control and impose the appropriate sanction in an antitrust case even holds in the United States where prosecutors from the DoJ can engage in prosecutorial plea bargaining in criminal cartel cases. Plea bargaining allows the prosecutor some certainty on the level of sanction to be imposed in the case, and the input from the prosecutor who has the benefit of fining guidelines to assist in these negotiations allows the sanction to be sculpted to fit the offence uncovered.

There is a further difficulty in Irish law with Wils' proposition. That difficulty lies in the limited nature of sanction that is available to the courts in a civil competition case brought by the Competition Authority. The sanctions available in civil proceedings brought by the Competition Authority are set out in section 14 (5) (a) of the 2002 Act. These sanctions are relief by way of injunction or declaration. There is at present no possibility of the courts imposing fines[167] in a civil case taken by the Competition Authority.

In fact, in Ireland, a standalone private action for breach of the competition rules may be superior to a civil action taken by the Competition Authority. A standalone action taken by a private party can potentially result in not only relief by way of injunction or declaration, but also damages, including exemplary damages as per

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[166] Ibid 216, citing Lord Scarman giving the judgment of the Court of Appeal in Attorney General's Reference No 40 of 1996, Leslie Atkinson (1978) 67 Cr App R 200 at p. 202.

[167] See further on civil fines in competition cases D McFadden, Two Tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement, forthcoming in *Regulatory Crime in Ireland*, (n103).

section 14(5) (a) and (b) of the 2002 Act. It will be recalled that exemplary damages are intended to punish and deter. In this instance were exemplary damages to be awarded in a private action, then a private actor will have achieved an enforcement result superior to that available to the agency charged with public enforcement of the law in civil cases. Of course, if the private action was a follow-on action to proceedings taken by either the Competition Authority or the DPP, then exemplary damages, in light of *Devenish*, would not be available.

Sanctioning individuals: Imprisonment

Wils is on firmer ground when he argues that sanctions on individuals, not just companies, are a necessary and effective deterrent. If those sanctions are criminal and involve imprisonment then they are likely to be even more effective. He has considerable support for this view from various commentators. For example, Terry Calvani, former member of the Competition Authority and before that Chairman of the Federal Trade Commission had this to say of the possibility of imprisonment...

> Deterrence and compensation are both appropriate objectives. Although fines and compensation payments can provide some deterrence, only custodial sentences are likely to be effective. Fines and compensatory damages would have to be much higher than current levels to effectively deter. Such an increase is politically infeasible. Thus, satisfaction of the deterrence objective is contingent on imposition of custodial sentences.[168]

In a separate paper, Calvani made the point thus...

> A criminal investigation is an altogether different kettle of fish. I have seldom been asked for a budget in such a matter. Rather than question whether too many resources are being devoted to the case, one may be asked:

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[168] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', in Katalin J. Cseres, MP Schinkel and FOW Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, (Edward Elgar Publishing Limited, Cheltenham UK 2006).

> "Are we doing everything necessary to mount a successful defence?"
>
> "Is there something else we ought to be doing in defence of the matter?"
>
> These questions are alien to in-house counsel managing civil cases. I am convinced that the prospect of incarceration focuses the corporate attention.[169]

Arthur Linman more colourfully described the effect of potential imprisonment on a businessman as follows...

> If the maximum statutory penalty for price fixing were a fine and an obligatory speech, then the antitrust laws would be as forbidding as the village parking ordinance. Experience shows that businessmen and their advisers are more willing to take liberties with the antitrust laws when the only sanction is a civil fine, an injunction, divestiture or damages ... than they are when a miscalculation can lead to imprisonment. For the purse snatcher a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno ... [t]he threat of imprisonment, therefore remains the most meaningful deterrent to antitrust violations.[170]

To the businessman, 'prison is the inferno'. This is a powerful endorsement of the criminal sanction as a deterrent to individuals. This view also has support today in Ireland. In the recent cartel case of *DPP v Duffy*,[171] McKechnie J gave a detailed judgement on sentencing in hard-core price-fixing cases. Duffy had pleaded guilty to his involvement in a long running price-fixing cartel amongst Citroen car

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[169] T Calvani, 'Enforcement of Cartel Law in Ireland', 2003 Fordham Corporate Law Institute, 3 (B. Hawk ed. 2004), reprinted in 6 Cambridge Yearbook of European Legal Studies (Bell & Dashwood eds. 2005).

[170] Arthur L Linman, 'Critique', 630 – 631, The Yale Law Journal, Vol 86, 619, 1977, 'The Paper Label Sentences: Critiques', Donald Baker and Barbara Reeves.

[171] *DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited*, [2009] IEHC 208.

dealers in the province of Leinster. McKechnie had these comments to make on the role of deterrence in the criminal justice system...

> Whilst there is no place in the criminal justice system for either vengefulness or vindictiveness, there is for deterrence.

McKechnie then quotes approvingly from a passage in O'Malley's *Sentencing Law and Practice*, which outlines both the general and specific purposes of deterrence. According to O'Malley...

> A penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing. Specific deterrence is more concerned with the particular offender and aims to impress upon him the punishment he will suffer if he re-offends.[172]

McKechnie agreed with O'Malley stating...

> Subject to the stricture that a punishment can never exceed that available on the facts and must always be proportionate, both general and specific deterrence have an important role to play in many areas of criminal behaviour, including the examples herein given.[173]

McKechnie then emphasised the point further with the following quotation from Greg Werden...

> Cartel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, **but deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders**

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[172] Ibid para 36, citing T O'Malley, *Sentencing Law and Practice,* (2nd Ed, Thomson Round Hall, Dublin, 2006) 2-11.

[173] Ibid.

> **clearly is secondary to the general deterrence of potential offenders.**[174] (Emphasis added).

McKechnie then continued...

> In these respects I would agree. Competition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place.[175]

There is therefore judicial support in Ireland for Wils' argument that '...effective deterrence of cartels requires a combination of monetary sanctions on companies and individual penalties, in particular imprisonment.' The judgement in *DPP v Duffy* also supports Wils' view that the 'central task of antitrust enforcement is to prevent violations of the antitrust prohibitions.'[176]

This does not mean that the sanctions are always at a level that could be considered to have a deterrent effect. In the *Heating Oil* case for example, the level of fines was low. At the completion of the jury trial of Michael Flanagan (prosecuted for his part in the price-fixing conspiracy), Judge Raymond Groarke stated...

> Those engaged in cartels and involved in the fixing of prices are doing so only with the motivation of greed and with nothing to be gained but financial profit. That is why the legislature takes such a serious view of it ... I could well see circumstances where persons convicted by a jury could be subjected to terms of imprisonment.[177]

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[174] Ibid para 37, citing an essay by G. Werden entitled, 'Sanctioning Cartel Activity: Let the Punishment fit the Crime', delivered at a Seminar organised by the Irish Competition Authority on the 22nd November, 2008.

[175] Ibid.

[176] Wils 7 (n112 and 137).

[177] Irish Daily Mail, 3rd March 2006 – 'Guilty verdict in first oil price case', page 8. See also see P. Gorecki and D. McFadden, 'Criminal Cartels in Ireland: The Heating Oil Case', European Competition Law Review (2006) 631 – 640 for details of the heating oil investigation.

Despite these comments, the judge fined Flanagan a mere €3,500 and did not impose a term of imprisonment.

Director Disqualification

Wils also makes the point that director disqualification is a potential sanction at the completion of a case taken by an NCA[178], which is otherwise unavailable in a private action. In a separate paper[179] Wils argues that though...

> ...[d]irector disqualification would not appear to be as strong a deterrent as prison ... director disqualification is certainly more effective than fines on individuals ... being barred from taking part in the management of a company may hurt the individual concerned in a way which the company cannot fully compensate financially. Director disqualification may also have a stigmatic effect and send a moral message, not as much as imprisonment would, but certainly more than fines.[180]

Again, Wils' argument is most likely valid in other EU Member States. However, in Ireland, under Part VII of the Irish Companies Act 1990 at section 160(2), the court enjoys a discretionary power to disqualify persons from holding directorships in any company in any proceedings taken before it. That section reads...

> Where the Court is satisfied in any proceedings or as a result of an application under this section that...
>
> (b) A person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner...

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[178] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 8, (n112).

[179] WPJ Wils, 'Is Criminalization of EU Competition Law the Answer?' presented at the Amsterdam Center for Law and Economics (ACLE) Conference: *Remedies and Sanctions in Competition Policy* (Amsterdam, 17 - 18 February 2005), and in *World Competition*, Vol. 28 No. 2 (2005).

[180] Ibid.

(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company makes him unfit to be concerned in the management of a company, or;

(e) or in consequence of a report of inspectors appointed by the court or the Director appointed under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company...

the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such a period as it sees fit.

This power to order a disqualification can be taken in 'any proceedings', including civil proceedings, as well as criminal cases brought by the DPP. The power of the court to disqualify can also be made by the court on 'its own motion.' This author pointed out in an article in *Competition*[181]...

> The courts have acknowledged their discretionary power under section 160(2) to disqualify directors by reference to the word "may" in the subsection. This was averred to by McCracken J in the High Court in *In Re Newcastle Timber Limited and Companies Acts* [2001] 4 I.R. 586, where he stated: "Even more relevant in the present case is that the use of the word 'may' in s. 160 gives the court a discretion which does not exist under s. 150."

This author argued in that article that...

> It is conceivable that on hearing evidence in a civil action taken by the Authority or in a private action taken under the 2002 Act that the conduct of the director(s) of

[181] D McFadden, 'How directors can be disqualified following competition cases some automatically, others at court's discretion, including civil cases', *Competition* Vol 14, Ed 8, 158 – 161.

> defendant corporate undertakings may draw them within the ambit of section 160(2).[182]

The deterrent value of disqualifying persons from holding directorships was confirmed by Finlay Geoghegan J in *Director of Corporate Enforcement v Padraig Collery.*[183] In that case, Finlay Geoghegan quoted Lord Woolf MR in *In re Westmid Packing Services Limited* [1998] 2 All ER 124. There Woolf had this to say on the deterrent value of director disqualification...

> ...other factors come into play in the wider interests of protecting the public, i.e. a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements.[184]

Disqualification is an automatic consequence when an individual is convicted on indictment for a crime in relation to a company[185]. However, the courts in Ireland have the discretionary power to order disqualification in a private action. The courts are also aware of the deterrent value of such disqualification on other would be offenders and have availed of this power.

Deterrence and punishment in summary

Wils points out that the '...central task of antitrust enforcement is to prevent violations of the antitrust prohibitions.'[186] He argues that the

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[182] Ibid 161.

[183] *Director of Corporate Enforcement v Padraig Collery* [2006] IEHC 67.

[184] Ibid citing Lord Woolf MR in *In re Westmid Packing Services Limited* http://www.bailii.org/ew/cases/EWCA/Civ/1997/3013.html[1998] 2 All ER 124.

[185] See McFadden 'How directors can be disqualified following competition cases some automatically, others at court's discretion, including civil cases', 159 (n181).

[186] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', (n112 and 137)

most important way to achieve this is by imposing sanctions on the undertakings and individuals responsible, and public enforcement is superior to private actions in this regard.

From the decision in the *Devenish* case it has been shown that public enforcement is indeed superior to follow-on private actions in relation to punishing infringements of competition law. The principle of *non bis in idem* forbids the courts from punishing anyone twice for the same breach of competition law. Indeed it is probably inappropriate to speak of follow-on actions as having an enforcement function at all, as this function is spent when a public agency such as the Commission or the Competition Authority in Ireland has already taken successful punitive action in relation to a competition violation. However, there is an additional deterrent effect naturally built in to a follow-on action. Undertakings will be mindful not only of the sanctions they may face if prosecuted by an NCA, but also, if there are effective means available for private redress, of the possibility of having to pay compensation to injured parties.

The position is somewhat different in the case of standalone actions. Standalone actions can play a role in the enforcement of competition law because by their nature they are actions taken in the absence of public enforcement. The sanctions and remedies available in a private action before the Irish courts under section 14 of the 2002 Act include declaratory and injunctive relief, damages including exemplary damages and the possibility of director disqualification under the Companies Act at the discretion of the Court. Public enforcement is hindered by the unavailability of fines in civil cases taken by the Competition Authority. There are potentially stronger sanctions available in private civil actions than are available in civil actions taken by the public enforcement agency. In this regard, standalone actions have a particularly important role to play not only in compensating injured claimants, but also in enforcing the law. This issue will be returned to in Chapter 7 of this thesis in the context of incentivising private actions for damages.

Wils believes that public enforcement is superior to private actions whether the private action is follow-on or standalone. He lists the power of the state to control the sanctions that can be imposed in a case. This however does not apply in civil or criminal cases brought in Ireland. In Ireland the prosecutor is a litigant in much the same way as a private plaintiff.

Wils also argues that public authorities are better equipped to uncover illegal behaviour. This is not always the case as private actors may well be aware of illegal secret behaviour but are unwilling or afraid to either report it or to take action themselves without adequate incentives to do so. The issue of incentivising standalone actions will be dealt with in Chapter 7.

Where public enforcement clearly has an advantage in deterring and punishing illegal behaviour is where (as in Ireland) breaches of competition law are criminal offences, and individuals as well as undertakings can be prosecuted. In this instance, individuals face the possibility of imprisonment, 'the inferno' as Linman referred to it and there is no doubt that this prospect increases the deterrent value of public enforcement over that available in a private action.

Pursuit of Corrective Justice through Compensation

Under this final heading, Wils argues that attempts to prevent violations of competition law are unlikely ever to be completely successful. For this reason, a further task of antitrust enforcement will be to deal with the consequences of violations that have already occurred. Where the harm has already occurred, the task for antitrust enforcement is the pursuit of corrective justice. This Wils divides into two headings: corrective justice through disgorgement by public enforcement and corrective justice through the pursuit of compensation. The compensatory function of private actions is the subject of the next chapter of this thesis. Disgorgement as part of the public enforcement process will be dealt with briefly here.

Disgorgement as corrective justice

Wils argues that disgorgement '...will normally automatically result from the imposition of deterrent penalties through public enforcement.'[187] To support this proposition, he argues that...

> ...in order to deter, fines must exceed the expected gain from the violation, multiplied by the inverse of the probability that a fine will be imposed. Fines thus set will therefore normally exceed the unjust enrichment and will automatically have disgorgement as one of their effects.[188]

In Ireland there are a number of difficulties with that proposition. First, there is no possibility of fines being imposed by the court in any civil proceeding instituted by the Competition Authority. The 2002 Act does not allow the courts to impose fines in civil cases brought by the Competition Authority. Fines are only available for criminal breaches of the 2002 Act. As vertical agreements under section 4(1) and abuse of dominance cases under section 5 of the 2002 Act will always involve rule of reason analysis, these breaches of competition law will almost never be pursued as criminal breaches of the law.[189] For this reason, a whole swathe of the Competition Act is effectively not amenable to the imposition of criminal fines.

Even where fines are available under the 2002 Act for criminal breaches, the fines imposed to date have been largely paltry. In the heating oil case, evidence was given at the sentencing of one of the conspirators, JP Lambe that the overcharge to the people of Galway City and County during the period of the price-fixing arrangements covered by the charge in the bill of indictment was in the order of €4,400,000.[190] However, the total in fines imposed by the courts in that

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[187] Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 12 (n112).

[188] Ibid.

[189] For a discussion on the issue of civil fines in competition cases in Irish law, see D McFadden, 'Two Tiers Equals Full Suite: Civil Fines Complement Criminal Enforcement', forthcoming in *Regulatory Crime in Ireland*, pages 193 – 215 (Blackhall Publishing, Dublin, 2010).

[190] RTE News, 'Man fined €15,000 for oil price-fixing' (Monday 6th March 2006) available at http://www.rte.ie/news/2006/0306/oil.html and accessed on the 4th October 2010.

case was in the order of €122,000.[191] This hardly counts as disgorgement of illegal profits.

In the Citroen dealers cartel, the fines increased substantially from those imposed in the heating oil case. However, as the cases were prosecuted on the basis of a breach by *object* and not *effect*, no evidence as to the overcharge in this cartel was provided to the court and it is therefore impossible to calculate whether the fines came even close to disgorging the offenders of their illegal gains.

Conclusion

The Commission's initiative in the Green and White Papers together with the numerous supporting documents and papers that went with them, has fired a debate in Europe on whether there is a need to encourage private actions for damages and if so how.

There is no doubt that the Commission began this process in the Green Paper with the intention of promoting private actions for damages as a private pillar of competition enforcement. The language of the Green Paper is imbued with the concept of private action doubling up as private enforcement. However, as was shown in this chapter, the Commission toned down this use of language when it came to the White Paper. As Kortmann and Swaak pointed out...

> The White Paper commences with several reassuring (conciliatory?) gestures towards the Member States...[192]

The reason for this apparent change in purpose for private actions for damages is almost certainly grounded in the reaction that the Commission received from Member States and others. This could be seen in the various submissions that were made to the Commission. There is little doubt that the Commission looked to the United States

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[191] For an outline on the fines imposed in the Heating Oil case, see Competition Authority Annual Reports for the years 2006 and 2007 available at www.tca.ie and for an outline of the Heating Oil investigation, see P Gorecki and D McFadden, 'Criminal Cartels in Ireland: The Heating Oil Case', (n177).

[192] Prof J Kortmann and C Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic', [2009] Vol 30, Issue 7, European Competition Law Review, 340 - 351.

and saw the role played there by 'private attorneys' general' in enforcing antitrust law; but Member States resisted the attempt to import into the European legal system an American concept of private enforcement of competition law.

However, though the Commission's language may have changed, it's almost certain that its purpose remained largely the same. The Commission remains committed to encouraging private actions for damages in competition cases in order to assist in enforcing the law.

A real difficulty with the theory of private actions performing an enforcement function in competition law is the principle of *non bis in idem*. Follow-on actions cannot involve any element of punishment in a competition case as the wrongdoer has already been punished by a public enforcement agency. However, standalone actions can play a part in enforcing the law. Here action is taken by private parties where the public agency is either unable or unwilling to act. If exemplary damages are awarded in such an action, then not only has the injured party been compensated, the offender has been punished and general deterrence has been enhanced.

Both follow-on and standalone actions can have a general deterrent effect. These actions can help clarify to undertakings the additional costs that will be incurred if they are sued for a breach of the competition rules.

Private actions for damages in Ireland have an important role to play in the enforcement of competition law. In standalone actions, exemplary damages can be awarded to a plaintiff at the discretion of the court where there has been an egregious breach of the law. As the sanctions in public enforcement sit at two extremes in Ireland, criminal sanctions for hard-core breaches of the law and declaratory and injunctive relief for all other breaches of the law, private enforcement can play a real and an effective role in enforcing the competition rules. The lack of civil fines, together with the fact that the public agencies charged with enforcing the law, the Competition Authority and the DPP, have to prove their cases in court just like private plaintiffs,

means that there are shortcomings in public enforcement of competition law in Ireland.

The Commission, in starting a debate on private actions for damages in Europe, has helped to expose the shortcomings in the spectrum of enforcement options available in competition cases in both Europe and Ireland. Though private actions for damages can play a role in enforcing the law, this role is most likely limited to standalone cases. Private actions for damages though have another equally important function to play: the recovery of compensation for injured parties. That will form part of the subject matter of the following chapters.

CHAPTER 3: DAMAGES ACTIONS FOR COMPENSATION: WHO CAN SUE AND FOR WHAT

Introduction:

In the previous chapter it was seen that the Commission initially viewed damages actions playing a role in the enforcement of competition law. The Commission's view on the role and purpose of private actions had evolved by the time it published its White Paper on damages actions. In the White Paper, the Commission spoke of private actions for damages in terms of ensuring that plaintiffs receive full compensation for their loss.

In a thesis on damages actions in competition law, it is necessary to look at what type of damages might be available to claimants and to see who exactly can or should be able to recover those damages. In this chapter an overview will be given of some of the issues that will arise in the context of damages actions in competition cases in Ireland. It will be seen that defining damages in antitrust is a complex exercise. A number of ways of defining damages in competition law have been looked at by the Commission during its private actions initiative. Mid-way into its private actions initiative the Court of Justice assisted the Commission in this task by providing a definition of damages in competition cases.

Defining damages is only one part of a very complex set of issues that will need to be considered by Irish courts, litigants and law makers in private competition cases in the future. Presuming that a particular definition of damages in competition cases develops in the Irish courts, the judiciary, litigants and their advisors will then have to grapple with the difficult and costly problem of quantifying the damages that arise. It will be seen that there are numerous methods of quantifying damages in competition cases and they can each give rise to different results. Quantification of damage is usually an imprecise but always necessary exercise.

Problems of defining and quantifying damages in competition law pale against the even more complex problems of establishing exactly who

can recover damages in these cases. The question that will inevitably arise in more complex cartel and abuse cases is exactly who is harmed by illegal antitrust behaviour, and who therefore should be allowed sue. The ultimate victim of anti-competitive conduct is usually the consumer. However, the illegal conduct may have occurred upstream at a remove of two, or three (or even more) places in the distribution chain from the consumer. The harm caused by the illegal conduct will most likely have been passed on to the consumer through the distribution chain. The consumer is therefore an indirect purchaser. Should this indirect purchaser be allowed sue in damages? Doesn't this give rise to extraordinarily complex litigation?

The alternative to allowing indirect purchasers sue in damages is to either allow direct purchasers recoup all the damages even though they may have passed on the overcharge, or simply allow the infringers keep their ill gotten gains. Neither of these solutions appears satisfactory. First, to deny access to compensation to those who suffered harm would most likely result in an injustice. Second, adopting the approach of either allowing the passing on defence or, alternatively, disallowing indirect purchasers from suing would result in one or other of two parties gaining an unjust enrichment.

Unjust enrichment arises on the one hand when direct purchasers recover all the damages even though they had passed on the overcharge to their purchasers, or on the other hand when offenders are allowed to avail themselves of the passing on defence and thereby keep their illegally earned anti-competitive profits.

Experience gained in over one hundred years of private antitrust litigation in the United States has shown that these problems are real and not theoretical and that they will eventually arise in private competition cases in Ireland. The American experience also shows that these issues will be difficult to deal with. The Commission was aware of the problems of defining and quantifying damages as well as issues surrounding indirect purchasers and the passing on defence when it embarked on its private damages initiative in competition law. It

sought views from interested parties and it proposed solutions to these problems. There is no doubt that these issues will certainly arise and will need to be addressed in private competition litigation under both domestic and Community law in Ireland if private antitrust actions eventually become more commonplace.[1]

The first part of this chapter will deal with the issue of who can sue. The second part will consider the question of how damages can be defined and quantified.

Who is actually injured and therefore can or should sue in damages?

Section 14 of the Competition Act 2002 (the '2002 Act') provides that...

> Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5 shall have a right of action...

This is both a broad and a generous statement of who is entitled to sue and recover in damages for loss caused by anti-competitive behaviour. Terry Calvani in an article on penalties and damages in a cartel context remarked...

> Since there has been relatively little private litigation in Ireland, it is premature to expect much adjudication of these issues. While there is no Irish law directly addressing many of these issues today, these questions will inevitably confront Irish judges. Whether they are influenced by American cases remains to be seen. But one thing is certain; the issues will arise.[2]

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[1] Ireland through submissions by the Competition Authority and the Department of Enterprise, Trade and Employment has shown its awareness of the existence of these issues.

[2] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', in Katalin J. Cseres, MP Schinkel and FOW Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, (Edward Elgar Publishing Limited, Cheltenham UK 2006).

Calvani's admonition that these 'issues will arise' is a central theme of this chapter.

A basic example of the problem of working out who can sue in antitrust damages actions can be seen in price-fixing cases. These cases are usually thought of as being the most straightforward infringement of competition law. In the United States, for example, price fixing is illegal *per se.* This means that '...[a] conspiracy to raise (or lower) prices is illegal even if no economic harm can be identified.'[3] JM Connor argued that despite the fact that price-fixing is illegal *per se* and that economic harm might not always be shown '...antitrust offences typically do cause economic harm to many groups: rival firms, buyers, suppliers, employees, shareholders, and other stakeholders.'[4] Connor distinguished five discrete groups that potentially suffer injury through paying an overcharge through the existence of a single cartel.[5] Actions for damages are possibly even more complicated in cases involving abuse of dominance contrary to section 5 of the Competition Act or Article 102 TFEU, or vertical agreements under section 4 and Article 101 TFEU.

Calvani drafted his own list of persons he believes can be classified as having been injured by anti-competitive behaviour. Calvani's list overlaps Connor's, but is not identical. Calvani's list of groups that suffer harm from anti-competitive behaviour will be used in this

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[3] JM Connor, 'Archer Daniels Midland: Price-Fixer to the World' (Fourth Edition), (2000), Staff Paper 00 – 11, Purdue University, page 59, accessed on the 4th October 2010 and available at http://ageconsearch.umn.edu/bitstream/28664/1/sp00-11.pdf

[4] Ibid at page 60.

[5] Connor's suggested groups of parties injured by a single cartel are as follows (ibid at pages 60 – 61)...

1. Overcharge to direct purchasers from the cartel ...
2. Indirect or "derived" overcharge (portion of the [overcharge] passed on to indirect buyers...)...
3. Portion of overcharge paid by direct buyers from non-cartel (fringe) suppliers that raised their prices toward [the Cartel price].
4. Dead Weight Loss (DWL) to buyers forced reduce their purchases or to purchase an inferior substitute. Courts allow claims from non-purchasers that were regular clients of the conspirators, but proof is viewed as difficult...
5. DWL to suppliers of factors of production to cartel members (reduced derived demand due to output contraction). Usually input suppliers have no standing because courts consider the injury "remote".

chapter as a guide to the various groups of persons potentially injured by anti-competitive behaviour given that it is simpler and is written from the perspective of a lawyer rather than an economist. It is also more general in that it can be applied to all forms of anti-competitive conduct.

Unidentifiable victim

The first group of Calvani's injured parties involves the 'unidentifiable victim.'[6] This type of injured party emerges when there is '...injury to the economy by virtue of the misallocation of resources'. Calvani makes the point that...

> Unquestionably there are costs associated with the output that the monopolist (or cartel) does not produce, but which would be produced in a competitive environment. As a result of a cartel (or monopoly) the market receives distorted signals, and an inefficient mix of goods or services is produced.[7]

As Calvani points out in his article, though these costs to Society are real '...we do not even pretend to compensate for them.'[8]

In *Hawaii v Standard Oil Co.* the State of Hawaii sued a number of petroleum retailers under a number of heads including as *parens patriae*.[9] In its claim, the State of Hawaii listed numerous alleged injuries suffered by the citizens and the State which included amongst others, lost opportunities in manufacturing, lost revenues to the State which were sent out of the State as part of the overcharge by the cartelists, increased taxes paid by the citizens of the State to make up for lost revenues and so on.

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[6] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 277, (n2).

[7] Ibid.

[8] Ibid. See also *Hawaii v Standard Oil Co.*, 405 U.S 251 (1972): 'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'

[9] *Hawaii v Standard Oil Co.*, 405 U.S. 251 (1972). The *Parens Patriae* procedure is explained briefly in Chapter 5 (at n82).

The United States Supreme Court found in *Hawaii v Standard Oil Co.* that the State's alleged harm was '...no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4 [of the Clayton Act].'[10] The court acknowledged that the anti-competitive effect of the violation may have harmed the State's economy. However, problems of proving the nature and extent of that harm, quantifying the harm, and the fact that there is a more direct method of recovering for such harm by way class action under the Rule 23[11] procedure, precluded the State from having the standing to sue in this case...

> Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the *quasi*-sovereign interests of the State.[12]

As Calvani said of this type of potential victim in his article, 'Injury – yes; recovery – no'.[13]

Primary Victims

Calvani's next group of injured parties were what he called the 'primary victims' of anti-competitive behaviour. These are the people who did not buy the cartelised (or monopolised) goods or service at all because of the anti-competitive price, which was too high.

In this scenario, the anti-competitive or 'monopoly' price that has dissuaded the consumer creates what is called a 'deadweight loss to society'. Hjelmfelt and Strother explain that this deadweight loss represents...

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[10] Ibid.

[11] Federal Rules of Civil Procedure, from the Cornell University Law School website at http://www.law.cornell.edu/rules/frcp/Rule23.htm and accessed on the 4th October 2010. The Rule 23 procedure will be discussed in detail in Chapter 4.

[12] *Hawaii v Standard Oil Co.*, 405 U.S. 251, at 264.

[13] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 277, (n2).

> ...the consumer surplus that is lost because consumers are unwilling to pay the monopoly price for a certain quantity of goods, but would have paid the competitive market price for that quantity ... Deadweight losses result from inefficiencies in the market that cause wealth or societal benefit not to be created in the first instance. Therefore, total societal wealth is not maximised.[14]

Hjelmfelt and Strother were '...unable to locate any antitrust case which has permitted recovery of damages for this consumer welfare loss.'[15] Connor and Lande,[16] Calvani[17] and Robert Lande[18], all make the same point: there does not appear to have ever been a case where damages have been awarded for consumer, or deadweight loss.

Secondary Victims

Calvani's next group of victims in antitrust damages cases are those who actually purchased at the cartel or monopoly price. He states that...

> ...They are injured, but they are less injured than the primary victims who were not even able to make the purchase. But even here we do not do a particularly good job in compensating the injured.[19]

The principle thrust of Calvani's argument under this head is the fact that most cartels occur in industries where there are multiple layers of distribution. For example, a manufacturer of goods sells them to a wholesaler, who in turn sells them to the retailer (e.g. a corner shop or

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[14] David J Hjelmfelt and Channing D Strother, 'Antitrust Damages for Consumer Welfare Loss', Cleveland State Law Review, (1991) Vol 39, 505, at 507.

[15] Ibid 505.

[16] JM Connor and RH Lande, 'How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines', (20 April 2005), Tulane Law Review, Vol 80 2005.

[17] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 277, (n2).

[18] RH Lande, 'Why Antitrust Damage Levels Should be Raised', (2004) Loyola Consumer Law Review, Vol 16, No.4, 329 at 338.

[19] Ibid.

a large multiple) who in turn sell them on to the consumer. If there is a cartel operating at the manufacturing level, the goods that have been produced by the manufacturers are then sold on down through a number of levels in the distribution chain before finally reaching the end consumer.

Who is the injured party in this instance? Who can or should sue? Should the wholesaler who purchased the goods at the cartel price from the manufacturer be the person to sue? The wholesaler was not the only party to suffer injury. The wholesaler may have passed all or some of the manufacturer's over charge on to the retailers who bought from the wholesalers and who in turn may have passed all or at least some of the over charge on to their customers, the 'end consumer'. The retailer and the end consumer as well as the wholesaler have all been harmed by the cartel that operated at the manufacturer level.

The example given in the preceding paragraph is in fact a simplified version of an often very complex problem that can arise in damages actions in competition cases. For example, a cartel (or indeed a monopoly) might have existed in an industry that supplied an input of some form or other into the manufacture of products that are in turn further converted before arriving, eventually, at the end user.

There have been a number of international cartels that show this complex distribution system where the original product subject to the cartel price fix has been mixed and added to other products before reaching the end consumer. One such example was the lysine cartel. The details of the lysine cartel are well known and have been the subject of numerous academic papers,[20] a fact based thriller,[21] a novel that was in turn made into a film called 'The Informant'[22] starring Matt Damon and directed by Steven Soderberg. The history of that cartel

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[20] See for example, JM Connor, '"Our Customers are our Enemies": The Lysine Cartel 1992 – 1995', (2001) Review of Industrial Organization, Vol. 18, 5 – 21; LJ White, 'Lysine and Price Fixing: How Long? How Severe?' (2001) Review of Industrial Organization, Vol. 18, 23 – 31; JM Connor, 'Archer Daniels Midland: Price-Fixer to the World'.

[21] K Eichenwald, *The Informant: A True Story*, (2001) Broadway Books; 1st edition.

[22] To see a trailer of the film, made by Warner Bros. you can visit the official movie website at http://theinformantmovie.warnerbros.com/dvd/index.html accessed on the 4th October 2010.

shows how the five world producers of amino acids (lysine) fixed the price for their product which was used as an additive in animal feeds. Both direct purchasers of amino acids (the producers of animal feeds) and indirect purchasers (the producers of meat from pigs and poultry that used feed that had lysine in it)[23] sued the cartel members for the harm caused by their illegal overcharges. Direct purchasers from the lysine cartel, the feed producers, recovered through settlement of a class action[24] the sum of €45,000,000[25], whilst indirect purchasers (pig and poultry meat producers that used animal feed with lysine added to it) recovered at least $15 million from ADM in those States that allowed indirect purchasers to sue .[26]

A more extensive, long lasting and damaging cartel than lysine, was the 'vitamins' cartel.[27] Connor referred to the vitamins cartel as the '...Mother of all Global Cartels.'[28] The vitamins cartel was really a complex conglomerate of 16 parallel but closely related and interconnected vitamins cartels.

The vitamins conspiracies affected an extraordinary range of industries as well as both direct and indirect customers. Purchasers from the vitamins manufacturers involved in the conspiracy included the manufacturers of animal feeds, manufacturers of fortified foods for human consumption, the producers of meat, poultry, fish, eggs, and milk as well as the manufacturers of cosmetics and vitamin supplements. From this list it is easy to see that a vast array of

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[23] For an examination of the follow-on actions taken by pig and poultry producers in Alabama following the lysine cartel case see CR Taylor, 'Indirect Damages from Price Fixing: The Alabama Lysine Case', (2001) Review of Industrial Organization, Vol. 18, 33 - 43.

[24] *In re Amino Acid Lysine Antitrust Litigation*, No. 95 C 7679, MDL No. 1083 United States District Court For The Northern District Of Illinois, Eastern Division.

[25] JM Connor, '"Our Customers are our Enemies": The Lysine Cartel 1992 - 1995', 20 (n20).

[26] See JM Connor, 'Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation (1996)', (2002) at pages 29 and 31, accessed on the 4th October 2010 and available at http://www.agecon.purdue.edu/staff/connor/papers/global_cartels_redux4.doc and which is republished in *The Antitrust Revolution*, John E. Kwoka and Lawrence White (eds), (4th edn, Oxford University Press, Oxford 2004, pages 252 - 276),

[27] For a comprehensive examination of the international bulk vitamins cartels of the 1990's see John M Connor, 'The Great Global Vitamins Conspiracy: 1989 - 1999', available at http://www.agecon.purdue.edu/staff/connor/papers/The%20Great%20Global%20Vitamins%20Conspiracy.pdf and accessed on the 4th October 2010.

[28] Ibid page 3.

purchasers, both direct and indirect was harmed by the illegal price-fixing conspiracy engaged in by the vitamins manufacturers.

A specific example of the type of injury caused by the vitamins cartel and the extent of that injury can be seen from the case filed by the Department of Justice ('DoJ') on May 20th 1999 against the companies F. Hoffmann-LaRoche and BASF Aktiengesellschaft as well as against the individual Kuno Sommer. These conspirators were charged, and pleaded guilty to, price-fixing in vitamins A, B2 (riboflavin), B5 (Calpan), C, E, and beta carotene.[29] According to Harry First...

> These vitamins are most commonly used as nutritional supplements or to enrich animal feed; they are also used in vitamin premixes to enrich numerous processed foods (such as breakfast cereals) ... The conspiracies lasted more than nine years ... and affected more than $5 Billion of commerce.[30]

It is clear from the foregoing that a price-fixing conspiracy can injure numerous purchasers at different points in the distribution chain. Many of the purchasers harmed by the vitamins cartels were at a great remove in that chain from the original infringers.

In the vitamins cartel, private suits were brought in numerous jurisdictions around the globe and involved actions by both direct and indirect purchasers. According to Connor...

> Scores of class actions were filed in many federal courts around the United States, and these were consolidated in one principal action that was argued in the U.S. District Court for the District of Columbia in 1999 to 2003. This consolidated suit had approximately 4,000 plaintiffs, firms that had purchased bulk vitamins in the United States directly from the major manufacturers. Most were

[29] Information sourced from Harry First 'The Vitamins Case: Cartel Prosecutions and the coming of International Competition Law', (2000 – 2001), 68 Antitrust Law Journal 711 - 734, at page 714.

[30] Ibid at pages 714 – 715.

> manufacturers of animal feeds, foods, pharmaceuticals, or vitamin premixes; some were farmers or farm cooperatives; and some were chemical wholesalers.[31]

One of the numerous follow-on private actions brought in the vitamins case was *Devenish Nutrition Limited & Others v Sanofi Aventis SA and others*,[32] referred to in Chapter 2. That case was in itself a complex action that included both direct and indirect purchasers from members of the vitamins cartels. Even so, that action only involved plaintiffs involved in the animal feed additive market, and from that, producers of food for human consumption. Other products as already mentioned were affected by the cartel, leaving open the possibility of numerous further private actions in different product markets.

It is clear that there were numerous potential and actual layers of harmed parties as a result of the vitamins cartel. The direct purchasers of vitamins and vitamins premix, who used it to add to their animal feeds, food for human consumption, cosmetics and so on, bought the vitamin input at greatly inflated prices. They in turn sold their product to a variety of meat and food producers, vitamins manufacturers etc. who in turn sold their products to wholesalers, and so on until the consumer purchased chicken or bacon, or cosmetic cream or a bottle of vitamin tablets at a price that had been affected at a great remove by a price-fixing conspiracy in vitamins.

Even in simple cartel cases where the cartel members sell a single good or service directly to the end user, that is, to the consumer, there are other potential problems that still need to be overcome. For example, in the heating oil cartel[33] in Galway, the harm caused by that price-fixing conspiracy affected a dispersed group of consumers, each with claims too small to bring on an individual basis even if they were allowed to do so under Irish law. The difficulties arising in small and

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[31] JM Connor, 'The Great Global Vitamins Conspiracy: 1989 – 1999', page 56 (n27).

[32] Devenish Nutrition Limited & Others v Sanofi Aventis SA, [2007] EWHC 2394 (Ch), [2008] 2 All ER 249.

[33] For an overview of the history of the Heating Oil Cartel see P Gorecki and D McFadden, 'Criminal Cartels in Ireland: The Heating Oil Case', European Competition Law Review (2006) 631 – 640.

dispersed consumer claims in competition cases will be dealt with in Chapters 4 and 5 on Class Actions. Suffice it to say that private actions for damages in competition cases throw up numerous potential difficulties not least of which is discerning who exactly is harmed by the illegal conduct and to what extent they have been harmed. As Calvani said '...compensation of secondary victims poses difficult issues.'[34] Clearly that was an understatement.

Tertiary Victims

Calvani lists a further group of victims of anti-competitive conduct that are potentially harmed and who might be thought to have a cause of action in damages. This tertiary group according to Calvani might include a supplier to a cartel. As the cartel reduces output to control and drive up the price for its goods, the supplier of raw materials or other inputs to the cartel that manufactures the cartelised goods will notice a drop in demand for its product. In the lysine cartel, it was shown that dextrose was an important ingredient in the production of lysine. ADM manufactured this input, but presumably there were other such manufacturers who also produced dextrose either for sale to ADM or to one of the other lysine manufacturers. Dextrose producers would see a drop in the sale of their product to a successful lysine manufacturing cartel. These producers suffered harm when selling to the lysine cartel members. Should they be allowed to recover for the harm they have suffered due to lost profits from a decline in sales?

Secondary Victims Revisited: Indirect Purchasers and the Passing on Defence

The discussion on who is injured in competition cases and therefore who should be allowed to claim damages reveals the enormous complexity that can arise in such damages actions. In particular, the discussion that arose under the heading 'secondary victims' revealed the potential for enormously complicated litigation that can, and in the United States, does arise in damages actions in competition cases.

[34] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 279, (n2).

Identifying who can or should sue in a competition damages action is a difficult task which is further complicated by what is known as the 'Passing on Defence'.

In its Green Paper on damages actions, the Commission explained the Passing on Defence as follows:

> The "passing-on defence" concerns the legal treatment of the fact that an undertaking which purchases from a supplier engaged in anti-competitive behaviour could be in a position to mitigate its economic loss by passing the overcharge on to its own customers. The damages caused by anti-competitive behaviour could therefore be passed down the supply chain or even suffered in entirety by the ultimate purchaser, the final consumer. As a matter of law, it has to be considered whether the infringer should be allowed to raise such a pass-on as a defence. Similarly, the standing of indirect purchasers – to whom the overcharge may or may not have been passed on – has to be considered.[35]

If there has been a pass on of an overcharge, should the indirect purchaser to whom this overcharge has been passed on be allowed to sue and if so who should this indirect purchaser sue? Should they sue the seller from whom they purchased the goods or services at the supra-competitive price or should they sue the party guilty of the original competition infringement, even though that party will be at least two steps removed from the injured indirect purchaser?

The Commission acknowledged that this issue greatly exacerbates the difficulties that can arise in competition damages actions...

> The "passing-on defence" substantially increases the complexity of damages claims as the exact distribution of damages along the supply chain could be exceedingly

[35] Commission Green Paper on Damages actions for breach of the EC antitrust rules, {SEC (2005) 1732}, Brussels, 19.12.2005, COM (2005) 672 final, para 2.4, pages 7 - 8.

> difficult to prove. Evidentiary problems also burden actions of indirect purchasers, as they might be unable to prove the extent of their damages and the causative link with the infringing behaviour.[36]

In the Green Paper, the Commission asked the following question in relation to the issue of indirect purchasers and the passing on defence...

> Should there be rules on the admissibility and operation of the passing on defence? If so, which form should such rules take? Should the indirect purchaser have standing?[37]

The Commission put forward four options (Options 21 – 24)[38] for interested parties to consider when looking at this issue. These options involved a number of potential combinations which either allowed or disallowed the passing on defence and either allowed or disallowed indirect purchasers to sue. The options were as follows...

> Option 21: The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer. This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain. Special consideration should be given in this respect to the burden of proof.
>
> Option 22: The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option direct purchasers will be in a better position as the difficulties associated with the passing-on defence will not burden the proceedings.

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[36] Ibid 8.

[37] Ibid 8, Question G.

[38] Ibid for Options 21 – 24.

> Option 23: The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.
>
> Option 24: A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss. This option is technically difficult but has the advantage of providing fair compensation for all victims.[39]

In attempting to answer the question posed by the Commission on whether there should be rules on the admissibility and operation of the passing on defence and then seeing how this might impact on damages actions in Ireland, it would first be useful to examine the position of indirect purchasers in the United States. It will be seen that the position in the United States on indirect purchasers and the passing on defence is extraordinarily complex and should at least provide a pointer to both the Commission and to Irish legislators on what not to do.

The American Experience of Indirect Purchasers and the Passing on Defence

The current position in the United States is very complex. In Federal law, only the direct purchaser is allowed to sue in damages in an antitrust damages action. The defendant seller in an antitrust damages action is also barred in federal cases from raising the passing on defence. However the situation is different in many of the states of the Union where indirect purchasers are allowed to sue.

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[39] Ibid 8.

Federal Law, Hanover Shoe and Illinois Brick

The passing on defence was effectively prohibited by the United States Supreme Court in federal antitrust cases in the case of *Hanover Shoe v United Shoe Machine Corp*[40] on the grounds that allowing it would further complicate antitrust litigation that was already complex, and would reduce incentives for direct purchasers to bring private antitrust actions.[41]

In *Hanover Shoe* the Court stated that a defendant could only raise the passing on defence if it could prove that the purchaser had...

> (i) raised its price in response to the overcharge; (ii) did not lose sales or profit margin thereafter; and (iii) would not have raised its prices absent the overcharge.[42]

The court acknowledged that...

> Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.[43]

The decision in *Hanover Shoe* has the effect of allowing direct purchasers to sue for treble damages under section 4 of the Clayton Act even where they passed on the over charge and in effect suffered little or no harm. As Donald Baker argued...

> *Hanover Shoe* always seemed to be a sensible result. Section 4 [of the Clayton Act] is concerned both about compensating victims and deterring violations, as reflected in trebling damages, and allowing such a

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[40] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[41] See Joint Comments Of The American Bar Association Section Of Antitrust Law, Section Of International Law, And Section Of Business Law On The Commission Of The European Communities' White Paper On Damages Actions For Breach Of The EC Antitrust Rules, June 30, 2008, 50, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf

[42] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 493 – 494 (n40).

[43] Ibid 493.

> defense would clearly weaken the deterrence aspect of the statute.[44]

Given that the decision in *Hanover Shoe* in effect meant that the direct purchaser can claim the entire overcharge and the defendant cannot rely on the defence that the overcharge was passed on, the question now arises as to where this leaves the indirect purchaser who has bought the goods at a price that has the overcharge built in to it?

The Supreme Court dealt with this issue in the 1977 case of *Illinois Brick v Illinois*.[45] In that case the Supreme Court in effect held that a plaintiff purchaser who bought goods at an anti-competitive price from an innocent re-seller cannot sue the upstream seller/manufacturer who had illegally fixed the price of the item before it was sold on. Thus, in Federal antitrust damages actions in the United States, indirect purchasers are barred from suing for damages the parties responsible for causing them harm. As Cotterill *et al* point out; the court in *Illinois Brick* based its decision...

> ...on the possibility that defendants would, under *Hanover Shoe*, be fully liable at the direct purchaser level and should not be subjected to downstream liability; apportioning damages to the various levels would be complex and burdensome...[46]

The combined effect of *Hanover Shoe* and *Illinois Brick* is that only the direct purchaser can sue for damages in an antitrust case in Federal courts even if the anti-competitive effects of the overcharge have been largely passed on to indirect purchasers and the direct purchaser suffered little or no harm. This allows for the possibility in Federal

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[44] DI Baker, 'Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) Loyola Consumer Law Review 16, at 396.

[45] *Illinois Brick v Illinois*, 431 U.S. 720 (1977).

[46] R Cotterill, L Egan and W Buckhold, 'Beyond Illinois Brick: The Law and Economics of Cost Pass-Through in the ADM Price Fixing Case', (2001) Review of Industrial Organization, Vol. 18, 45 – 52 at 46. And see the majority decision of the court in *Illinois Brick*, given by Justice White "……we understand *Hanover Shoe* as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it" *Illinois Brick v Illinois*, at 734 – 735 (n45).

antitrust cases in the United States that direct purchasers can earn a windfall by claiming treble damages even though much of their supposed loss may have been passed on. Indirect purchasers who may ultimately have suffered real harm cannot recover for the losses they may have suffered. Finally, the defendant in these cases is barred from raising the passing on defence.

Calvani explained that the Court had three reasons for reaching its decision in *Illinois Brick* in barring indirect purchasers from suing. The first was to avoid the possibility of duplicative recovery whereby the defendant could possibly be exposed to suits from numerous levels of prospective plaintiffs. The second and more important reason according to Calvani was that the Court reasoned that...

> ...the administrative costs associated with identifying, measuring and apportioning injury were tasks that the courts were ill equipped to do.[47]

Finally, according to Calvani, the Court feared that...

> ...increasing the costs of litigation and the diffusion of damages might diminish the incentive to sue and reduce the effectiveness of treble damages as a deterrent.[48]

Although the intention of the Court in *Hanover Shoe* and *Illinois Brick* was to simplify litigation in these complex cases and reduce the possibility of duplicative recovery, that is not what happened as we shall see.

A different approach in various States

In spite of *Hanover Shoe* and *Illinois Brick*, indirect purchasers can still bring an action for damages in individual states that have legislated to allow for such recovery.

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[47] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 278, (n2)

[48] Ibid.

The Antitrust Modernization Commission (the 'AMC') pointed out in its report to Congress that...

> In thirty-six states and the District of Columbia ... indirect purchasers can sue under state law providing that *Illinois Brick* does not apply to state court actions...
>
> Through legislation or court decisions, many states have adopted policies that allow indirect, as well as direct, purchasers to sue under state antitrust law to recover damages. The result typically has been that direct purchasers sue in federal court, and indirect purchasers sue in state court, to recover damages resulting from the same antitrust violation...
>
> As a result, there is typically a morass of litigation in various state and federal courts relating to a single alleged conspiracy.[49]

The position now is that defendants are exposed to actions for treble damages in Federal courts from direct purchasers and simultaneously to actions for treble damages from indirect purchasers in a multitude of state courts all arising from the same cause of action. This clearly defeats the purpose behind the rule of law set down by the Supreme Court in *Illinois Brick*.

Surprisingly the Supreme Court in the case of *California v Arc America*[50] confirmed the validity of a state's law that permitted indirect purchasers to sue for damages. In that case the court held...

> Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies ... And on several prior occasions, the Court has recognized that

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[49] Antitrust Modernization Commission Report and Recommendations (the "AMC Report"), vi (Apr. 2007), accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf The AMC was established pursuant to the Antitrust Modernization Commission Act, 2002, Pubic Law Number 107-273, 116 Stat 1856.

[50] *California v Arc America*, 490 U.S. 93 (1989).

> the federal antitrust laws do not pre-empt state law ... It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law. As construed in *Illinois Brick*, § 4 of the Clayton Act authorizes only direct purchasers to recovery monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.[51]

In the aftermath of *Arc America* and with the introduction of state 'repealer' laws in numerous states that disallow the rule in *Illinois Brick*, defendants in antitrust damages actions in the United States must face the likelihood that they will be sued by both direct and indirect purchasers and that these actions will take place in more than one court venue. Duplicative recovery and complex litigation has not been avoided. Indeed, where the Supreme Court wanted to simplify litigation in Federal courts, it has now in fact managed to complicate the litigation minefield for defendants in antitrust damages cases. Brendan Sweeney described the position in the United States post *Arc America*...

> The position post *California v Arc* is worse than if *Illinois Brick* had never been decided, since some plaintiffs have no option but to bring their case in the state courts. Where the plaintiffs were spread out across various states, the result was a proliferation of largely identical

[51] Ibid at 102 – 106.

> suits with no possibility of enforced consolidation. This resulted in simultaneous actions in Federal Court ... and in a variety of state courts ... Therefore despite the best efforts of the Supreme Court to simplify antitrust procedures, the diversity of jurisdictions makes the conduct of antitrust civil cases both complex and costly.[52]

Robert Lande described the position of the passing on defence in antitrust cases in disparaging terms...

> It cannot reasonably be disputed that the current antitrust damages system is a confusing, inefficient patchwork. The current system is so illogical that it is easy to ridicule – indeed, no rational person ever would have designed it from scratch in its current form.[53]

Ronald Davis described the current position very well...

> What we have ... is a jerry-rigged legal structure with one ad hoc legal solution balanced precariously on the next. It is, moreover, a structure that could evolve into a powerful engine to encourage settlements, regardless of the factual merits of a case.[54]

A Solution to Illinois Brick

The AMC debated the issues raised on indirect purchaser standing and the passing on defence at some length before making a lengthy and detailed recommendation[55] on how to solve the problem. In summary, it recommended that...

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[52] B Sweeney, 'The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the situation in the United States, Europe and Australia', (2006) 30 Melbourne University Law Review, 837 – 879, at 858.

[53] RH Lande, 'Why Antitrust Damage Levels Should be Raised', (2004) Loyola Consumer Law Review, Vol 16, No.4, 329 – 345, at 330.

[54] RW Davis, 'Indirect Purchaser Litigation: Arc America's chickens come home to roost on the *Illinois Brick* wall.' 65 Antitrust Law Journal, 375 – 406, (1996 - 1997) at 396.

[55] Antitrust Modernization Commission Report and Recommendations (the "AMC Report"), Recommendation 47, 270 – 271 (n49).

> Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury.[56]

To achieve this, the AMC suggested that Congress would need to pass legislation specifically overruling *Hanover Shoe* and *Illinois Brick*. This would allow both direct and indirect purchasers to sue for actual damages suffered because of an antitrust violation...

> Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.[57]

The AMC also suggested that state antitrust actions be removed to federal courts and that all direct and indirect actions be consolidated in a single federal forum.

The Commission's solution to the indirect purchaser and passing on conundrum

In its White Paper on damages actions, the Commission returned to the complex problem of indirect purchasers and the passing on defence in antitrust damages actions. It suggested that...

> ...infringers should be allowed to invoke the possibility that the overcharge might have been passed on. Indeed, to deny this defence could result in **unjust enrichment** of purchasers who passed on the overcharge and in undue

[56] Ibid 270.

[57] Ibid.

> **multiple compensation** for the illegal overcharge by the defendant.[58] (Emphasis in original).

The Commission therefore argued that...

> ...defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge.[59]

In its White Paper and in the Staff Working Paper that accompanied it, the Commission argued that it is necessary that defendants be allowed to raise the passing on defence in a damages case. The overarching principle that guided the Commission is the concern that either a defendant or a plaintiff might enjoy unjust enrichment, either by the defendant keeping illegally earned profits or by direct purchasers recouping damages when the harm has been passed on to indirect purchasers. In acknowledging the possibility that an indirect purchaser might find it difficult to prove his loss and where the defendant has successfully raised the passing on defence, the Commission suggested that...

> ...indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.[60]

However, there is a problem with this suggestion. If indirect purchasers are able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety, then the possibility arises that unjust enrichment of indirect purchasers may occur. It is quite possible that a portion at least of the overcharge was either absorbed by the direct purchaser, or that the indirect purchaser passed the overcharge on further, to consumers or other business customers, but that the defendant may not be in a position to prove this. If the defendant is unable to rebut the presumption in favour of the indirect

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[58] White Paper on Damages actions for breach of the EC antitrust rules, {SEC(2008) 404} - {SEC(2008) 406} at para 2.6, page 7 – 8.

[59] Ibid 8.

[60] Ibid.

purchaser, then the indirect purchaser may earn a windfall, an unjust enrichment.

It is also possible that the Commission's proposal will increase the prospect of double recovery, again defeating the Commission's intentions. Under the Commission's proposals, if the passing on defence fails, then direct purchasers are entitled to recover damages. However, there is nothing to prevent the indirect purchasers from then instituting proceedings and claiming damages even though the pass on has not been proved by the infringer...

> The Commission's proposals to create a passing-on defense for infringers in actions by direct purchasers, and to institute a rebuttable presumption in favour of indirect purchasers that overcharges are passed on in their entirety ... may well increase the likelihood of double recovery by direct and indirect purchasers, and defendants being exposed to dual liability, which is not the Commission's intent.[61]

The Commission is in a difficult position in trying to deal with the problems that can arise in complex competition damages litigation, especially the problems that arise with indirect purchasers and the passing on defence. In fact, in the final paragraph in the White Paper dealing with the passing on defence, the Commission in relation to '...joint, parallel or consecutive actions brought by purchasers at different points in the distribution chain...' called upon national courts...

> ...to make full use of all mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation of the harm caused by an infringement of competition law.[62]

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[61] Joint Comments Of The American Bar Association Section Of Antitrust Law, 20 (n41).

[62] White Paper on Damages actions for breach of the EC antitrust rules, {SEC(2008) 404} - {SEC(2008) 406} at para 2.6, 8.

Ireland and the problem of Indirect Purchasers and the Passing on Defence

It will be recalled that section 14 (1) of the 2002 Act states that...

> Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under *section 4* or *5* shall have a right of action under this subsection...

The relief available under section 14 (4) includes damages, (including exemplary damages) and injunctive and declaratory relief.

The section stipulates that the plaintiff must be an 'aggrieved' person. Although the Act does not define 'person', it is clear from the provisions of section 18 (c) of the Interpretation Act 2005 that it includes corporate persons.

The Competition Authority in its submission[63] on the Green Paper pointed out that though 'aggrieved person' is not defined in the Act, the term 'aggrieved' is used elsewhere in Irish legislation and is one that is familiar to the Irish Courts. The Authority referred to the case of *The State (Lynch) v Cooney*[64] where the court said of the term that it is...

> ...to be generously interpreted - which is generally understood to include any person who has reasonable grounds to bring the proceedings ... The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only

[63] Irish Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (Submission) (20th April 2006) S/06/001, available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S06001.aspx?page=3&year=0 and accessed on the 4th October 2010.

[64] *The State (Lynch) v Cooney*, [1982] IR 337.

> by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.[65]

A plain reading of section 14 of the 2002 Act together with the passage just quoted from the *State (Lynch) v Cooney* decision would suggest that the judiciary is likely to give a broad interpretation as to who might be allowed to sue in a competition damages case. Of course at this stage, this is pure speculation. There has been very little private litigation in competition cases before the Irish courts so the courts have not yet had to deal with these complex problems. However, as Terry Calvani pointed out...

> While there is no Irish law directly addressing many of these issues today, these questions will inevitably confront Irish judges. Whether they are influenced by American cases remains to be seen. But one thing is certain; the issues will arise.[66]

The Competition Authority in its submission to the Commission on the Green Paper on damages actions stated that there should be no specific rule on the passing on defence. The Authority expressed concern that...

> ...in practice, the existence of a successful (or almost successful) passing-on defence might preclude the bringing of damages actions by either direct or indirect purchasers. For this reason, the Competition Authority supports further consideration of the implications of the passing-on defence and the issue of whether indirect purchasers may sue.[67]

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[65] Ibid as cited in the Irish Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (Submission) (n63).

[66] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 276, (n2)

[67] Irish Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (Submission) at para 5.3, (n63).

The Complex Compromise Solution

Ronald Davis described the three options that were considered by the U.S. Supreme Court in *Illinois Brick* for solving the problems that arise with indirect purchaser standing and the passing on defence. He described the three options thus...

> (1) the Universal Pass-on Solution: overrule Hanover Shoe and let any party assert pass-on defensively or offensively, as the case may be or as a variation on the Universal Pass-on Solution, the Court might effectively overrule Hanover Shoe by confining it to a limited number of economic circumstances;
>
> (2) at the other extreme, the Absolutely No Pass-on Solution: a strict rule prohibiting inquiry into the pass-on of an anticompetitive over charge, whether at the instance of a defendant or an indirect purchasing plaintiff; or
>
> (3) the Complex Compromise Solution:
>
> - permit indirect purchasers to sue (i.e., endorse "offensive pass-on theory");
> - try to combine claims by direct purchasers and all layers of indirect purchasers in one big litigation, so as to avoid inconsistent out-comes, correctly allocate the damages pie to everyone in the distribution chain, and avoid duplicative damages;
> - where everybody is in one big lawsuit, permit defendants to assert a pass-on defense; but

- keep the Hanover Shoe/no pass-on defense rule for cases where only the direct purchasers are the plaintiffs.[68]

Davis explained that the dissenting Supreme Court justices in *Illinois Brick*, Brennan, Blackmun and Marshall favoured the third option, that is, the Complex Compromise Solution. He also pointed out that the Department of Justice also favoured this solution when it entered as *amicus curiae* in the case as did numerous lower courts.

Though this solution to the issue would create incredible complexity in antitrust damages litigation, it would also be the most equitable. Such a solution would not deny parties that have suffered injury from recovering compensatory damages. It would also allow the defendants raise the passing on defence which would prevent direct purchasers from gaining an unjust enrichment. The complex compromise solution would also prevent defendants from being unjustly enriched because if they raise the passing on defence, indirect purchasers are still able to recover. Finally, though the cases could potentially be massive and difficult to control, the suggested solution would allow all actions be dealt with in one court through consolidation of the cases.

In the context of private actions for damages in Ireland for infringements of either domestic or Community law, the issue of indirect purchasers and the passing on defence may seem theoretical or at least matters for consideration at a far distant future point in time. However, these are issues that will certainly arise when competition damages actions become more common.

Defining Damages in Private Competition Cases: The Commission Initiative

A further problem in competition claims is that of defining damages. In the Staff Working Paper[69] accompanying its Green Paper on Damages actions in competition cases, the Commission set out its understanding

[68] RW Davis, 'Indirect Purchaser Litigation: Arc America's chickens come home to roost on the *Illinois Brick* wall.' at 387 – 388, (n54).

[69] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final}.

of the fundamental right to compensation that citizens and businesses enjoy when they have been victims of competition law violations. The first paragraph of the section of the Staff Working Paper, entitled 'The Aims and Advantages of Private Enforcement' makes this point clear. That paragraph reads...

> It is fundamental to the idea of private damages actions that the victim of a violation of the law is entitled to compensation for the loss suffered as a result of the violation in question. If competition law is to better reach consumers and undertakings and enhance their access to forms of legal action to protect their rights, it is desirable that victims of competition law violations are able to recover damages for loss suffered. Damages can be claimed both in actions between co-contractors, as well as in actions brought by third parties against infringers of the law.[70]

As the Commission points out,[71] the Court of Justice has already made this clear in *Courage v Crehan,*[72] where it said -

> The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[73]

The Commission asked a series of questions (listed A – O) in its Green Paper on various aspects of private actions for damages with a total of 36 suggested options contained within these questions for interested parties to consider. Question E asked how damages should be defined.

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[70] Ibid at para 4, page 6.

[71] Ibid, at para 1.1, page 4.

[72] Case C-453/99, *Courage –v- Crehan*, [2001] ECR I-6297.

[73] Ibid 26.

Under that Question, the Commission set out the following four options, listed 14 – 17...

> Option 14: Definition of damages to be awarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages).
>
> Option 15: Definition of damages to be awarded with reference to the illegal gain made by the infringer (recovery of illegal gain).
>
> Option 16: Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.
>
> Option 17: Prejudgment interest from the date of the infringement or date of the injury.

The question of how damages should be defined is a reasonable one. Answering that question with a precise definition is much more difficult. As has been pointed out by McGregor in his book on damages...

> ...it has become more and more difficult, as time has moved on, to construct a definition of damages which is satisfactory and which is comprehensive. So many exceptions to, and qualifications upon, once solid, clear, unadulterated rules have appeared, perfectly sensibly, that a clear cut definition is no longer feasible; the arrival of restitutionary damages and of human rights was the last straw.[74]

McGregor could have added that the advent of antitrust damages actions in the United Kingdom and Europe has added even further confusion. Even so, McGregor put forward the definition used in earlier

[74] H McGregor, *McGregor on Damages* (18th edn Sweet & Maxwell, London 2009) 3.

editions of his book '...a definition which still represents the norm...'[75] though this definition is '...qualified to indicate that it applies generally but not invariably...'[76] That general definition of damages is...

> Damages in the vast majority of cases are the pecuniary compensation, obtainable by success in an action, for a wrong, which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling.[77]

McGregor states that the '...object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered.'[78] He then quotes the classic definition of damages from Lord Blackburn which reads...

> ...that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[79]

Defining and calculating damages is a particularly complex exercise in competition damages actions. In the Staff Working Paper accompanying the Green Paper, the Commission put forward the view that...

> Damages are traditionally considered to compensate a victim for the loss suffered because of an antitrust infringement.[80]

This statement by the Commission on the traditional view of damages would sit reasonably well with the definition given by Lord Blackburn in

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[75] Ibid.

[76] Ibid

[77] Ibid.

[78] Ibid 13.

[79] Ibid 14, citing Lord Blackburn in *Livingstone v Rawyards Coal Co.*, (1880) 5 App. Cas. 25 at 39.

[80] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final} at para 112, page 34.

the *Livingstone* case. However, the Commission in its initiative on damages actions was also concerned with looking for ways of encouraging private actions for damages when there has been an antitrust infringement. This is clear when the Commission states in the Staff Working Paper accompanying its Green Paper that...

> It seems, however, that pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. As a result, thought should be given to other methods of approaching damages. Paragraphs 114 to 124 present different approaches that Member States have taken to calculate the basis of the damage in a way that makes it more attractive for claimants to file a damages claim. In doing so, the award may have as its purpose not only the compensation of the victim's individual loss but also the recovery of benefits gained by the defendant as a consequence of the tortious act.[81]

As an alternative view, the Commission suggests that...

> ...the action can be structured as an action for recovery of illegal gain made by the infringer as a result of the infringement. In this case, the claimant's claim is not for subjective loss suffered, but for the illegal gain that the defendant has made from the infringement.[82]

The Commission was therefore putting forward a more expansive method of defining compensatory damages in its Green Paper in part at least as a way of incentivising private actions. Option 14 in the Commission's Green Paper is based on the theory of the loss suffered by the claimant and involves a calculation of the actual harm suffered by the plaintiff in an antitrust infringement case. Option 15 on the

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[81] Ibid.

[82] Ibid at para 115.

other hand is based on a calculation of the illegal gain made by the defendant from his illegal behaviour.

The Irish Competition Authority in its submission to the Commission on its Green Paper[83] favoured Option 14 over 15. The Authority explained its reasons for favouring calculation of damages based on harm rather than damages calculated based on illegal gain in terms of avoiding unjust enrichment of plaintiffs and that Option 15 '... would increase the danger of frivolous and vexatious actions and cultivate a litigation culture.'[84]

It is not clear that Option 15 would necessarily lead to a windfall on every occasion as the Competition Authority would have it. Equally, it is not all clear how Option 15 on its own would lead to a litigation culture. In any event, the purpose of the exercise in the Green and White Papers was to assist the taking of private actions for damages where they had not been taken previously.

It is true that the methods of calculation contained in Options 14 and 15 might not necessarily result in the same quantum of damages being calculated as arising from the same set of facts. Quantifying the harm suffered by a plaintiff in a competition damages action is usually very difficult and can sometimes prove impossible. The harm or loss suffered by the injured party might arise through the denial of choice – the plaintiff may have decided not to purchase the cartel goods at all – but how is this to be calculated and where does this quantum of harm fit with any illegal gains that may have been made?

Equally, allowing calculation of damages based solely on the illegal gain made could involve punitive awards of damages if the gain were to exceed the harm suffered by the plaintiff. In their Final Report for the European Commission entitled 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios'

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[83] Irish Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (n63).

[84] Ibid at para 4.1, page 7.

('External Impact Assessment Report')[85] the authors of the report argue that the differences between these two options '...need to be carefully taken into account in evaluating the potential impact of private antitrust enforcement.'[86] The authors of this report for the Commission go on to say however that...

> ...it can be already anticipated that a definitive choice in favour of either criterion is hardly possible, as there is no one-size-fits-all rule when it comes to the basis for damage calculation. Indeed, most often, the choice of the quantification rule lies in the interpretative power of the judge. For example, whenever reliable information on the loss suffered by the plaintiff is not available, a gain-based damage award may be considered as a suitable proxy in assessing [the] amount of compensation to be granted.[87]

Manfredi answers the Question

Whilst awaiting the responses of interested parties to the questions posed in the Green Paper, the Commission's question on how damages should be defined was, in many respects, answered by the Court of Justice in the *Manfredi*[88] case. *Manfredi* had been decided by the Court of Justice after the Green Paper but before the White Paper was published.

In the Staff Working Paper[89] accompanying the White Paper on Damages Actions, the Commission summarised the *acquis*

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[85] Report For The European Commission, Contract DG COMP/2006/A3/012, December 2007, (External Impact Assessment Report) available on the Commission website at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441 and accessed on the 4th October 2010.

[86] Ibid, para 4.2, page 416.

[87] Ibid 416 - 417.

[88] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

[89] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM (2008) 165 final} {SEC (2008) 405} {SEC (2008) 406}.

communautaire[90] in Community law on the issue of damages, using language from the *Manfredi* judgment...

> Victims of an EC competition law infringement are entitled to full compensation of the harm caused. That means compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.[91]

> Victims of an EC competition law infringement are entitled to particular damages, such as exemplary or punitive damages, if and to the extent such damages may be awarded pursuant to actions founded on the infringement of national competition law.[92]

> In the absence of Community law on the matter, Member States are allowed to take steps to ensure that the protection of the right to claim damages for the loss caused by a competition law infringement does not entail the unjust enrichment of the victims.[93]

The language of the Court in *Manfredi* is imbued with the concept of damages being recovered based on the harm suffered by the plaintiff. For example at paragraph 60 of the judgment the Court states...

> ...as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict

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[90] According to Craig and De Burca in *EU Law: Text, Cases and Materials*, (3rd edn Oxford University Press, Oxford 2003, page 23), the term *acquis communautaire* refers to '...the body of Community law built up over the years.' Allan F Tatham in his book *Enlargement of the European Union* (European law Collection) [2009] Kluwer Law International, Biggleswade, Bedfordshire, page 328 explained: 'The term 'acquis communautaire' refers to the entire body of European law, and literally means the Community patrimony in the sense of its legal 'assets''. The Commission refers to the *acquis communautaire* as 'secondary legislation.' For example, in its document 'Communication from the Commission to the European Parliament and the Council: Codification of the Acquis Communautaire', Brussels, 2001, Com (2001) 645 final, the Commission claimed that according to its own estimates '...the total *acquis communautaire* (secondary legislation) currently comprises about 80,000 pages...' page 3.

[91] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM (2008) 165 final} {SEC (2008) 405} {SEC (2008) 406} at para 187, page 57.

[92] Ibid 190, 58.

[93] Ibid 192, 58.

> or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition...[94]

At paragraph 61 the Court says...

> It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.[95]

At paragraph 98, the Court stated...

> ...in the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.[96]

It is therefore no surprise that the authors of the External Impact Assessment Report point out that in light of the Court of Justice decision in *Manfredi*...

> ...damages actions based on art. 81 of the Treaty are mainly aimed at restoring the harm suffered by the victims. This principle does not eliminate the possibility that punitive or exemplary damages are used, but sets a minimum level of compensation.[97]

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[94] *Manfredi v Lloyd Adriatico Assicurazioni SpA*, at para 60, (n88).

[95] Ibid 61.

[96] Ibid 98.

[97] External Impact Assessment Report for the European Commission, para 4.2, page 417, (n85).

According to the authors of the External Impact Assessment Report, this means that...

> ...gain-based calculations would be consistent with the ECJ jurisprudence only in two cases – *i.e.*, whenever such methods provide a proxy for the determination of harm; and whenever they lead to an amount of damages greater than the suffered harm.[98]

Apart from the two exceptions mentioned above, *Manfredi* would appear to largely preclude the possibility of allowing for a gain based calculation of damages. The authors of the External Impact Assessment Report explain that in gain based quantification of damages, also known as disgorgement of profits, damages...

> ...are quantified based on the profit (or gain) made by the infringer(s) as a result of unlawful conduct.[99]

Although acknowledging that the gain based method of quantification of damages is sometimes put forward as a viable alternative method of quantifying damages in antitrust cases, the authors stated that for the purpose of their report and for evaluating the various options that might be used in quantifying damages, they only considered...

> ...the potential co-existence of the two methods [harm based and gain based] not the introduction of a gain-based method as a standalone policy option.[100]

Harm and full compensation for loss suffered

As the authors of the External Impact Assessment Report for the Commission explained...

> The compensatory principle is based on the idea that a person that suffered antitrust injury has to be made whole

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[98] Ibid.

[99] Ibid 427.

[100] Ibid.

> of the loss sustained ... Based on this option, the plaintiff is entitled to claim damages equal to the loss or harm suffered, in order to be placed back in the same situation in which she would have been, had the harm not occurred.[101]

In this context, the authors of the report point out that harm includes compensation for actual loss (*damnum emergens*) and for loss of profits (*lucrum cessans*). The difference between compensation for actual loss and loss of profits was mentioned when dealing with the issue of indirect purchasers and the passing on defence earlier in this chapter. There it was seen that the question as to whether defendants should be allowed to raise the passing on defence only arises in relation to alleged overcharges being passed on to indirect purchasers and not to lost profits.

Legislating for quantification of damages

In its White Paper, the Commission states that...

> For reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission suggests **codifying** in a Community legislative instrument the **current *acquis communautaire*** on the scope of damages that victims of antitrust infringements can recover.[102] (Emphasis in original)

Given the fact that there may be need for variation, or 'wriggle room' in the method used by a court in calculating the damages that should be paid to a successful plaintiff in a competition case, it is questionable whether it is either necessary or wise to proceed to codification of the *acquis communautaire* set down by the Court of Justice in *Manfredi*. Having embarked on a process to enhance private actions for damages for citizens under the competition rules in the Treaty in its Green

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[101] Ibid 417.

[102] White Paper on Damages actions for breach of the EC antitrust rules, {SEC(2008) 404} - {SEC(2008) 406}.

Paper, the Commission's initiative was strengthened by the decision of the Court of Justice in *Manfredi*. This development is acknowledged by the Commission in its White Paper and in the Staff Working Paper accompanying the White Paper. However, the Commission in its White Paper took the decision in *Manfredi* as a spur to encourage codification of the current *acquis communautaire* in a Community legislative instrument which is not necessarily what the Court of Justice envisaged.

The Commission is currently engaged in a process of codifying the *acquis communautaire* and may therefore have intended adding the *acquis* on the scope of damages available to victims of antitrust infringements. However, it may also have had in mind a far grander form of legislation whereby its various recommendations for change to encourage private actions for damages might lead to a directive or a new regulation of which the *acquis* would form part.

The ABA cautioned against codifying the *acquis communautaire*. In its submission[103] to the Commission on the White Paper, the ABA pointed out that a victim's right to receive compensation for damages incurred as a result of a violation of a wide variety of laws is an existing fundamental right in most member states of the EU. According to the ABA...

> ...competition law represents but a small subset of legal rules, which requires full compensation if infringed in a way that causes a loss to a victim. Experience in other areas of law should inform the application of the damages concept in the competition law context.[104]

The ABA also point out that the...

> ...legislative process, by its nature, will be of long duration, will require significant resources, and may interfere with what may be perceived as core

[103] Joint Comments Of The American Bar Association Section Of Antitrust Law, 50, (n41)

[104] Ibid 9 – 10.

> competencies currently reserved for the Member States, namely their respective civil legal orders.[105]

The ABA suggested that...

> ...the Commission's goal to enhance awareness and to summarize the current *acquis communautaire* can be achieved in a significantly less static, less cumbersome, less intrusive, yet equally effective way.[106]

Such an alternative method could be by way of guidelines ...

> ...in these guidelines the Commission would be free, and perhaps unlikely to meet with any objection, to restate the *acquis communautaire* as set out in Manfredi...[107]

Codifying the *acquis communautaire* in legislation might have the further and unwelcome consequence of denying courts the option in appropriate cases from using a gain based method of calculating antitrust damages, if the definition of the *acquis* in the legislation was too narrowly drawn.

Though the Court in *Manfredi* defined damages on the basis of harm or loss to the plaintiff, it did not preclude the possibility of a gain based method being used. It was clearly concerned that plaintiffs should not be unjustly enriched.

The Court said...

> Therefore, first, in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules.

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[105] Ibid 10.

[106] Ibid.

[107] Ibid.

> However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.[108]

In other words, Community law does not prevent national courts from applying rules that prevent the unjust enrichment of plaintiffs. In such a complex field of varying national rules on defining and applying damages actions, it might be wise for the Commission to leave this aspect of the calculation of damages to the courts without constraining the courts unnecessarily with legislation.

Damages but not Restitutionary Damages

In its Response[109] to the Commission's White Paper the OFT suggested that provision might be made to allow damages to be calculated on a restitutionary basis. The OFT argued...

> ...express provision for the calculation of damages in the aggregate and/or on a restitutionary basis is essential for representative actions to work effectively. In such actions, the calculation of compensatory damages on an individual basis may be evidentially too complex or inefficient.[110]

The OFT's suggestion was made in the context of assisting collective actions in antitrust damages cases. This is clarified by the OFT when it stated...

> The OFT has recommended that courts have discretion to direct that, in appropriate cases, damages will be calculated on an aggregated basis or awarded on a restitutionary basis. This will be a key factor in securing the viability of representative actions, especially

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[108] *Manfredi v Lloyd Adriatico Assicurazioni SpA*, at para 99, (n88).

[109] Office of Fair Trading, 'Response to the European Commission's White Paper, Damages Actions for breach of the EC antitrust rules', (Submission) (July 2008) OFT 1006.

[110] Ibid at para 4.2, page 8.

> representative actions at large or those brought on behalf of a large number of businesses or consumers.[111]

The OFT's reference to having recommended that courts have such discretion appears to refer to its detailed recommendations[112] to the UK Government in November 2007 on reforming domestic law '...to improve the effectiveness of redress for those who have been harmed by breaches of competition law.'[113] Amongst these recommendations was the following...

> The OFT recommends that damages should also be available on a restitutionary basis and that mechanisms be developed for the management and distribution of damages awards.[114]

The Irish Competition Authority also made reference to the possibility of restitution playing a role in private competition actions in its submission[115] to the Commission's Green Paper, though in a more oblique fashion than the OFT. The Authority referred to restitution in response to the Commission's questions, 'Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?'[116] The Authority debated a number of possible methods of allowing for collective redress and in that context referred to section 19(b) of the FTC Act[117], which allows the FTC to institute a civil action seeking redress for consumers who have been injured by violations of the antitrust rules. The Authority pointed out that under the FTC Act...

> The court may order a wide variety of remedies, including restitution in the form of monetary refunds. Disgorgement

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[111] Ibid at para 4.3.

[112] Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', (Recommendations) (November 2007) OFT 916 resp.

[113] Ibid at para 1.1, page 2.

[114] Ibid 7.35, 9.

[115] Irish Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (Submission) (20th April 2006) S/06/001, (n63).

[116] Ibid page 11.

[117] 15 U.S.C. § 57b(b) (2000)

> to the US Treasury has also been held to be an appropriate remedy for preventing unjust enrichment where it is not possible to identify all the consumers entitled to restitution.[118]

Reference to restitution, or to damages being awarded on a restitutionary basis, connotes two separate remedies that need to be considered in the context of private actions in competition cases. McGregor on Damages explains that restitution is something quite different from damages. He points out that...

> Actions claiming money in restitution ... do not depend upon a wrong done to the claimant. Their very existence indeed is attributable to the fact that no wrong, whether tort or breach of contract, is generally available upon which the claimant may sue. Illustrations are provided by actions for money paid under a mistake of fact, actions paid for money paid under a contract which is in some way vitiated and actions to recover money paid to a third party for which the defendant is primarily liable. Such claims depend not upon a loss to the claimant but upon a benefit to the defendant; they do not fall within the ambit of a textbook on damages.[119]

Tettenborn began his treatise on the Law of Restitution in England and Ireland with this definition of restitution...

> Restitution can be defined as the area of civil law concerned with reversing unjust enrichment on the part of a defendant. More precisely, it involves removing from him some accretion to his wealth which, in the eyes of the law, he should not be entitled to retain, or making him

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[118] Irish Competition Authority, 'European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules', (Submission) (20th April 2006) S/06/001, para 6.3, page 11 (n63).

[119] H McGregor, *McGregor on Damages*, para 1 – 006, page 6 (n74).

> pay for some non-money benefit on the basis that it would be wrong to allow him to retain it for nothing.[120]

Restitution is concerned with the concept of unjust enrichment of the defendant as opposed to loss or harm suffered by the plaintiff. The defendant makes a gain but the plaintiff need not have suffered a loss, or indeed the plaintiff need not have suffered harm. As McGregor points out in his book on damages, 'Actions claiming money in restitution ... do not depend upon a wrong done to the claimant.'[121] The entire thrust and purpose of the Commission's initiative in its Green and White Papers has been the encouragement of private actions for damages by claimants who have suffered some form of antitrust injury. The injury is caused by undertakings behaving in an anti-competitive manner contrary to the Treaty provisions contained in Articles 101 and 102 TFEU, and in an Irish legal context to breaches of sections 4 and 5 of the Competition Act 2002.

The Commission was concerned with addressing the problem of quantifying an injured party's losses in an antitrust action, something that can be extremely difficult if not impossible to do. As was shown earlier, the Commission in its Green Paper considered the option of allowing injured parties to recover on the basis of the gain that an infringer made, rather than merely looking to the loss that the injured party suffered. This type of recovery is sometimes referred to as restitutionary damages and is a somewhat controversial concept in English law at this time.[122] Though the Commission may have considered a gain based mechanism for recovering overcharges in competition cases, as was already outlined the Court of Justice in *Manfredi* has clarified that '...injured persons must be able to seek compensation ... for actual loss...' thus clarifying that damages in competition cases are defined on the basis of loss and are therefore compensatory in nature.

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[120] A Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn Cavendish Publishing Limited, London 2002) 1.

[121] H McGregor, *McGregor on Damages*, (n74).

[122] See for example the comments of Lord Nicholls in *Attorney General v Blake* [2001] 1 A.C. 268 at 284H., where he said: "I prefer to avoid the unhappy expression 'restitutionary damages.'"

McGregor states that restitutionary damages arise...

> ...where the commission of a wrong results in a benefit to the wrongdoer which exceeds and outstrips the loss to the person wronged, who suffers a lesser loss or, frequently, no loss at all.[123]

Virgo explains the confusion that can arise when discussing the concept of restitutionary damages...

> The term 'restitutionary damages' is apt to mislead, since 'damages' suggests the award of a compensatory remedy which is assessed by reference to the claimant's loss, but the addition of the word 'restitutionary' immediately contradicts this.[124]

Maddaugh and McCamus, in attempting to define restitution which they state '...is now a separate and independent branch of the law of obligations'[125], cited Lord Clyde in *Banque Financiere de la Cite v Parc (Battersea) Ltd.* where his lordship stated...

> ...the basis of the appellants' claim is to be found in the principle of unjust enrichment ... the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss ... The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned.[126]

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[123] H McGregor, *McGregor on Damages*, at 12 - 001, 453, (n74).

[124] G Virgo, *The Principles of the Law of Restitution* (2nd edn Oxford University Press, Oxford 2006) 437.

[125] PD Maddaugh and JD McCamus, *The Law of Restitution* (2nd edn Canada Law Book Inc., Aurora Ontario 2004) 13.

[126] Ibid 15 - 16.

In *Devenish Nutrition Limited & Others v Sanofi Aventis SA*[127], the English High Court and Court of Appeal addressed the question of whether damages actions in antitrust cases could involve a restitutionary award. The Court of Appeal, upholding the decision of the High Court, held that...

> ...the court was bound by authority to hold that a restitutionary award could not be made on a claim for a non-proprietary tort; and that, in any event, the case lacked the exceptional circumstances which would be a prerequisite to the making of such an award, which was available only where necessary to do justice and was therefore not an appropriate remedy in principle where damages were an adequate remedy.[128]

The Court concluded by stating that...

> ...whatever the law ought to be, it is not (yet) the law that a restitutionary award is available in all cases of tort. In my judgment a restitutionary award is not an available remedy in an antitrust case. If the law is to be changed, it must be done by a higher court than this one. Moreover, even where a restitutionary award is available, it is generally awarded where an award of more traditionally based compensatory damages would be inadequate to compensate the claimant for the invasion of his rights. Yet in the present case ... the measure of restitutionary damages is the same as the measure of compensatory damages. If that is so, then on the assumed facts compensatory damages would be an adequate remedy.[129]

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[127] *Devenish Nutrition Limited & Others v Sanofi Aventis SA*, (n32).

[128] Ibid at 1.

[129] Ibid at 108.

The Court of Appeal in reaching its decision in *Devenish* considered the House of Lords decision in *A.G. v Blake*[130] which appears to allow in exceptional circumstances the possibility that restitution might be available in torts beyond those dealing with interference with property. In other words, *A.G. v Blake* which allowed a restitutionary award in a breach of contract case, opened the possibility (while not deciding with finality on the issue) that such an award might be available in an action for breach of statutory duty. Competition damages actions are actions for breach of statutory duty.[131]

However, the Court of Appeal held that it was bound by its earlier decisions in *Stoke on Trent City Council v W & J Wass Limited*[132] and *Halifax Building Society v Thomas.*[133] *Stoke on Trent* made clear that restitution was only available in proprietary torts. *A.G. v Blake* appears to extend this in exceptional circumstances to other cases but the *Blake* case dealt with breach of contract only and not with non-proprietary torts such as would arise in a competition damages action. The judge in the High Court in *Devenish* held that *Halifax v Thomas*

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[130] *Attorney General v Blake*, [2001] 1 AC 268. That case involved an action by the British Government against the notorious spy George Blake for breach of contract. That contract included a clause not to divulge any official information obtained by him by virtue of his employment either in the press or in book form. The undertaking was to continue after his employment ceased. The problem for the British Government in that case was that they could not prove any loss on foot of the breach by Blake of his contract terms. The House of Lords found that though compensatory damages were the normal remedy for breach of contract, in exceptional circumstances restitution could be ordered where compensatory damages were inadequate.

[131] It should be noted that the availability of restitutionary damages has been further developed in *Experience Hendrix LLC v PPX Enterprises,*[2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, where a sliding scale model of restitutionary damages was set out by the House of Lords. This envisages at one end partial disgorgement damages and at the other end a full account of profits. In relation to the idea that competition damages actions are a breach of statutory duty, Lord Diplock in *Cottage Garden Foods Ltd v Milk Marketing Board* [1983] 3 W.L.R. 143, [1984] A.C. 130, had the following to say: "A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty. If this categorisation be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on the part of a private individual who sustained loss or damage by reason of a breach of a directly applicable provision of the Treaty of Rome, the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which the duty is imposed takes the negative form of a prohibition of particular kinds of conduct rather than the positive form of an obligation to do particular acts. Of the many statutory duties imposed upon employers under successive Factories Acts and regulations made thereunder, which have provided far and away the commonest cases of this kind of action, some take the form of prohibitions, others positive obligations to do something: yet it has never been suggested that it makes any difference to the cause of action whether the breach relied on was a failure to perform a positive duty or the doing of a prohibited act."

[132] *Stoke on Trent City Council v W & J Wass Limited*, [1988] 1 WLR 1406.

[133] *Halifax Building Society v Thomas*, [1996] Ch 217 CA.

specifically precluded the availability of restitution in a case involving a breach of statutory duty. In the Court of Appeal, this was clarified...

> In the Halifax case, the claimant had received repayment of all that was due to it. There was therefore no need for a restitutionary award, and such an award would have been inappropriate. This case does not decide that a restitutionary award cannot be made in a non-proprietary tort claim, but it does prevent Devenish from claiming the profits made by the defendants merely on the basis that they made their profits through violations of competition law.[134]

The Court of Appeal has clarified that restitution '...is not an available remedy in an antitrust case.' However, the Court did not rest there. It proceeded to consider what it would have done if restitution was available.[135] It considered that it would not have made a restitutionary award in that case, as normal compensation was both adequate and appropriate and could be calculated using normal methods of quantifying such damages.

As already outlined, restitutionary damages are different and distinct from restitution as they connote the commission of an injury to the plaintiff by the defendant. Restitutionary damages are therefore a form of damages award as opposed to restitution in so far as they are a method of awarding compensation to a plaintiff who has been wronged by the actions of the defendant. As Virgo explained...

> If however, 'damages' is interpreted simply to mean a financial remedy, the addition of the word 'restitutionary' simply clarifies that it is a remedy which is assessed by reference to what the defendant obtained as a result of

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[134] *Devenish Nutrition Limited & Others v Sanofi Aventis SA*, at 86 (n32).

[135] The court acknowledged that both the European Commission and the OFT supported the prospect of restitutionary damages being awarded in competition cases. See *Devenish Nutrition Limited & Others v Sanofi Aventis SA*, at 94 - 96 (n32). The Court also acknowledged (at 130) '...Community law does not prevent the making of a restitutionary award.' However, the court continued that '...if it were open to the court to make such an award, it would be awarded only in exceptional circumstances...'

committing a wrong, whereas compensatory damages are assessed with reference to the loss suffered by the claimant.[136]

In other words, restitutionary damages can be viewed as a form of gain based recovery of damages, as opposed to compensatory damages which are calculated based on the loss or harm suffered by the plaintiff. As pointed out earlier, gain based recovery might only be available '...whenever such methods provide a proxy for the determination of harm; and whenever they lead to an amount of damages greater than the suffered harm.'[137]

The first of these two situations – gain based recovery used as a proxy for determining harm – is not an entirely unreasonable method of calculating the damages owing to an injured party. If it proves completely impossible to calculate the compensatory damages owed to an injured party, then looking to the illegal gain made by the defendant because of a wrong committed by the defendant might prove the only remaining way of allowing the plaintiff to recover damages. A downside of this is that this method might allow a plaintiff to become unjustly enriched if the damages paid to him are based on the gain that a defendant made. However, compared to the alternative where the loss to the plaintiff cannot be calculated and the defendant may end up retaining his illegal gains, using a gain based method as proxy might be acceptable to the courts.

The second situation – where a gain based recovery might be allowed if it leads to an amount of damages that is greater than the suffered harm – relates to the possibility of the courts imposing punitive or exemplary damages. *Manfredi* did not preclude the possibility of courts imposing such damages. In fact the court made clear in *Manfredi* that under the principle of equivalence...

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[136] G Virgo, The Principles of the Law of Restitution, 437 (n124).

[137] External Impact Assessment Report for the European Commission, para 4.2, page 417, (n85).

> ...it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law...[138]

This is not a controversial issue in Ireland given that punitive and exemplary damages are concepts well known to the Irish legal system. Furthermore, the Competition Act 2002 allows for the imposition of exemplary damages. However, in light of the decision in *Devenish* and based on the principle of *non bis in idem*, exemplary damages should not be available in actions before the Irish courts where there has already been public enforcement arising out of the same cause of action that has given rise to the private 'follow-on' action.

Defining Damages in Competition Cases in Ireland: *Donovan v ESB*

There have been very few private actions for damages in competition cases in Ireland under either domestic or Community law. When the English law firm Ashurst was preparing its report[139] on the comparative study it conducted on the current state of damages actions in competition law in Europe, it sought 'national reports' from selected law firms from each member state within the European Union. John Meade, solicitor, of Arthur Cox prepared and submitted the 'National Report' for Ireland.[140] According to Meade ...

> In only one action to date, *Donovan and others v Electricity Supply Board*, have damages been awarded to the plaintiffs involved for infringement of Irish competition law. There has been no reported case to date in which

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[138] Ibid, 93.

[139] Study on the conditions of claims for damages in case of infringement of EC competition rules, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

[140] National Report, Ireland, (undated) prepared by John Meade, Solicitor, Arthur Cox Solicitors, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/ireland_en.pdf

damages have been awarded for infringement of EC competition law.[141]

This author is unaware of any further competition cases that resulted in an award of damages to a plaintiff since Meade's National Report which was prepared in or about 2004.

Despite the fact that the *Donovan* case appears to be the only competition case that has resulted in an award of damages to date in Ireland, some interesting insights on how Irish courts might treat competition damages actions in the future can be gained from a review of that case. The facts of the case are reasonably straightforward. The ESB was at the time the sole producer of electricity in the State. The Supreme Court found that because of this fact the ESB therefore controlled '...the supply side of the market for electric power.'[142]

The facts were as follows. In June, 1991, the 'Register of Electrical Contractors of Ireland Ltd.' commonly known as 'RECI' was established. RECI, in turn, established a register of electrical contractors and as part of the new self regulatory regime it appointed inspectors.

In September 1992, the ESB announced changes in its conditions of supply of electricity whereby it stated 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 RECI's register or (b) an inspector employed by RECI, in the case of installations completed by non-registered contractors.

Immediately after the introduction by the ESB of its new conditions of supply in September, 1992, the plaintiffs who were electrical contractors not registered with RECI applied successfully for an interlocutory injunction to restrain the implementation of the new regime.

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[141] Ibid at page 1, referring to *Donovan and others v Electricity Supply Board,* [1994] 2 IR 305, [1997] 3 IR 573.

[142] *Donovan and others v Electricity Supply Board*, [1997] 3 IR 573.

Thereafter, amendments were made to RECI's memorandum and articles of association and also to its registration rules. These amendments appear to have had the effect of removing the plaintiffs' substantial complaints. However, the plaintiffs pursued the matter further seeking damages for the injury and loss that occurred in the period between the introduction of the new RECI arrangements in September 1992 and the injunction of the 2nd November 1992. In essence the plaintiffs claimed that the operation by the ESB of the RECI regime amounted to an abuse of a dominant position contrary to section 5 of the Competition Act 1991 as it imposed unfair trading conditions upon them. The ESB was dominant in the market for the supply of electricity. The plaintiffs succeeded in their claim and the ESB appealed to the Supreme Court.

The Supreme Court found that an undertaking which was dominant in one market (supply of electricity) and used this dominance so that it affected competition in a sub-market (the market for the supply of electrical contracting services) where it was not dominant (ESB only had a maximum share of this market of 2.5%) could be guilty of an abuse contrary to section 5 of the Competition Act, 1991. This was the case even where the undertaking gained no competitive advantage by its actions and where it did not have '...an anti-competitive intent'.

Damages in Donovan

Counsel for the ESB argued that...

> ...an award of damages would not be proper in the present case in view of the finding by the learned trial judge that the abuse committed by the defendant was unintentional.[143]

However, the Supreme Court was unequivocal in its decision and upheld the decision of the High Court. The Supreme Court held that...

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[143] Ibid.

> The court has jurisdiction to award damages in an action properly brought under s. 6 of the Act of 1991. This means it must award damages in an appropriate case. Its function is to compensate injured parties for damage suffered as a result of the abuse complained of. It is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises. It awards damages on the same basis as it would award them in the case of any tort or civil wrong.[144]

It appears that the quantum of damages recovered by the plaintiffs amounted to approximately €360,000.[145] This was hardly an earth-shattering amount. Given the complexity of the case and the time it took from instituting proceedings in 1992 to finally recovering damages in 2001, it is easy to see why few would be tempted to take a private competition damages case.

Though the Supreme Court was unequivocal in *Donovan v ESB* that '...the court's function was to compensate injured parties for damages suffered as a result of ... abuse [of dominance]',[146] a more recent decision of the Supreme Court casts a worrying doubt over that Court's possible approach to future private competition cases. In *Pierce t/a Swords Memorial & anor v Dublin Cemeteries Committee & ors*[147] Macken J, delivering the unanimous decision of the Court made the following comment...

> Another reason why I consider that a claim under the Competition Act 1991 is not a real alternative remedy, is that orders made in competition cases, especially those commenced by the Competition Authority, but also private ones, pursuant to the provisions of the Competition Act 1991, are geared predominantly towards

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[144] Ibid.

[145] National Report, Ireland, (undated) prepared by John Meade, (n140), citing Whitaker, *Competition,* Volume 12, Edition 6, page 105. In fact the citation is incorrect as it should refer to Volume 12, Edition 5.

[146] National Report, Ireland, (undated) prepared by John Meade, page 26 (n140).

[147] *Pierce t/a Swords Memorial & anor v Dublin Cemeteries Committee & ors*, [2009] IESC 47.

> declaratory relief, even if it is also possible for a party to seek an injunction and damages arising from the declaratory order.[148]

The above quoted comment should be looked at in the context within which it was made. The plaintiffs had sued the defendants on the basis that the plaintiffs' constitutional right to earn a living was being interfered with by the defendants engaging in an activity which the plaintiffs claimed the defendant had no authority to do. The defendants had argued that the plaintiffs did not have *locus standi* to bring such an action and that in fact a more appropriate cause of action lay under the Competition Act.

Though the Supreme Court agreed that '...a theoretical remedy in law under the Competition Act 1991...'[149] existed, the court found that...

> ...the true question which arises in cases of this nature and which allows the court to exercise an appropriate discretion in the matter, is which is the more appropriate remedy in the context of common sense and the ability to deal with the questions raised and the principles of fairness.[150]

Given that there was a prior history of one of the plaintiffs making failed attempts to engage either the European Commission or the Irish Competition Authority to take enforcement action under competition law, it was not unreasonable for the plaintiffs to look to the constitutional right to earn a living as the best way to seek redress notwithstanding the private right of action that they still enjoyed under the Competition Act.

Even though the background context of the case is the question of *locus standi* and the appropriateness of which type of action a plaintiff should take, the comments of the Supreme Court on competition

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[148] Ibid page 8.

[149] Ibid.

[150] Ibid.

remedies are worrying. The Court appears to believe that the principle remedy available in competition cases is declaratory relief, even though the plaintiffs were claiming that they had suffered injury including financial loss and the Competition Act states that damages are a remedy in a competition case. Of course, a damages action might fail if a breach of competition law is not established, but a statement to the effect that the predominant purpose of an order in an action in competition law is to obtain declaratory relief rather than damages or an injunction appears to be without foundation.

Quantifying damages

As can be seen from the foregoing, defining damages in a competition case is a difficult task. Quantifying those damages can be an equally if not even more difficult task.

The Commission acknowledged this difficulty, and in its White Paper on damages actions it proposed...

> ...to draw up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.[151]

The Department of Enterprise, Trade and Employment in its submission on behalf of Ireland to the Commission on its White Paper welcomed the proposal to draw up non-binding guidance for quantification of damages. According to the Department, such non-binding guidelines would be of great use to litigants, their advisers and to the courts.

The High Court in England and Wales in the *Devenish* case took the view that precise quantification of damages is not necessary in a competition damages action. In that case Lewison J stated...

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[151] White Paper on Damages actions for breach of the EC antitrust rules, {SEC(2008) 404} - {SEC(2008) 406} at para 2.5, page 7.

> I am not ... persuaded that evidential difficulties of exact proof are insuperable difficulties to effective compensation as a matter of domestic law. Nor am I persuaded that the usual techniques by which the courts award damages in domestic cases are inadequate to produce a fair result.[152]

Despite the confidence of the English High Court on the matter, there is little doubt that non-binding guidance on the quantification of damages would be helpful to those engaged in antitrust damages litigation. However, it is important to understand why such guidance is just that, 'guidance', and not a set of specific rules. It will be seen that such guidance could only ever be non-binding given the myriad ways in which damages in an antitrust action can be quantified.

The 'But-for World'

According to the American Bar Association guide on proving antitrust damages...

> The essential starting point for any damages quantification is the but-for premise that the defendant's violation did not occur. That premise is the foundation for constructing a hypothetical 'but-for world,' which, when compared to the plaintiff's actual experience, should isolate the effect of the violation on the plaintiff from the effects of all other events. A quantification of the difference between the plaintiff's experience in the but-for and actual worlds determines the amount of damages.[153]

This 'essential starting point' in the quantification of damages was established in a number of cases in the first part of the 20th century, the most recent of which was the 1946 case of *Bigelow v RKO Radio Pictures*.[154] It is not only the accepted starting point for antitrust damages actions in the U.S. but is also recognised as such by the

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[152] *Devenish Nutrition Limited & Others v Sanofi Aventis SA*, 32 (n32).

[153] Kaethe Carl and others, *Proving Antitrust Damages: Legal and Economic Issues,* (2nd ed ABA Publishing, Chicago 2010) 53.

[154] 327 U.S. 251 (1946)

Commission in its Staff Working Paper accompanying the Green Paper on damages actions.[155] To measure a plaintiff's loss using the 'but-for premise' essentially involves measuring the difference between the plaintiff's actual position because of the anti-competitive conduct that caused the harm and the position that the plaintiff would have been in 'but-for' the illegal conduct by the defendant.

A Variety of Methods for Quantifying Loss

The Commission proposal in relation to guidance referred to 'approximate methods of calculation or simplified rules on estimating the loss'. There are in fact a number of possible methods of quantifying damages in a competition case. The Staff Working Paper accompanying the Green Paper listed these various methods under the following four general headings: a) the simple calculation methods, b) more complex calculation methods, c) the sampling method and d) the *ex aequo et bono* quantification.[156]

Simple calculation methods

The first head involving the 'simple calculation methods' contains three separate methods for quantifying damages. These are, the 'before and after method', the 'yardstick approach' and the 'cost based approach'. Each of these three approaches has its attractions, but it also has its pitfalls.

The 'before and after approach' involves comparing prices during the period covered by the illegal behaviour with prices before the infringement started and prices after the infringement was brought to an end. This method allows an assumption as to what the prices would have been 'but for' the competition infringement.

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[155] See paragraph 126 of Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final} page 38 for a description of the 'but-for premise'.

[156] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final} 39 – 40.

The 'yardstick approach' compares the prices in the market where the infringement occurred with prices in a similar market but where there was no competition infringement.

The 'cost based approach' is based on the infringer producing evidence of its costs per unit of the good/service that was subject to the infringement. A reasonable profit is then estimated and added to the cost of the unit, rather than the anti-competitive overcharge that had been added due to the infringement, and this process leads to an estimation of the competitive price.

The obvious attraction of using any one of these three methods of quantifying damages is the comparative simplicity that is involved in their use. However, each of the methods, and especially the first two, is dependant on the existence of extensive price information from either the periods before and after the period of the infringement or for the time period of the comparator region. Such information can be difficult to come by and is often unavailable.

The ABA in its book on quantifying damages points out that the 'before and after' and the 'yardstick' approach depend on the assumption that the prices used for comparison were unaffected by the illegal infringement.[157] It is possible, for example that in a neighbouring area where the illegal behaviour was not carried out, prices in any event might have risen to match that in the area where there was an infringement.

In the External Impact Assessment Report, it is pointed out that research has shown that '...since implicit or tacit collusion is more likely after explicit collusion, after-the-cartel prices may be higher than the but-for ones.'[158] Both the ABA and the External Impact Assessment report also point to other variables that can lead to inaccuracy with these approaches including the need to choose carefully the non cartelised or non monopolised price for use in the comparator as there

[157] See *Proving Antitrust Damages: Legal and Economic Issues* at 58 (n153) for a discussion on this point, and pages 56 – 62 more generally for a discussion on these various quantification methodologies.

[158] External Impact Assessment Report for the European Commission, 4.3.1.11, 442, (n 85).

is a need '...to rely on stable, non-volatile prices with exact information on the duration of the cartel.'[159]

In relation to the cost based approach, the External Impact Assessment Report points out that this '...is the simplest amongst the methods that do not use any comparator.'[160] This method has its difficulties and shortcomings, not the least of which is determining the appropriate mark up for a reasonable profit. It is also reliant on precise accounting data for calculating the 'per unit' costs of the goods that were subject to the infringement.

The ABA point out that in the United States perfection is not required in quantifying loss: a welcome observation, as perfection using these models is impossible. [161]

More complex calculation methods

The Commission outlined two methods under this head in its Staff Working Paper accompanying the Green Paper. The first of these two is called the 'price prediction method.' As the Commission explained...

> ...the price prediction approach uses econometric modelling to seek to predict prices in a "but for" scenario on the basis of historical determinants of prices or yardstick comparisons with other markets. This approach is a more sophisticated version of the before and after and yardstick approaches but is heavily dependent on the quality of the data available.[162]

The other method for quantifying damages suggested by the Commission under this 'more complex' calculation method involved the 'theoretic modelling approach.' This method...

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[159] Ibid.

[160] Ibid 444.

[161] See *Proving Antitrust Damages: Legal and Economic Issues* at 58 (n153) at footnote 25 citing the case of *Blue Cross & Blue Shield United v Marshfield Clinic*, 152 F.3d 588, 592 – 594 (7th Cir. 1998).

[162] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final} para 134, page 39.

> ...simulates an oligopolistic model to ascertain the effects of the distortion. Econometric modelling and other data are used to estimate key model parameters to feed them into a theoretical model.[163]

The Commission acknowledges that the two 'more complex' models for calculating damages can lead to more accurate calculations of damage to plaintiffs. However the downside of these processes is that they are much more data intensive and are very time consuming. Though the Commission does not point this out in the working Paper accompanying the Green Paper, the cost of engaging in either of these two processes could prove prohibitive. These processes would require high level economic and specialist legal analysis, and the use of economic evidence in court. This might achieve a more accurate quantification of damage, but at a high cost that could render the use of these models pointless.

The sampling method

The Commission suggested that there is an additional method of quantifying damages where the plaintiff shows 'reasonable approximations of the damage suffered.' To explain this method the Commission cited the Court of Justice in *Société anonyme des laminoirs.*[164] There the Court when looking to see what the but-for world was in that case stated amongst other things that...

> [w]hen it is necessary to consider a situation as it would have been if there had been no wrongful act or omission, the court must, whilst insisting that all available evidence be produced, accept realistic approximations, such as averages which have been established by means of comparisons ... Although in using this method it is not possible to arrive at an exact assessment of the damage, nevertheless the sampling methods habitually used in

[163] Ibid.

[164] Joined cases 29, 31, 36, 39 to 47, 50 and 51/63 *Société anonyme des laminoirs v High Authority* [1966] ECR 139.

> economic surveys make it possible to reach acceptable approximations provided that the basic facts are sufficiently reliable.

Using the sampling method looks a little like making an educated guess to arrive at the quantum of damage involved.

The ex aequo et bono quantification

Ex aequo et bono quantification of damages equates with the courts estimating a reasonable quantum of damages where a more exact quantification is either impossible or too difficult to prove. The court looks at the actual pricing for the goods or services that has been charged because of the anti-competitive conduct and compares it with a benchmark price. This benchmark price might be arrived at by using...

> ...historical information on prices (but-for-price) or different geographical markets (yardstick) or market share fluctuations (market share approach for lost profits claims).[165]

As the Commission point out, the *ex aequo et bono* method of estimating damages '...could be used in conjunction with, or to underpin from a legal perspective the use of simple calculation methods...'[166] However, the simplicity of this particular method leads to a loss of accuracy.

Some Criticism of Proposed Guidelines

Kortmann and Swaak[167] noted that, 'as was to be expected' the Commission's proposal to issue guidelines on the quantification of

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[165] External Impact Assessment Report for the European Commission, para 4.3.4., page 450 (n85).

[166] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final} para 139, page 40.

[167] Prof J Kortmann and C Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic', [2009] Vol 30, Issue 7, European Competition Law Review, 340 – 351.

damages in antitrust damages actions '...received almost no negative responses.'[168] As Kortmann and Swaak put it...

> In view of the limited experience of the European courts with antitrust claims, any assistance with issues of damage calculation is welcome (especially if it comes in the form of "non-binding guidance").[169]

However, Kortmann and Swaak are critical of the proposal. They point to the fact that the Commission appears to be considering a suggestion put forward by the OFT that the average overcharge in cartel cases be used as '...guidance for courts in determining the quantum of damages.'[170] That suggested average overcharge put forward by the OFT was contained in the OFT's response to the Commission Green Paper[171] where the OFT suggested a rebuttable presumption of an overcharge of 10% by the cartel. The OFT's suggestion was...

> It may be appropriate for there to be a rebuttable presumption that the cartel has resulted in a price increase of, for instance, 10 per cent.[172]

The OFT were merely putting forward a hypothetical scenario for the Commission to consider when looking at guidance in quantifying damages. Kortmann and Swaak correctly point out that there has been some research showing that cartels can overcharge in the region of 20 – 30%.[173] This research would undermine presumptions favouring an average overcharge estimate in cartels of 10%. Kortmann and Swaak

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[168] Ibid at 346.

[169] Ibid.

[170] Ibid, citing Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final} {SEC (2008) 405} {SEC (2008) 406} at paragraph 200, page 60.

[171] Office of Fair Trading, 'Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules', (Response) (May 2006) OFT844.

[172] Ibid at para 6.6, page 17.

[173] Prof J Kortmann and C Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less Than Enthusiastic',(n167) in footnote no. 54, page 346, where the authors cite John M Connor, 'Price-fixing overcharges: legal and economic evidence', (Staff Paper No. 04-17, (revised) Purdue University, 2005) at page 70.

though, were more concerned that allowing a rebuttable presumption in these non-binding guidelines would make it...

> ...considerably easier to bring antitrust damage claims, including unmeritorious claims.[174]

Despite this criticism of the Commission's proposal, it retains some merit. It should be recalled that the guidelines would be 'non-binding', which would leave courts free to use the quantification method that best suits the case that is being dealt with in a given instance. Furthermore, as the calculation of damages in competition cases is potentially so difficult, guidelines could assist both the court and parties to proceedings to reach a speedy conclusion on the quantification of damages which in itself would be a much more efficient use of scarce court resources. As Kortmann and Swaak acknowledge, almost all respondents welcomed the idea of non-binding guidelines, suggesting that concerns regarding the accuracy of such guidelines might be exaggerated. It should be recalled that there is now at least some guidance from the caselaw of the Court of Justice, notably in the case of *Manfredi* to assist the courts when quantifying damages in antitrust cases.

Summing Up

The Commission in its Staff Working Paper accompanying the White Paper, acknowledged the difficulty that courts face in quantifying damages in a competition case. However, the Commission did reach the conclusion that the requirement of the Court of Justice that a victim of an antitrust violation has a right to full compensation '...cannot be reconciled with national provisions that fix an upper limit on the amount of compensation that the victim of such an infringement could recover.'[175] The Commission set out the *acquis communautaire* on the issue which states...

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[174] Ibid.

[175] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final} para 196, page 59.

> The principle of full compensation implies that Member States may not a priori fix any form of upper limit on the amount of compensation that the victim of a competition law infringement could effectively recover.[176]

The Commission referred to the Court of Justice decision in the case of *Marshall*[177] to support this conclusion. In that case, the Court of Justice stated...

> It also follows from that interpretation that the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.[178]

Conclusion

This chapter has given an overview of some at least of the issues that will arise in Irish courts if and when damages actions are instituted in competition cases. Thethrough its decision in *Manfredi* has given some direction on how damages should be defined, though the possibility remains that a more expansive view might yet be taken by Irish courts in actions taken under domestic or Community law.

Irish courts will certainly have to deal with the problem of quantifying damages in competition cases. Though the Irish courts have great experience in quantifying damages in various types of actions, competition cases bring their own particular difficulties that will need to be dealt with. These difficulties include establishing who is harmed by

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[176] Ibid 59 – 60.

[177] Case C-271/91 *Marshall* [1993] ECR I-4367

[178] Ibid para 30.

competition infringements and therefore who should be allowed to recover.

These difficulties are not theoretical. They have caused problems in other jurisdictions, most notably the United States where after years of dealing with private antitrust litigation, solutions still evade legislators and courts alike.

The problems of defining and quantifying damages in competition cases as well as determining who is harmed and therefore should be allowed to recover are just some of the difficulties that will need to be addressed in private competition actions in Ireland in the future. In the next two chapters it will be seen that mechanisms that allow for mass recovery of small and dispersed losses of victims (usually the consumer) in competition cases are also needed in Ireland and that adopting the appropriate mechanism for assisting recovery in those cases throws up many more difficulties for lawyers, courts and legislators. For now it is worth recalling Calvani's caution...

> While there is no Irish law directly addressing many of these issues today, these questions will inevitably confront Irish judges. Whether they are influenced by American cases remains to be seen. But one thing is certain; the issues will arise.[179]

[179] T Calvani, 'Cartel Penalties and damages in Ireland: criminalization and the case for custodial sentences', page 276, (n2).

CHAPTER 4: COLLECTIVE REDRESS

Introduction

It was argued in Chapter 2 that although private actions may have an enforcement role in standalone cases, the primary function of private actions for damages in competition law is to compensate victims for their loss. In Chapter 3 it was shown that identifying the victims of antitrust violations (and therefore ascertaining who can or should sue in damages) can be a very complex problem. It can also be difficult to define and quantify the type of damages award that should be available in a damages action.

In this chapter an overview will be given of one of the most important and effective ways of allowing small and dispersed claims in competition cases to be litigated effectively thereby allowing consumers receive compensation for their losses. This is collective redress or the class action procedure. There are currently a number of jurisdictions that employ a variety of class action mechanisms, the best known of which is the American class action. The American class action has many attractive features, but the alleged excesses it encourages have also been criticised.

Our nearest neighbour Britain also has procedures that allow for multi-party litigation. However, as will be seen, the system there has thus far proved largely ineffective in allowing redress in damages in competition cases. A lively debate is underway in Britain about how the system of collective redress can be improved to allow consumers' rights be vindicated in competition cases. That debate in Britain has been sparked by the negative experience there in multi-party litigation in competition cases, as well as by the Commission initiative in both its Green and White Papers on damages actions. The debate was further fuelled by the recent global financial crisis which threw up an opportunity, since spurned, to introduce a novel method of collective redress in the United Kingdom through the Financial Services Act 2010.

At the outset it will be necessary to look at the debate that the European Commission initiated in the area of collective redress for

damages in competition cases. As has been pointed out previously in this thesis, the Commission initiative on damages actions has started a wide-ranging debate in Europe on damages actions in competition cases and has focused specifically on the obstacles to effective redress that exist in Europe. As already mentioned, the Commission has indicated that removing those obstacles may require legislation.

The Commission identified effective system of collective redress as essential to claimants with small and dispersed losses successfully receiving compensation for competition law infringements. Any legislation that the Commission may introduce in this field would impact directly on the rights of claimants in Ireland under the Treaty. It is therefore necessary in this chapter to place the Commission initiative on collective redress beside the forms of collective redress already in use in both the United States and in Britain and compare them. The Commission looked at various models currently in use when considering the model(s) it proposed for use in Europe. In particular it looked at the model in use in the United States, but in the end opted for a class action model similar to that currently in use in the United Kingdom.

There have been complaints regarding the American system of class action due to alleged abuses in that system. The British method of allowing collective redress is undergoing review and possible reform. How effective (or otherwise) the British model is, is relevant to the debate taking place in Europe. The choice of collective redress model in Britain will also have relevance in Ireland. This is so not only because of the choices that the Commission may make if legislation is introduced for collective redress, but also because of the impact the British (and Commission) model(s) may have on any future system of collective redress in Irish domestic law. As mentioned, the Commission's preferred model for collective redress bears many similarities to the models currently in use in Britain. In Ireland, given that the Commission may legislate in this area, it will be necessary to understand exactly what type of collective redress model the

Commission wants to make available to claimants in damages actions for small claims in competition cases.

Recap: Legal requirement for effective redress

In Chapter 2, the requirement under Community law for Member States' legal systems to set out procedural rules governing private actions was identified. For example, the Court in *Manfredi* stated...

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[1]

In fact the Court made clear that...

> It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC (now Article 101 TFEU).[2]

Therefore, citizens' rights flowing from Community law are not only safeguarded - there is an onus imposed on Member States' legal systems to lay down detailed procedural rules governing actions that safeguard those rights.[3]

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[1] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

[2] Ibid.

[3] See Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, and Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* (n1).

The Commission, in its Staff Working Paper accompanying the White Paper, recognised that citizens have rights under the competition provisions of the Treaty...

> Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle also applies to indirect purchasers.[4]

This statement (that any individual can claim compensation for harm suffered) is problematic on a number of fronts. For instance, in the previous chapter it was seen that there can be an extraordinary degree of complexity in determining who can sue in competition cases. That discussion revealed that the most likely class of persons to sue for an infringement of competition law are secondary victims. Secondary victims can be divided into both direct purchasers and indirect purchasers. This factor (the division between direct and indirect purchasers) causes further complexity for the quantification of damages along the distribution chain and for correctly identifying who has suffered harm. In this regard it will be recalled that the issue of the passing on defence was discussed and that though it has not yet been addressed in a competition case in Ireland, there is little doubt that this will become a feature in private competition litigation in Ireland in the future.

However, as already stated, the question of who can sue in a private competition case can be very complex even where the injured class can be identified as direct purchasers of a specific product within a defined geographic area.[5] A problem that can arise is where the injured persons are a wide and dispersed group of claimants who have individually suffered small scattered losses, though collectively the overcharge by a cartel (or dominant firm abusing its market power)

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[4] Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 37.

[5] See for example the Heating Oil case where the cartel which gave rise to the prosecution in that case was located in Galway City and County and related to the sale of marked gas oil and kerosene for the period January 1st 2001 to February 11th 2002. For a discussion of that case see P Gorecki and D McFadden, 'Criminal Cartels in Ireland: The Heating Oil Case', European Competition Law Review (2006) 631 – 640.

might run to many millions of euro. This occurred in the heating oil cartel in Galway which operated between January 1st 2001 and February 11th 2002. Evidence given in court during the sentencing of JP Lambe (facilitator of the cartel and convicted of aiding and abetting the other members of the cartel) indicates that the cartel in total overcharged their customers approximately €4,400,000 in that period. However, individual customers might have only been overcharged around €60 each.[6] John Bronsteen and Owen Fiss, in an article on the class action rule in the United States, explain why the class action is useful to claimants with these small and scattered claims...

> The class action has many uses. The most compelling occurs when someone inflicts a small harm on each member of a large group of people. In such a case, any one victim would have to spend more money to hire a lawyer than he could recover by winning the lawsuit, so he would not sue. The class action enables the claims of all the individual victims to be aggregated, thereby spreading the lawsuit's costs among all class members and creating a potential recovery that is large enough to make the suit economically viable. Although each individual who is harmed wins only a small amount, the public benefit is substantial.[7]

Michael Rush has argued that the '...class action presents itself as the ideal means of recovering an award...'[8] in circumstances where there are small and scattered losses suffered by numerous claimants. He lists the following reasons for this...

> First, the class of potential litigants is large. Second, it is likely that the people affected are dispersed over a wide geographic area. Third, each person is only likely to have

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[6] See Whitaker, *Competition*, 'Western oil cartel – 1: heating oil customers can now sue for damages', Volume 14, Edition 4, page 84.

[7] J Bronsteen and O Fiss, 'The Class Action Rule' (2003) The Notre Dame Law Review 78 no.5 1419-53, at 1419.

[8] M Rush, *The Defence of Passing On*, (Hart Publishing, Oxford, 2006) page 225.

> a very small financial stake in the outcome of any proceeding. The cost of actually commencing litigation, with the attendant risk of failure, will far outweigh the potential benefits of recovery. Finally, it is foreseeable that many of the affected consumers will not actually be aware of their right of recovery.[9]

Rush then argued that the solution to the foregoing problem was the use of the class action...

> In these circumstances there is considerable scope for utilization of the class action mechanism. It has the capacity to inform people of their rights, organize them as members of a coherent group and enable the expenses of litigation to be defrayed across a large number of people.[10]

Waye and Morabito argue the case for class actions in clear and simple terms. Pointing out that litigation has now become so expensive that it '...has become the prerogative of the very rich or the very determined...'[11] they argue that...

> ...even the judiciary are warning that the courts are no longer able to provide effective access to justice This problem is particularly acute for individual holders of small to medium-sized claims. Because the monetary compensation that might be attained from these claims is relatively small compared to the cost of litigating them unless the claims can be aggregated it is unlikely that they will be pursued.[12]

Waye and Morabito's solution to this problem is the class action which, they argue, enables...

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[9] Ibid.

[10] Ibid.

[11] V Waye and V Morabito, 'The dawning of the age of the litigation entrepreneur', (2009) The Civil Justice Quarterly, 389 – 433, at 389.

[12] Ibid.

> ...aggregation with a view to taking advantage of the economies of scale realisable by permitting a small number of claim holders to initiate a claim on behalf of a class of parties similarly affected by harm. Class actions thus act as a panacea for the limited access to justice to which small to medium claim holders are ordinarily subject.[13]

Andrea Giussani used a very colourful metaphor when describing the advantages of the class action over individual damages suits in his article on the possible advent of class actions in Europe. He drew the analogy of placing commuters onto buses rather than placing them individually into cars...

> At first glance, one may think that buses would worsen the traffic conditions: they are big and relatively slow, and would also force the cabs to reduce their own speed. Citizens, however, know all too well that the contrary is true: buses not only give access to transport to people who can't afford a taxi ride, but also transport in just one vehicle many customers who would otherwise use different cabs; the corresponding reduction of vehicles in the streets guarantees, on the whole, lighter, and not heavier, traffic conditions, with a stunning increase of efficiency in citizens' global mobility.[14]

It will be seen in Chapter 5 that there is an anomaly in the Irish legal system in that the small claims for damages for losses incurred by consumers in competition cases under both domestic and Community law cannot be vindicated. The reason for this is that these small claims cannot be recovered in the District Court. Even if such claims could be claimed in that court this would not provide a practical method of recovery. The obvious method for allowing recovery in such cases is by

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[13] Ibid.

[14] A Giussani, 'Enter the damage class action in European law: heading towards justice on a bus', (2009) Civil Justice Quarterly, 132 – 140.

way of collective redress.[15] Though collective redress is not unknown in Ireland, the current methods that allow for such actions are wholly inadequate for the purpose.

This chapter will involve a review of the method of collective redress suggested by the Commission in its White Paper on damages actions. This review will help inform the debate on the need for a mechanism of collective redress for mass dispersed small claims. That debate will certainly arise when addressing the problem of how persons injured by competition law infringements can obtain redress in private actions in Ireland under both domestic and Community law.

The Debate in Europe

A review of the collective redress mechanisms available in some jurisdictions such as the United States or the United Kingdom involves a review of models for collective redress that are actually in current use. A review of the position in the European Union is a different matter. That review involves an examination of the steps taken so far by the Commission to advocate the introduction of collective redress mechanisms for private actions in competition cases. In turn, these steps form part of the much larger project undertaken by the Commission on the study of the underdevelopment of damages actions for breach of the competition rules under the Treaty.

The review conducted by the Commission in its Green and White Papers on damages actions reveals both the need for effective forms of collective redress in competition damages actions and the complexity and potential pitfalls inherent in such systems. The Commission initiative has at the very least sparked an intense debate in this area and has offered the opportunity to study and discuss options that might be used to address the need for effective forms of redress for injured consumers in competition damages cases.

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[15] Alternative dispute resolution or mediation are not alternatives that can be considered in this context. A defendant in a competition infringement action will hardly consider mediation if there is no threat of legal proceedings and a possible damages award as an alternative. In other words, without the real threat of litigation, there is no incentive to mediate small claims with a large group of customers.

The ultimate outcome of the review by the Commission may result in legislation, for example by way of Directive, which would directly impact on the legal remedies available to injured parties in competition cases under the Treaty in Ireland and the other Member States.

In Chapter 2 reference was made to the fact that the Court of Justice has clarified in *Courage v Crehan* that there is a right of action for citizens to claim damages for injury suffered through anti-competitive agreements that fall foul of Article 101 TFEU. In that case the Court stated that the...

> ...full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101 (1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[16]

Though this clarification was helpful for the Commission, it was not the first time that such a right had been recognised. Clifford A Jones points out that the Commission believed from the early 1960's that damages actions for breach of the competition rules was a possibility...

> ...the Commission from the beginning has considered that actions for damages were available to third parties in addition to the declarations of nullity mentioned in Article [101(2) TFEU].[17]

Jones also states that in its proposal to the Council with respect to what ultimately became Regulation 17 of 1962 and which has since been replaced by Regulation 1 of 2003, the Commission made a statement about the civil consequences of Treaty violations. Jones quoted the original statement in French and provided the Commission's unofficial English translation from the time which reads...

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[16] Case C-453/99 *Courage –v- Crehan*, (n3).

[17] CA Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford University Press, Oxford 1999) 33.

> ...to these sanctions may be added the eventual publicity of the decision and the inherent risks of the nullity of the understanding, and of damages which could be raised by third parties.[18]

Referring to the Commission's early thoughts on the possibility of damages actions flowing from a breach of the Competition rules in the Treaty, Jindrich Kloub made the point...

> Therefore while perhaps the Commission had harboured its interpretation of the existence of a right to claim damages for over 40 years, the *Courage* decision has provided it with the solid backing of authoritative judicial interpretation.[19]

The court's decision in *Courage v Crehan* gave the Commission, according to Kloub, 'the black letter support'[20] it needed to embark on its analysis of the current state of development in Europe of damages actions in competition cases under the Treaty. The decision of the Court of Justice in *Manfredi*[21] gave added impetus to the Commission in this analysis. It will be recalled that the Court in *Manfredi* said...

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...[22]

These cases together with the introduction of Regulation 1 of 2003 encouraged the Commission to consider reform and in particular, the

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[18] Ibid page 34, quoting the Commission's unofficial translation of 28 October 1960.

[19] Jindrich Kloub, 'White Paper on Damages Actions for breach of the EC Antitrust Rules: Plea for a more holistic approach to Antitrust Enforcement' (2009) European Competition Journal, 517.

[20] Ibid.

[21] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] (n1).

[22] Ibid.

introduction of mechanisms that safeguarded citizens' rights which are derived under the Treaty.

The Commission's review resulted in the 2008 publication of the White Paper on damages actions for breach of the antitrust rules.[23] Leading up to that point the Commission had taken a number of steps including, for example, adopting a Green Paper[24] on damages actions and a Commission Staff Working Paper[25] which was annexed to the Green Paper.

These documents were preceded by a study commissioned by the European Commission and carried out by the English law firm Ashurst. This study resulted in the Ashurst Report[26] which found...

> The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment.[27]

One outcome of the review and analysis engaged in by the Commission on the development of damages actions was the need for a method to allow for collective redress in competition cases. The White Paper makes this clear...

> With respect to **collective redress**, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. Individual consumers, but also small businesses, especially those who have suffered **scattered and relatively low-value damage**, are often

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[23] White Paper, 'Damages actions for breach of the EC antitrust rules', Com 2008 (165) Sec (2008) 404 – 406.

[24] Green Paper, 'Damages actions for breach of the EC antitrust rules', Com 2005 (672), 19th December 2005.

[25] Commission Staff Working Paper, Annex to the Green Paper, Damages actions for breach of the EC competition rules, {Com (2005) 672 final}

[26] Study on the conditions of claims for damages in case of infringement of EC competition rules, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

[27] Ibid at page 1.

> deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently **remain uncompensated**.[28] (Emphasis in original)

The Commission Staff Working Paper[29] that accompanied the White Paper gives an overview of the responses received by the Commission from interested parties to its Green Paper. This Staff Working Paper fleshes out how the Commission selected the specific proposals contained in its White Paper on damages. The Staff Working Paper gives more detail on the case made by the Commission for the 'Necessity to provide for means of collective redress for all categories of victims of competition law infringements.'[30] In particular the Commission argues in the Staff Working Paper that...

> ...competition law is a field where collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus access to justice, and contribute to the overall efficiency in the administration of justice ... it is essential that collective redress mechanisms are available for competition law infringements.[31]

In its Staff Working Paper accompanying the White Paper, the Commission suggests that there are a number of ways of achieving collective redress for the victims of competition infringements. These various methods of collective redress are necessary in competition cases because...

> By allowing an aggregation of claims for damages that would otherwise not be viable in individual court action, judicial collective redress mechanisms not only ensure the victims' right of access to justice, but also reduce the

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[28] White Paper Com 2008 (165), para 2.2.1., (n23).

[29] Commission (EC), 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', Brussels 2.4.2008, SEC (2008) 404.

[30] Ibid page 15.

[31] Ibid, para 40, page 16.

> inequality between the victims (often the weaker party) and the infringers (often the financially stronger party)...[32]

The Commission then makes clear that...

> It is therefore necessary to design facilitating measures enabling consumers and small businesses to effectively seek redress in court for the harm suffered from competition law infringements. These measures would play an important role in rendering the victims' right to antitrust damages more effective in Europe.[33]

The Commission is clear that there is a need for mechanisms enabling collective redress in competition damages claims. The Commission outlined three areas that needed to be addressed when considering what model of collective redress to follow. The three areas are: a) funding the action; b) defining, representing and controlling the group or class; and c) quantification and distribution of damages. These issues are briefly outlined here.

Funding the action

In its Staff Working Paper accompanying the White Paper, the Commission pointed out that...

> Even if collective redress mechanisms allow for more efficient bundling of claims and sharing of the risks and costs among a greater number of victims, the fact remains that available ways of funding can have a serious impact on the use, or misuse, of collective redress mechanisms.[34]

According to the Commission, depending on the system put in place to allow for collective redress, there are a number of ways of funding such actions. These include funding by the victims themselves; funding

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[32] Ibid, para 41, page 16.

[33] Ibid, para 42.

[34] Ibid, para 45, page 17.

by a body designated for the purpose; funding by the lawyers acting on behalf of the class and who will act under a contingent fee arrangement; funding by some form of public scheme including legal aid or by a private scheme established for the purpose; funding by insurance companies and; funding by independent parties acting in a private capacity somewhat like a venture capitalist investing in a risky business venture. There is no doubt that most of these funding mechanisms would cause serious concerns under Irish law, notably in the area of maintenance and champerty.[35] That issue will be addressed in Chapter 6 of this thesis.

Defining, representing and controlling the group or class

The definition of the group, according to the Commission in its Staff Working Paper...

> Influences the practical functioning of the mechanism (e.g. how many victims will participate to the action, the way damages will be quantified and distributed, etc.).[36]

The Commission points out that there are several ways that the group may be defined. For example...

> ...the group may be strictly defined (e.g. strict identity of harm, named victims) or more loosely defined (e.g. similarity of harm, unnamed victims, etc.).[37]

The form of collective redress model that is actually used will determine how groups in collective actions are defined. Closely connected with this is the issue of affiliation to the group in an action. Affiliation to the group may be by way of 'opt-in' or 'opt-out' depending on what collective redress model is chosen. The role of the court in supervising collective actions will be important in guaranteeing...

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[35] The law on maintenance and champerty are explained in some detail in Chapter 6.

[36] 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', para 46, (n29).

[37] Ibid.

> ...an appropriate definition of the group of victims, the adequacy of the representation or to avoid unmeritorious actions being brought.[38]

How the group in a class action is represented is also important. In its submission on the White Paper on damages actions, the American Bar Association (the 'ABA') commented on this point...

> The Staff Working Paper recognizes the importance of adequate representation. Indeed, in the United States and Canada, the overriding due process concern facing a court at the outset of class action litigation is to ensure that the class representatives will fully and fairly protect the interests of the so-called "absent" class members, the vast majority of whom typically play no active role in the litigation.[39]

The adequacy of class representation is of greater importance in 'opt-out' class actions than in 'opt-in' actions according to both the Commission and the ABA...

> This makes sense because opt-in class members, by definition, are aware of the lawsuit and will have expressed some desire to participate, making it more difficult for any one plaintiff to benefit at the expense of others.[40]

The ABA, drawing from its '...substantial experience and expertise in antitrust law and issues relating to private rights of action in the United States and around the world...'[41] continues by making the further point

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[38] Ibid.

[39] Joint Comments Of The American Bar Association Section Of Antitrust Law, Section Of International Law, And Section Of Business Law On The Commission Of The European Communities' White Paper On Damages Actions For Breach Of The EC Antitrust Rules, June 30, 2008, page 25, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf

[40] Ibid.

[41] Ibid 2.

that even an 'opt-in' class action, if the number of members grows to very large proportions...

> ...will need to be managed by one or a small handful of lead plaintiffs and their counsel; hundreds or thousands of plaintiffs cannot be at counsel table at the same time. Procedural safeguards are therefore essential to ensure, even in the case of opt-in classes, that the lead plaintiffs do not elevate their individual interests above those common to the rest of the class.[42]

Quantification and Distribution of Damages

Quantifying the damage to individuals who have suffered dispersed and small losses will prove difficult in most competition cases...

> The more loosely the group of victims is defined, the more difficult it will be to precisely quantify the harm suffered by all the individual claimants, and to actually distribute the damages awards to the victims.[43]

The complex problem of quantifying damages in a competition case was addressed in Chapter 3. There it was shown that there are four general methods of quantifying damages currently used in competition cases in different jurisdictions. These were listed as a) The simple calculation methods, b) The more complex calculation methods, c) The sampling method and d) The *ex aequo et bono* quantification.[44] The first two methods listed are in turn broken down into further separate methods of quantifying damages in competition cases.

It becomes even clearer in this Chapter that the enormous complexity involved in calculating damages in competition cases is made more difficult when quantifying the dispersed and relatively small losses

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[42] Ibid 25-26.

[43] Commission Staff Working Paper accompanying the White Paper, para 47, 18, (n29).

[44] Commission Staff Working Paper Annex to the Green Paper, 39 – 40, (n25).

suffered by a vast group of consumers, few of whom may have been identified in an 'opt-out' class action.

Distributing the damages award in a successful action will rarely be as straightforward as paying specific sums to known individuals. In some instances it will be impossible to identify some if not all the injured persons in a class action case. A method used in some legal systems of applying damages awarded in a successful class action where some or all of the injured parties cannot be identified is to apply the damages *cy-près*. The Commission explained this method of applying damages in a footnote as follows...

> Distribution according to the "cy-pres" doctrine means that the damages awarded are not distributed directly to those injured to compensate for the harm they suffered (for instance because they cannot be identified) but are rather used to achieve a result which is as near as may be (e.g. damages attributed to a fund protecting consumers' interests in general).[45]

Rachael Mulheron in her research[46] for the Civil Justice Council in the United Kingdom used the example of the OFT's milk price-fixing case as an occasion that would have been ideal for an 'opt-out' class action with damages applied cy-près, if such an option had been available. Mulheron first discussed the poor result in the action taken by *Which?* in the *JJB Sports* case, arguing...

> ...it is striking how much more effective the follow-on 'football shirts' case may have been, had it been possible to litigate such an action under an opt-out regime which permitted an aggregate class-wide assessment of

[45] Commission Staff Working Paper accompanying the White Paper, at footnote 28 (para 47), page 18, (n29).

[46] R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', a research paper submitted the Civil Justice Council for England and Wales, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf and accessed on the 4th October 2010.

> damages, and thereafter, a cy-près order for damages distribution.[47]

Mulheron then continued...

> The same thoughts occur in respect of the milk price-fixing case ... where the profits made from the cartel clearly outstrip the fines imposed, where the purchasers have no prospect of proving the fact of purchase, where the amount per claim is very small, but where the aggregate profits have no realistic prospect of being stripped without aggregate damages assessment and cy-près distribution...[48]

Mulheron quoted an article by Caroline Binham of *The Lawyer*. In her article Binham claimed...

> Supermarket mega-chains Asda, J Sainsbury and Safeway have pleaded guilty to fixing milk and dairy prices following a probe by the Office of Fair Trading (OFT). The trio will have to pay a total of £116m in fines.
>
> The supermarkets could now face the prospect of follow-on actions by wronged consumers or competitors.
>
> ...The cartel cost the consumer around £270m, said the OFT.[49]

There is no provision for 'opt-out' class actions in the UK at present, nor is there the ability to apply damages cy-près. For this reason and contrary to Binham's claim that '...supermarkets could now face the prospect of follow-on actions by wronged consumers...'[50] there was no prospect that a follow on action for damages under section 47B of the Competition Act 1998 would occur in the milk price-fixing case. In that

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[47] Ibid 40-41.

[48] Ibid 41.

[49] C Binham, 'Supermarkets guilty of milk price-fixing' *The Lawyer* (London) 7th December 2007.

[50] Ibid.

case the consumer was overcharged an estimated £270m and yet the wrongdoers were not, and could not be stripped of their illegal gains by private follow-on actions for damages and nor could the injured consumers recover damages for their loss.

The reason that there could be no follow on action in the milk case is obvious. How could any consumer who bought milk from one of the cartel members prove that they had made such a purchase during the relevant time period covered by the OFT investigation? Who would have retained evidence of such a purchase, be it in the form of a receipt or an empty milk carton? Obtaining evidence and identifying injured parties in the milk case would be almost impossible.

Even if it were possible to prove purchase of milk from a member of the cartel during the time period when the cartel operated, how could an individual quantify their loss? Would it really be practicable to make payments in the order of a few pennies or at best a few pounds to each of the injured parties? The example of the OFT's milk case reveals the need for a form of class action that allows damages to be applied cy-près. The shortcomings in the UK's provision for collective redress will be dealt with later in this chapter.

Two Options for Redress: the Commission's Proposals in the White Paper

Having identified many of the underlining issues on collective redress mechanisms, the Commission took a conservative approach and proposed two options, which, when analysed are somewhat disappointing. The Commission's proposed options were...

> ...**representative actions**, which are brought **by qualified entities**, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (i) officially designated in advance or (ii) certified on an ad hoc basis by a Member State for a

particular antitrust infringement to bring an action on behalf of some or all of their members; and

...**opt-in collective actions**, in which victims **expressly decide** to combine their individual claims for harm they suffered into one single action.[51] (Emphasis in Original)

Both options involve actions on behalf of clearly identified injured parties. The Commission accepts that in some 'rather restricted cases,'[52] the representative actions model it proposes might be taken on behalf of *identifiable* victims. Otherwise, this option will require that...

Victims shall normally be identified either at the beginning of the proceedings or at a later stage.[53]

The proposal for an 'opt-in' collective action envisages a system where '...the victims have to express their intention to be included in the action.'[54] The Commission therefore advocated the introduction of a model of collective redress on behalf of known and identified injured persons rather than a broader model that would cover a greater mass of unknown, and sometimes unknowable, injured persons.

The Commission in its Staff Working Paper accompanying the White Paper acknowledged the shortcomings in its proposal for an 'opt-in' collective action...

An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of

[51] White Paper, Com 2008 (165), at page 4 (n23).

[52] Commission Staff Working Paper accompanying the White Paper, in para 52, page 19, (n29).

[53] Ibid, in footnote 30, page 19.

[54] Ibid, para 58, page 20.

> their alleged harm suffered), an opt-in collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim's harm.[55]

In the UK, the consumer group *Which?* took the first, and still the only representative action under section 47B of the Competition Act 1998 in the *JJB Sports*[56] case. The experience of *Which?* and of those who worked on the case (Deborah Prince and Ingrid Gubbay) is explored later in this chapter. However, it is useful to note here the view that *Which?* came to at the conclusion of the *JJB Sports* case...

> There is in our view a compelling case for an opt out provision to be made available.[57]

In its submission to the Commission on the White Paper, the OFT, in somewhat oblique fashion, gave added support to creating a mechanism that allows for 'opt-out' (or 'at large' actions as the OFT refers to them) alongside 'opt-in' collective actions. The OFT referred to the action brought by *Which?* in the *JJB Sports* case and acknowledged that...

> Only one body is currently designated and, in the 5 years since the legislation came into force, the designated body has brought only one action. Thus, the current UK approach based on prior designation has not resulted in a significant level of either applications for designations or of representative actions.[58]

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[55] Ibid, pages 20–21.

[56] *Consumers Association v JJB Sports plc*, Competition Appeals Tribunal (CAT) case number: 1078/7/9/07.

[57] R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', 40, (n46).

[58] Office of Fair Trading, 'Response to the European Commission's White Paper, Damages actions for breach of the EC antitrust rules' (Submission) July 2008, page 5 available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/oft_en.pdf and accessed on the 4th October 2010.

Given the negative British experience with a more restrictive representative action taken by a qualified entity under the section 47B Competition Act procedure, the OFT then recommended...

> ...a less restrictive option whereby the court may give permission to representative bodies to bring both at large and named actions.[59]

The ABA provides further arguments against the model for collective redress suggested by the Commission in the White Paper...

> A verdict in an opt-in class will not legally bind potential plaintiffs who did not "opt-in," but the outcome of the case can have serious consequences for individual claims that may be brought separately. For example, if the representative plaintiff does a poor job developing the case, a court might issue a decision exonerating the defendants. This precedent might make it difficult for a subsequent plaintiff to prove the defendants' liability. At the other extreme, a large damages award might leave the defendant with insufficient resources to satisfy subsequent judgments.[60]

It is quite likely that the Commission shied away from proposing a more far reaching method of collective redress such as an 'opt-out' model because of fears of importing the alleged excesses of the US system of class actions into the European legal arena. The Commission admitted this was the case in the Staff Working Paper accompanying the White Paper on damages actions...

> The development of collective redress mechanisms in Europe has increasingly attracted attention because of the importance of these mechanisms for access to justice, but

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[59] Ibid.

[60] ABA Submission on White Paper, 26, (n39).

> also due to the excesses that have been reported from other jurisdictions.[61]

In a footnote to the above quoted passage the Commission explained that...

> Excesses in US class action litigation have often been mentioned, and the risk of importing these excesses into Europe was raised. It is important to note, however, that the overall legal context in the US, which goes well beyond the mere class action mechanism, is very different from the one in Europe. US class actions in antitrust cases are characterised by a combination of features that is very specific to the US, including jury trial, one-way shifting of costs, treble damages, wide pre-trial discovery, contingent fees agreements and an opt-out mechanism.[62]

It is clear therefore that the Commission opted for a more conservative 'opt-in' model for collective redress along with a parallel representative model taken on behalf of clearly identified injured persons in order to avoid the feared excesses of the US class action model.[63]

Overview of the US Class Action

Reasons for this overview

At this point it is necessary to review the American class action procedure. The necessity for this review arises because the Commission was conscious of the American class action model when it consulted on the issue of collective redress in damages actions. However, the Commission decided to steer clear of that model when drafting its own collective redress model. The reason the Commission decided against following the American model was explained in the

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[61] Commission Staff Working Paper accompanying the White Paper, para 43, pages 16-17, (n29).

[62] Ibid, at footnote 24, page 17.

[63] For a discussion of the alleged excesses in the American class action and the debate that framed changes o the law, see Nan Ellis, 'Class Action Fairness Act of 2005: The Story behind the Statute', 35 Journal of Legislation 77 (2009) 76 - 112.

preceding paragraphs. The Commission feared the alleged excesses attached to the American class action.

This overview will look at aspects of the American class action, both positive and negative, as it is used in American antitrust law. The purpose of this overview is to highlight some of the myths surrounding the class action and see how real or imagined these myths are. These myths allege excesses and abuses in class action proceedings by plaintiffs and their lawyers. When some of the layers of myth surrounding the American class action are pealed away, the American class action can be studied properly. That study reveals a mechanism for redress that can be effective for small claimants when used properly and monitored effectively.

Excesses in the American class action are not entirely imagined. In this section of the chapter, some of those excesses will be discussed. For example, the use of judicial discretion by one judge in applying funds cy-pres to progress a personal project, led to the establishment of the Loyola Consumer Law Review. A section of this overview, titled 'Some Concerns with the US Class Action Procedure', will give examples of abuses in the class action procedure. It will also be shown that excesses in the class action have at times been exaggerated. This in turn has lead to the creation of some of the myths surrounding the American class action. Persuasive arguments have been made countering some of this myth making and empirical evidence has undermined some of the wilder claims of abuse. These will be referred to as will a case study of how a class action was dealt with by Judge Richard Posner sitting in an appeal court. That case study will show both the excesses in the system, and how they are sometimes dealt with successfully. Finally, this section of the Chapter will look at some of the steps taken in the United States towards reforming the abuses in the class action system.

By revealing excesses in the class action and by understanding what causes them, it should be possible to avoid them when introducing an effective class action model into Europe and Ireland. By exploring the

American class action, the positive aspects of that procedure can be highlighted with a view to adapting it for use in an Irish (and European) model for collective redress. It will be seen later in this chapter, that aspects of the American class action, notably the provision for 'opting-out' from the class, are being actively considered in Britain.

This overview will outline how the American class action works. The various prerequisites that are required for a class action are explained as is the class action certification procedure. This will show there are rules governing the class action procedure, rules designed for oversight of class actions by the courts and that are intended to guard against abuse. This section of the thesis will also look at the doctrine of cy-pres as it is used in the American class action. This is relevant in the context of the Commission's early thoughts on a more expansive class action model and also in the context of the later discussion in this chapter on the debate on collective redress in Britain. It will be seen that the American class action is very different to the forms of collective redress suggested by the Commission as a solution to the problem of bringing mass claims in competition damages cases.

Finally, it should be noted that there is a vast literature on the federal class action in the United States.[64] This overview is necessarily curtailed by the space that can be devoted to the American class action in a thesis dealing with the broader issue of private actions in an Irish competition law context. Class actions form part only of an overall thesis on antitrust damages actions. The American class action forms a sub-part of the class action story, albeit a very important part worthy of devoting time to in this thesis.

Some stand out features of the American class action

The American class action has certain features that distinguish it from the model proposed by the Commission. Amongst these distinguishing

[64] See for example footnote 59 on page 25 of the Joint Comments of the ABA in its submission to the Commission's White Paper, (n39) which lists just some of the journals and books dealing with this area. See also Marc D Ashley & others, *Antitrust Class Actions Handbook*, (ABA Publishing, Chicago 2010).

features is that a class action can be initiated by a self-appointed class representative and that the class action can proceed on an 'opt-out' basis. These features are briefly explained here.

The self appointed class representative

It will be recalled from earlier in this Chapter that one of the two options put forward by the Commission was the introduction of representative actions by a named entity. That named entity would represent those persons who agree to participate in the collective action. This is very different to the class action procedure in the United States. There, the class action is initiated by an individual who appoints himself as class representative without first consulting other members of the putative class. That representative is the person who decides to take a class action on his own behalf and on behalf of those of his fellow class members who do not take the active decision to 'opt-out' from the proceedings. Bronsteen and Fiss outline this unusual feature of the American class action...

> In the class action ... there is no consensual tie between the represented and the representative. In fact, the named plaintiff appoints himself as representative of the class, and most of those represented do not know the representative or even that they are being represented ... The named plaintiff represents the interests of the class.[65]

The issue of a self appointed representative taking an action on behalf of a class will be returned to below when dealing with some concerns regarding the American class action.

The 'Opt-Out' Model

A related feature of the American class action is that it involves the 'opt-out' procedure. The 'opt-out' is used in the United States in contrast to the 'opt-in' procedure which is used elsewhere such as

[65] John Bronsteen and Owen Fiss, 'The Class Action Rule', at pages 1419 – 1420, (n7).

Britain and is proposed by the Commission. Giussani explained the difference between the two systems in very simple terms...

> ...in the former case ['opt-in'], the judgment binds only the group members that actively joined the suit; in the latter case, all the group members are bound, except those that actively departed from the collective action.[66]

Rachael Mulheron defines the 'opt-out' approach to class actions as allowing...

> ...a class action to be commenced by the representative plaintiff without ... the express consent of the class members.[67]

There are those that criticise the use of an 'opt-out' provision in class actions. Those criticisms will be dealt later in this section of the chapter. For now Mulheron's point should be noted that...

> ...for all the rhetoric about the respective advantages and disadvantages of opting out ... it is clearly the preferred choice in modern common law systems.[68]

The rules governing class actions in federal cases in the United States are contained in Rule 23 of the Federal Rules of Civil Procedure[69] ('Rule 23') which were adopted in their present format in 1966. Rule 23(c)(2)(B) expressly states...

> (v) that the court will exclude from the class any member who requests exclusion;[70]

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[66] A Giussani, 'Enter the damage class action in European law: heading towards justice on a bus', 136 (n14)

[67] R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford and Portland, Oregon 2004), 34.

[68] Ibid, at 35.

[69] Federal Rules of Civil Procedure, from the Cornell University Law School website at http://www.law.cornell.edu/rules/frcp/Rule23.htm and accessed on the 4th October 2010.

[70] Ibid.

Benjamin Kaplan, when reviewing the amendments made to the Rules of Civil Procedure, gave an outline of the history of the class action leading up to the changes introduced in 1966. He explained that the reason for moving from the previous 'opt-in' procedure under the 1938 rules to a new 'opt-out' procedure under the new 1966 rules was to ensure that the dispersed small claims of 'small people' would not be ignored or go unclaimed as had been the case under the 1938 civil rules procedure which involved 'opt-in'. He argued...

> If now we consider the class ... we see that requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people – especially small claims held by small people – who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.[71]

Rule 23 of the Federal Rules of Civil Procedure

Rule 23(c)(2)(B), which creates an 'opt-out' provision in class actions, applies only to class actions that are taken under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Rule 23(b)(3) is of particular relevance as it is the rule that applies to class actions in antitrust cases. It should be noted that Rule 23 sets down the rules applicable to all class actions and is not limited solely to class actions in antitrust.

There are four cumulative prerequisite conditions that must be met before a class action will be certified by the courts. The Federal Trade Commission (the 'FTC') in a submission[72] to the OECD's Competition Committee in 2006 gave a useful outline on how the four prerequisites in Rule 23 operate...

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[71] B Kaplan, 'Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure', (1967) 81 Harvard Law Review 397-398.

[72] Federal Trade Commission (Submission to the OECD), Competition Committee, Working Party No. 3 on Co-operation and Enforcement Roundtable Discussion On Private Remedies: Class Action/Collective Action; Interface Between Private And Public Enforcement – United States of America, DAF/COMP/WP3/WD (2006) 34.

> Rule 23(a) sets out the four prerequisites for a class action. First, there must be numerosity of class members such that "joinder of all members is impracticable." Second, there must be commonality, meaning there are "questions of law or fact common to the class." Third, there must be typicality of "the claims or defences of the representative parties" as compared to the rest of the class. And fourth, the representative parties must "fairly and adequately protect the interests of the class." Rule 23(b) further provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter.[73]

The four prerequisites contained in Rule 23(a) are cumulative. Nicholas Pace in his paper on Class Actions in the United States[74] deals with how the four prerequisites of the Rule must be met. Pace makes light of the first three prerequisites. In relation to the numerosity requirement he states...

> As a practical matter, the numerosity requirement is not a difficult hurdle to clear; on occasion, classes of just a few dozen members have been certified.[75]

For the second prerequisite, that of commonality, Pace points out that this is another '...requirement that is relatively easy to meet'[76]:

> ...in cases seeking certified class status is that there be "questions of law or fact common to the class." Courts have held that there need be just a single common

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[73] Ibid 2-3.

[74] NM Pace, 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', (Report) 2007, available from the Stanford Law School website at http://www.law.stanford.edu/library/globalclassaction/PDF/USA National Report and accessed on the 4th October 2010. According to the ABA in its Antitrust Class Actions Handbook: 'In antitrust actions, particularly large scale actions brought on behalf of all consumers of a product, a finding of numerosity "is especially appropriate" and is rarely contested.' See Marc D Ashley & others, *Antitrust Class Actions Handbook*, at page 154, (n64).

[75] Ibid 7.

[76] Ibid.

> question ... A class-wide resolution of the case by settlement or verdict would, however, only apply to that common question.[77]

The *typicality* prerequisite will not usually cause too much of a problem either. Most civil claims are settled before trial in the United States and this is '...especially so for certified class actions.'[78] Problems might only arise at trial, or indeed thereafter. The reason for this is that '...it would be the class representative's individual claims that would be decided by the jury or judge and the outcome would essentially be applied to the entire class.'[79] Therefore, the claims of the class members and the representative that took the action '...need to be based on the same legal theories of liability and arise from the same events or practices.'[80] The ABA Handbook cites the case of *In re Catfish Antitrust Litigation*[81] in support of this view. The ABA Handbook states...

> ...where it is alleged that the defendant engaged in a common scheme to violate the antitrust laws, there is a strong assumption that the representative's claims are typical.[82]

The final prerequisite demands that representation of the class be both fair and adequate. This is an *alignment of interests* prerequisite designed to protect the interests of class members and avoid a conflict of interest that might arise between the representative plaintiff and the class members not present. Pace argues...

> In many ways this goal is similar to that of the typicality requirement and is satisfied when the representative is a

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[77] Ibid. Again the ABA Handbook is instructive on the matter: 'Rule 23(a)(2) does not require that all questions of law and fact be common. Rather, there must exist at least one issue, the resolution of which will affect all or a substantial number of class members ... Generally, this commonality requirement is not a heavy burden to meet.' See Marc D Ashley & others, *Antitrust Class Actions Handbook*, at page 154, (n64).

[78] Pace, 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', at 7, (n74).

[79] Ibid.

[80] Ibid.

[81] *In re Catfish Antitrust Litigation*, 826 F. Supp. 1019 (N.D. Miss. 1993).

[82] Marc D Ashley & others, *Antitrust Class Actions Handbook*, at page 162, (n64).

> member of the class, is making the same claims based on the same facts and law, and has the same interest in a successful outcome.[83]

This final prerequisite of the Rule 23(a) procedure in effect places responsibility on the...

> ...legal counsel initially chosen (at least in theory) by the class representative and as such the attorney has to be sufficiently qualified, experienced, unconflicted, and able to vigorously prosecute this type of litigation.[84]

Satisfying the four criteria in Rule 23(a) is not sufficient for a class action to be certified by the courts. 'To obtain class certification, plaintiffs must establish all four elements of Rule 23(a) along with one provision of Rule 23(b).'[85]

> Rule 23(b) further provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter.[86]

Rule 23(b) lists four categories '...or pigeonholes'[87] into one of which a class is required to fit. The four categories are rather confusingly contained in three numbered sub-sections, Rule 23(b)(1) to Rule 23(b)(3). Rule 23(b)(1) contains two further sub-parts (A) and (B) that act as alternates and therefore make up the four categories into one of which a class must fit having also satisfied the four criteria in Rule 23(a).

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[83] NM Pace, 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', at 7, (n74).

[84] Ibid.

[85] *Robert A. Georgine & Others v Amchem Products Inc* 83 F.3d 610; 1996 U.S. App Ct. and reiterated in *In Re Schering-Plough/Merck Merger Litigation* Civil Action No. 09-CV-1099 (DMC), United States District Court For The District Of New Jersey, 2010 U.S. Dist.

[86] FTC Submission to the OECD's Competition Committee, (n72).

[87] J Bronsteen and O Fiss, 'The Class Action Rule',1427, (n7).

The relevant category in Rule 23(b) for the purpose of this review is the last category which is found at Rule 23(b)(3). The criterion in that category reads...

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.[88]

Pace characterises this category as 'Financial Injury Class Actions.'[89] He makes the point that...

> Unlike mass tort class actions which seek compensation for personal injury or property damage ... these claims usually have some sort of basis in an existing contractual or business relationship between the class members and the defendants. The primary goals here are the restitution of any ill-gotten gains the defendants might have realized and the deterrence of similar practices in the future, on the part of the defendant as well as others within the same industry.[90]

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[88] Federal Rules of Civil Procedure, (n69).

[89] NM Pace, 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', at 17, (n74).

[90] Ibid 17-18.

Pace states that particularly notable cases in this group include '...labor and employment, antitrust, and various consumer matters.'[91]

Class Certification

Rule 23(c)(1) gives the court a vital role as gate-keeper in class action proceedings. The rule sets out the requirement that the class action be certified by the court before it can proceed. Rule 23(c)(1) reads...

> (A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.
>
> (B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).
>
> (C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.[92]

Class certification by a court is a vital 'gate-keeper' function of the courts in federal class actions in the United States. Edward H. Cooper explained the importance of class certification and contrasted the position in the United States under Rule 23(c) with the position under Part IVA of the Federal Court of Australia Act 1976 where class certification is not required. Cooper argues...

> At least one country - Australia - has apparently devised a class procedure that does not require court certification of the class. It is difficult to believe, however, that a group action can be maintained on any basis other than pure opt-in without some measure of court control. The risks of sloppy class definition are too great, including

[91] Ibid.

[92] Federal Rules of Civil Procedure, (n69).

> fundamental conflicts of interest and indeterminate res judicata consequences. The risks of indifferent or incompetent representation both by the named class member parties and by class counsel are also great. The dangers of a purely representative-defined class are particularly acute when the action is resolved by settlement. In settling, the class adversary is interested in spreading the res judicata net as wide as possible. The class representative may not have adequate incentive to resist, and the court has had no prior encounter with the class definition question to guide its review of the settlement.[93]

It is clear that the court is expected to play a central role at the outset of class action litigation in ensuring that the action only proceeds once the class has been defined and appropriate counsel is appointed to ensure the interests of absent class members are safeguarded.

Clayton Antitrust Act and Treble Damages

Rule 23 does not create the right to bring a private action in antitrust cases in the United States. This right of action derives from section 4 of the Clayton Antitrust Act of 1914.[94] That section reads *inter alia*...

> ...any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

This section of the Clayton Act is important as it is this provision that allows for treble damages in antitrust cases, including in class actions

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[93] EH Cooper, 'Class Action Advice in the form of Questions', (2001) 11 Duke Journal of Competition and International Law, 215.

[94] The Clayton Antitrust Act (15 U.S.C.A. § 12 et seq. [1914]).

under Rule 23. Treble damages are not available in class actions taken under Rule 23 in any other area of the law.

Cy Pres Doctrine

As previously mentioned, Rachael Mulheron suggested that the *JJB Sports* litigation in Britain may have been more successful if it had involved an opt-out class action with undistributed funds applied cy-pres. Mulheron also used the OFT's successful milk price-fixing case as an example of the beneficial use that an opt-out class action with funds distributed cy-pres can have in consumer redress cases.

In the context of quantifying and distributing damages in competition cases the Commission stated...

> Distribution of the award itself may be direct (e.g. by the defendant or by an independent fund, with various possible degrees of action requested from the victims) and may exceptionally be more indirect (e.g. cy pres distribution, distribution to a public interest foundation).[95]

The application of the doctrine of cy-pres in the distribution of funds was described in the *In re Lease Oil Antitrust Litigation* as follows...

> This disposition of funds that have not been individually distributed, by distributing them for the next best use which is for indirect class benefit, has been approved under the equitable power of courts in various cases under the analogous cy pres doctrine. The cy pres, or next best use, doctrine originated in the charitable trust field when courts took steps to prevent the failure of trusts. In the class action context, cy pres applications have also been referred to as fluid class recovery distributions.[96]

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[95] Commission Staff Working Paper accompanying the White Paper, para 47, 18, (n29).

[96] *In re Lease Oil Antitrust Litigation* (No. II) 2007 U.S. Dist. LEXIS 91467, (S.D. Tex. Dec. 12, 2007. The Court in *Turner v Murphy Oil* further explained that the cy-pres doctrine... '...has migrated and appeared with increased vigor in class action/multi-district litigation milieu. As used

Distribution of unclaimed funds under the cy-pres doctrine is a matter for the discretion of the courts. Rule 23 does not refer to cy-pres distribution, nor is it found in a statutory provision. In the case of *In re Lease Oil Antitrust Litigation*[97] the District Court for the Southern District of Texas explained the Court's discretion to apply funds cy-pres as follows...

> ...this Court holds that the disposition of unclaimed funds in a class action settlement in federal court is a procedural matter committed to the discretion of the district court under Federal Rule of Civil Procedure 23, and thus is unconstrained by state unclaimed property laws. Rule 23 governs practice and procedure in federal court class actions. Among other provisions, Rule 23(d) gives the district court powers to make orders relating to procedural matters in a class action, and Rule 23(e) provides that any settlement of a class action must be approved by the district court. Specifically, Rule 23 grants the district courts discretion to determine whether a proposed settlement is "fair, adequate, and reasonable."[98]

In *Powell v Georgia-Pacific Corp*[99] the US Court of Appeals explained that...

> Cy-pres (sometimes called fluid-class) distribution has traditionally been used in cases in which class members are difficult to identify or where they change constantly,

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in this context a court should endeavor to distribute unused funds in a manner most consistent and compatible with the issues which gave rise to the lawsuit which created the fund.' *Patrick Joseph Turner et al v Murphy Oil USA Inc.*, Civil Action No. 05-4206, Consolidated Case Section "L" (2) United States District Court For The Eastern District Of Louisiana 2009 U.S. Dist.

[97] Ibid, *In re Lease Oil Antitrust Litigation*.

[98] Ibid. The court in *Turner v Murphy Oil* again confirmed its discretionary powers to apply unclaimed funds cy-pres: 'In class action suits filed in federal court, the district court's ability to determine the use of unclaimed funds derives from the court's inherent power to manage its own docket and its power under Rule 23(d) of the Federal Rules of Civil Procedure to make such orders as necessary to manage the class action. When a class action settlement agreement is silent as to the distribution of excess funds, or when there is an adjudicated aggregate class recovery that results in unclaimed funds, the district judge must make the determination about the appropriate distribution of the surplus ... This distribution is usually done according to the tenets of the cy pres doctrine.' *Patrick Joseph Turner et al v Murphy Oil USA Inc.*, (n96).

[99] *William Powell et al v Georgia Pacific Corporation et al*, 119 F 3d 703 (8th Cir 1997).

> as when a utility is found liable for overcharging its customers ... In these cases, the court, guided by the parties' original purpose, directs that the unclaimed funds be distributed "for the indirect prospective benefit of the class."[100]

The court in the *Powell* case acknowledged that... 'Cy pres distributions of unclaimed funds have been controversial in the courts of appeals.'[101] However, in *Powell* the court said that...

> After carefully reviewing the record, we ... conclude that the cy pres remedy fashioned by the court was not an abuse of discretion.[102]

An example of the controversy that is caused by the use of cy-pres distribution is the case of United States District Court Judge Hubert Will. Spencer Waller explained in an article in the *Loyola Consumer Law Review*[103] that Judge Will...

> ... increasingly believed that the centrist tradition in American antitrust law was threatened by the influence of the so-called Chicago school of antitrust analysis and the associated well-funded group of think tanks, academic literature, and judicial education programs that sought to inculcate what he considered a false belief that a narrow definition of allocative efficiency was the only value at stake in antitrust ... Judge Will decided to do something about it.[104]

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[100] Ibid.

[101] Ibid. The court cited the case of *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307-09 (9th Cir 1990) by way of example where the courts refused to apply funds cy pres.

[102] *William Powell et al v Georgia Pacific Corporation et al,* (n99).

[103] SW Waller, 'The Future of Private Rights of Action in Antitrust: A Conference Introduction', [2004] 16 Loyola Consumer Law Rev. 295.

[104] Ibid 1 – 2.

It seems that Judge Will had the opportunity in a major treble damages class action settlement[105] to apply surplus funds to establish the Institute for Consumer Antitrust Studies and directed the funds to Loyola. The purpose of the application of funds cy-pres in this case was '...to promote the interests of consumers in the ongoing antitrust debate.' His decision to apply the funds in this fashion failed on that occasion as his decision was overturned on appeal. However, this did not deter Judge Will. He eventually succeeded in his ambition in applying the undistributed excess funds in another class action settlement[106] to the Loyola Institute. As Waller points out...

> Over the years, the Institute has received additional funding and support from Loyola University Chicago, subsequent cy pres court distributions, foundations, law firms, corporations, and individuals.[107]

It is unlikely that this level of judicial activism would be tolerated in Ireland. Judge Hubert Will stretched the doctrine of cy-pres to its limits. The Judges action in this instance should not condemn the use of the cy-pres doctrine in antitrust cases. A carefully crafted, statutorily based doctrine can have a beneficial use in class action cases. The downside of the perceived excessive use of the doctrine of cy-pres can be seen in the judgment of Richard Posner in the *Mirfasihi* class settlement case. He observed in relation to the use of the cy-pres doctrine in that case that...

> The doctrine, or rather something parading under its name, has been applied in class action cases ... but for a reason unrelated to the reason for the trust doctrine. In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement ... to the class

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[105] *In re Folding Carton Antitrust Litigation*, 687 F. Supp. 1223 (N.D. Ill. 1988).

[106] *Superior Beverage Co. v. Owens-Illinois, Inc.*, 847 F. Supp. 477 (N.D. Ill. 1993).

[107] Waller, 'The Future of Private Rights of Action in Antitrust: A Conference Introduction', 2 (n103).

> members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy ... is purely punitive.[108]

Posner's somewhat jaundiced view of the use of the cy-pres doctrine is understandable where the doctrine has been stretched to breaking point. Posner does not reject the class action system itself and his further comments on the settlement in *Mirfasihi* below show his concerns that class members are dealt with fairly. However, his view that the application of unallocated funds in a class action settlement to the next best or nearest use cannot be considered as a form of punitive award. In this instance, counsel for both the plaintiffs and Fleet had agreed settlement terms. The District Court Judge was left with unallocated funds and in his discretion attempted to apply these funds to the nearest or next best cause.

Some concerns with the US Class Action Procedure

Hans Erichson quoted some of the Senate debates on the passage of the Class Action Fairness Act[109] ('CAFA') which reveal the degree of antipathy amongst some legislators to the perceived abuses in the American class action. For example Senator Orrin Hatch is quoted as saying...

> The real kicker is this: in some cases, many believe the only interests served by these settlements are those of the class counsel. Again, they will walk away with hundreds of thousands and sometimes millions of dollars. And what do the class members recover? Perhaps a worthless coupon ... This is an intolerable practice and one that the Class Action Fairness Act will curb.[110]

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[108] *MAV Mirfasihi v Fleet Mortgage Corporation*, 356 F.3d 781, 784, U.S. 7th Circuit (2004).

[109] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note).

[110] H.M. Erichson, 'CAFA's Impact on Class Action Lawyers', 156 University of Pennsylvania Law Review, 1593 - 1627, (2007 - 2008) at page 1592, citing 151 Cong. Rec. S.1007 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch).

The FTC in its submission[111] to the OECD outlined some of the concerns that are regularly raised about the American class action procedure. These included the opt-out system under Rule 23, insufficient notice given to class members and incentives for collusive settlements.

In relation to allegations of collusive settlements the courts retain some control in agreeing the terms of settlements in class actions. In *Priddy v Edelman* the court clarified its role in class action settlements...

> In evaluating a proposed settlement of a class action, the district court is required to examine the terms of the settlement and the process by which the settlement was arrived at, to make sure that the terms are reasonable and that the settlement is not the product of fraud, overreaching, or collusion.[112]

Despite the 'gate-keeper' function that the Court is expected to play in class action settlements, concerns remain that the class action is ripe for collusive settlements where lawyers representing the plaintiff class collude with defendants to secure high fees for themselves whilst gaining little (if anything) of benefit for their class clients. This, amongst other things, necessitated various attempts at reform[113] culminating in the enactment of the CAFA in 2005. The issue of reform of the class action will be returned to below.

The FTC highlighted the opt-out aspect of the Rule 23 procedure as being a source of some concern. The FTC argued that...

> Some commentators argue that there is a flaw in an opt-out system that permits "lawyers to speak for immense

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[111] FTC submission to OECD (n72).

[112] *Priddy v Edelman*, 883 F 2d 438, 447 (6th Cir 1989).

[113] See for example H.M. Erichson, 'CAFA's Impact on Class Action Lawyers', (n110) at page 1594 where he gives the following examples: 'Recent class action reforms - the Private Securities Litigation Reform Act of 1995 (PSLRA), the Supreme Court's 1997 and 1999 settlement class action decisions in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, and the Rule 23 amendments of 2003 have - addressed a variety of legal issues but share a common theme of mistrust. Each sought to tighten controls on class action lawyers to reduce abuse in light of problems of agency, autonomy, and leverage.'

> 'phantom' classes of people who have not selected them -- who may, in fact, be entirely unaware that they are parties to a lawsuit," which allows class counsel, rather than the class members, to drive the litigation and automatically gives counsel substantial bargaining power.[114]

Bronsteen and Fiss referred to this aspect of the opt-out in class actions under Rule 23. The opt-out allows a self appointed plaintiff, not acting as agent for the other class members, to bind all other class members to the result of a class action that the plaintiff initiates (on the theory that the class members' interests were actually represented)...

> Obviously, such a method of appointment and the system of representation it sets into motion are inherently suspect and grate against even a minimum regard for allowing individuals to be in charge of their own destiny.[115]

Waye and Morabito argued...

> Modern class-action regimes that adopt opt out devices do not entail a rejection of this philosophy. They simply recognise that its rigid application to legal disputes that involve similarly situated victims of illegal conduct would result in denial of access to justice where the claims are individually non-recoverable (or where, as a result of non-financial barriers, individual proceedings would not be

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[114] FTC submission to OECD, 4, (n72).

[115] John Bronsteen and Owen Fiss, 'The Class Action Rule', at page 1421, (n7). An example from Australia, provided by Waye and Morabito is also informative. They refer to a 1992 parliamentary debate on the proposed introduction of an 'opt-out' provision for class actions in the Federal Court of Australia when it was argued: 'Our court system is based on the fact that individuals make their own decisions to initiate proceedings; it is done by the conscious decisions of individuals. That is what ought to happen; people ought to take responsibility for whether they want to start proceedings. But under this Bill they become part of a system without knowing, or perhaps even caring. It really goes against the philosophical basis of our legal system and affects the individual rights of people to make those decisions.' V Waye and V Morabito, 'The dawning of the age of the litigation entrepreneur', (2009) The Civil Justice Quarterly, 389 – 433.

> brought) or in the inefficient use of finite judicial resources where the claims are individually recoverable.[116]

Former Commissioner Thomas B. Leary of the FTC argued in a speech[117] delivered to a class action summit in Washington that there is real potential for conflicts of interest and other abuses in an 'opt-out' class action...

> One direct effect is that lawyers, rather than clients, become the real parties in interest ... Lawyers are subject to the same frailties as any other group of human beings and it is unreasonable to expect that they will always be able to differentiate between their own interests and the interests of the class members they are supposed to represent. The traditional problem of conflicts among a class of plaintiffs or defendants that has always existed in multiparty litigation has been transmuted into a potential problem of conflicts between lawyers and class members.[118]

However, Bronsteen and Fiss argue that '...the willingness of the legal system to tolerate interest representation and the method of appointment it implies might stem from two considerations.'[119] The first of these considerations is the '...social importance of the class action.'[120] They make the point that...

> In some instances, most notably where great social harm is dispersed among countless individuals, the class action is the only mechanism by which our legal system can redress a large-scale public wrong. There, although

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[116] Ibid, Waye and Morabito, 'The dawning of the age of the litigation entrepreneur', (2009) The Civil Justice Quarterly (n115).

[117] Based on oral remarks made at The Class Action Litigation Summit, Washington, D.C., 'The FTC and Class Actions' (June 26, 2003). Available at http://www.ftc.gov/speeches/leary/classactionsummit.shtm and accessed on the 4th October 2010.

[118] Ibid.

[119] John Bronsteen and Owen Fiss, 'The Class Action Rule' 1421, (n7).

[120] Ibid.

> permitting interest representation denies absent class members formal access to the courts, rejecting that form of representation renders the legal system powerless to perform its most important function - holding accountable the party responsible for a great social harm.[121]

The second consideration which is a subsidiary consideration according to Bronsteen and Fiss is the small and dispersed value of damage that is suffered by consumers such as can arise in competition cases. They make a deft argument for class actions in these cases...

> ...where the dollar loss to each individual is small, though the aggregate social harm is great - not much would be lost by the individual putatively represented if the representation proves inadequate. Each individual member of the class would lose the chance of litigating his claim (a day in court), but because his individual stake is so small he would probably never have utilized the opportunity.[122]

The FTC submission to the OECD also lists a number of '...shortcomings in notices to the class.'[123] The shortcomings in these notices to injured parties in an antitrust class action might include an omission of '...pertinent information, such as the nature of the claims in the lawsuit...'[124] The notice might also...

> ...provide scant notice of the legal rights that may be at issue in the class action; may "sell" the settlement rather than present it in a neutral fashion; may attempt to dissuade class members from participating in or objecting to the proposed settlement; or may hinder the ability of

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[121] Ibid.

[122] Ibid.

[123] FTC submission to OECD, 4, (n72).

[124] Ibid.

> potential class members to receive additional information regarding the settlement.[125]

Probably of most concern are the excesses that the FTC list as arising under the heading 'Incentives for Collusive Settlements.' This scenario envisages the lawyers for the class settling on terms that are advantageous to their own interests and not necessarily to their class clients. As the FTC points out '...the overwhelming majority of class actions, like the majority of other lawsuits, are settled before trial.'[126]

Thomas Leary argued that there are incentives for the lawyers for the plaintiff class together with the defendant to collude in their own interests and at the expense of the class. Leary refers to two areas of specific concern that arise under this head. These are '... (1) so-called "coupon" settlements ... and (2) settlements where class counsel get an inordinately large share of the recovery.'[127] Although Leary concedes that there may well be cases where coupon settlements are appropriate he refers to two cases which highlight the downside of such settlements. In one of them he says...

> In the Charter Communications settlement, defendant cable company was accused of charging customers excessive late-payment fees. Under the settlement, attorneys got $5.5 million in fees. Customers got a new late-payment policy and a choice of various free services, but they also got larger cable bills. One class member complained: "please don't sue anyone else on my behalf. I can't afford any more of these brilliant legal victories."[128]

Despite the FTC's concerns regarding the excesses that occur in antitrust class actions, the FTC concluded in its submission to the OECD that...

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[125] Ibid.

[126] Ibid 5.

[127] Thomas Leary, 'The FTC and Class Actions', (n117).

[128] Ibid.

> A class action can be an efficient mechanism for using judicial resources, providing consumer redress, deterring wrongdoing, and safeguarding the integrity of the marketplace.[129]

Abuses exaggerated

Earlier, it was shown that the Commission shied away from the American model of class action because of the attendant alleged abuses. Nan Ellis has argued that when the 'problem' (in this case alleged abuses in the class action procedure in the United States) is defined incorrectly, or worse, defined by those with an interest to effect change in the law to align it with their own interests, then the law is changed without necessarily bringing about desired reform...

> The class action lawsuit specifically has been the subject of critical commentary. The rhetoric surrounding class actions lawsuits mirrors the rhetoric discussed [earlier in the article] with a few refinements. Most importantly, we will see how the way the story is told framed the problem in a way that clamored for public policy response. There is a class action "crisis" driven in large part by the notion that class action lawsuits are brought and managed by the plaintiffs' attorneys "without providing any real benefit to society." There is an "explosion" of class action "extortion." Again, the story has good guys, bad guys, victims and a ready solution.[130]

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[129] FTC submission to OECD, 8, (n72). Likewise, though Bronsteen and Fiss in their article argued for reform of the class action procedure under Rule 23, they nonetheless recognise the value of the Rule 23 class action as the rule allows... '...redress significant public wrongs, and for that reason it accepts the concept of interest representation. At the same time, the rule is mindful of the risks of abuse, and therefore it establishes requirements aimed to make certain that the named plaintiff - this self-appointed representative - adequately represents the interests of the absent class members.' (n7).

[130] Nan S. Ellis, 'Class Action Fairness Act of 2005: The Story behind the Statute', 35 Journal of Legislation 77 (2009) 76 – 112, at pages 89 – 90. In fact Ellis' thesis is to the effect that the way in which the 'problem' of abuse in class actions was defined in various debates, lead to a clamour for reform, driven by those with an interest to emasculate the class action. Similarly L. Chimerine and R. Eisenbry have argued that: 'Tort litigation has been blamed for driving liability insurance premiums to excessive levels, reducing real wages and overall employment, undermining corporate profits, dampening productivity growth, discouraging research and development, and generally reducing the willingness of corporations and individuals to take reasonable risks (such as introducing new products) that may benefit themselves and society. There is scant evidence

In fact Ellis' thesis is to the effect that the way in which the 'problem' of abuse in class actions was defined in various debates, led to a clamour for reform, driven by those with an interest to emasculate the class action.[131] The language used is emotive. 'Facts' are distorted or misquoted to fit a picture that is not at all accurate. Ellis neatly describes the abuses allegedly engaged in by counsel on behalf of the plaintiff class...

> ...in the area of class action, the abuses brought about by the plaintiffs pale in comparison to the evildoing of the plaintiffs' attorney. Characterized as "entrepreneurial," or as "opportunistic aggregators," these lawyers seek creative ways to bring class action lawsuits, reap huge fees, and settle lawsuits in ways that benefit themselves rather than their clients. Notice how the story changes in the class action arena. In the typical tort tale, the greedy plaintiff contacts a greedy lawyer and they proceed with their frivolous claim. In the class action tale, the entrepreneurial lawyer himself solicits the client who has little at stake in the actual lawsuit. The class action lawsuit is the "brainchild" of the attorney with little input from his client. They are, in many ways, lawyers who do not have to be responsible to their individual clients.

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for any of these claims. To the contrary, macroeconomic trends since the early 1990s are especially inconsistent with the argument that supposedly high and rapidly rising tort costs have inflicted serious harm on the economy. Yet the legal system's critics continue to argue that there is a tort liability "crisis" that warrants changing the tort system, and that change is a key element in bolstering economic growth in the future. Yet these critics provide no credible evidence to support their assertions. In fact, what little effect changing the tort system will have on the economy might hurt job creation rather than help it.' From, 'The frivolous case for tort law change: Opponents of the legal system exaggerate its costs, ignore its benefits', The Economic Policy Institute, available at http://www.epi.org/publications/entry/bp157/ accessed on the 4th October 2010.

[131] Ellis argued: 'Public policy literature tells us that how a public policy problem is defined is an important component of policy formulation ... Problem definition affects whether the problem makes it to the public policy agenda, it affects the solutions proposed and it affects the likelihood of any policy action being endorsed and implemented. Recognition that public issues are malleable, or open to competing interpretations as well as factual distortion, is not new. It is generally accepted that mismatches often exist between measures of the seriousness of a problem and the level of attention devoted to it...' Ellis, 'Class Action Fairness Act of 2005: The Story behind the Statute', 35 Journal of Legislation', at page 77, (n 130).

> These lawyers will happily "sell out a class.., in exchange for generous attorneys' fees."[132]

Ellis' thesis is that the CAFA was enacted to address fears that were exaggerated and sometimes made up. This was done as a political scheme to emasculate the class action in the United States.

> As we have seen, CAFA was enacted to address the fears of class action abuses. No doubt, class actions are abused. On the other hand, there is no doubt that class actions serve legitimate public policy goals. This section will not consider the extent those fears were justified. What public policy tells us is that '[v]eracity is not the measuring standard - political success is."[133]

A story, laced with exaggeration, was created that there was a crisis that needed to be addressed. There were villains (class plaintiffs and their lawyers) as well as victims (defendants, taxpayers, American overseas competitiveness and so on).

> It is a story with villains and victims. CAFA is premised on a recitation of Congressional findings that are highly consistent with this causal story. The fact that these findings were, however, based "primarily on untested anecdotes and assumptions;" that the "reformers had exaggerated the degree of the abuse," or that the crisis in class actions "may have more to do with perception than reality" is largely irrelevant. The story is the story.[134]

Ellis' argument is that it is important to know and understand the exact nature of the problem before attempting to remedy it.

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[132] N. Ellis, 'Class Action Fairness Act of 2005: The Story behind the Statute', at pages 90 - 91, (n130).

[133] Ibid at page 107.

[134] Ibid. See also Chimerine and Eisenbry in: 'The frivolous case for tort law change: Opponents of the legal system exaggerate its costs, ignore its benefits' (n130). They give an example a lobby group pressing for 'reform' which merges with their own interests: 'A key proponent of the view that the tort system has large negative effects on the economy is Tillinghast-Towers Perrin, a company whose clients include most of the world's largest insurance companies. Tillinghast (or TTP) has for many years published a report on what it claims to be the costs of the U.S. tort system.'

A concrete example of exaggeration of abuse in class action was referred to earlier. It has been argued that a 'tort tax' that has been imposed on the United States economy by the exponential growth in civil litigation driven principally by class action law suits. In its submission[135] to the Law Reform Commission's consultation on multi-party litigation, the Competition Authority quoted an article most likely written by Jim Copland where he asserted...

> ...it is reported that the civil justice system, as an industry, is growing at a staggering rate—four times that of the economy. Federal class actions have increased by 300% in the last decade while state class actions have increased during the same period by 1000%. Those costs must be borne by the economy.[136]

These figures have been contested. For example, Professor Andrew Gavil has debunked claims of an exponential and uncontrolled growth in class actions. In his address to the Antitrust Modernization Commission (the 'AMC') in June 2005 he pointed out that...

> In 2001, the total number of private civil actions dropped from the 811 in 2000 to 707. More striking is the decrease in class actions from the recent high of 213 in 2000 to 122 just a year later ... any perception that the volume of antitrust litigation is substantial or on the rise is uninformed.[137]

Chimerine and Eisenbry have also addressed the issue of exaggerated claims being made by vested interests against tort litigation in the United States. They direct their analysis at the company Tillinghast-

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[135] Submission to the Law Reform Commission on its Consultation Paper on multi-party litigation (class actions), Submission No. S/03/005, dated 30th October 2003, available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S03005.aspx?page=1&year=2003 and accessed on the 4th October 2010.

[136] Ibid. The Competition Authority do not cite the source for this in their submission, but it is most likely from an article by J Copland, 'The Tort Tax', Wall Street Journal (New York 11 June 2003) which is available at http://www.manhattan-institute.org/html/_wsj-the_tort_tax.htm and accessed on the 4th October 2010.

[137] Statement of Professor Andrew I Gavil, 'Before the Antitrust Modernization Commission Panel II: "State Indirect Purchaser Actions: Proposals for Reform" Federal Trade Commission, Washington, D.C. (June 27, 2005).

Towers Perrin (Tillinghast) '...a company whose clients include most of the world's largest insurance companies.'[138] According to Chimerine and Eisenbry, Tillinghast estimate that the cost to the American tort system cost $246 billion in 2003. Chimerine and Eisenbry argue, persuasively, that Tillinghast's estimate of tort costs is grossly inflated and includes costs not attributable to the tort system. Furthermore, Tillinghast's methods are faulty because...

> Tillinghast does not examine jury verdicts, settlements, lawyers' fees or any actual costs of what might generally be considered the legal system. Rather, Tillinghast's numbers are calculated from total liability insurance premiums, primarily as reported by the insurance reporting firm, A.M. Best, as well as Tillinghast's own "internal" sources. Had Tillinghast honestly measured tort system costs, these costs would have been lower, by at least 50 percent, because so much of what the company measures is not even vaguely related to the legal system.[139]

A case study of abuse in class actions: the Mirfasihi Settlement

An excellent description of how a class action settlement resulted in abuse of the class by the alleged collusion between class counsel and settling defendants was given by Richard Posner in his judgement in the *Mirfasihi*[140] class action settlement case. In that case an action was brought on behalf of approximately 1.6 million persons whose home mortgages were held by Fleet Mortgage Corporation ('Fleet'). Fleet, without their mortgage customers' permission or knowledge, transmitted detailed information on their customers to various telemarketing companies which then, in conjunction with Fleet, used that information and deceptive practices to sell those customers financial services they did not want. This transmission was in breach of

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[138] Chimerine and Eisenbry, 'The frivolous case for tort law change: Opponents of the legal system exaggerate its costs, ignore its benefits', (n130).

[139] Ibid.

[140] *MAV Mirfasihi v Fleet Mortgage Corporation,* (n108).

various State and Federal consumer laws, as well as in violation of the common law right to privacy.

It transpired that there were in fact two classes of injured parties. Approximately 1.4 million persons whose financial information Fleet transmitted to the telemarketers but who did not actually buy anything from them, and a further group of approximately 190,000 persons whose financial information Fleet sold and who in turn did buy products that they did not need or want and that were unsuitable for their needs. It also appears from the case that though the smaller group were represented by class counsel, the larger group were unrepresented.

A settlement was negotiated and was approved by the District Court Judge. An appeal was lodged against the settlement on the basis that the larger information-sharing class of 1.4 million persons, who did not purchase products from the telemarketers, had received nothing in the class settlement. The settlement for this larger class had the effect of surrendering all of their claims against Fleet as part of that settlement as they had not opted out of the action. The district judge had not found that the claims of the larger class were worthless. The unauthorised transmission of information to the telemarketers violated various state consumer protection laws that authorise the victims of the breach to receive an award of damages.

Fleet agreed to pay back the profits of its illegal conduct which came to a total of $243,000 to members of the smaller telemarketing class. These profits had come from members of the entire class, but because the total profits were so small, a distribution to the entire class would amount to less than 20 cents each. For this reason, it was agreed in the settlement between class counsel and the defendants to transfer the profits to the smaller telemarketing class. The District Judge approved a fee to class counsel of $750,000. Fleet and class counsel for the smaller group argued that the larger group hadn't been denied an award in the settlement for giving up their claims. They argued that in fact the larger group of claimants had...

> ...the emotional satisfaction of knowing that Fleet had been forced to give up its profits.[141]

In the appeal of that settlement, Posner was scathing of that argument which he described as 'preposterous.' Posner estimated that the aggregate damages of the information sharing class might total in the region of $35,000,000, or even higher. This is in contrast to the claim made by counsel for the settling class and counsel for Fleet that restitution in the case, if spread evenly, would amount to less than the postage to each class member. Posner pointed out that this argument '...founders on the fact that restitution is merely an alternative remedy to damages.'[142] Posner then had this to say about class counsel, Fleet and the District Court Judge that agreed the settlement...

> Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself? **The settlement that the district judge approved sold these 1.4 million claimants down the river.** Only if they had no claim - more precisely no claim large enough to justify a distribution to them - did they lose nothing by the settlement, and the judge made no finding that they had no such claim.[143] (Emphasis added)

This case highlights some of the horror stories that were used to attack class actions in competition and consumer cases. These concerns include the alleged collusion in the settlement between plaintiff class counsel and the defendants, with class counsel receiving fees far in excess of the sum made available to the smaller class that was to receive some recompense. There was the obvious failing in the settlement that the overwhelming majority of class members, in the

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[141] Ibid.

[142] Ibid.

[143] Ibid.

region of 1.4 million, received absolutely nothing at all in the settlement. The way the opt-out process was used in this case raised questions as to the adequacy of the notice given to class members, both prior to initiating proceedings and notice of the quantum in the settlement.

Despite the serious deficiencies exposed in this class action settlement, there are nonetheless positives that point to the potential use and benefit of the opt-out class action in competition cases. Judge Posner did not comment negatively on the class action procedure in his judgement *per se*. Rather, he commented negatively on the particular actions of counsel for the plaintiff class and counsel for defence on the terms of settlement that they reached. Posner was clearly unimpressed with the role played by the District Court Judge whom in relation to an entire class, he felt 'had sold down the river'. In relation to the role played by the judiciary in these cases he said...

> Because class actions are rife with potential conflicts of interest between class counsel and class members ... district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole ... Unfortunately the district judge's decision approving the settlement does not discuss the settlement's questionable features not only the one we've stressed, namely the denial of any relief to an entire class, the kind of thing that led to rejection of the settlements in *Crawford v. Equifax Payment Services, Inc* .... but also the reversion of unclaimed refunds to the putative wrongdoer and the fact that the class that was denied relief did not have separate counsel from the counsel for the favored class.[144]

Posner acknowledged that there was a vast class of injured plaintiffs who had suffered loss, loss that he estimated could exceed

[144] Ibid.

$35,000,000 and that this class had been excluded in the settlement terms. This class of injured persons could not otherwise recover without resort to a class action. He highlighted the areas of potential abuse, pointing to the responsibility of the judiciary in protecting absent class members. Additionally, by his action in this appeal, he showed that cases of abuse in class actions can be uncovered and overturned by vigilant members of the judiciary. The decision of the lower court was reversed and remanded for reconsideration by the District Court.[145]

Steps towards Reform: The Class Action Fairness Act 2005

As mentioned above, there have been various attempts at reform in the United States of the abuses in the class action procedure.[146] The most recent attempt is the Class Action Fairness Act of 2005 ('CAFA').[147] CAFA[148] along with the other legislation in this area attempted to tighten procedures and prevent abuse of the class action device. These legislative reforms according to Erichson...

> ...regulated the selection of class counsel, tightened control of class counsel fees, toughened pleading requirements, reduced class counsel's ability to dictate the choice of forum, facilitated interlocutory appeals, and impeded settlement class actions and coupon settlements. Taken together, the overall message of recent

[145] The *Mirfasihi* case returned to the Circuit Court from the District Court of two further occasions, having been remanded back to the District Court on the first two occasions because the Appeal Court did not agree with the settlement terms reached in the class action. Having been first remanded back as mentioned, the District Court (with a different judge) agreed settlement on only marginally different terms and still awarded nothing to the larger class. The larger class appealed a second time (450 F.3d 745 (7th Cir. 2006)) and the Circuit Court again remanded back to the District Court. Only on the final appeal to the Circuit Court, was the Circuit Court happy that the appropriate methodology was used by the lower court in calculating any damages that the larger class might be entitled to. In fact the Circuit Court (in December 2008) finally acknowledged that the larger group were not entitled to any damages meaning that original settlement was correct, if the methodology of the Court was not. Posner's final words on the case in his December 2008 judgement were: 'This case is *finito*.'

[146] See for example, H.M. Erichson, 'CAFA's Impact on Class Action Lawyers', 156 University of Pennsylvania Law Review, (n110) at page 1594 for a listing of the various statutes that attempted to bring about reform of the class action.

[147] Class Action Fairness Act of 2005, (n109).

[148] The CAFA at section 2 (a) (1), in fact reaffirmed the importance of the class action: 'Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.'

> developments seems to be, "in theory, class actions are fine, but in practice, don't trust the class action lawyers."[149]

Amongst the various matters that CAFA attempted to address, it dealt specifically with the use of coupons in class settlements.[150] It also contains a portion detailing the responsibility of the Court to safeguard against abuse...

> Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this sub section shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

Erichson makes the point, in a footnote in his article, that...

> The statute constrains the use of coupon settlements, reflecting the expectation that lawyers cannot be trusted to settle in the class's best interests. It also requires notice of proposed class settlements to government authorities, on the theory that the class's lawyers cannot be trusted to present the full story to the court, and that additional monitors are needed to protect class members' interests.[151]

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[149] H.M. Erichson, 'CAFA's Impact on Class Action Lawyers', 156 University of Pennsylvania Law Review, (n110) at pages 1594 – 1595.

[150] Chapter 114, at section 1712 of CAFA reads '... (a) If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.'

[151] H.M. Erichson, 'CAFA's Impact on Class Action Lawyers', 156 University of Pennsylvania Law Review, (n110) in footnote 21, at page 1597. CAFA at sections 2 and 3 also listed some of the abuses reported in the area of the class action, such abuses which the Act states have '...harmed class members with legitimate claims and defendants that have acted responsibly...' and the fact that... 'Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where - (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value'

It remains to be seen how these reforms will fare in the years to come. It is worth noting that whilst American policy makers are willing to reform class action law to iron out alleged abuses, there are already mechanisms (for example the role of the Court as 'gate-keeper' in settlements) built in to the system to protect against such abuses. Furthermore, as Ellis has argued in her article, it is questionable whether the alleged abuses were as extreme (or indeed real) as made out by those who called for reform.

The UK Models for Collective Redress

Reasons for this overview

An exploration of the American class action procedure was necessary for a number of reasons. The class action in the United States has certain features, including the 'opt-out' provision and the 'cy-pres' discretionary dispersal of excess funds by the Court from a damages award that could make class actions more effective if they were available in competition damages claims in Europe (and Ireland). It was also necessary to understand some of the alleged abuses that occur in the American model as these are often cited as reasons for avoiding the adoption of effective collective redress mechanisms in other jurisdictions. It was seen earlier for instance that the Commission cited the alleged excesses in the American class action as reason for avoiding some of the features of that model when presenting a collective redress model in the White Paper.

It is necessary to examine now the position in Britain regarding collective redress. Britain is Ireland's nearest neighbour and the two jurisdictions (except for Scotland) share similar legal systems. Both are members of the European Union and therefore both have participated in the Commission inspired debate on damages. More to the point, the Commission's proposal in the White Paper for collective redress resembles that which is currently in use in Britain. As will be seen, the form of collective redress currently available in Britain has been criticised and there have been calls for reform. The reforms suggested include adoption of some aspects of the American class action model,

including 'opt-out' and cy-pres distribution which have just been describe in the preceding section of this chapter.

Further reasons for looking at the position in Britain are the fact that there is a debate taking place in there on the type of collective redress that should be available for competition (and other) cases. It is that debate that will be reviewed first. This review will set the current position in Ireland (to be examined in Chapter 5) in stark contrast with what is happening in Britain in the area of collective redress.

Collective Redress in Britain: A Lively Debate

The debate on the effectiveness and possible need for reform of collective redress in Britain has been informed by a number of research projects and reports undertaken in the field in recent years. The Civil Justice Council (the 'CJC')[152] has played a lead role and made a substantial contribution to this debate. In December 2008 it published a report entitled 'Improving Access to Justice through Collective Actions.'[153] The opening paragraph to the report states that the report was '...published as **formal advice to the Lord Chancellor**.'[154] (Emphasis in original) The report then goes on to say in paragraph 2...

> The paper makes a series of recommendations that aim to improve, through the proposed civil procedure reforms, access to justice for citizens through collective actions. The recommendations do not seek to change, introduce, or remove citizens' substantive legal rights.[155]

Professor Rachael Mulheron has also made a substantial contribution to this debate. Her research paper entitled 'Reform of Collective Redress

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[152] The Civil Justice Council is a non-departmental public body established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system in England and Wales. Further information on the CJC can be found at http://www.civiljusticecouncil.gov.uk/ accessed on the 4th October 2010.

[153] Improving Access to Justice through Collective Actions, (Report) available at http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf and accessed on the 4th October 2010.

[154] Ibid at para 1, 8.

[155] Ibid at para 2.

in England and Wales: A Perspective of Need'[156] was submitted to the Civil Justice Council as part of its review on improving access to justice through collective actions. Mulheron questioned whether there was...

> ...'evidence of need' for reform of collective redress in England and Wales, and if so, what/where are the gaps, and how should the gaps be closed off so that any reform has substance, and is not merely 'a solution looking for a problem'?[157]

Mulheron's conclusion was that there was '...overwhelming evidence of the need for a further collective redress mechanism, in order to supplement presently-existing procedural devices available to claimants.'[158]

The Office of Fair Trading (the 'OFT') contributed to the debate on collective redress in its submission[159] to the Commission's White paper on damages actions and through its own review on private actions in competition law in the United Kingdom. That review on private actions in the United Kingdom resulted in the OFT publishing recommendations to Government in November 2007.[160] The work carried out in the area of competition law was followed in turn by the OFT's submission to the European Commission's Green Paper on Consumer Collective Redress.[161] Each of these submissions makes consistent recommendations concerning the need to introduce more effective models for collective redress in the United Kingdom.

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[156] R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', (n46).

[157] Ibid at page vii.

[158] Ibid.

[159] Office of Fair Trading, 'Response to the European Commission's White Paper, Damages actions for breach of the EC antitrust rules' (Submission), (n58).

[160] Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business, Recommendations from the Office of Fair Trading' (Report) November 2007 available at http://www.oft.gov.uk/news/press/2007/162-07 and accessed on the 4th October 2010.

[161] Office of Fair Trading, 'Green Paper on Consumer Collective Redress' (Submission) March 2009, available at http://ec.europa.eu/consumers/redress_cons/responses/OFT_en.pdf and accessed on the 4th October 2010.

For example, in its submission to the Commission on the White Paper on damages actions, the OFT said...

> The OFT has recommended that standalone and follow-on representative actions should be available on behalf of (i) named consumers and businesses and (ii) consumers and businesses at large.[162]

In its Report containing recommendations on private actions in competition law published in November 2007, the OFT recommended...

> In the OFT's view, the availability of representative actions on behalf of consumers or businesses at large would encourage a greater number of well-founded actions to be brought. Given the barriers to effective redress identified in the consultation, the absence of a representative action which may be brought on behalf of consumers or businesses at large is a significant shortcoming of the present system. This weakness was correctly identified in the White Paper and must now be addressed.[163]

In its submission to the Commission's White Paper and its Report on Private Actions just referred to, the OFT recommends the introduction of representative actions in competition cases and that such representative actions should be *at large*, meaning, that they should allow for some form of opt-out system rather than rely on a system that only allows for an opt-in mechanism.

The debate on collective redress in the UK has not been confined to the field of competition law. Professor John Peysner and Angus Nurse of Lincoln University prepared a report for the then Department of Business, Enterprise and Regulatory Reform (BERR) and which was published in December 2008, on Representative Actions and

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[162] Office of Fair Trading, 'Response to the European Commission's White Paper, Damages actions for breach of the EC antitrust rules', (submission) at paragraph 2.1 (n58).

[163] Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business, Recommendations from the Office of Fair Trading', at paragraph 7.29, (n161).

Restorative Justice.[164] The research was designed amongst other things to...

> Identify types of consumer cases (not including competition cases) where groups of consumers are suffering detriment and where representative actions might realistically deliver redress;[165]

The Lincoln University report for BERR made a number of recommendations. Amongst these the Lincoln University report recommended that...

> Even the least enthusiastic supporter of private enforcement through the civil courts recognises that there will be cases in which aggregated and co-ordinated action satisfies a cost benefit test.[166]

The Lincoln University report also made recommendations that further study in the field of collective redress was required. The report suggested for example...

> That pilot restorative justice scheme(s) should be established to determine whether there would be increased costs, training needs or other resource difficulties that would need to be addressed...[167]

The report for BERR also recommended that...

> Consideration should be given to introducing an independent Consumer Ombudsman along the lines of the Nordic Ombudsmen who could consider representative actions and implement restorative justice to deliver

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[164] University of Lincoln, Representative Actions and Restorative Justice: *A Report for the Department for Business Enterprise and Regulatory Reform (BERR)*, (Report) 12th December 2008 available at http://www.berr.gov.uk/files/file51559.pdf and accessed on the 4th October 2010.

[165] Ibid at paragraph 1.2.

[166] Ibid, Recommendation 3, 94.

[167] Ibid, Recommendation 1, 93-94

> effective and efficient enforcement, compensation and redress for consumers.[168]

The British Parliament recently considered the introduction of a collective redress procedure which would have included an opt-out class action in the Financial Services Bill[169] 2009/10 at sections 18 and 19. In the Explanatory notes to the Financial Services Bill it appears that the background to the Bill involved...

> ...proposed reforms to financial regulation to enable more effective prudential regulation and supervision of firms, greater emphasis on monitoring and managing system-wide risks, and **improved protection and support for consumers.**[170] (Emphasis added)

In relation to consumer protection, the Bill...

> ...enables collective proceedings to be brought in respect of financial services claims. Collective proceedings are court proceedings brought by a representative person, who does not need to have any direct interest in the proceedings, on behalf of a group of persons who have the same, similar or related claims and who would otherwise be entitled to pursue their own individual proceedings.[171]

The Treasury, which was the Department that sponsored the Bill, published an Impact Assessment Report[172] on the Bill in November 2009. Under the questions: 'What is the problem under consideration?

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[168] Ibid, Recommendation 2, 94.

[169] The Bill is available at http://services.parliament.uk/bills/2009-10/financialservices.html and accessed on the 4th October 2010.

[170] Financial Services Bill, Explanatory Notes, paragraph 7, available at http://www.publications.parliament.uk/pa/ld200910/ldbills/026/en/10026x--.htm#index_link_1 accessed on the 4th October 2010.

[171] Ibid at paragraph 17.

[172] Financial Services Bill Impact Assessment Report, (Report) November 2009, available on Her Majesty's Treasury website at http://www.hm-treasury.gov.uk/d/fin_bill_ias.pdf and accessed on the 4th October 2010.

Why is government intervention necessary?' the following reasons were provided...

> Current redress mechanisms are not entirely adequate where **a large number of consumers suffer detriment in a similar way**. That is why some cases that might be actionable on a group basis are settled individually by the Financial Ombudsman Service or the courts. The take up of collective action has been modest, despite regular mis-selling and other scandals. The number of complaints referred to FOS is expected to rise to 150,000 in 2009-10 and continue to rise during the current economic downturn. Up to 45% of these cases have similar characteristics.[173] (Emphasis added)

The rationale for considering the introduction of a new form of collective redress mechanism in financial services cases could easily be applied to instances involving consumer harm in competition cases.

Opposition MP's queried why a new form of collective redress was being introduced in the area of financial services first.[174] In particular fears were expressed that US style class-actions could be introduced. The Minister, Lord Myners, in response to these worries pointed out that...

> We do not want to see the development of a US-style litigation culture, and there are a number of major differences between the US and UK legal systems which lead me to conclude that that is not likely to happen. In the UK, it is not the case that parties normally bear their own costs. The "loser pays" principle applies in the UK, which is an effective deterrent to spurious claims. There is no provision for US-style punitive awards or treble

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[173] Ibid, Impact Assessment Report, 69.

[174] For more on the debate on the Financial Services Bill, see "Financial Services Bill: Committee Stage Report" Bill No. 06 of 2009/2010 (Research Paper 10/04) January 2010 available on the UK Parliament website at http://services.parliament.uk/bills/2009-10/financialservices/documents.html and accessed on the 4th October 2010.

> damages, and the legal system is not used as a sort of private regulator to allow individuals to hold companies to account. There is no burden of extensive up-front disclosure, no provision for lawyers to take a share of the damages, and no jury trials in which juries can make awards that are exceptional.[175]

Parliamentarians were clearly aware of the alleged excesses of the US class action system and took these excesses into account when drafting this new form of class action in the Financial Services Bill. The Bill contained a proposal for a mixed 'opt-in' 'opt-out' system of collective proceedings at section 19.

Unfortunately, though there was support in parliament for the introduction of this novel procedure, this portion of the Bill was dropped at the last stage of its progress through Parliament. The BBC quoted Lord Myners, the then City Minister, as stating that the class action proposal was '...necessary, sensible and desirable.'[176] The BBC then ascribed the following comments to Lord Myners as the reason for dropping the class action from the Act...

> ...dropping collective redress was a pragmatic move to get the rest of the Bill through in the last days of the current government.[177]

Calling the British general election on the 8th April 2010 necessitated compressing the Financial Services Bill in order to get it passed through all legislative stages and enacted before parliament was prorogued. Peter Vicary-Smith the Chief Executive of the consumer group *Which?* bemoaned this lost opportunity. In a press release he said...

> Collective redress is a potentially powerful weapon for consumers against the systemic mis-selling of financial

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[175] Ibid, 17.

[176] BBC News, Thursday 8th April 2010, from the BBC website at http://news.bbc.co.uk/2/hi/business/8608969.stm accessed on the 4th October 2010.

[177] Ibid.

products and would prove a real deterrent for firms engaging in unscrupulous sales practices.

By dropping these measures from the Financial Services Bill, a golden opportunity to empower consumers is being missed. We call on Parliament to reintroduce collective redress at the earliest opportunity.[178]

Overview of the Law on Collective Redress

The CJC report[179] provides a useful overview on the state of the law in England and Wales on collective redress up to December 2008. Even so, it does not give the entire picture. In the short time that has passed since the report was published, there have been further developments in this debate. These include the 'Government's Response to the Civil Justice Council's Report: "Improving Access to Justice through Collective Actions"'[180] published in July 2009 by the Ministry of Justice, and the aforementioned sections 18 and 19 of the Finance Services Bill[181] which proposed a system of collective redress with a mixture of opt-in and opt-out depending on the circumstances of the case.

Even so, the CJC report provides a useful starting point for a review of the legal options on group litigation currently available in Britain to litigants seeking damages through collective redress. The CJC review also highlights the deficiencies that exist in that system. A review of those options will be followed by a review of the various proposals for reform that have been made in Britain on collective redress. This review will place the current underdeveloped position of collective redress in Ireland into stark relief when that is examined in Chapter 5.

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[178] Dropping collective redress from Financial Services Bill is missed opportunity, says Which? (7 April 2010), available from *Which?* website at http://www.which.co.uk/about-which/press/press-releases/campaign-press-releases/personal-finance/2010/04/dropping-collective-redress-from-financial-services-bill-is-missed-opportunity-says-which.jsp and accessed on the 4th October 2010.

[179] Improving Access to Justice through Collective Actions, (Report), (n153).

[180] 'The Government's Response to the Civil Justice Council's Report.' (20 July 2009) and available at the Ministry of Justice website at http://www.justice.gov.uk/publications/response-civil-justice-report-collective-actions.htm and accessed on the 4th October 2010.

[181] Accessed on the 4th October 2010 and available at http://www.publications.parliament.uk/pa/ld200910/ldbills/026/10026.20-26.html#ln065

The test case, joinder and consolidation of actions

The test case, joinder and consolidation of actions are recognised methods in England and Wales of dealing with potentially numerous actions that have common or similar features. The CJC report states that the test case, joinder and consolidation are...

> ...inadequate means through which to effectively and efficiently prosecute large numbers of individual claims which arise from a common cause or give rise to common or similar issues of law or fact.[182]

In the test case...

> English civil procedure has traditionally provided the court with the necessary power to manage litigation so that where a large number of individual claims, each raising a common, or perhaps several common, factual or legal issues all but one or a small number of actions which raise those common issues are prosecuted to final determination.[183]

It is usually a matter for the parties to decide which case(s) go forward first to determine the point of law at issue. The court has the power to stay all other cases until the issues are determined in the test case and the decision in the test case has '...precedential effect in respect of those stayed or any future actions.'[184]

The test case in England and Wales is not dissimilar to the test case used in Ireland. As will be explained in Chapter 5, the test case is an unsuitable vehicle for dealing with numerous small claims arising in a competition or consumer context. For instance, as the CJC report

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[182] Improving Access to Justice" (Report) by Civil Justice Council, page 72, (n153).

[183] Ibid at pages 18 - 19.

[184] Ibid at page 19.

points out '... [The test case] is predicated on a large number of claims being issued.'[185]

According to the CJC, the Civil Procedure Rules (CPR) provides '...two mechanisms through which large numbers of individual claims can be prosecuted simultaneously.'[186] These are the joinder and consolidation[187] of claims and they are also considered by the CJC as a method for dealing with multiple similar actions that might be considered as forming a class.

However, just as in Ireland this route is problematic and unsatisfactory. First there has to be a number of actions already separately commenced before the Court, *at its discretion*, can decide to avail of this procedure under the CPR. Furthermore, as the CJC report points out...

> Joinder and consolidation, while offering the ability to manage several individual claims within one action become unwieldy when truly large numbers of parties are involved, which limits their efficacy and the court's ability to adequately and properly resolve the claims and issues arising within them on their substantive merits.

Representative actions

Representative actions are provided for under Part 19.6 of the Civil Procedure Rules (CPR Rule 19.6).[188] This rule allows one or more claimants with the same interest in a cause of action to initiate proceedings in the High Court. Rule 19.6.1 reads...

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[185] Ibid at page 73.

[186] Ibid at page 19.

[187] CPR 3.1 (g) & (h), 'The court's general power of management', available at the Ministry of Justice website at: http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part03.htm#IDAJK4EC and accessed on the 4th October 2010.

[188] Available on the website of the United Kingdom's Ministry of Justice at http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part19.htm and accessed on the 4th October 2010.

(1) Where more than one person has the same interest in a claim –

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

The representative action in England and Wales is almost identical to that found in Ireland. A examination of this procedure in an Irish context will be given in Chapter 5. As the model is similar to that available in Ireland, there are, likewise, similar attendant difficulties with the representative action as a vehicle for dealing with mass claims in competition cases.

Amongst the difficulties found with the representative action model in England and Wales is the *same interest* test highlighted in the *Markt*[189] case. The same interest test was given a very narrow definition in the older cases that dealt with the issue in the early part of the 20th century.[190] Those cases found that the same interest in a representative action meant...

i) a common interest arising, for instance, under a common document;

ii) a common grievance; and

iii) a remedy beneficial to all, but **not damages**. (Emphasis added)[191]

As the CJC report points out...

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[189] *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA).

[190] See for example Lord McNaughton in *Bedford v Ellis* [1901] AC 1 (HL) at 7 – 12 and Fletcher Moulton LJ in *Markt v Knight Steamship Co Ltd* at 1035.

[191] Fletcher Moulton LJ in *Markt*.

> The strict interpretation of the commonality test and the inability to obtain damages has resulted in the representative rule being underused within the framework of English civil procedure.[192]

It is interesting to note that the case law in England and Wales shows that the courts have tried to develop the scope of the representative action by both loosening the same interest test whilst holding out the possibility of damages being awarded in certain circumstances.

The CJC report included a paper at Appendix M by John Sorabji[193] who argues that English law already had an effective collective redress mechanism from at least the late 19th century if not earlier but that it was left unused and unrecognised because of the erroneous majority decision of the Court of Appeal in the *Markt* case. In essence Sorabji argues that there is currently a mechanism available that allows for effective redress in mass torts if it is re-awakened...

> It leaves me looking at whether ... as a class action is available to us today as a means through which to introduce – or reintroduce – an effective collective redress mechanism via procedural reform of the representative action in England and Wales.[194]

Sorabji argues that the representative rule's utility was severely restricted after the *Markt* case. This he argues was due to the majority judges, Vaughan Williams and Fletcher Moulton LLJ ignoring the binding precedent of the House of Lords decision in the *Duke of Bedford v Ellis.*[195] In that case Lord Macnaghten gave the majority decision where he found *inter alia*...

> The basis of the common interest and grievance did not have to be the same for each class member;

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[192] Improving Access to Justice" (Report) by Civil Justice Council, 27, paragraph 18, (n153).

[193] "Class Actions: Reinventing the Wheel", Civil Justice Council Collective Address Event Theobald's Park: 26 – 27 March 2008.

[194] Ibid at paragraph 5.

[195] *Duke of Bedford v Ellis*, [1901] AC 1.

> That other factors, such as distinct rights between the class members, may serve to differentiate the class members was irrelevant.[196]

Sorabji then points to more recent cases that, he argues, allows for amongst other things, damages to be awarded in a case using the representative rule. First he points to the decision of Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd*[197] where Vinelott found that while individual damages claims could not be pursued by a representative plaintiff, a declaration that class members were entitled to damages could be granted.

This case was quickly followed by the decision of Dillon J in *EMI Records Ltd v Riley*[198] where the Court found that...

> ... having regard also to the fact that any damages would be paid by the plaintiffs to BPI, it was appropriate that damages should be recoverable by the plaintiff in its representative capacity since that would avoid the procedural complication that for the purpose of the inquiry into damages either all the members of BPI would have to be joined as co-plaintiffs or they would have to issue separate writs and apply for consolidation with the plaintiff's claim...[199]

Then in the *Irish Rowan*[200] case the Court of Appeal explained that it had erred eighty years earlier in the *Markt* case. Amongst other things the Court found that...

> A claim for debt or damages would not be excluded from a representative action ... merely because it was brought by or against a number of parties severally, provided that

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[196] Ibid.

[197] *Prudential Assurance Co Ltd v Newman Industries Ltd,* [1981] Ch. 229.

[198] *EMI Records Ltd v Riley*, [1981] 2 All ER 838, [1981] 1 WLR 923.

[199] Ibid at Paragraph 2.

[200] *Irish Shipping Ltd v Commercial Union Assurance Co plc and Another*, [1991] 2 QB 206, [1990] 2 WLR 117.

> the representative and represented parties had the same interest in the proceedings, shared a common grievance and sought relief which was beneficial to all.[201]

The *Irish Rowan* would appear to leave the door open to the representative action being used in mass damages claims. Sorabji then refers to the 2003 case of *Independiente Ltd v Music Trading On-Line (HK) Ltd*[202] which found that the definition of 'same interest' had to be interpreted flexibly...

> The test to establish whether the rule was appropriate for the case was that laid down by *Ellis*: common interest, common grievance and relief beneficial to all.[203]

Despite Sorabji's argument that the '...representative rule as explained in the jurisprudence could be transformed into a modern class action...'[204] there is still sufficient doubt as to whether it could be used as an effective means of allowing redress which includes damages in collective actions in competition cases. Sorabji's thesis, though persuasive, points up the reliance of the representative action on the varying interpretations of the court from case to case. Furthermore, certain aspects of an effective collective redress mechanism, such as the ability to apply damages in a successful action cy-près or the ability to suspend limitation periods are absent. Legislation will be required to create certainty in the representative procedure and to remedy the deficiencies just referred to (lack of cy-près and suspension of time periods for bringing proceedings).

Group Litigation Orders

Group Litigation Orders ('GLO's') were introduced in May 2000.[205] These were introduced in response to the findings and recommendations

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[201] Ibid.

[202] *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch).

[203] Improving Access to Justice (Report) 333, (n153).

[204] Ibid at paragraph 32, 334.

[205] Civil Procedure (Amendment) Rules 2000 (SI 221 of 2000). The GLO regime is set out in the Civil Procedure Rules at 19.10 – 19.15.

made by Lord Woolf in his report 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales'.

The GLO regime is set out at CPR 19.10 – 19.15. CPR 19.10 defines the GLO as follows...

> A Group Litigation Order ('GLO') means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').

An obvious problem that can be seen immediately with GLO's is that they are essentially a system that allows for case management of individual claims. The GLO is designed to manage in as efficient a manner as possible a large number on individual claims. These claims must raise common or related issues of law or fact. Representative claimants or defendants are not identified or selected under a GLO. On the contrary, individual claims are brought within overarching managerial framework. The obvious difficulty that arises here in the context of small and dispersed claims that are likely to be found in competition and consumer cases is that the GLO requires that separate proceedings be commenced by individuals before the court can make a group litigation order. Lord Woolf pointed out the problem that arises in this context in the *Boake Allen* case...

> Before a GLO can be made it is necessary for each individual potential member who wishes to join the GLO to make an individual claim under CPR Part 7 or Part 8. This in conjunction with the application to register enables the court to determine whether the respective litigants qualify to be a member of the GLO... The purpose of a GLO is then 'to provide for the case management of claims which give rise to common or related issues of fact or law (the GLO issues') (CPR Part 19.10)...Directions may also provide 'for one or more claims on the group register to proceed as test claims' as happened in the cases the subject of these proceedings (Part 19.13(b)). Where

> judgment is given on an issue on the group register in relation to a GLO, that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given, unless the court orders otherwise. (Part 19.12 (1) (a)).[206]

The obvious deficiency with the GLO is that it requires an existing claimant to opt in and join the group. As Peysner and Nurse pointed out in their Report to BERR on Representative Actions and Restorative Justice...

> However, assuming that ... a modern consumer society is marked by mass production and mass consumerisation the fact that many individuals or small businesses share potential claims is not reflected in the number of group actions/claims actually brought - some 62 since 2000. A key reason for this is that a GLO requires a positive step by a prospective claimant to 'opt in' to join the 'club' to obtain all the benefits and suffer any detriments.[207]

That being said the GLO regime does accommodate the possibility that an individual claim can be selected to go forward as a test case within the GLO framework. Where a claim goes forward as a test case any determination will bind the other claims subject to the GLO and can, if the court directs, bind any claims which are subsequently entered onto the group register.

Section 47B of the Competition Act 1998

Section 47B of the Competition Act 1998, as inserted by section 19 of the Enterprise Act 2002 allows a representative action to be brought by a specified body, in respect of 'consumer claims made or continued on behalf of at least two individuals.' An action under section 47B is a follow-on action for damages in respect of previously-proven anti-

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[206] *Boake Allen Ltd and others v Her Majesty's Revenue and Customs*; *NEC Semi-Conductors Ltd and other test claimants v Inland Revenue Commissioners* [2007] UKHL 25, at para 32.

[207] Page 24 of the University of Lincoln Report on Representative Actions and Restorative Justice, (n164).

competitive breaches. The OFT pointed out in its Recommendations to Government of November 2007 on Private Actions in Competition Law[208] that...

> ...section 47B of the CA98 only allows a representative action to be brought in the CAT where the OFT, a concurrent regulator or the European Commission has made an infringement decision.[209]

There must already have been an adverse finding of anti-competitive activity by an undertaking before section 47B applies. This means that a representative action can only be taken on a 'follow on' basis and precludes the possibility of stand alone actions. The OFT highlighted the obvious shortcomings with this provision...

> As competition authorities have finite resources, this limits the number of cases in which consumers can seek redress: it is not realistic to expect that a competition authority could investigate all cases where consumers have been harmed and then take on the role of securing redress for them. If competition authorities were to pursue every single alleged infringement, this would weaken rather than strengthen the competition regime.[210]

Section 47B only assists consumers injured in competition cases where there has been a finding by the OFT, the European Commission or by another regulator with concomitant competition enforcement powers. The shortcomings with section 47B are made worse by a further shortcoming: an action under section 47B can only be taken on behalf of named consumers. This means that section 47B is an 'opt-in' representative action for consumers in follow-on cases only.

Section 47B of the Competition Act 1998, permits a representative action to be brought by a specified body, in respect of 'consumer

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[208] Office of Fair Trading 'Private actions in competition law: effective redress for consumers and business, Recommendations from the Office of Fair Trading' (n160).

[209] Ibid at paragraph 5.7.

[210] Ibid.

claims made or continued on behalf of at least two individuals'. The only 'specified body' designated to date is *Which?* pursuant to the Specified Body (Consumer Claims) Order 2005, SI 2005/2365.

In the next chapter reference will be made to the successful action taken by *Which?* in the JJB Sports[211] replica jerseys case. Amongst the positives in that case was the fact that redress was sought and obtained in an action taken by *Which?* on behalf of injured consumers who might not otherwise have received any compensation as a result of this cartel being uncovered. Indeed, *Which?* appears to have had high hopes when it embarked on this case. Rachael Mulheron quoted newspaper articles as stating...

> The [Consumers' Association, Which?] believes that as many as a million people could have been overcharged between £15 and £20 for the replica shirts.[212]

And also...

> Hundreds of thousands of consumers could receive payouts after *Which?*, the consumer group, announced that it was intending to sue JJB Sports on behalf of fans who were overcharged for football shirts.
>
> The consumer body said that the case applied to total of one million shirts, and is appealing to the hundreds of thousands of customers who bought them to come forward.[213]

However, it is clear that the shortcomings with the representative class action under section 47B were legion. Mulheron quotes from e-mail

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[211] *Consumers Association v JJB Sports plc Competition Appeals Tribunal* (CAT) case number: 1078/7/9/07. Consumers had bought replica England and Manchester United football jerseys from JJB Sports and other manufacturing companies which were found by the Office of Fair Trading (OFT) to have been involved in a price-fixing cartel. JJB Sports was fined £18.6 million by the OFT. The Consumer association *Which?* as a designated body took a 'follow-on' action under section 47B of the Competition Act 1998.

[212] Compensation claim for rip-off football kits' (The Telegraph, 9 Feb 2007) cited by R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', (n46).

[213] JJB Sports faces legal action over price-fixing' (The Times, 8 Feb 2007), Ibid.

correspondence with Dr. Deborah Prince the head of legal affairs with *Which?*...

> One of the biggest issues with the current legislation is that it only allows an opt-in system. Because of the generally low level of uptake, the opt-in system will invariably result in proportionality issues. To make it attractive for designated bodies to bring follow-on actions in all competition redress cases, **the system must be changed so that opt-out systems can be used**. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective. The only real, practical way to get over this is to introduce an opt-out system.[214] (Emphasis added)

Mulheron states that Ingrid Gubbay prepared the submission made by *Which?* to the OFT's discussion paper on Private Actions in Competition Law which dated 2nd July 2007. Ingrid Gubbay explained that among the negative experiences gained by *Which?* in the JJB Sports case were the following 'front loading' issues...

> The single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form. We believe that there should be a high degree of flexibility in this area.
>
> There is in our view a compelling case for an opt out provision to be made available.[215]

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[214] 'Observation by the Head of Legal Affairs, Which?' cited by R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', 41, (n46).

[215] R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', at 40, (n46). Ingrid Gubbay repeated her views on the preference of 'Opt-out' over 'Opt-in' in a speech entitled, 'Statutory Consumer Redress UK 2007', and given at the Irish Institute for European Affairs in Dublin on the 1st October 2007 when she said: 'Experience demonstrates that a system that requires the group to sign up will never be large enough to cover the losses incurred, and therefore any settlement figure or judgement is hardly likely to succeed in deterring multinational cartelists. This is where the U.S., Australian and Canadian style actions have a great advantage.' Accessed on the 4th October 2010 and available at

Julian Connerty of the law firm Clyde & Co. which lead the case for *Which?* made the following point...

> What this case proves is that the question of an opt-in versus an opt-out system is key: having an opt-in system makes it very difficult for the claimant and for Which?[216]

Its clear that section 47A of the Competition Act 1998, which was created to allow for a form of collective redress for injured parties in competition cases is inadequate and seen to be inadequate by the OFT and by *Which?*, the body specially designated to bring claims under that section. The OFT in its recommendations on 'Private actions in competition law: effective redress for consumers and business' stated...

> The current evidence suggests that representative actions exclusively on behalf of named consumers continue to fail to optimise economies of scale and give rise to unnecessary costs and complexity. There is a risk that meritorious cases may not be brought or may only be brought by, or on behalf of, a small number of those who have been harmed.[217]

The CJC Recommendations

The Civil Justice Council made a number of recommendations[218] to the Lord Chancellor in 2008. These recommendations, the report appears to suggest, would lead to 'an improved collective procedure'.[219]

The recommendations include 'a generic collective action [with] ... individual and discrete collective actions ... in the wider civil context i.e., before the CAT or the Employment Tribunal to complement the

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http://www.tca.ie/images/uploaded/documents/2007-10-01%20Consumer%20Redress%20Procedure.pdf

[216] The Lawyer, 'JJB to pay out after football shirts claim' (9 January 2008).

[217] Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business, Recommendations from the Office of Fair Trading' (Report), (n160).

[218] Improving Access to Justice through Collective Actions, (Report), (n153).

[219] 'An Improved Collective Procedure', the title to 'Part 9 Recommendations' on page 123 of the CJC Report, Improving Access to Justice through Collective Actions, (n153).

generic civil collective action.'[220] 'Collective claims may be brought on an opt-in or opt-out basis.'[221] Recommendations 4, 5 and 6 suggest a certification procedure with the Court acting as 'Gate Keeper' and specialist judges having a central role in case managing collective actions. Recommendation 8 continues the gate keeper role of the court to ensure that in class action cases that end in settlement, the interests of the claimants is protected. Finally, Recommendation 11 makes clear that to ensure legal certainty and to avoid challenges as to the *vires* of any new procedure, '...is desirable that any new action be introduced by primary legislation.'[222]

The UK Government's View on the CJC's Recommendations

The Ministry of Justice published a response to the CJC Recommendations entitled: "The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions.'"[223] That response was clear and unequivocal...

> The Government does not support the introduction of a generic right of collective action. It believes that such rights should be considered, and where appropriate introduced, in respect of specific 'sectors'.
>
> Rights of action should be introduced only where there is evidence of need and following an assessment of economic and other impacts and consideration of alternative approaches.[224]

Notwithstanding the rejection by the Ministry of Justice to the creation of a generic Class Action, the Ministry supported the creation, where appropriate, of collective redress mechanisms in specific sectors.

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[220] Ibid, Recommendation 1, 123.

[221] Ibid, Recommendation 3, 130.

[222] Ibid, Recommendation 11, 159.

[223] 'The Government's Response to the Civil Justice Council's Report.' (n180).

[224] Ibid, Executive Summary, bullets 2 and 3, page 3.

Evidence of a willingness of the UK Government to introduce a collective redress mechanism with at least some of the elements put forward by the CJC can be seen in the Financial Services Bill which was referred to earlier in this chapter.

Conclusion

The Commission recognised the need to make available to citizens a collective redress mechanism so that rights, derived from the Treaty and recognised by the Court of Justice, could be vindicated before national courts. The Commission initiated debate on what form collective redress should take within the European Union. Unfortunately, having bravely initiated debate on the issue, the Commission's suggested solution to the problem of collective redress was a mixture of representative action by nominated body and 'opt-in' class action.

The Commission shied away from urging the adoption of a more expansive 'opt-out' class action procedure as found in the United States. The reason for following a model along the lines of the American class action was because of fears of importing into Community law, alleged abuses attendant with the American model. As seen in this chapter, there are such abuses in the American class action. However, despite this, the current American class action model has proved effective at allowing small claimants gain redress that would otherwise be denied that redress whilst stripping illegal profits from companies engaged in an antitrust infringement. Experience from the United States reveals that the excesses in their class actions are sometimes exaggerated whilst the benefits are often ignored.

Recent experience in Britain shows that the model proposed in the White Paper by the Commission is unlikely to be effective at achieving the task set for it: compensating consumers with small and scattered low value claims caused by antitrust infringements. It is because of this experience in Britain that policy makers there are actively reviewing collective redress to find ways of making it more effective.

If the Commission succeeds in introducing by way of legislation an EU wide collective redress mechanism, it is unlikely to be effective in the format presented in the White Paper. Experience from Britain suggests that this form of collective redress, if adopted, will most likely need to be revisited again in the future.

At least it can be said that policy makers in Europe (at the Commission) and in Britain are actively looking at the area of collective redress as there is an understanding of the need for effective redress mechanisms. As will be seen in the next chapter, there is little debate on the issue in Ireland and even less comprehension of the need for reform amongst policy makers.

CHAPTER 5: COLLECTIVE REDRESS FOR BREACH OF COMPETITION LAW IN IRELAND

Introduction: Collective Redress in Ireland, the need, the law and the policy

We saw in Chapter 4 it that the Commission has recognised the need for a form of collective redress in competition damages actions. This need for collective redress comes from the requirement in Community law '...to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...'[1] Collective redress also helps overcome some of the obstacles to recovering damages in cases where the losses are small and dispersed.

The Commission proposed a particular model of collective redress in the White Paper after receiving the views of interested parties. It was argued in Chapter 4 that the model of collective redress proposed by the Commission, which bear similarities to the model currently used in Britain, has serious shortcomings which are likely to render it ineffective. It was argued in Chapter 4 that the Commission shied away from a more effective model of collective redress such as that used in the United States because of the perception that such a model would be open to a variety of abuses. It was also argued in Chapter 4 that though there are some abuses in the American class action procedure, these abuses are often imagined or exaggerated.

The debate that is currently taking place on collective redress in the United Kingdom was then discussed in Chapter 4. We saw that the debate in Britain is possibly leading towards a more expansive form of collective redress. Parliament there recently considered the introduction of an 'opt-out' class action in the Financial Services Bill to work alongside the current 'opt-in' model. Commentators, policy makers, the OFT and academics have argued the case for a more effective form of collective redress than is currently available in Britain. Experience in Britain informs us that an 'opt-in' class action such as

[1] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

that proposed by the Commission for class actions in Europe for infringement of the Treaty rules on competition, will be ineffective.

It will be argued in this Chapter that the requirement under Community law to put in place procedural rules to safeguard citizens rights derived under Community (competition) law is not being met in Ireland. The reason for this, amongst other things, is that at present there is no means for claimants who have suffered small and dispersed losses from a competition infringement to collectively recover damages in the Irish courts. It will be argued that there is need for reform. Reform would involve the introduction of a system of collective redress for competition damages actions in Ireland.

This chapter will include an overview of the law in Ireland on collective redress. That overview will identify shortcomings in existing collective redress mechanisms. This review of the law is necessary. The reason for this is that although the review repeats some of the features discussed in the Chapter 4 in relation to collective redress in Britain, the shortcomings in the law in Ireland need to be teased out to show that there are such shortcomings and that there is a need for reform. This is necessary as policy makers in Ireland do not appear to understand that there is a deficiency in this area. This will be seen later in the Chapter when views of policy makers will be explored especially in relation to collective redress. It will be seen that there is a lack of appetite or indeed of understanding in Government for reform which would include introduction of an effective system for collective redress. There is a heightened need for understanding amongst policy makers to the problems in collective redress especially given the shortcomings in the law in Ireland revealed in this Chapter.

It will also be shown that the Competition Authority initially failed to see the potential in adapting an effective form collective redress in Ireland. The Competition Authority was opposed to the introduction of class actions. It will also be seen that the Competition Authority's views on this matter evolved over time. The Authority will have a role to play in advocating reform in this field.

The legal need to safeguard citizens' rights under the Treaty

It will be recalled that the Court of Justice of the European Union has clarified in *Courage v Crehan* that...

> The full effectiveness of Article 85 of the Treaty (now Article 101 TFEU) and, in particular, the practical effect of the prohibition laid down in Article 85 (1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.[2]

This view was restated and reinforced by the Court in *Manfredi v Lloyd Adriatico Assicurazioni SpA* where the Court stated...

> It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC (now Article 101 TFEU).[3]

The Court in *Manfredi* continued by saying that...

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the

[2] Case C-453/99, *Courage –v- Crehan*, [2001] ECR I-6297.

[3] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* (n1).

> exercise of rights conferred by Community law (principle of effectiveness)...[4]

The Commission in its Staff Working Paper accompanying the White Paper stated that the *acquis communautaire* of the European Union is as follows...

> Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle also applies to indirect purchasers.[5]

It is clear from both the Treaty and the case law of the Court of Justice that there is a recognised right for individuals to sue in damages for any loss or harm caused by the anti-competitive conduct of undertakings. In fact, the Court of Justice has made clear that there is an onus on Member States to create the conditions in their legal systems that will ensure that the rights of citizens of the European Union are safeguarded so that they can sue in damages if they are the victims of a competition law infringement. The Member States are to safeguard these rights by laying down detailed procedural rules to ensure that private actions can be taken by individuals. This in turn will ensure that the rights of citizens that are safeguarded in Community law will be enforceable.

The Commission in its White Paper reiterated the views expressed by the Court on safeguarding citizens' rights under the Treaty in both *Courage v Crehan* and in *Manfredi* and tied this to the need to consider introducing mechanisms that allow for collective redress...

> With respect to **collective redress**, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. Individual consumers, but also

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[4] Ibid.

[5] Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 37.

> small businesses, especially those who have suffered **scattered and relatively low-value damage**, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently **remain uncompensated**.[6] (Emphasis in Original)

Irish shortcomings on the legal right to sue under the Treaty

Section 14 of the Competition Act 2002 (the '2002 Act') creates a right of action for individuals to sue for injury caused by undertakings infringing sections 4 and 5 of the 2002 Act. That section allows 'any person who is aggrieved in consequence of [a breach of sections] 4 or 5...' of the Act to sue. Section 14 (1) speaks only of a person's right to sue for a breach of sections 4 and 5 of the 2002 Act. No mention is made of a right to sue for a breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU', formerly Articles 81 or 82 TEC).

Section 14 (2) of the 2002 Act creates a civil right of action for the Competition Authority to sue, though not in damages. The Authority's right of action includes breaches of both sections 4 and 5 of the 2002 Act as well as breaches of Articles 101 and 102 TFEU.

There is an obvious anomaly in section 14 of the 2002 Act. The Competition Authority has a right to sue for a breach of sections 4 and 5 of the 2002 Act as well as for breaches of Articles 101 and 102 TFEU. However, the private plaintiff can only sue for a breach of sections 4 and 5 of the 2002 Act. Section 14(2) reads...

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

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[6] White Paper on Damages actions for breach of the EC antitrust rules Com 2008 (165) Sec (2008) 404 - 406.

Under the 2002 Act the Oireachtas empowered the Competition Authority to enforce breaches of Articles 101 and 102 TFEU in anticipation of Regulation 1 of 2003, but failed to ensure that individuals had the right to sue for damages before the Irish Courts for breaches of Articles 101 and 102 TFEU. It is however, most likely that the right of individuals to sue before the Irish Courts for breaches of Articles 101 and 102 TFEU are protected by the decisions of the Court of Justice in both *Courage v Crehan* and in *Manfredi*.

For example, Regulation 1 of 2003, at recital 7, makes express reference to the right of individuals to sue in national courts for breaches of Articles 101 and 102 TFEU...

> National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements...[7]

However, the exhortation by the Court of Justice for the legal systems of Member States to '...designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...'[8] were not accommodated when section 14 of the 2002 Act was being drafted. Of course, the enactment of section 14 of the 2002 Act predates the Court's decision in *Manfredi*.

It is clear that the 2002 Act did not create a right for claimants to sue in damages for breach of the Treaty rules governing competition. It is also clear that the 2002 Act did not provide the procedural rules governing such actions, and therefore the 2002 Act does not, by itself, safeguard individual's rights derived under Community law.

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[7] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the EC Treaty.

[8] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] (n1).

However, the Rules of the Superior Courts do appear to have addressed the issue. Order 63B of the Rules of the Superior Courts, introduced under Statutory Instrument No. 130 of 2005[9] acknowledged in its definitions section that competition proceedings before the High and Supreme Courts in Ireland included...

> (g) proceedings seeking the application of Article 81 or 82 of the Treaty; and
>
> (i) any other proceedings which concern the application of a provision of the Act, of the Regulation or of Articles 81, 82, 86, 87 or 88 of the Treaty.

The Regulation referred to is Council Regulation (EC) No. 1 of 2003, which is also defined in the definitions section of Order 63B.

Accordingly, the Rules of the Superior Courts acknowledge the right of individuals to sue under Articles 101 and 102 of the Treaty as well as their pre-existing right to sue for infringements of sections 4 and 5 of the Act. However this does not mean that there are effective mechanisms available to private litigants enabling them to enforce their rights before the Irish Courts, either under domestic law or under the Treaty.

No right of action for Consumers with small claims

One of the immediate concerns with section 14 of the 2002 Act is the fact that claimants who suffer comparatively small losses due to anti-competitive conduct by undertakings, might in fact be precluded altogether from suing for damages. The reason for this is that their loss would not reach the jurisdictional thresholds of either the Circuit or High Courts.

As already pointed out, section 14 (1) of the Act reads...

> Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is

[9] S.I. No. 130 of 2005, Rules of the Superior Courts (Competition Proceedings) 2005.

> prohibited under section 4 or 5 shall have a right of action under this subsection for relief...

Therefore, section 14 (1) creates a right of action for any person who is aggrieved through an infringement of sections 4 and 5 of the 2002 Act. Section 14 (3) of the 2002 Act limits the right of action to sue for a breach of sections 4 and 5 that arises under section 14 (1), to the Circuit and High Courts. That subsection simply reads...

> Subject to subsection (4), an action under subsection (1) or (2) may be brought in the Circuit Court or in the High Court.

Section 14 (4) makes clear that there is a strict limitation on the venue for hearing cases when suing under the 2002 Act...

> Where an action under subsection (1) is brought in the Circuit Court any relief by way of damages, including exemplary damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of the jurisdiction of the Circuit Court in an action founded on tort.

The definition of court contained in section 3 of the 2002 Act reads...

> "court", where used without qualification, means the District Court, the Circuit Court or the High Court as appropriate, or, in the case of an appeal, the Circuit Court, the High Court or the Supreme Court as appropriate;

Sections 14 (3) and (4) clearly specify the venue for hearing private actions for damages in competition law. The venue specified by the two sub-sections is either the Circuit or the High Court. Those two sub-sections therefore qualify the definition of court given in section 3 of the 2002 Act and used in sub-sections 14 (3) and (4). For this reason there is at least a very strong doubt that an injured party can sue for

damages in the District Court for a breach of sections 4 and 5 of the 2002 Act.

Accordingly the difficulty presented by section 14 of the 2002 Act is that it does not provide a right to sue for damages in the District Court for a breach of sections 4 and 5 of the 2002 Act. It is also possible that an injured person might not be able to sue in damages for a breach of the competition provisions under the Treaty in the District Court either, if the quantum of damages claimed falls below the jurisdictional threshold of the District Court,[10] as no provision is made for such a claim to be brought in the District Court. Vincent Power made this point in an article in *Competition*...

> What if one has a small claim, say, €1,000 to €2,000? It may well be that one simply takes one's case to the Circuit Court even though such claims would ordinarily fall within the remit of the District Court. However, the plaintiff who loses will have been involved in Circuit Court litigation and have to bear the associated costs...[11]

It is likely that many consumer claims arising from infringements of competition law will involve small sums by many claimants. Indeed, Vincenzo Manfredi's claim in *Manfredi* which went all the way to the Court of Justice was a small claim which started out life in the Giudice di Pace[12] (the small claims court in Italy). Once Mr. Manfredi had won his action in the Court of Justice, the Giudice di Pace awarded him damages totalling €889.10 together with legal costs totalling €500. The case had involved a claim by Manfredi against his insurance company

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[10] The monetary limit which specifies the jurisdiction of the District Court in civil matters is currently set at IR£5,000 (€6,348.69) as per section 4 of the Courts Act 1991. Section 14 of the Courts and Courts Officers Act, 2002, provides for the extension of the general jurisdiction of the District Court when making orders involving the payment of a monetary amount to €20,000. This section has not as yet been brought into force.

[11] Whittaker, *Competition*, V. Power: 'Little Guy caught in the gap, loophole stops cartel victims from suing for modest damages', Vol.15, Edition 10, page 206.

[12] P Nebbia, '...So What Happened to Mr. Manfredi? The Italian Decision Following the Ruling of the Court of Justice', European Competition Law Review, (2007) 591 – 596, at 591.

for an increase in premiums caused by illegal agreements involving his insurers and other insurance companies.[13]

Power points out that the inability of consumers to claim damages for small losses in the District Court has the potential to affect the claimant's rights and lead to a breach of Community law. As clarified in *Manfredi*, it is a matter for the legal systems of Member States to provide an effective mechanism for citizens to vindicate their rights. Power argued that...

> The amounts may be small, but to the particular plaintiff it could be quite significant. It also matters because in so far as the claim is in respect of a breach of EC competition law, Ireland would be in breach of Community law for failing to enable victims of breaches of competition law to vindicate their rights.[14]

Power suggests a simple solution to this problem - section 14 of the 2002 Act should be amended to allow plaintiffs sue in the District Court for damages under the 2002 Act. In reality this would not address the problem effectively, as there are many other difficulties facing the potential claimant in a competition damages claim.

Another solution to the problem, also suggested by Power, would be to allow for a form of class action that allows damages to be awarded in competition cases before Irish courts. This is more likely to be an effective method of redress for the victims of anti-competitive behaviour.[15]

Some reasons for introducing Class Actions in Irish Law

An outline of the types of class actions available in certain jurisdictions such as the United Kingdom and the United States was given in

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[13] Ibid.

[14] V. Power: 'Little Guy caught in the gap, loophole stops cartel victims from suing for modest damages', at pages 206 & 215 (n11).

[15] For example, see the comment in Marc D Ashley & others, *Antitrust Class Actions Handbook*, (ABA Publishing, Chicago 2010) page 4: 'The rise of antitrust class actions occurred because procedural innovations have made class actions an increasingly effective tool for claims involving a large number of plaintiffs.'

Chapter 4. That Chapter also detailed the purpose of collective redress in competition cases. It was argued in that chapter that collective redress is an effective mechanism in cases involving mass small (consumer) claims against large wealthy defendants. The alternative to collective redress involves either a myriad of small claims clogging up the courts, or injured parties being unable to sue.

Therefore the class action potentially gives access to justice to plaintiffs with small claims who might otherwise not have obtained redress for their loss.

The Commission's White Paper states in a single paragraph the clear need for effective mechanisms of collective redress. The rationale for such mechanisms is simple...

> Individual consumers, but also small businesses, especially those who have suffered **scattered and relatively low-value damage**, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently **remain uncompensated**. At the rare occasions where a multitude of individual actions are brought in relation to the same infringement, **procedural inefficiencies** arise, for claimants, defendants and the judicial system alike.[16] (Emphasis in original).

As a consequence of this, class actions would help to ensure that claimants can sue in damages for the losses they have suffered from a competition infringement. This in turn means that there are likely to be a greater number of claims made as claimants become empowered to bring class actions.

The introduction of a system for easily initiating class actions ensures that the State complies with the finding of the Court in *Manfredi* that...

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[16] White Paper on Damages actions for breach of the EC antitrust rules, para 2.1, (n6).

> ...it is for the domestic legal system of each Member State to ...lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...

A benefit to the State as Defendant: Army Hearing Loss Cases

As argued above and also in Chapter 4, there are many reasons for considering the introduction of a system of class actions in Ireland that allows an award of damages to claimants. Amongst these reasons is the requirement of conforming to Community law by providing mechanisms for citizens to vindicate their rights under the Treaty in the courts. There is also a need to create effective and efficient means for litigating competition damages claims before the courts.

Policy makers in government may eventually understand the needs of consumers to be able to gain redress for competition infringements. They may also feel the need to respond to the requirements to conform to Community law by creating effective redress mechanisms in Irish law for consumers in competition cases. However, the State could itself benefit from an effective class action procedure. The State has in the past been the defendant in actions taken by multiple claimants. Such actions have sometimes involved a myriad of individual actions seeking damages, with each claimant taking a separate action represented by their own team of lawyers.

An example of this is the army hearing loss litigation.[17] That litigation grew out of claims by serving and former members of the defence forces taking cases alleging hearing loss suffered during the course of their duties. According to the Department of Defence...

> The basis of most of the claims is that the individual was, in the course of his duty, exposed to noise at range practices from either small arms or artillery. In each case

[17] An outline of the case under the heading 'Overview of Hearing Loss Litigation Issue', accessed on the 4th October 2010 and available on the Department of Defence website at http://www.defence.ie/website.nsf/document+id/93191A155924DAD5802570C8005065D3#Overview

> it is usually alleged that no hearing protection, or inadequate hearing protection, was provided and that as a consequence the individual has suffered a hearing loss.[18]

This indicates that in this cause of action there was a large and identifiable class of potential claimants each of whom had similar claims arising from almost identical causes of action. The Department admitted that...

> It has effectively proved impossible to counter these claims as there is inadequate contemporaneous evidence to rebut the claims to the satisfaction of the courts.[19]

The Department of Defence faced an almost identical evidential difficulty in defending each of these cases. It is clear that the Department received these claims on an individual basis...

> Claims began arriving in significant numbers in 1992 and the volume of new claims reached its peak during 1997 when an average of over 120 claims per week was received. During the course of 1999, the rate of new claims arriving had reduced to a level of just under 100 per month.[20]

In other words, the Department had to deal with an enormous number of individual claims that arose from a similar set of facts and could have been handled as a class action. Instead, the State (Department of Defence and the Chief State Solicitor) had to deal with these damages actions on an individual basis.

In a written answer to a question from Fine Gael T.D. Jim O'Keeffe in October 2009, the then Minister for Defence Willie O'Dea T.D. gave the following information on the scale of both the damages paid out by the State and the legal costs that the State also had to pay...

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[18] Ibid.

[19] Ibid.

[20] Ibid.

> A total of 16,807 hearing loss claims have been received from current and former members of the Defence Forces in respect of loss of hearing allegedly caused during their military service. 16,139 claims have been disposed of to date. €288.7 million has been paid in respect of hearing loss claims including plaintiffs' legal costs of €100.2 million. The plaintiffs' legal costs include the fees of the solicitors' firms as well as other costs such as Counsel fees, medical reports, etc.[21]

The number of claimants in the army hearing loss cases was very large. The State dealt with them individually on a case by case basis. The legal costs amounted to €100.2 million which represented more than one third of the total outlay (including damages) in these cases. No doubt the amount of resources consumed with dealing with this amount of litigation on a case by case basis was equally large. If the State had been dealing with just a small number of law firms acting on behalf of a class of claimants, much time and effort as well as scarce resources could have been saved. Costs, including legal costs, would most likely have been much more manageable than the final amount reported by the former Minister for Defence.

The Law in Ireland on Multi-Party, Representative and Class Actions

The form of class action found in the United States in Rule 23 of the Federal Rules of Civil Procedure or the type of collective redress allowed by the GLO or by section 47B of the Competition Act 1998 in Britain and described in Chapter 4 are unknown in Ireland. This does not mean that there is not a form of collective redress in Irish law. In fact there are at present a number of ways in which the courts can deal with multi-party actions under either the Rules of the Superior Courts or through other statutory provisions. These include representative actions, joinder and consolidation of actions, test cases, public inquiries and compensation tribunals. However, it will be seen

[21] Dail Debate, Vol. 695, No 2, at 31, (page 14 of 29) accessed on the 4th October 2010 and available at http://debates.oireachtas.ie/DDebate.aspx?F=DAL20091119.xml&Node=H17&Page=14

that the methods for conducting multi-party litigation in the State are limited and would be largely ineffective in most competition damages cases.

Consumer Protection Act 2007

A recent form of statutory redress for consumers was included in section 81 of the Consumer Protection Act 2007. This section created a form of compensation order where either the District or Circuit Court, whichever has jurisdiction to hear the case, can order a trader to pay compensation to a named aggrieved consumer who consents to the application, in an amount of money that the court considers appropriate in respect of any loss or damage to that consumer resulting from that offence. There does not appear to be a limit to the number of aggrieved consumers that can be named in such an application for compensation. Neither does it appear that an accumulation of such compensation orders would bring the matter outside the jurisdiction of the court dealing with the matter, in circumstances where the accumulation of such orders would ordinarily exceed the statutory limit of compensation that that court could usually allow.[22] However, the limitations of this procedure are such that it would not be of much assistance in the great bulk of competition cases involving mass claims. This author is unaware of any instances where this procedure has been used to date.

Law Reform Commission and Multi-party litigation

The Law Reform Commission (the 'LRC') carried out a consultation in 2003 on whether there was a need to amend the law in Ireland on multi-party litigation. The LRC invited submissions from interested parties and issued a report in 2005. The Consultation Paper[23] and Report[24] on multi-party litigation by the LRC provide a very useful source of information on the state of the law on class actions in

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[22] See more generally N Reilly, 'The Effects of the Unfair Commercial Practices Directive on Irish Law' (Ph.D. Thesis, Trinity College Dublin, June 2009) at Chapter 11.

[23] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation (Class Actions)' (LRC CP 23-2003).

[24] Law Reform Commission, 'Report Multi-Party Litigation' (LRC 76-2005).

Ireland. Its review of the law on multi-party litigation also provided a helpful outline of the various options currently available to potential litigants that find themselves in a class of injured persons seeking redress.

Representative Actions

Representative actions are probably the closest there is in Ireland to the class action seen in the United States and elsewhere. The representative action in Ireland is similar to that found in Britain under Part 19.6 of the Civil Procedure Rules (CPR Rule 19.6)[25] and which was discussed in some detail in Chapter 4. It will be necessary however, to examine briefly the Irish version of the representative action given that there are some differences in interpretation by the Irish courts. It is also necessary to look at the representative action as it will be seen later in this Chapter that Irish policy makers mistakenly believe that it adequately fills the role of the class action in Ireland. It will be seen that the representative action falls short of what is required for providing an effective vehicle for bringing multi-party actions for damages in competition cases.

Order 15 rule 9 of the Rules of the Superior Courts 1986 facilitates representative actions before the High Court. The representative action enables large numbers of persons to be joined to a legal action taken by a single party, as represented parties. Order 15 rule 9 states...

> Where there are numerous persons having the same interest in one cause of action or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.

A representative action under Order 15 rule 9 allows one or more representatives to bring an action on their own behalf and on behalf of other named injured parties. The introduction of representative actions

[25] Available on the website of the United Kingdom's Ministry of Justice at http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part19.htm and accessed on the 4th October 2010.

was a response of the courts to the usual requirement that all parties to an action must be present in court when making or defending a claim.[26] In a case involving potentially numerous claimants as might be found in a competition damages case, it would be next to impossible to have all plaintiffs together in court at the same time. It would certainly be impossible if all plaintiffs appeared in court simultaneously with their respective legal teams, where each plaintiff is represented separately, and all wish to plead their case at once. A representative action at first glance seems to solve this problem.

However, the representative action has been used on very few occasions in Ireland. The LRC's Consultation Paper on Multi-Party Litigation[27] lists a number of reasons for the unwillingness of potential litigants from availing of the representative action procedure. The reasons put forward in the LRC Consultation Paper are as follows.

The court must first be satisfied that each individual member of the class has authorised the named party to act in a representative capacity for each of the claimants. This rule is apparently quite rigid.

All members of the class must have the same interest in one cause of action or matter.[28] In *Adam & Others v The Minister of Justice, Equality and Law Reform*, Mr. Justice Diarmuid B. O'Donovan stated that...

> Counsel on behalf of the Respondents submitted that, in the circumstance that the interests of the several Applicants herein were demonstrably different, the proceedings herein did not qualify for consideration as a class action; a submission with which, as I interpreted his response, Counsel for the Applicants did not take issue. Accordingly, as it appears to me that the respective interests of the several Applicants herein vary considerably, I think that it was wholly inappropriate that

[26] See *Duke of Bedford v Ellis* [1901] AC 1 where Lord MacNaughten famously stated that "the parties were so numerous that you could never 'come at justice'."

[27] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation (Class Actions)', (n23).

[28] *Roche v Sherrington* [1982] 1 WLR 599 and also *Barker v Allanson* [1937] 1 KB 463.

> their respective claims herein should have been included in the one set of proceedings. However, for the present, that is by the by.[29]

The problem that arose in the *Adam* case is unlikely to be an issue in a competition class action. The reason for this is that the plaintiffs will be suing a defendant(s) for imposing an anti-competitive price or other anti-competitive measure that will apply to all customers, and therefore all members of the class in near equal measure.

However, there is real uncertainty whether the courts can award damages to successful claimants in a representative action. The LRC referred to the case of *Markt & Co Ltd v Knight Steamship Co Ltd*[30] and specifically to the remarks of Fletcher Moulton LJ. Fletcher Moulton in that case said...

> Where the claim is for damages the machinery of a representative suit is absolutely inapplicable. The relief which he is seeking is a personal relief applicable to him alone, and does not benefit in any way the class with whom he purports to be bringing the action.

It appears that the current position in Irish law is set out in the *Markt* case. This was confirmed by John Meade solicitor, of Arthur Cox, when he submitted the 'National Report'[31] to the Commission on behalf of Ireland. There, when addressing the possibility of representative bodies taking a class action on behalf of consumers in competition cases he stated...

> 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

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[29] *Adam & Others v The Minister of Justice, Equality and Law Reform*, Unreported, High Court, November 16th 2000 at para 4.

[30] *Markt & Co Ltd v Knight Steamship Co Ltd*, [1910] 2 KB 1021, 1040-41.

[31] National Report, Ireland, (undated) prepared by John Meade, Solicitor, Arthur Cox Solicitors, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/ireland_en.pdf

injury each member may sue for damages on an individual basis.[32] (Emphasis added)

This means that a plaintiff in a representative action is entitled only to declaratory and injunctive relief. It will be recalled from Chapter 4 however, that it has been argued[33] that the Court of Appeal in England erred in *Markt* in not following the binding precedent of the House of Lords in *Duke of Bedford v Ellis.*[34] Recent developments in Britain through a series of cases up to *Independiente Ltd v Music Trading On-Line (HK) Ltd*[35] appear to suggest that a more flexible approach is being taken with the representative action which may now allow an award of damages. However, there has been no corresponding development in interpretation in the Irish courts on the availability of damages in representative actions.

A further limitation to representative actions is that although the parties that agree to be represented in the action are bound by the decision of the court in the case, a defendant might still face further action from claimants who had not agreed to be represented in the action.[36] Although this is clearly a downside to representative actions, it is not clear that this problem is solved by the various forms of class action, including opt-in and opt-out class actions that are used in different jurisdictions around the world including the United States and in Europe.

Where the representative action has clear deficiencies is when the court allows a member of the representative class to be exempted from the judgement during the course of the action.[37] Allowing an opt-out from judgement in representative actions is an obvious weakness

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[32] Ibid, at para C (ii), page 6.

[33] John Sorabji paper titled: 'Class Actions: Reinventing the Wheel' at Appendix M of the CJC Report 'Improving Access to Justice" (Report) by Civil Justice Council' available at http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf and accessed on the 4th October 2010.

[34] *Duke of Bedford v Ellis*, (n26).

[35] *Independiente Ltd v Music Trading On-Line (HK) Ltd*, [2003] EWHC 470 (Ch).

[36] The LRC Consultation Paper refers in this regard to the case of *Abrahamson & Others v Law Society* [1996] 1 IR 403, 413-15.

[37] *Moore v Attorney General*, [1930] IR 471, 489.

that would require being dealt with in any class action procedure that might be introduced in Ireland. This would ensure that class actions were effective and efficient in bringing certainty and closure to multi-party damages cases.

The LRC lists one final problem with representative actions - the unavailability of legal aid to bring such actions. A central argument in this thesis is that there is a need for various mechanisms and possibly incentives to assist and encourage private actions for damages in competition cases. However, assistance and incentives are unlikely to include legal aid. Given the current economic climate, it is unlikely that the State would countenance the extension of civil legal aid to competition and consumer class actions. In any event, encouraging private actions for damages by injured parties in competition cases should involve encouraging a form of self help. If the appropriate mechanisms and incentives are in place, then private actions for damages should be possible without recourse to the public purse.

The representative action as it is currently drafted in the Rules of the Superior Courts and interpreted by the Irish courts is a defective vehicle for multi-party actions for damages brought by consumers who have suffered low levels of individual loss in competition cases.

Joinder and Consolidation

Joinder and consolidation occurs where the Court joins two or more separate actions into a single suit. This is a similar process to that described in Chapter 4 in Britain. Each claimant becomes a party to the action in his own right. It is a method for dealing with numerous similar actions simultaneously. Order 15 rule 1 of the Rules of the Superior Courts makes provision for this form of action...

> All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any

> common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the proceeding, the Court may order separate trials or make such order as may be expedient.

There are obvious limitations to this procedure in assisting injured parties seeking redress through collective action in competition cases.

First, there usually has to be a number of separate proceedings already in existence before the court can order joinder or consolidation. In order to rely on this procedure in damages claims in competition cases, this presupposes that claimants are willing to individually commence proceedings and then hope that the court will order their consolidation into one suit. This is unlikely to happen in a competition case if it involves numerous small claims that would normally only be taken in the District Court, or at best in the Circuit Court. Given that at present small claims under the 2002 Act cannot be brought in the District Court it is unlikely that there would be many, if any, cases for a court to consolidate. Added to that the fact that joinder and consolidation can only occur in the higher courts, it appears that this provision is almost completely useless for damages actions in competition cases.

A further limitation to this procedure is the fact that the defendant can apply to court to have the cases heard separately. This adds a degree of uncertainty to the process and hardly inspires confidence that joinder and consolidation provides an effective method of affording collective redress in competition cases. It is safe to say therefore that joinder and consolidation do not solve the problem of allowing numerous small claimants to gain access to the courts to claim for damages in competition cases.

The test case

The LRC in its Consultation Paper states that the preferred approach to multi-party actions in Ireland is the test case. In this scenario, 'the first

case to be litigated becomes the benchmark by which the remaining cases are resolved.'[38]

Without delving too deeply into the test case, the obvious shortcomings that arise in the joinder and consolidation of actions arise here as well. A small claimant looking to recoup losses that fall within the jurisdiction of the District or Circuit Courts is unlikely to feel incentivised to take an action on their own in the hope that their test case will clarify matters for other small claimants in their class.

Although subsequent plaintiffs and defendants are not technically bound by the finding in the test case, the doctrine of stare decisis would ordinarily have a guiding influence on subsequent litigation by other members of the class. However, if the action is brought in a lower court, namely the District or Circuit court, the doctrine does not apply.

It is safe to say that the test case will have little impact in all but the rarest competition case involving an action for damages.

The Competition Authority's view

The Competition Authority made a submission[39] to the LRC in response to the LRC's Consultation Paper. The Competition Authority at the time of its submission to the LRC was surprisingly negative in its view of class actions in competition cases when it submitted in its introduction that...

> ...we have serious doubts as to its suitability for actions involving large classes of consumers, particularly in the area of competition law.[40]

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[38] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation, at paragraph 1.31, (n23).

[39] Competition Authority Submission to the Law Reform Commission on its Consultation Paper on multi-party litigation (class actions), Submission No. S/03/005, dated 30th October 2003, accessed on the 4th October 2010 and available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S03005.aspx?page=1&year=2003

[40] Ibid at para 1.2.

In its submission to the LRC Consultation Paper, the Authority acknowledged that '...Competition law is one area where potentially large groups of consumers may suffer injury.'[41] Indeed the Authority's submission makes clear the Authority's view that section 14 of the Competition Act 2002 is '...a valuable additional means of enforcing the competition rules by means of private action.'[42] The Authority submission then appears to make the case for class actions when it states...

> Although the Authority is the statutory enforcer of competition law, lack of resources means that it cannot take action in every case that arises. The existence of a right of private action is therefore also valuable for its deterrent effect. Unfortunately, this effect at present is rather weak. The number of private actions taken has been few. A significant reason for this may be the frequent existence of a Goliath-like defendant, which individual plaintiffs may be loath to take on. However, it is rare that a breach of competition law would affect only one or two individuals. Because breaches of competition law usually result in higher prices than would otherwise have been the case, consumers are ultimately the injured parties.[43]

Despite making what is a strong argument in favour of class actions in competition cases, the Authority then explains its belief that there are better ways of addressing the issue than by way of class action. The Competition Authority felt that '...class actions would be undesirable because of the possibility of abuse of the procedure and because of the difficulty of identifying the correct plaintiffs.'[44] The Competition Authority argued that the LRC should consider alternatives to the class

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[41] Ibid at para 1.3.

[42] ibid at para 1.4.

[43] Ibid at para 1.5.

[44] Ibid at para 1.6

action procedure, 'alternatives that might be better suited to cases involving injury to large groups of consumers.'[45]

An examination of the Authority's various arguments made to the LRC in 2003 against the introduction of class actions is informative. The arguments made by the Authority reflect at least some of the arguments that are regularly made against the introduction of class actions in other jurisdictions. These arguments were aired in Chapter 4 when dealing with issues arising under the American class action. The Competition Authority's views on the use of the class action procedure in competition cases appear to have been heavily influenced by the experience of the class action in the United States and in particular by the negative aspects of the class action in the United States that the Authority highlighted in its submission which as mentioned were discussed in the previous Chapter.

Cost to the Economy

The Authority emphasised the supposed huge cost to the United States economy of class action suits. In its submission, the Authority referred to statistics where...

> ...it is reported that the civil justice system, as an industry, is growing at a staggering rate - four times that of the economy. Federal class actions have increased by 300% in the last decade while state class actions have increased during the same period by 1000%. Those costs must be borne by the economy.[46]

The Authority did not cite the source of these statistics in its submission. It is likely however, that these statistics were drawn from an article entitled the 'Tort Tax', by Jim Copland which was published

[45] Ibid.

[46] Ibid at para 2.2.

in the Wall Street Journal on the 11th June 2003.[47] In that article Copland argued...

> ...even as the economy has stagnated and the stock market has plunged, the tort tax has continued to skyrocket: In 2001, the last year for which data are available, U.S. tort costs grew by 14.3%. If tort costs continue to increase at their 2001 pace, the 10-year cost of the tort tax will be over $4.8 trillion - roughly triple the size of the 2001 and 2003 Bush tax cuts combined.[48]

Copland argued that the key driver in this 'dramatic run-up in tort costs' is...

> ...an explosion of "class-action" claims in which lawyers sue major corporations on behalf of thousands or even millions of plaintiffs, who often don't even know they are being represented. Between 1997 and 2000, American corporations reported a 300% increase in federal class actions and a 1,000% spike in state class actions filed against them. Facing these massive suits, and watching their share prices sink with bad publicity, corporations settle rather than risk billions of dollars in punitive damages.[49]

The European Commission in its Staff Working Paper accompanying the White Paper acknowledged that respondents to the Green Paper had raised these concerns...

> The objections focus principally on the potential costs of collective redress mechanisms for society, and on the risk of multiple recoveries from infringers. Those opposing any initiative in that field evoke the US system in their

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[47] J Copland, 'The Tort Tax' *Wall Street Journal* (New York 11 June 2003) available at http://www.manhattan-institute.org/html/_wsj-the_tort_tax.htm and accessed on the 4th October 2010.

[48] Ibid at para 3.

[49] Ibid at para 4.

> argumentation, mentioning the excesses this system has led to, and the resulting costs for business and society as a whole.[50]

The statistics quoted by the Competition Authority as well as the allegation that the so called 'Tort-tax' add hugely to legal costs as well as adding costs to business have been disputed.[51] However, even if these statistics were correct (and it is not accepted by this author that they are), it should not prevent the introduction of class actions in Ireland. It is possible to take those positive aspects of the class action system from the United States and elsewhere and transpose them to the Irish system whilst learning from mistakes that have been made. The Commission in its Staff Working Paper accompanying the White Paper on damages actions makes that point...

> It is important to underline that specific features may be designed in order to serve as effective safeguards against misuse of the system. These measures can contribute to ensuring that the collective redress mechanisms for victims of competition law infringements in Europe achieve the objective of improving access to justice and guaranteeing compensation, whilst avoiding imposing unnecessary costs on potential defendants and the judicial system.[52]

In a footnote to the paragraph just quoted the Commission also addresses the alleged excesses in the American class action. The Commission make the point, amongst other things that...

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[50] Commission (EC), 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', at para 29, (n5).

[51] See for example Andrew Gavil's statement to the AMC, which was discussed in Chapter 4. See also L. Chimerine and R. Eisenbry, 'The frivolous case for tort law change: Opponents of the legal system exaggerate its costs, ignore its benefits', The Economic Policy Institute, available at http://www.epi.org/publications/entry/bp157/, which was referred to in Chapter 4, and 'The Tort Tax Scam', published by the Centre for Justice and Democracy, July 7th 2006 available at http://www.centerjd.org/archives/issues-facts/MB_torttaxscam.pdf both accessed on the 4th October 2010.

[52] Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, para 43, (n5).

> US class actions in antitrust cases are characterised by a combination of features that is very specific to the US, including jury trial, one-way shifting of costs, treble damages, wide pre-trial discovery, contingent fees agreements and an opt-out mechanism. The introduction in Europe of features similar to one or some of these features may not produce the same effects. For instance, the introduction of opt-out mechanisms in Portugal and The Netherlands is not reported to have led to similar excesses.[53]

It is of course true that there are abuses in the American version of the class action and some of these were highlighted in Chapter 4. It will be recalled that the example of the *Mirfasihi*[54] class action settlement was given. It was shown in *Mirfasihi* how counsel for the class was to benefit most from the proposed settlement whilst the vast majority of class members were to receive absolutely nothing. It was also shown that when the Court is vigilant in its role as 'gate keeper' as was the case with the appeal court in *Mirfasihi*, abuses in class actions can be reduced if not entirely avoided.

No reward for plaintiffs

The Authority then argued in its submission to the LRC that most class action cases are settled and that...'It quite frequently happens in such cases that plaintiffs receive nothing.'[55] The Authority refers to American experience using the example of an airline case where...

> ...each member of the class received a letter requesting him to put together all of his flight receipts for a five-year period that ended several years before receipt of the letter. Production of these receipts would entitle him to a

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[53] Ibid, at footnote 24 to para 43.

[54] *MAV Mirfasihi v Fleet Mortgage Corporation*, 356 F.3d 781, 784, U.S. 7th Circuit (2004). The Nan Ellis article, 'Class Action Fairness Act of 2005: The Story behind the Statute', 35 Journal of Legislation 77 (2009) 76 – 112, will also be recalled in this regard.

[55] Competition Authority Submission to the LRC, at para 2.3, (n39).

> share of the settlement. Very few people – if any – were able to avail of this offer.[56]

As with previous examples, the Competition Authority only looked to the negative aspects of the American class action. The Authority did not consider that the American class action model could be adapted to the Irish legal system thereby removing the objectionable aspects of the American class action.

An important difficulty with class actions according to the Authority is the fact that class members are paid only small sums, if paid anything at all. Payment is frequently through means of coupons and these can only be reclaimed if the class member can prove that they have been one of the members of the class that suffered injury. Furthermore, even if the class member can prove their loss, they are forced to return and deal again with the defendant from whom they have received the coupon through the class action, the defendant that caused the class plaintiff loss in the first place through anti-competitive behaviour. Finally, the Authority points out that class action suits frequently settle. There are strong counter arguments to the points made here by the Competition Authority and these counter arguments will be outlined now.

Counter arguments to the Competition Authority's view

Although there are undoubtedly difficulties and abuses with class actions, especially with the type of class action found in the United States, the reasons given by the Authority for opposing class actions could equally be used for arguing for their introduction.

Small sums in damages dispersals

The Authority argued that class members frequently receive only small sums by way of settlement through the class action process. This of course is the purpose of collective redress for consumers with small claims in competition infringement cases. Claimants that have suffered

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[56] Ibid.

small and dispersed losses that would at best merit legal action in the District Court are at present unable to recover damages. The class action affords such claimants the opportunity to recover damages for their losses where that right is otherwise denied at present.

An example of this is the outcome in the *Consumers Association v JJB Sports plc*[57] case in the UK which was mentioned in Chapter 4. In that case consumers had bought replica England and Manchester United football jerseys from JJB Sports and other manufacturing companies. The companies including JJB Sports had been found by the Office of Fair Trading (OFT) to have been involved in a price-fixing cartel where the purchasers of the replica jerseys had paid a cartel overcharge in the order of £15 per jersey. JJB Sports was fined £18.6 million by the OFT. The Consumer association *Which?* as a designated body took a 'follow-on' action under section 47B of the Competition Act 1998. The action ultimately settled. According to *Which?*...

> Fans who paid up to £39.99 for certain England and Manchester United football shirts during specific periods in 2000 or 2001 and joined our case against JJB Sports will receive a payment of £20 each...
>
> However, if you bought one of the affected shirts but didn't join the case, you can still claim back £10. To do this, you must present either proof of purchase or the shirt itself, with its label intact, at a JJB store before 5 February 2009...
>
> Many of those who purchased the relevant shirts still have the whole of next year to take their shirt or proof of purchase into a JJB store, so we encourage them to do so.

[57] *Consumers Association v JJB Sports plc*, Competition Appeals Tribunal (CAT) case number: 1078/7/9/07.

> If you present a shirt, the payment is reduced to £5 if the label is missing, and any shirt presented will be indelibly marked.'[58]

There were a number of shortcomings with this case and the outcome has been decried as being unsatisfactory even by those involved in the case. The negative aspects of the case were outlined in Chapter 4 where the various models currently in use for collective redress in some jurisdictions was examined. However, for the purpose of this chapter, this case is an example of consumers with small claims having the opportunity to gain redress where they might not otherwise have done. An 'opt-out' class action in this case may have recovered a far greater pay out in damages, if it had been available.

Difficulty proving loss

Another difficulty pointed out by the Authority is that class members frequently find it impossible to prove their loss. The passage of time from when the loss occurred to when the class action is settled means that till receipts and so forth are lost. This is not a difficulty that is peculiar to members of class actions or persons with small claims. If an injured party realised that they had bought a football jersey from a company implicated in a cartel case and decided to bring their own action, presuming that that action was allowed, they would still require proof that they had bought the jersey from the implicated undertaking in the first place. In the *JJB Sports* case, where receipts could not be produced by claimants to prove purchase, production of the jersey would prove sufficient to gain compensation.

Class action settlements

The LRC in its consultation paper points out that '...Experience in other jurisdictions has shown that the majority of class actions are resolved by way of settlement...'[59] The Authority implies in its submission that

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[58] 'JJB to pay fans over football shirt rip-off: *Which?* helps consumers to get cash back', from *Which?* website dated January 2008 at http://www.which.co.uk/news/2008/01/jjb-to-pay-fans-over-football-shirt-rip-off-128985 accessed on the 4th October 2010.

[59] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation', at para 4.87 (n23).

this is somehow a negative aspect of the class action. However, settlement of a class action has obvious advantages. It brings finality and certainty to both plaintiff and defendant in an action. Settlement of actions before they are tried frees up court time and resources, reduces the overall costs of the litigation and removes the element of risk for both plaintiff and defendant in otherwise complex cases.

The LRC in its consultation paper acknowledges the need '...to protect class members from a settlement that is imprudent or unfair [and that this] necessitates some modification of the general rules that pertain to settlement.'[60] In constructing a class action procedure for use in the Irish courts, close judicial scrutiny by appropriately appointed judges to deal with complex competition class litigation should not prove an insurmountable hurdle. The LRC in its consultation paper made such a recommendation...

> The Commission recommends that the settlement or discontinuance of a class action be subject to the approval of the court.[61]

This is not a novel recommendation. For example, the UK's Civil Justice Council (the 'CJC')[62] published a report in December 2008 entitled 'Improving Access to Justice through Collective Actions.'[63] The sub-title of the report was 'Developing a More Efficient and Effective Procedure for Collective Actions' and the report, which was delivered to the Lord Chancellor on the 12th December 2008, contained a number of recommendations. Amongst these recommendations was Recommendation 8 which reads...

> To protect the interests of the represented class of claimants any settlement agreed by the representative

[60] Ibid at para 4.87, page 86.

[61] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation', at para 4.89 (n23).

[62] The Civil Justice Council is a non-departmental public body established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system in England and Wales. Further information on the CJC can be found at http://www.civiljusticecouncil.gov.uk/ accessed on the 4th October 2010.

[63] 'Improving Access to Justice through Collective Actions', available at http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf and accessed on the 4th October 2010.

> claimant and the defendant(s) must be approved by the court within a 'Fairness Hearing' before it can bind the represented class of claimants. In approving a settlement or giving judgment on a collective claim the court should take account of a number of issues in order to ensure that the represented class are given adequate opportunity claim their share of the settlement or judgment.[64]

The CJC listed four benefits to a fairness hearing. These were...

> First, it allows the court to ensure that the interests of absent class members (who, in many cases, are unlikely to have the benefit of legal advice) have been adequately served by the settlement. Secondly, it also seeks to prevent 'sweetheart deals', by which representative claimants use the class action to improve their own bargaining position to settle their individual claims on terms more favourable than for the other class members. Thirdly, a fairness hearing seeks to ensure that the legal representative's funding arrangements do not compromise the best interests of the class members, and that there is no collusion between class lawyers and the defendant. Finally, a fairness hearing is a means for the court to monitor extortionate settlements to prevent profiteering from vulnerable defendants i.e., so-called blackmail suits.[65]

The CJC understood the need for the Court to play a gatekeeper role in class action cases. The four benefits of the 'Fairness Hearing' in a class action settlement speak for themselves. It will also be recalled from Chapter 4 that the American class action procedure has in built judicial

[64] Ibid at page 148 and following.

[65] Ibid at page 149.

safeguards[66] that have recently been strengthened by passage of the CAFA.[67]

However, when the LRC came to publishing its 'Report on Multi-Party Litigation' in 2005, it took a very different position from the CJC recommendation just quoted. The LRC's recommendation in its Report reads...

> The Commission recommends that the terms upon which a settlement would be accepted or rejected should be agreed by the individual members of the group at the opt-in stage. The court should be made aware of the terms of this agreement and will have the jurisdiction to set the terms of acceptance or rejection of the settlement only in exceptional circumstances.[68]

The LRC did not favour the court having an active gate keeping function in class action settlements. This appears strange at first glance, especially given the suggestion of the LRC in its consultation paper. However, the reason for this change has much to do with the form of class action that the LRC recommended in its Report. The LRC appeared favourable to an 'opt-out' type class action during the consultation phase in 2003, though at that stage the LRC had sought views on both the 'opt-in' and 'opt-out' approach to the class action.[69] The LRC's position had crystallised on a preference for an 'opt-in' type class action by the time of its final report in 2005. An opt-in process involves active participation in the class action by the class members. The class members have to take positive steps to actively participate in the class action otherwise they are excluded from the class. Given that the class members in an opt-in class action have positively affirmed their desire to participate in the class action, it is presumed that they

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[66] For example, see discussion in Chapter 4 on the case: *MAV Mirfasihi v Fleet Mortgage Corporation*,356 F.3d 781, 784, U.S. 7th Circuit (2004).

[67] See discussion in Chapter 4 of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note) ('CAFA').

[68] Law Reform Commission, 'Report: Multi-Party Litigation', at para 2.103 (n24).

[69] See in particular Law Reform Commission, 'Consultation Paper on Multi-Party Litigation (Class Actions)' at para 4.06, page 62 (n23).

are actively looking after their own interests to an extent that reduces the need for a gate keeping function on the part of the Court.

One of the four benefits listed by the CJC is that it allows the Court ensure that class counsel does not settle on terms more suitable to themselves than to the class they represent. In Chapter 4, problems with the American model of class actions including abuses by class counsel were discussed as were some of the attempts to address some of these alleged abuses.

A specific example of abuse that the Authority pointed to is the use of coupons as a method of payment to class members by settling defendants. The Authority argued that this method of payment by way of settlement to class members is more beneficial to the settling defendant and to the class lawyers than to the members of the class. The reasons put forward by the Authority are that coupons are frequently recoverable only if the claimant class member redeems the value of the coupon through a future purchase from the defendant whom they have just sued. This means that the class member that has suffered loss from the defendant must deal again with the same defendant in order to recover that loss. Meanwhile, the lawyer acting for the class receives substantial fees from the settling defendant. Furthermore, the defendant is also happy with the settlement as it becomes a means of drumming up more business in the future. This turns a case where the defendant was facing potentially huge losses into a business opportunity with huge benefits for the defendant. Rachael Mulheron in her book *The Class Action in Common Law Legal Systems* citing CR Leslie neatly makes the point...

> In most cases, coupons are not punishment; they are promotional. Settlement coupons are the economic equivalent of a court supervised promotional campaign.[70]

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[70] R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford and Portland, Oregon 2004), 406, citing CR Leslie, 'A Market Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation', (2002) 49 UCLA Law Review 991, 996.

Mulheron then quotes a United States Senator who decried the practice of paying plaintiffs in a class action by way of coupons. The Senator is quoted as saying...

> ...if coupons are better for the clients, then why aren't the lawyers paid in coupons?[71]

Mulheron again citing Leslie refers to the suggestion that...

> ...class lawyers "be paid in the same currency as the class" has been academically suggested ... with the aim of realigning interests of lawyers and class members – so that the formers' own rational self interest will motivate it to negotiate either a cash based settlement or, in the case of a coupon settlement, marketable coupons that actually confer value on the class.'[72]

Taking account of these examples of alleged abuse, the Oireachtas could draft a class action procedure that determines the form of payment to be made to class members when a case either settles or an adverse finding is made against the defendant by the Court. Careful scrutiny of settlements by the courts coupled with appropriate methods of payments in a given case could be achieved. Indeed, payment of damages to class members in Ireland might include payment by way of coupon in appropriate cases, if such coupon has a real value vetted by the courts.

Disproportionate rewards for lawyers

The Authority then highlighted another abuse that is frequently cited by commentators on class actions in the United States. This abuse arises where lawyers for the plaintiffs in a class action settle on terms that benefit themselves rather than the class members. A lawyer

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[71] Ibid at 406, Sen Grassley, Class Actions Fairness Act of 1999: Hearings on S 353 Before the Senate Judiciary Committee Administrative Oversight and the Courts Subcommittee, 106th Cong 77 (1999) 2, cited in NC Scott, 'Don't Forget Me! The Client in a Class Action Lawsuit', (2002) 15 Georgetown Journal of Legal Ethics 561, 592.

[72] Ibid, Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (n70), at pages 406-7, citing Leslie 'A Market Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation' at page 997.

acting for a large mass of plaintiffs in a class action will be in a position to reach a deal with a defendant on terms favourable to the lawyer but not necessarily favourable to his clients in the class. Defendants, according to the Authority's submission '...are generally keen to settle at any cost, and will try to strike attractive deals with counsel in order to do so.'[73]

The suggestion made by the Authority here is that lawyers for a class are open to being bought off by the defendant on terms attractive to the lawyer but not to the class. The Authority then refers to a specific case as an example of the type of abuse that unscrupulous counsel for a class sometimes engage in. The case referred to is MassMutual, but the case details are not cited in the submission. It is possible that the Authority was referring to the case of *Wilson v Massachusetts Mutual Life Insurance Company*,[74] a case dealt with in the New Mexico Court of Appeals. The Authority made its point using the initial proposed settlement terms in this case as follows...

> Under the terms of the proposed settlement, the defendant would have provided better disclosure in the future, but would have paid no damages to the class. Even the improved disclosure, moreover, would not have benefited most of the class members - approximately 5 million of the class members were no longer MassMutual policyholders at the date of the settlement. All of the class members, however, would have released their potential claims against the insurer.[75]

The interesting point here is that this case did subsequently settle after the intervention cited by the Authority, and on terms closely scrutinised by the Court.

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[73] Submission to the LRC on its Consultation Paper on multi-party litigation, at para 2.5, (n39).

[74] *Floyd D. Wilson et al., for themselves and all others similarly situated, Plaintiffs-Appellees, v. Massachusetts Mutual Life Insurance Company, Defendant-Appellee, v. New Mexico Taxation and Revenue Department, Intervenor-Appellant, v. State of Texas*, Intervenor-Appellant, Docket Nos. 23,274 and 23,351, Court of Appeals of New Mexico.

[75] Submission to the LRC on its Consultation Paper on multi-party litigation, at para 2.7, (n39).

Initiation of cases by legal firms

The Competition Authority also pointed to the problem of law firms being incentivised to initiate actions on behalf of class members. This problem is closely linked to the issue of lawyers earning disproportionate rewards for taking these actions. The Authority suggested to the LRC that '...criteria should be set in place to prevent the possibility of this arising in Ireland.'[76] The suggestion by the Authority that safeguards are put in place to avoid potential abuse by unscrupulous lawyers is sensible.

The Department of Enterprise, Trade and Employment made a submission[77] on behalf of Ireland to the European Commission on its White Paper in July 2008. In that submission, when dealing with a separate issue, the Department made the following point...

> Indeed, the Irish law of torts (civil wrongs) recognises the specific torts of maintenance and champerty which are intended to prevent civil actions being taken for the benefit of a third party.[78]

The law in Ireland on maintenance and champerty undoubtedly gives rise to potential problems that need to be addressed when devising mechanisms for collective redress before the Irish courts. Issues arising in maintenance and champerty will be addressed in Chapter 6. For now it should be noted that mechanisms used in some jurisdictions to facilitate class actions can involve nominated bodies taking an action on behalf of class members. As seen in Chapter 4, section 47B of the UK's Competition Act 1998 allows a specified body to bring a representative action in respect of consumer claims made or continued on behalf of at least two individuals. Under that provision it will be recalled however that...

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[76] Submission to the LRC on its Consultation Paper on multi-party litigation, at para 2.9, (n39).

[77] Department of Enterprise, Trade and Employment, 'Response to the European Commission White Paper on Damages actions for breach of EC antitrust rules' (31 July 2008), http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/ireland_en.pdf, accessed on the 4th October 2010.

[78] Ibid at para 29.

> The only 'specified body' to date is *Which?*, pursuant to the Specified Body (Consumer Claims) Order 2005, SI 2005/2365, and the only action brought pursuant to s 47B has been the case of *The Consumers Association v JJB Sports plc* (case number: 1078/7/9/07).[79]

Competition Authority submission to Commission Green Paper on Damages Actions

The Competition Authority made a submission[80] to the European Commission's Green Paper on damages actions. The submission is in the form of a response to a questionnaire and therefore just over one page of the submission is devoted to collective actions.

Although the Authority essentially repeats the solutions it suggested to the LRC in its comments on the LRC's consultation paper, it seems that the view of the Authority on collective redress had evolved and progressed by April 2006 from its position in its submission to the LRC in 2003.

In its Green Paper submission, the Authority states...

> The Competition Authority believes that certain types of collective action may address this problem, in particular, empowering bodies such as consumer associations to institute actions on behalf of consumers.[81]

Then, in its summary to this part of its submission to the Green Paper it states...

> ...the Competition Authority submits (a) individual consumers should not be deprived of bringing an action;

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[79] R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', a research paper submitted the Civil Justice Council for England and Wales dated 8th February 2008, at para A, page 36, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf and accessed on the 4th October 2010.

[80] See 'Irish Competition Authority Submission On Commission Green Paper On Damages For Breach Of EC Antitrust Rules', available at http://www.tca.ie/images/uploaded/documents/s_06_001%20Damages%20Actions.pdf and accessed on the 4th October 2010.

[81] Ibid at para 6.3.

(b) consideration be given to the creating of a cause of action by a representative body, or (c) consideration be given to some adaptation of the US parens patriae procedure.[82]

Contrast that submission with the closing comment in the submission to the LRC where it stated: 'The Authority recommends that the Commission consider possible alternatives to the class action procedure.'[83] The Authority submission to the LRC continued by suggesting the LRC consider recommending '...regulatory bodies might be empowered to sue on behalf of consumers,'[84] or 'Whether the existing representative action might be improved.'[85]

This slow evolution in the Authority's position on collective redress is to be welcomed. However, it was argued in Chapter 4 that the representative action, referred to here by the Competition Authority, and as currently found in Britain is flawed. Should a representative action be made available in Ireland, careful scrutiny of developments in the representative action in Britain should be encouraged so that lessons can be learned from developments there.

The suggestion that some consideration be given to the adaptation of the *parens patriae* procedure, though interesting, is lacking in detail and does not look as if it has been fully thought through. It most likely would be an unsatisfactory method of dealing with damages actions in competition cases. The reason for this is that in the United States, it is the Attorney General who takes the case in each of the 23 States[86] that allows a *parens patriae* procedure. If this were to happen in Ireland, a public official or an agency such as the Attorney General on behalf of

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[82] Ibid at para 6.5. Parens Patriae literally means: 'father of the country.' According to the ABA Section of Antitrust in *Antitrust Law Developments* (6th ed. 2007) Vol. 1, pages 638 - 639: 'The concept of *Parens Patriae* as a means for a state to seek redress for wrongs committed against its general populace was first recognized by the United States Supreme Court in *Louisiana v Texas*...the wrong must 'affect the public at large,' rather than merely private individuals.'

[83] Competition Authority Submission to the LRC on its Consultation Paper on multi-party litigation (class actions), at para 5, (n39).

[84] Ibid at para 5 (b)

[85] Ibid at para 5 (c)

[86] *Antitrust Law Developments*, page 639, (n82).

the people of Ireland, or the Competition Authority, would be responsible for taking these cases. The Attorney General's office does not have the expertise in litigating competition cases at this time, and is unlikely in the present economic climate to have the resources to take such cases. The Competition Authority's role as public enforcement agency could become blurred by having a role in seeking damages on behalf of injured parties in what would be a form of state led private action.

Public Policy in Ireland on damages and collective redress

The Authority shifted its position slightly by 2006 regarding the introduction of collective redress in competition cases. That shift in position became more marked by 2007.[87] For example, in a presentation given at the Irish Institute for European Affairs on 27th September 2007, this author pointed to some of the weaknesses in the Authority's stated public position[88] on class actions. In the final slide of his presentation this author asked whether the Competition Authority should re-think its views on class actions.

Negative views from other quarters: the Department of Enterprise

The Competition Authority was not alone in expressing negative views on the possible introduction of class actions in competition cases in Ireland. The Competition Authority did not make a submission to the Commission on the follow up White Paper on damages action. Rather, the Department of Enterprise, Trade and Employment took the lead on behalf of Ireland by making a submission[89] to the Commission on damages actions. It is that Department that is principally responsible for drafting competition policy in Ireland...

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[87] See D. McFadden, 'Consumer Actions for Damages for Anti-Competitive Violations', (presentation slides) available at http://www.tca.ie/EN/Promoting-Competition/Speeches--Presentations/David-McFadden-Consumer-Actions-for-Damages-for-AntiCompetitive-Violations.aspx?page=1&year=2007 and accessed on the 4th October 2010.

[88] Ibid. This author referred to the Competition Authority's submissions to the Law reform Commission and to the Commission on the Green Paper on damages actions. In particular, the author referred to the two principal reasons given in those submissions by the Competition Authority for opposing the introduction of class actions and then questioned if the Competition Authority's stance was tenable in light of experience in cartel enforcement (the Heating Oil case) and in light of the debate initiated by the Commission in its Green Paper.

[89] See Department of Enterprise, Trade and Employment, 'Response to the European Commission White Paper on Damages actions for breach of EC antitrust rules', (n77).

> The work of the Section is concerned mainly with the development of policy and the provision of advice on the application of competition law.[90]

In its submission on the White Paper, the Department of Enterprise, Trade and Employment encouraged '...the Commission to further explore the rationale for the creation of a special regime for competition litigation.'[91]

Paragraph 8 of the Submission then gives a clear indication of the thinking of both the Department and the Irish Government on the issue of encouraging private actions for damages. It ends by questioning whether the Commission should be leading this process at all and suggests that '...Member State-led development may be preferable to Community intervention at this stage.'[92]

Indeed, the Department of Enterprise, in its submission, questions the interpretation by the Commission of the decisions of the Court of Justice in *Courage v Crehan* and in *Manfredi*...

> ...Ireland does not read those decisions as inviting, still less directing, the harmonisation of the procedural aspects of competition law within the Community. It is considered that what is proposed in the White Paper goes far beyond the issues considered in those decisions.[93]

The above quotation from the submission gives an indication of the Department of Enterprise's views on the Commission's initiative on damages actions. Paragraph's 19 – 21 of the Department's submission

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[90] From 'The Role of Competition Policy', the Competition Policy section of the Department of Enterprise, Trade and Innovation, available at http://www.deti.ie/commerce/competition/role.htm and accessed on the 4th October 2010. The Department of Enterprise, Trade and Employment has been renamed the Department of Enterprise, Trade and Innovation. See speech of Taoiseach Brian Cowen dated 23rd March 2010 available at http://www.taoiseach.gov.ie/eng/Government_Press_Office/Taoiseach's%20Speeches%202010/Speech_by_the_Taoiseach,_Mr_Brian_Cowen,_TD,_D%C3%A1il_%C3%89ireann,_Nomination_of_Members_of_Government,_23rd_March,_2010.html and accessed on the 4th October 2010.

[91] See Department of Enterprise, Trade and Employment, 'Response to the European Commission White Paper on Damages actions for breach of EC antitrust rules', at para 7, (n77).

[92] Ibid at para 8.

[93] Ibid at para 12.

puts forward the argument that the requirements in *Manfredi* have been more than met by the enactment of section 14 of the Competition Act 2002. In Paragraph 21 the Department argues that...

> ...[t]here are no national provisions that render it practically impossible or excessively difficult to exercise the right to seek compensation.'[94]

In this chapter arguments contrary to the assertion made by the Department in paragraphs 19 – 21 of its submission to the Commission on the White Paper have been made. For instance, it has been argued in this chapter that claimants are at present unable to sue for small sums in damages in the District Court. There is currently no mechanism allowing for collective redress through a class or representative action by claimants who have suffered small and scattered losses. Therefore, even if there was a right to sue in the District Court, in reality there would still be no real or effective method of recovering damages for scattered and relatively low-value losses suffered because of anti-competitive behaviour under both Irish and Community law. It has been argued in this chapter that the right to redress which individuals derive directly from Community law and that Member States are obliged to safeguard by virtue of the decision in *Manfredi* is not at present met by Irish law. It has also been shown that claimants suffering small and dispersed losses due to competition infringements under domestic law, also have no real avenue available to recover damages for those losses.

Public Policy and collective redress

There is a real concern that public policy as revealed by the submission made by the Department of Enterprise to the Commission on its White Paper is both antithetical to collective redress mechanisms in competition cases whilst simultaneously revealing a lack of understanding of the need for such mechanisms in Irish law. This can

[94] Ibid at para 21

be seen in a review of the submission made by the Department on the White Paper.

The Department addressed each of the various issues raised by the Commission in its White Paper in turn. In relation to collective and representative actions it stated...

> In principle, Ireland has no particular difficulty with the proposal for collective actions. Irish law already makes provision for actions of that nature in the form of Order 15, Rules 1 and 9 of the Superior Courts. These provisions, it should be said, are rarely utilised which could suggest a weakening of the White Paper's basic premise that there is a real practical problem which requires to be addressed by the Community legislature. [95]

It appears that the Department of Enterprise '[i]n principle ... has no particular difficulty with the proposal for collective actions...' However, there are clearly a number of difficulties with the Department's interpretation of how Order 15 of the Superior Court Rules operates in practice.

The Department of Enterprise appears to believe that Order 15, rule 1 of the Rules of the Superior Courts addresses the issue of collective redress and that therefore there is already adequate provision for collective action in Irish law. It will be recalled that Order 15 rule 1 deals with *joinder* and *consolidation* of cases and for the reasons outlined earlier, this is an ineffective mechanism for dealing with collective redress in competition damages actions.

The Department then argues that...

> These provisions ... are rarely utilised which could suggest a weakening of the White Paper's basic premise that there

[95] Ibid at para 26.

> is a real practical problem which requires to be addressed by the Community legislature.[96]

The Department of Enterprise therefore believes that adequate provision is already made in Irish law for collective redress for plaintiffs seeking to recover damages, and that as this mechanism is rarely used there must not be any problem that requires fixing. This reveals an extraordinary lack of understanding by the Department of Enterprise of the issue of damage caused to both consumers and business through infringements of competition law. That statement by the Department suggests that the Department does not believe that there is a problem needing to be solved as the mechanisms currently in place that allow for private redress have not been utilised. In fact, as has been argued in this thesis, there are many obstacles to be overcome in bringing a private action for damages in a competition case. Not least of these obstacles in an Irish legal context is the unavailability of an appropriate and effective method of collective redress. Collective redress allows plaintiffs with small and dispersed claims arising from an infringement of competition law to be recovered. This inability for claimants to recover damages caused by a competition law infringement is present elsewhere in Europe and is the reason for the Commission's damages initiative.

It is possible that the Department made a typographical error at paragraph 26 of its submission on the White Paper and intended referring to Order 15 rule 9 of the rules instead of rule 1. Rule 9 deals with representative actions. If that is the case, then the Department meant to refer to the fact that the representative action, instead of the system of joinder and consolidation, has been underutilised in private damages actions. This typographical error, if that is what it is, makes no difference to the point just made. As has been argued in this chapter similar difficulties arise in representative actions as in joinder and consolidation of cases. In any event, it does not appear that the Department made such an error, as it dealt separately with

[96] Ibid at para 26.

representative actions in its submission at paragraphs 28 – 37 of its submission as will now be seen.

Department's view on Representative Actions

The Department in its submission appears to miss altogether the thrust of the Commission's White Paper proposals regarding representative actions. The Department sets out the current legal position in Ireland regarding third parties instituting proceedings seeking damages where the plaintiff has not suffered harm...

> ...it is likely that, in some circumstances at least, representative bodies such as trade associations or consumer groups would have sufficient standing to bring proceedings on behalf of its members seeking declaratory or injunctive relief in relation to alleged breaches of competition law (including Articles 81 and 82) but a claim for damages could not be maintained by such a body (other than in relation to damage suffered by itself). Where members of a representative body have suffered injury each member is required to sue for damages on an individual basis.
>
> It is a fundamental and long-standing principle of Irish law that a party seeking damages must establish loss and/or injury to it and cannot (save in very limited circumstances such as where the person who has suffered loss or injury is a minor) sue in respect of loss or damage to another party.[97]

As far as the Department is concerned, representative actions seeking damages for injured parties by third parties goes against a fundamental principle of Irish law. The Department clearly missed the point that without an effective mechanism of collective redress that allows injured parties with small and dispersed losses to recover damages, then the rights of citizens in member states which they

[97] Ibid at paras 28 -29.

derive directly from Community law are not being safeguarded. Parallel to this, the right to take action to recover damages created by statute under domestic law is negatived by failure to create an effective mechanism of redress for claimants with small and dispersed losses.

There is undoubtedly a problem in Irish law in relation to the law on maintenance and champerty. This issue and its impact on funding private competition litigation will be addressed in Chapter 6. For now it is sufficient to point out that any reform of the law in Ireland in relation to class actions will require legislation. That legislation would be an ideal opportunity to address the issues that arise in litigation funding under the law of maintenance and champerty.[98]

It is because of technical legal issues encountered by citizens in various Member States of the European Union that the Commission saw the need for debate on introducing mechanisms that overcome these difficulties. The Court of Justice in *Manfredi* stated that...

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and **to lay down the detailed procedural rules** governing actions for safeguarding rights which individuals derive directly from Community law...[99] (emphasis added)

Acknowledging the need for the introduction of Community rules on the issue the Commission stated in its White Paper on damages actions that...

> This White Paper considers and puts forward proposals for policy choices and specific measures that would ensure, more than is the case today that **all victims** of

[98] The crimes and torts of maintenance and champerty were abolished in the United Kingdom on the recommendation of the Law Commission by the Criminal Law Act 1967. Under Irish law, maintenance and champerty remain indictable misdemeanours at common law and constitute actionable torts at the suit of the person injured as a result of the action. Chapter 6 deals more fully with these issues.

[99] Joined cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] (n1).

> infringements of EC competition law **have access to effective redress mechanisms so that they can be fully compensated** for the harm they suffered...
>
> **The primary objective** of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules... [100] (emphasis in original).

One of the more worrying aspects of the Department's submission to the Commission on its White Paper is the suggestion that '...it would be helpful to have clear and cogent evidence that ... there is a significant problem to be addressed.'[101] The Department then make the assertion that 'no empirical evidence is presented'[102] that there is any problem to be addressed. The Department also queries whether '...providing for representative actions of the nature referred to in the White Paper is the appropriate solution to that problem.'[103]

It appears that the Department was completely unaware of the various studies and reports either commissioned or drafted by the European Commission in the lead up to the Green and White Papers on damages actions. These reports and studies included the Ashurst Report,[104] the Commission Staff Working Paper accompanying the Green Paper,[105] the External Impact Study,[106] the Impact Assessment Report[107] and the

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[100] White Paper on Damages actions for breach of the EC antitrust rules, para 1.2, (n6).

[101] See Department of Enterprise, Trade and Employment, 'Response to the European Commission White Paper on Damages actions for breach of EC antitrust rules', at para 30, (n77).

[102] Ibid at para 31.

[103] Ibid at para 30

[104] Study on the conditions of claims for damages in case of infringement of EC competition rules, available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf and accessed on the 4th October 2010.

[105] Commission Staff Working Paper Annex to the Green Paper, Damages actions for breach of the EC competition rules, {Com (2005) 672 final} available at http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf and accessed on the 4th October 2010.

[106] Making Antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report for the European Commission, 21st December 2007, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf and accessed on the 4th October 2010.

Commission Staff Working Paper accompanying the White Paper[108] amongst many others. This lack of awareness on the part of the Department of the extent of the work and research conducted by the Commission on this project is of concern as it reflects a lack of understanding by the Department of the central thrust of the Commission's initiative on the damages issue. This in turn reveals a lack of sympathy by the Department, and by extension, the Irish Government for the Private actions project as a whole.

This lack of understanding and sympathy for the damages actions project undertaken by the Commission does not bode well for any efforts that might be made to persuade the Irish policy makers to adopt new mechanisms that allow for collective redress in competition damages claims.

Conclusion

A number of arguments have been made in this chapter. First, bringing small claims for damages in competition cases is next to impossible under domestic or Community law in Ireland. There is no right to sue for small claims in the District Court, nor is there an effective mechanism of collective redress that allows an award of damages. This problem is made worse as public policy appears antithetical to the problems involved in recovering damages in competition cases. This means that the steps required to make private actions for damages possible in Ireland are unlikely to happen unless policy makers change their views on these issues.

There is undoubtedly a role for the Competition Authority in advocating[109] reform in this area. This advocacy role needs to be aimed

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[107] Commission Staff Working Document, Accompanying Document to the White Paper on damages actions for breach of the EC antitrust rules, Impact Assessment {Com (2008) 165 final} accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf

[108] Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules (n5).

[109] Section 30 (1) of the 2002 Act gives the Competition Authority an 'advocacy function.' That section states amongst other things: The Authority shall have... the following functions: (e) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions... (g) to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition...

at policy makers in government and especially in the Department of Enterprise, Trade and Innovation to ensure they understand both the need for reform and how that reform can be brought about. Reform will involve legislation to allow for damages actions in District Court, and more importantly, to allow for an effective form of collective redress in competition cases.

Should reform of the law occur it is important that careful consideration be given to the form of collective redress that is chosen. Experience from both Britain and America which was explored in Chapter 4 shows that opt-in models are unlikely to be effective, whilst opt-out models can be open to abuse if not carefully drafted and monitored. This means that the role of the Court in a future class action model that includes an 'opt-out' provision is vital.

It has been argued in this chapter and in Chapter 4 that there is a need for an effective form of collective redress to ensure that the rights citizens derive from Community law can be protected and vindicated. It is also obvious that the rights of citizens under domestic law are rendered ineffective unless appropriate mechanisms are put in place to allow citizens to avail of them. Simply creating a right of action in section 14 of the 2002 Act does not mean that citizens can take action when necessary.

It is regrettable that there is a lack of understanding and a degree of antipathy within the Department of Enterprise, Trade and Innovation towards introducing methods that allow for collective redress in competition cases. Until that position changes, it may well take legislation by the Commission in this field before Irish consumers can at last get access to the courts in competition damages cases. Unfortunately, as was argued in Chapter 4 of this thesis, the collective redress model proposed by the Commission has many shortcomings that will render it largely ineffective. However, bad as that may be, at present, it represents the only hope for consumers with small claims in competition damages cases in Ireland.

CHAPTER 6: LITIGATION FUNDING, CONTINGENT FEES AND THE LAW OF CHAMPERTY

Introduction:

In Chapters 4 and 5 options for collective redress were explored as a mechanism for allowing injured parties with small and dispersed claims gain access to the courts. These collective redress mechanisms might therefore potentially allow recovery for the losses these claimants may have suffered.

Even if a form of collective redress is introduced there is yet another major obstacle to bringing private actions for damages in competition cases in Ireland. This obstacle is the prohibitive cost of litigation in Ireland in civil matters. Methods used in other jurisdictions to overcome this obstacle to justice for injured parties are not, as yet, available in Ireland due to ancient laws still in force that prohibit new and novel methods of funding litigation which are being adopted in other jurisdictions. It will also be seen that despite legislation and professional rules governing the calculation of fees by lawyers, these laws and professional rules are often ignored. The position on the calculation of legal professional fees in Ireland is both confused and contradictory.

In this chapter, the laws that create barriers to funding private litigation in Ireland will be examined. These laws will then be analysed by comparison with the law on litigation funding in other jurisdictions - principally England and Wales, where there has been recent radical change in both statute and the interpretation of public policy by the courts on litigation funding. Fee arrangements used in the United States for paying lawyers will be examined, and in passing, recent developments in Australia in litigation funding will also be looked at. It will be seen that recent developments in Australia on litigation funding have taken the issue to a point that is unlikely to be reached in Ireland.

This chapter will demonstrate that there is a need for a radical rethink on the laws concerning litigation funding in the State, not only so as to

ensure greater access to justice but also to clarify what is otherwise a confused and contradictory state of affairs in Ireland.

The Funding Barrier to Private Actions

As has already been argued in this thesis, mechanisms that allow for collective redress are important in allowing injured parties with small and dispersed claims to recover compensation for their loss. However, an effective collective redress mechanism on its own will not solve the problem of gaining access to justice for such claimants.

Alan Riley and John Peysner argue that a vital element in allowing claimants gain access to justice is '[t]he funding of competition actions.'[1] Peysner in another article on costs and financing private litigation in competition cases had this to say on the importance of costs in bringing damages actions...

> Costs are the key to the castle in competition damage cases. So far costs and financing problems have limited the potential for bringing cases even when there is established cartel activity.[2]

This costs element in the private actions equation is one that has been largely overlooked in the debate on damages actions. As Riley and Peysner point out, '...the importance of funding barriers to undermining private actions has not had any significant profile in the debate.'[3]

Riley and Peysner were referring to the lack of comment and debate on the funding issue amongst scholars, practitioners and regulators. It is also fair to say that the Commission did not address the funding issue in any meaningful or substantive way in its Green Paper on damages actions in antitrust cases or in its Staff Working Paper accompanying

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[1] A Riley and J Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?' (2006) 31 European Law Review 748, 1.

[2] J Peysner, 'Costs and Financing in Private Third Party Competition Damages Actions', (December 2006),The Competition Law Review, Volume 3 Issue 1, 97-115 at 114, accessed on the 4th October 2010 and available at http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art5Peysner.pdf

[3] A Riley and J Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?, (n1).

the Green Paper. The Commission steered well clear of the issue of funding private actions for damages in its Green Paper.[4]

However, the Commission acknowledged in its Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules that despite having not raised the issue in its Green Paper, the Commission had received some submissions on the costs of litigation from interested parties. According to the Commission...

> Most of the respondents supported the viewpoint that contingency fees, whereby lawyers' fees are calculated as a percentage of any successful claim, should not be encouraged.[5]

In a footnote to the paragraph just cited, the Commission referred to Advocate General Maduro's comments in the *Cipolla*[6] case...

> It can be noted that, concerning success fees, Advocate General Poiares Maduro stated in his opinion in the Cipolla case that the possibility of fixing "success fees" for lawyers' services might improve access to the courts by enabling parties who have no financial resources to have access to the courts with the risk being borne by the lawyers.

The Office of Fair Trading (the 'OFT') recognised that the inability to fund cases was a barrier to bringing actions for damages especially in competition cases which can be particularly complex and, therefore carry with them a high risk of failure...

> One of the major obstacles to bringing private actions in competition law is the cost of such actions and the difficulties and risks in funding them. Broadly, there are two dimensions to this issue. First, a claimant will have to

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[4] Green Paper on Damages actions for breach of the EC antitrust rules; Com (2005) 672, SEC (2005) 1732.

[5] 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', Brussels 2.4.2008, SEC (2008) 404, at para 244.

[6] Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, at paragraph 94.

> incur significant disbursements (for example, court fees and payments to experts) to start and progress the action. Second, if his claim fails, the claimant is likely to have to pay the other party's legal costs.[7]

Riley and Peysner summed up the issue neatly...

> The prospect of having to pay costs upfront and to pay at least a part of the other side's costs is likely to act as a major disincentive for many potential claimants to bring civil actions. That disincentive is compounded by the heavy costs that are likely to be incurred in most competition cases as a result of the complexity of competition cases; the demands for economic evidence and the heavy reliance on substantial quantities of documentary evidence.[8]

Herbert Kritzer writing recently on the problem of costs and access to civil justice asked: 'Why is it that despite all of our efforts, we cannot lick the demon of high costs for civil justice?'[9] Kritzer made the point that...

> Complaints about the cost of securing (civil) justice are probably as old as formalised procedures for securing that justice. The same can probably be said for the single biggest cost of securing justice in most cases: the costs associated with legal representation.[10]

The Irish Supreme Court has also acknowledged the huge costs that can be incurred in competition litigation. In *Pierce t/a Swords Memorial & anor v Dublin Cemeteries Committee & ors*[11] Macken J pointed out

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[7] OFT 'Private actions in competition law: effective redress for consumers and business', (Discussion paper) April 2007 OFT916, 26, accessed on the 4th October 2010 and available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf

[8] A Riley and J Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?' (2006) 31 European Law Review 748, (n1).

[9] HM Kritzer, 'Fee regimes and the cost of civil justice', (2009) Civil Justice Quarterly, 28(3) 344 - 366.

[10] Ibid.

[11] *Pierce t/a Swords Memorial & anor v Dublin Cemeteries Committee & ors*, [2009] IESC 47.

the folly of an individual who would pursue a private action in competition law after his complaints to both the Competition Authority and the European Commission had been rejected. In that regard, Macken J said that the claimant would be...

> ...embarking on what is recognised as extremely expensive, even cripplingly expensive, litigation, a very precarious position for any party.[12]

The ability to fund complex and expensive litigation such as a competition damages action will clearly have a bearing on whether such actions will be taken at all. In the context of this chapter, funding arrangements include the use of contingency fees and/or conditional fee agreements. Funding arrangements can also include in this context third party funding by professional litigation funders whose business is, in essence, a form of venture capitalism in litigation. If private actions for damages are to be encouraged as a form of self-help for injured parties seeking recompense for loss suffered in competition cases, then funding mechanisms that assist plaintiffs in seeking redress without the need for State assistance need to be considered if not encouraged. As civil legal aid in the current economic climate is unlikely to be available in competition damages cases, then other mechanisms that help fund private litigation need to be examined as possible solutions to this funding problem.

The Law on Maintenance and Champerty

Before looking at the various ways of funding complex competition cases on behalf of a class of injured parties that may have suffered small and dispersed loss, it will be necessary to look first at what is the major barrier to such funding mechanisms that currently exists in Ireland. This barrier to introducing new funding mechanisms in competition damages actions is the law and doctrine on maintenance and champerty. As Mulheron and Cashman have said in relation to third party funding of complex competition litigation...

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[12] Ibid at page 7 of 9.

> ...stalking along behind this rapidly-emerging area is the doctrine of champerty, a doctrine of public policy which cannot be entirely consigned to the annals of legal history just yet.[13]

Maintenance

Lord Denning MR described maintenance in *In re Trepca Mines Ltd* (No 2)[14] as follows...

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.

In the context of litigation funding, the definition of maintenance given by Siún Leonowicz is useful. Maintenance, she states, is...

> ...the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation, nor any other motive recognised by the law as justifying interference.[15]

Fletcher Moulton LJ described the policy underlying the law of maintenance in *British Cash and Parcel Conveyors, Limited v Lamson Store Service Company, Limited*[16] as being...

> ...directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.

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[13] R Mulheron and P Cashman, 'Third Party Funding: a changing landscape', Civil Justice Quarterly 27(3), 2008, 312.

[14] *In re Trepca Mines Ltd* (No 2) [1963] Ch 199.

[15] Siún Leonowicz, 'Maintenance and Champerty', 12 (6) Commercial Law Practitioner (2005) 157.

[16] *British Cash and Parcel Conveyors, Limited v Lamson Store Service Company, Limited*, Court of Appeal, [1908] 1 K.B., 1006.

Champerty

Sir William Blackstone defined the law of champerty in his *Commentaries on the Laws of England*...

> Champerty ... is a species of maintenance, and punished in the same manner; being a bargain with a plaintiff or a defendant ... to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense ... In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is the one main reason why a chose in action ... is not assignable at common law, because no man should purchase any pretence to sue in another's right...[17]

Blackstone clarified that champerty is 'a species of maintenance.' It involved a '... [division] of the land or other matter sued for between them...' so that the champertor who has come to the litigation, funds the litigation in return for a share of the winnings. In the modern era, Lord Mustill in *Giles v Thompson*[18] having cited with approval Fletcher Moulton's definition of maintenance in the *British Cash and Parcel Conveyors* case, had this to say of champerty...

> For champerty there must be added the notion of a division of the spoils.

Leonowicz defined champerty as follows...

> Champerty is a particular kind of maintenance. It involves the maintenance of an action in consideration of a

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[17] Sir W Blackstone, 'Commentaries on the Laws of England, Book the Fourth', Vol 4, Dublin MDCCLXX (1770), printed for John Exshaw, Henry Saunders & seven others, 134 – 135.

[18] *Giles Respondent v Thompson Appellant, Devlin Respondent v Baslington Appellant*, House of Lords 26 May 1993, [1993] 2 W.L.R. 908 [1994] 1 A.C. 142.

> promise to give the maintainer a share in the proceeds or subject-matter of the action.[19]

David Capper explained the emergence of the law of Champerty in an article[20] on the leading Irish case on the torts of maintenance and champerty, *Fraser v Buckle*...

> The origins of the law on maintenance and champerty lie in the inability of the mediaeval courts to deal with unscrupulous men of power fomenting litigation by others as a means of harassing their enemies. Litigation seems to have been used as kind of warfare and so severe did this problem become that special statutes were enacted barring persons from giving unsolicited testimony (i.e. otherwise than under subpoena) on behalf of others or even arguing cases on their behalf. The severest restrictions on assisting litigants were gradually removed as the country became more peaceful and the crimes and torts of maintenance and champerty were abolished on the recommendation of the Law Commission by the Criminal Law Act 1967. What remained were rules of public policy rendering arrangements for the maintenance of the litigation of others void and unenforceable.

Capper's reference to the severest restrictions being abolished by the Criminal Law Act 1967 is a reference to the position in England and Wales. Under Irish law, maintenance and champerty remain indictable misdemeanours at common law[21] and constitute actionable torts at the suit of the person injured as a result of the action.[22]

How is the law on maintenance and champerty relevant to funding arrangements in competition damages actions today? It would appear

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[19] Siún Leonowicz, 'Maintenance and Champerty', (n15).

[20] D Capper, 'The Heir-Locators Lost Inheritance', The Modern Law Review, Vol 60, No. 2, (March 1997) 286 - 292.

[21] SE Quinn, *Criminal Law in Ireland*, (3rd Ed. Irish Law Publishing, Dublin 1998) at page 425.

[22] E Quill, *Torts in Ireland*, (3rd Ed. Gill & Macmillan, Dublin 2009) at page 411. Quill points out that... 'These torts are virtually unused in modern times...'

that in Ireland at least, contingent and conditional fee agreements as well as third party professional litigation funding arrangements and indeed, 'no win, no fee' agreements, fall squarely within the common law prohibition on maintenance and champerty and are therefore both unenforceable as well as being potentially criminal. Each of the aforementioned methods of funding litigation involve some form of bargain with a plaintiff or a defendant either between the lawyer for that party or with a third party who has no direct interest in the litigation. If that bargain involves supporting the taking or continuance of litigation, then it falls foul of the doctrine of maintenance and champerty.

Trilogy of Irish Cases on Champerty and Maintenance in Ireland

There have been three leading cases dealing with the law of maintenance and champerty before the Irish Courts in recent times. These cases all arose in the 1990's and they outline the current state of the law on maintenance and champerty in Ireland.

The first of these cases was *McElroy v Flynn*[23]. In that case a lady, Mary Creedon, died intestate in London, leaving a large estate. The British Treasury Solicitor inserted advertisements in various newspapers seeking next-of-kin. These advertisements were seen by the plaintiff David McElroy, who specialised in tracing next-of-kin in such cases. McElroy located the defendants, who were cousins of the deceased, and told them that he thought they were entitled to a share in the estate of a deceased, whose name he purported not to know. He offered to represent the defendants, and to put forward a claim on their behalf. The defendants agreed and signed deeds of assignment which stated that in consideration of McElroy informing them that they might be entitled to a share in the estate of the deceased, they would assign to him 25% of their respective shares in the said estate. McElroy travelled to London where he lodged claims on behalf of both defendants. The defendants subsequently discovered that the estate in

[23] *David McElroy (t/a Irish Genealogical Services) v Catherine Josephine Flynn and Daniel O'Flynn*, [1991] ILRM 294 (McElroy v Flynn).

question was that of their cousin Mary Creedon, and they informed McElroy that they were repudiating their agreements to assign 25% of their respective shares to him. McElroy instituted proceedings in the High Court seeking a declaration that the defendants had assigned 25% of their respective shares in the estate to him. The defendants counterclaimed for a declaration that the agreements between them and McElroy were champertous and therefore void.

Blayney J dismissed McElroy's action finding that the agreement was champertous. Blayney J stated...

> Where a person undertakes actively to assist in the recovery of shares in an estate to which other persons are entitled, an agreement whereby the former will receive a percentage of the shares of the latter, savours of champerty and is void.[24]

The next case to deal with the issue of champertous agreements was *Fraser v Buckle*.[25] This was another heir locator type case. In that case the defendants, who resided in Ireland, were among the descendants of a deceased who had died intestate in New Jersey. They were unaware of their potential entitlement until informed by the plaintiffs (Frasers), who described themselves as genealogists and international probate researchers. Frasers entered into agreements with the defendants, whereby Frasers would reveal the identity of the deceased intestate in consideration of the defendants giving to Frasers one third of any sum they might inherit. The proper law of the contract was stated to be the law of England and Wales. The preparations for the probate proceedings in New Jersey were conducted by Frasers at their own expense. The probate proceedings were successful and the defendants shared a net sum of more than $750,000. The defendants refused to pay Frasers the one third share as previously agreed, on the grounds that the agreements were unenforceable as being

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[24] Ibid.

[25] *Simon Fraser and Nathan G Fraser, trading as Fraser and Fraser v Denis Buckle, Veronica Doherty and Patricia Byrne, (Fraser v Buckle)* Supreme Court [1996] 1 IR 1.

champertous. However, the defendants did accept that Frasers were entitled to fees on a *quantum meruit* basis.

The Supreme Court in *Fraser v Buckle* affirmed the decision of Costello J in the High Court. The Supreme Court first dealt with the question of the proper law of the contract, which they found in this case was the law of England and Wales. The court then found that the contracts were unenforceable under their proper law, in that heir locator agreements had been condemned in the courts of England and Wales 100 years previously. The court also found that while recent case law in England and Wales presaged a very restricted future role for maintenance and champerty, the decision condemning heir locator agreements had not been disapproved of.

The Supreme Court then went on to find that '...the law in Ireland in relation to maintenance and champerty had not undergone any sea change since the last century.'[26] The court found that...

> ...if the arrangement come to was not merely that information should be given, but that the person who gave it and who was to share in what might be recovered should himself recover the property or actively assist in its recovery by procuring evidence or similar means, then the arrangement was contrary to the policy of the law and void.[27]

Finally, the court stated that '...accordingly, even if the contracts had been valid under their proper law, they were champertous and unenforceable in Ireland.'[28]

The final case in this trilogy is that of *O'Keeffe & Anor v Linda Scales*.[29] Unlike the previous two cases, this case did not involve heir location. Rather, this case more closely resembles an action arising out of a

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] *Joyce O'Keeffe and Patrick O'Keeffe v Linda Scales*, Supreme Court [1998] 1 IR 290.

contingent fee type agreement. The appellant/defendant, Linda Scales, had been the solicitor for the respondents/plaintiffs, the O'Keeffe's. The O'Keeffe's had become financially ruined having lost their entire life's savings in a business investment that had failed. The O'Keeffe's sued their solicitor, Linda Scales, using a new solicitor, Denis Murnaghan. The O'Keeffe's had become very financially indebted to Mr. Murnaghan and had incurred a liability for approximately IR£275,000 to him. Of the IR£275,000 a sum of IR£164,300 was owed by the O'Keeffe's to Mr. Murnaghan on foot of a judgment of the High Court in July 1993 in proceedings instituted in 1992 by Mr Murnaghan and the balance was owed on foot of further work done by Mr Murnaghan as solicitor for the O'Keeffe's in proceedings instituted in 1993 by other parties against the O'Keeffe's. The sum of IR£275,000 was claimed in the proceedings by the O'Keeffe's as items of special damage against the appellant/defendant, Ms. Scales.

Ms. Scales claimed in her appeal to the Supreme Court that the inclusion of these items of special damage in the claim by the O'Keeffe's changed Mr Murnaghan's position as solicitor for the O'Keeffe's in the case into a position that savoured of maintenance and champerty. Ms. Scales claimed that Mr. Murnaghan was assisting in the promotion and conduct of litigation by the O'Keeffe's. Murnaghan had an interest flowing from the litigation in that he stood to receive a share of the award if the O'Keeffe's were successful. The share of the award would represent repayment of the debts due to him by the O'Keeffe's which are distinct from Murnaghan's proper costs as solicitor for the O'Keeffe's in this particular action.

The court came to the conclusion in relation to the law on champerty that...

> It is clear ... that the law relating to maintenance and champerty still exists in this State. A person who assists another to maintain or defend proceedings without having a bona fide interest independent of that other person in the prosecution or defence of those proceedings acts

> unlawfully and contrary to public policy and cannot enforce an agreement with that other person for any form of benefit whether it be a share of the proceeds of the litigation or a promise of remuneration such as money or a transfer of property if the claim is successfully defended.[30]

The *O'Keeffe* case in fact dealt with the question of whether an action being brought by the O'Keeffe's could be stopped before hearing, on the basis that it was being maintained by the solicitor acting on behalf of the O'Keeffe's. On that point the court opined...

> ...even assuming that Mr Murnaghan is maintaining the Respondents' action in a champertous and unlawful manner, I doubt if that would in itself amount to a defence to the Respondents' action much less entitle the appellant to stifle the Respondents' claim in limine on this motion to stay or dismiss in advance of a plenary trial.[31]

These three cases confirm that the laws on maintenance and champerty are still in full force in Ireland. In each of the cases, the courts cited similar authorities (mostly English) on the law of maintenance and champerty. It was mentioned by the court in each of the cases that this line of authorities shows that there has been some development in the thinking of the courts in England and Wales on the law of maintenance and champerty and in particular, that public policy concerns in relation to the question of funding litigation have evolved. This chapter will demonstrate that the laws relating to maintenance and champerty in England and Wales have significantly changed. Unfortunately on examination of the three leading cases on the law in Ireland it does not appear at present that the thinking of the Irish Courts or the Oireachtas has developed much at all in relation to this area of the law.

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[30] Ibid.

[31] Ibid.

Contingency Fees and Conditional Fee Agreements

As mentioned earlier, funding litigation other than from ones own pocket can take many forms. Contingent fee agreements and conditional fee agreements are the most common forms of such funding arrangements and are used in other common law jurisdictions such as England and Wales, the United States and Australia. Each of those jurisdictions has or had laws prohibiting the unlawful maintenance of litigation by third parties and prohibiting champertous agreements. This however did not prevent the development and use of contingent and/or conditional fee agreements from occurring. There is a subtle but important difference between these two types of fee agreement.

Contingency (or Contingent) Fee Agreements

The Civil Justice Council (the 'CJC') in the United Kingdom, in a study[32] on contingency fees in the United States, defined contingency fees as follows...

> Under a damages based contingency fee system, a lawyer is paid nothing if the case is lost, and a percentage of any damages recovered for a claimant if s/he wins. Normally the fee is paid out of the claimant's damages, but it is possible for it to be paid by the unsuccessful defendant.[33]

The Law Reform Commission in Ireland (the 'LRC') gave a similar definition of contingency fees. The LRC made the point that '...lawyer's remuneration is contingent on a successful outcome and is calculated as a percentage of any judgment or settlement.'[34] The LRC pointed out that one of the complaints made about contingency fees is that...

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[32] Professor Richard Moorhead and Senior Costs Judge Peter Hurst, "Improving Access to Justice", 'Contingency Fees: A Study of their operation in the United States of America', A Research Paper informing the Review of Costs, (November 2008), Robert Musgrove (Ed.)

[33] Ibid 6.

[34] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation (Class Actions)' (LRC CP 23-2003) 30.

> While contingency fee arrangements enable plaintiffs to litigate without running the risk of liability for costs and litigation expenses, contingent fees of thirty percent and above have led to accusations of "entrepreneurial" lawyering.[35]

In a contingency fee agreement, lawyers agree to act for an otherwise impecunious client on the basis that if the action is successful, the lawyer will take a percentage of the damages that are recovered. These lawyers are in effect, supporting the bringing of litigation by funding the case out of their own resources. The lawyers are taking on a degree of risk. If the case fails, they are paid nothing by their client. If the case succeeds, the lawyer is paid his fee out of the proceeds of any award made by the court in the case.

David Root explained that the contingency fee in fact involves more than there being just '...no bill for services when unsuccessful in litigation.' He explained that the contingent fee agreement between lawyer and client in the United States also involves the provision of financing and insurance by the lawyer to the client. In relation to the financing element in a contingent fee agreement, the lawyer...

> ...will not collect fees or incurred expenses until after the conclusion of the case. Therefore by delaying the collection, 'the contingency fee lawyer finances the litigation for the client while a case is pending.'[36]

Root also argues that the contingency fee lawyer offers his client an insurance service as part of the contingency fee agreement. This is the case because...

> ...a lawyer only collects after a favourable judgement ... he essentially bears the opportunity cost of performing the

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[35] Ibid 30 – 31.

[36] David A Root, 'Attorney Fee-Shifting In America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule', (2005), 15 Indiana International & Comparative Law Review 583 – 617, 585, citing Herbert Kritzer, 'The Wages of Risk: The Returns of Contingency Fee Legal Practice', 47 DePaul Law Review 267, 270 (1998).

> litigation regardless of the outcome, especially if unsuccessful.[37]

In a contingency fee agreement, it is the lawyer that funds the action and takes on the risks if the litigation does not succeed. However, the rewards can be very handsome for successful lawyers operating under on a contingent fee. In an action where the damages award runs to many millions of Euro, a contingency fee agreement with a lawyer of, for example, 30% can lead to very substantial fees being earned by the lawyer. However, as Lord Denning MR made clear in *Wallersteiner v Moir*[38] lawyers receiving payments (in England and Wales) on foot of contingent fee agreements were breaking the law...

> English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee,' that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty.

Contingent fee agreements are common, indeed the norm in the United States as Alfred Youngwood explained...

> The contingent fee is the normal and usual method of compensation for the American lawyer representing a plaintiff in a personal injury action as well as in numerous other civil causes ... The American justification for the contingent fee is that it enables a poor person with a meritorious cause of action to obtain competent legal services.[39]

Youngwood in his article written in 1965, pointed out that...

> ...in the United States the contingent fee is well established. It has been in use since 1848 in New York

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[37] Ibid 593.

[38] *Wallersteiner v. Moir* (No. 2) [1975] Q.B. 373, 393

[39] Alfred D. Youngwood, 'The Contingent Fee: A Reasonable Alternative?' The Modern Law Review, Vol. 28, No. 3 (May, 1965), pp. 330-335, at 330, citing *Gair v Peck* 361 U.S. 374 (1960).

> and 1878 in New Jersey. Today its use is approved in 48 of the 50 States, Washington D.C. and in the Federal Courts.[40]

Youngwood then described the various forms that contingent fee agreements may take in the United States...

> There are various different forms the contingent fee arrangement may take, all of them having in common the condition that if there is no recovery there is no legal fee payable. The fee may be a flat percentage of any recovery; a series of increasing or decreasing percentages depending upon the size of the recovery; a series of increasing percentages depending upon at which stage of negotiations or litigation recovery is secured; or perhaps a percentage of the recovery above a stated minimum recovery.[41]

It should be noted that in the United States, the legal system there generally employs a rule whereby each party is expected to pay their own costs regardless of the outcome of the proceedings. This rule is known as the 'American rule' and it '...has stood for over 200 years...'[42] This is a radically different state of affairs to that found in Ireland, and indeed in England and Wales where the general rule, sometimes referred to as the 'English Rule', with some discretion for the Courts on the matter, is that costs follow the event. In other words, the loser (usually) pays.

In an article arguing that the contingent fee system in the United States has served litigants well, Stephen Landsman explained why the contingent fee system was adopted...

> It suggests that our concern, from the earliest times, in such cases as those involving title disputes, tax questions,

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[40] Ibid 330.

[41] Ibid 331.

[42] David A Root, 'Attorney Fee-Shifting In America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule', 585 (n36).

> inheritance and patent claims, has been to guarantee that both rich and poor will have access to the courts and will be assured an opportunity to avail themselves of the assistance of counsel.[43]

Root makes a similar point to Landsman. He states that '...the major purpose of the contingency fee was to provide open access to the courts for all people, regardless of their financial station.'[44] Further on in the article he argues that...

> The most important aspect of the contingency fee system is its ability to provide all American citizens an opportunity to have their day in court...[45]

Root also argues however that the contingency fee...

> ...served as an attempt by American jurisprudence to expel itself from the English ideology that litigation was evil. "[T]he English typically 'lumped the contingent fee in with other champertous practices that were thought to stir up unwanted litigation and involve unscrupulous lawyers in the nefarious business of brokering lawsuits." Contrary to the English view that litigation was evil, American jurisprudence took the view that litigation should be used to cure societal problems, thus encouraging the use of the contingency fee as a financial vehicle to alleviate these ills.[46]

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[43] S Landsman, 'The History of Contingency and the Contingency of History', 47 DePaul Law Review 261, 262 (1998).

[44] David A Root, 'Attorney Fee-Shifting In America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule', 593 (n36).

[45] Ibid 598.

[46] Ibid, 593 – 594, citing Aaron C. Charrier, 'Taxing Contingency Fees: Examining the Alternative Minimum Tax and Common Law Tax Principles', 50 Drake L. Rev. 315, 320 (2002) and Lester Brickman, 'Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?', 37 UCLA Law Review 29, 37 (1989).

Conditional Fee Agreements

Conditional fee agreements are a little different to contingency fees. The CJC described conditional fee agreements as follows...

> Typically, claimant lawyers are (usually) paid nothing if they lose a case but if they win they are paid a base fee (the number of hours reasonably spent multiplied by their normal hourly rate) plus a success fee (which is a percentage of the base fee)[47].

Conditional fees are therefore more limited in the quantum that a lawyer will be allowed to recover from a client if the case is successful. Conditional fee agreements in England and Wales are permitted under Section 58 of the Courts and Legal Services Act 1990 which came into effect in 1995. They were extended in 2000[48] to allow a maximum uplift fee of 100% of the base fee where the claim is successful.

Silence of the Commission on contingency and conditional fees

Neither contingency fees nor conditional fee arrangements were mentioned by the Commission in its Green Paper at all and were only mentioned in passing in the Staff Working Paper[49] accompanying the Green Paper. In its Staff Working Paper accompanying the Green Paper the Commission acknowledged the potential value of contingent fee agreements when it stated...

> Some jurisdictions provide further incentives for bringing an action of damages. Specific cost rules can also serve to provide an incentive. For example, contingency fees are a strong incentive because the financial risk for bringing the action is borne not by the claimant but by private attorneys. The experience of US law suggests that the existence of contingency fees is a factor in the emergence

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[47] R Moorhead and P Hurst, "Improving Access to Justice", 'Contingency Fees: A Study of their operation in the United States of America', 4 (n32).

[48] Conditional Fee Agreements Order 2000 SI 2000/823.

[49] Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules Com (2005) 672 Final.

> of a claimant bar strongly associated with bringing actions for damages.[50]

However, the Commission quickly ended that paragraph on the topic of fee agreements with the following...

> It must be underlined, however, that contingency fees are not allowed in some Member States and are regulated in others.[51]

The authors of the report entitled 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios'[52] which was commissioned by the European Commission made the point that...

> An alternative means of facilitating access to justice for plaintiffs may be the introduction of contingency fees. However, these fee arrangements between clients and lawyers are treated very differently in the EU27; in particular, they are prohibited in most jurisdictions, and are rather heavily regulated in others. Moreover, the European Commission did not envisage taking specific action on contingency fees in the Green Paper, and only briefly mentioned this means of facilitating access to justice in the Staff Working Paper. At the same time, however, contingency fees can be seen as a powerful instrument to facilitate the bringing of antitrust damage claims.[53]

The authors of this report for the Commission also point out that...

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[50] Ibid para 218, 62.

[51] Ibid.

[52] Report For The European Commission, Contract DG COMP/2006/A3/012, December 2007, available on the Commission website at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441 and accessed on the 4th October 2010.

[53] Ibid 201.

> The merit of contingency fees has been extensively analysed in the literature, especially as a way to overcome the obstacles of financing the litigation when the liquidity of plaintiffs is constrained...[54]

The authors further point out that despite the fact that the literature is divided on the various pros and cons of contingent fee arrangements and so forth in antitrust cases, they are clear that...

> To be sure, however, most authors agree that contingency fees can significantly facilitate plaintiffs in initiating legal actions.[55]

Are Contingency or Conditional Fee Agreements the solution to the funding problem in Ireland?

The contingency fee agreement has its attractions as a possible solution to the litigation funding problem in damages actions in competition cases in Ireland. For such a system to be introduced, indeed to just allow for conditional fee agreements, legislative changes would certainly be required to abolish or at least modify the crimes and torts of maintenance and champerty.

Critics of the American style contingency fee agreement point out that there are problems attendant with that system. David Root lists four criticisms with the contingency fee. These are '...1) a "flood" of litigation; 2) frivolous and unreasonable litigation; 3) unconscionably large fees; and 4) unjust financial detriment to a successful defendant.'[56]

In relation to the first of these criticisms, the 'flood of litigation', if this were to happen it would mark a sea change in the current position where there are almost no private actions for damages in competition law at present. However, although Root (and others) argues that the

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[54] Ibid.

[55] Ibid 205.

[56] David A Root, 'Attorney Fee-Shifting In America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule', 594 (n36).

contingency fee agreement allows access to the court for all including the poorest, this in itself might not be sufficient argument to bring about such a radical change to the system of fee setting in competition, or other, cases in Ireland.

It could be argued that similar concerns might also arise in relation to the second and third criticisms mentioned by Root, which are frivolous and unreasonable litigation as well as unconscionably large fees. In fact, as the 'English Rule' applies in Ireland, a contingency fee system based on the loser pays principle is unlikely to lead to frivolous and unreasonable litigation given that the cost of losing the case will still be borne by the plaintiff, even if he does not have to pay his lawyers under the contingent fee agreement. In relation to the possibility of unconscionably large fees, this problem could easily be addressed from the outset by drafting rules to cap or scale fees billed on a contingency basis.

The final criticism listed by Root, that of unjust financial detriment to a successful defendant, simply does not apply in Ireland given that the 'English Rule' of the loser pays still applies and would be unlikely to be removed if any changes were to be introduced. In other words, a successful defendant would be allowed to recover his costs unlike in the United States. That said, it is of course difficult to see how a successful defendant could recover his legal costs if the plaintiff is impecunious and had to employ his lawyers under a contingency fee agreement. A way to deal with this problem might be to insist that the lawyer taking the action for the impecunious client indemnify the successful defendant against at least part of the costs of defending himself.

If change were to occur in Ireland, the most likely scenario is that the Oireachtas would follow the English system and introduce a conditional fee system. However, as the OFT points out, the conditional fee agreements currently used in the UK are not entirely successful...

> Currently, the percentage increase on the normal fees if the case is won can be no more than 100 per cent.

> Although this may be sufficient for the purposes of follow-on competition actions ... it may not be a sufficient incentive for lawyers to take well-founded, standalone cases.[57]

The OFT suggests that the current conditional fee agreement allowed under section 58 of the Courts and Legal Services Act 1990, should be amended to allow a percentage fee increase of more than 100% above the normal base fee.

It would seem clear that a system whereby lawyers can charge clients on a contingency fee basis or by entering into a conditional fee agreement might help to solve the problem of enabling injured parties to bring damages actions they might not otherwise be able to afford upfront. Another method of solving the funding problem that could be considered is third party funding from professional litigation funders.

Litigation funding by third party professional funders

An emerging source of litigation funding in damages cases in the United Kingdom is funding by professional third party funders. The Civil Justice Council in its report on Funding Options and Proportionate Costs[58] described third party funding as follows...

> Third party funding is the provision of funds by individuals or companies who have no other connection with the litigation. A funder may provide the full legal costs of the proceedings, part fund, or fund only disbursements outlayed. Protection from adverse costs is often (but not exclusively) provided, and in some circumstances the funder may provide no direct funding at all, but agree to cover a party's potential exposure to adverse costs. In

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[57] OFT 'Private actions in competition law: effective redress for consumers and business', (Discussion paper), para 5.6, (n7)

[58] Civil Justice Council, 'Improved Access to Justice – Funding Options and Proportionate Costs: The Future Funding of Litigation – Alternative Funding Structures, A Series of Recommendations to the Lord Chancellor to Improve Access to Justice through the Development of Improved Funding Structures', (June 2007), accessed on the 4th October 2010 and available at http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf

> return, the funder would expect to make a financial profit for their outlay and attendant risk to investment.[59]

As Mulheron and Cashman point out...

> Since the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd in 2005* developments in litigation funding have gathered remarkable pace in England. There has been an increasing number of litigation funders and brokers entering into the market; hedge fund interest in backing commercial litigation has expanded...[60]

A whole new industry in litigation funding as well as brokering litigation funding has sprung up in the United Kingdom. Mulheron and Cashman list numerous litigation funders and litigation funding brokers in their article as currently operating in England...

> Litigation funders operating in England now include: Allianz, IM Litigation Funding, Juridica Investments, Smith & Williamson, and the newly-formed Harbour Litigation Funding which is part of the New Jersey hedge fund MKM Longboat's portfolio of business. Litigation funding brokers are also active in seeking to advise on third-party funding and to match litigation funding products (and there are many) to litigants' needs. Examples of firms fulfilling this niche include: Commercial Litigation Funding Ltd, Calunius Capital, Global Arbitration and Litigation Services, The Judge, and Maxima Costs Chambers...[61]

These types of funders are similar to venture capitalists. They are in fact commercial entities concerned with the business of investing capital in damages claims where the claimants are unable to fund their cases themselves. Professional litigation funders are in this business

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[59] Ibid 53.

[60] R Mulheron and P Cashman, 'Third Party Funding: a changing landscape', Civil Justice Quarterly 312, (n13).

[61] Ibid 314 – 315.

for the profits they undoubtedly believe can be made in this area. Aileen Murtagh made this point in the Irish Law Society Gazette...

> Third-party litigation funding can take many forms. In recent years, private litigation funding markets have developed rapidly, particularly in England, with the emergence of professional litigation funders. These professional funders invest money so that litigation can be pursued and they, as funders, can profit from sharing in the winnings if the claim succeeds ... Interestingly, hedge funds are also increasingly investing in litigation funding as a stable alternative to volatile stock markets.[62]

In an article entitled 'Something for Nothing?' that appeared in Raconteur,[63] a London based publishing house that, according to themselves, produce independent special interest reports exclusively for News International – The Times and The Sunday Times, Neil Rose made the following point on third party funding...

> A newer player is third-party funding (TPF), in which a third party covers all the costs of the case - both the client's own costs and also the other side's if the case is lost – in return for a share of the proceeds of anywhere from 20 per cent to 50 per cent. As a rule of thumb, a funder will be looking for a return of three or four times the investment.[64]

Making the point that funders are interested primarily in making a business investment and are therefore 'picky about the cases they take on – one in every 10 seems to be the average and they have to be big ones to appeal in the first place...'[65] Rose, quoting Susan Dunn of the litigation funding company Harbour Litigation Funding, explained...

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[62] A Murtagh, 'Other People's Money', Law Society Gazette, November 2009, 36 – 39, at 36.

[63] N Rose, 'Something for Nothing?' Raconteur on Legal Efficiency, March 2010, available at http://np.netpublicator.com/netpublication/n89269938 and accessed on the 4th October 2010.

[64] Ibid.

[65] Ibid.

> ...that too often lawyers focus totally on the legal merits of the case they are presenting for funding while "completely overlooking" the value of the claim and whether the defendant has the means to pay any award.[66]

Third party litigation funders approach each case as they would any business enterprise where they are investing capital in the hope of a return. As Mulheron and Cashman point out...

> Before entering a litigation funding agreement, the funder or broker will perform a due diligence analysis of the claimant's case (reviewing the documents, obtaining counsel's opinion on the merits, discussing the action with the client's lawyers, and tracing information about the assets of the defendant).[67]

In an article in the English Law Society Gazette[68], Grania Langdon-Down quoted Bob Gordon managing director of the litigation funding firm 1st Class Legal which she stated has been testing the third-party funding market, lending £12m to fund 17 cases, as saying...

> ...some funders only want cases involving a minimum of [£]2m in potential damages. 'We want a spread of cases. However, the people who have real problems are those with a dispute worth 75,000, where the legal costs on each side would be 40,000, and the numbers just don't stack up to get insurance or funding - and there are thousands of cases like that.'[69]

Mulheron and Cashman make a similar point in their article, quoting an un-named litigation funding broker as saying...

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[66] Ibid.

[67] R Mulheron and P Cashman, 'Third Party Funding: a changing landscape', CJQ 316, (n13).

[68] G Langdon-Down, 'Litigation Funding: An overview of a contentious area of growth', Law Society Gazette, 21st May 2009, available at http://www.lawgazette.co.uk/features/litigation-funding-an-overview-of-a-contentious-area-of-growth and accessed on the 4th October 2010.

[69] Ibid.

> In outline, the funder wants a return of 3-4 times the sum invested in the litigation. As an example, if the legal fees (Counsel's fees, disbursements and Expert's fees) which have been funded amount to £500,000, the funder receives £1.5m to £2m ... therefore, the damages available in any case have to be reasonably substantial although each Funding Agreement is negotiated individually, depending upon the circumstances.[70]

In her article, Langdon-Down quotes Brian Raincock, chairman of the firm Litigation Protection Ltd, in relation to funding class or group litigation. Raincock she reports...

> ...says group actions pose difficulties because they tend to be complex and difficult to manage, but the CJC's[71] opt-out proposal 'would certainly make them more attractive'.[72]

Bob Gordon of 1st Class Legal, again in the same article is quoted by Langdon-Down as saying that his company has been approached about funding group litigation and in that regard....

> We would be happy to do it, but there must be sensible mechanisms to control overall costs.[73]

The Master of the Rolls in England and Wales, Sir Anthony Clarke has been quoted, extra judicially as saying... 'I am in principle a supporter of third-party funding, provided that appropriate regulation is put in place'.[74]

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[70] R Mulheron and P Cashman, 'Third Party Funding: a changing landscape', CJQ 316, (n13).

[71] The CJC is the Civil Justice Council. It is a non-departmental public body established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system in England and Wales. Further information on the CJC can be found at http://www.civiljusticecouncil.gov.uk/ accessed on the 4th October 2010.

[72] G Langdon-Down, 'Litigation Funding: An overview of a contentious area of growth', (n68).

[73] Ibid.

[74] Sir Anthony Clarke MR, 'Drive for transparency on third-party funding', Law Society Gazette, 14th February 2008, available at http://www.lawgazette.co.uk/news/drive-transparency-third-party-funding and accessed on the 4th October 2010.

Maintenance and Champerty Again

The law on maintenance and champerty clearly creates a serious barrier to the possibility of professional third party funders entering the market in Ireland. Aileen Murtagh was quite blunt about the matter when she said...

> Many of the arguments against third-party litigation funding are grounded in the archaic doctrines of maintenance and champerty.[75]

Murtagh clarified how these 'archaic' doctrines might hinder the use of third party funding in litigation in Ireland...

> A person is guilty of 'maintenance' if he supports litigation in which he has no legitimate concern without just cause or excuse. 'Champerty' is a subset of maintenance, whereby maintenance is provided in return for a share of the spoils of litigation, and is traditionally considered an abuse of process. Indeed, it is telling that the jurisdictions in which third-party litigation funding has flourished are those in which the crimes and torts of maintenance and champerty have been abolished, or never existed.[76]

In his book *Contract Law in Ireland*,[77] Robert Clark, addressing the specific issue of contingency fees, acknowledged that the law was changing in England and Wales in relation to maintenance and champerty...

> In England there is a strong line of authority which has cast doubt on the future of these concepts in a closely regulated modern society.[78]

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[75] A Murtagh, 'Other People's Money', Law Society Gazette, (n62).

[76] Ibid.

[77] R Clarke, *Contract Law in Ireland*, (5th edn Thomson Roundhall, Dublin 2004).

[78] Ibid at page 374.

However, in relation to the current state of the law in this area, Clark made the point simply as follows...

> ...in a formal sense, Irish law looks seriously antiquated on these issues.[79]

As pointed out earlier, third party funding along with contingency fees and possibly conditional fee arrangements would most likely fall foul of the common law rules against maintenance and champerty still in force in Ireland.

Funding litigation in Ireland: A Confused and Inconsistent state of affairs

As already argued earlier in this chapter, the inability to fund complex and high risk litigation such as might arise in competition cases is undoubtedly a serious barrier to bringing private actions for damages in Ireland for most potential litigants. This was acknowledged by the Irish government in 1996, when introducing the Competition (Amendment) Bill of that year in the Senate. The then Minister of State in the Department of Enterprise and Employment, Eithne Fitzgerald pointed out that, amongst other things, the high cost of litigation was a barrier to the enforcement model in use at that time to enforce competition law. It will be recalled that the enforcement model then in use was private actions taken by injured parties. Minister Fitzgerald made the point that...

> The Bill's main feature is that it will address the lacuna which existed that only private individuals could take a competition case. The legislation provides that the Competition Authority can act in the public interest. This is an important safeguard because it is often difficult for small businesses, which may be particularly squeezed by competition, to take a case. It is also difficult for people to take cases against suppliers given that the cost of legal

[79] Ibid at page 375.

> action in this country can be prohibitive; it can even be prohibitive for Governments.[80]

The government's solution in the Competition (Amendment) Act 1996 to the ineffectiveness of private enforcement was to allow public enforcement of competition law by a specialist agency, the Competition Authority. The private right of action was retained in that Act and again in the 2002 Act. However, the difficulties encountered by plaintiffs bringing private actions including the high cost of such litigation were not addressed in either the Competition (Amendment) Act 1996 or in the 2002 Act. For instance, no new or special rules were introduced in either the 1996 Amendment Act or in the 2002 Act to assist plaintiffs in taking private actions by assisting them on the issue of costs.

The OFT recently put forward a possible solution to the problem of litigation funding in private actions for damages cases. The OFT suggested using conditional fee agreements combined with after the event insurance and some form of loan arrangement with a professional litigation funder. In this context the OFT described a conditional fee agreement as a form of agreement where...

> ...solicitors and counsel agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won.[81]

Interest on the loan payable to a professional funder would be drawn from any damages recovered if the action is successful, as would the capital amount put up by the funder. The OFT suggested that if the case is lost, the funder would only be '...liable for the costs of the opposing party to the extent of the funding provided.'[82] The difficulty with the OFT's suggestion to assist funding in competition cases is that contingent and/or conditional fee agreements with lawyers, together with any form of third party funding of litigation by persons not directly

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[80] Seanad Éireann (Debate), Vol 147, Competition (Amendment) Bill 1994, Second Stage, 5th June 1996, line 1412 – 1413, available on the Oireachtas website at http://historical-debates.oireachtas.ie/S/0147/S.0147.199606050004.html and accessed on the 4th October 2010.

[81] OFT Discussion Paper, 27 (n 7).

[82] Ibid.

involved in the litigation, would almost certainly fall foul of the common law prohibition against champertous agreements which has already been outlined in this chapter.

Legislation and Guidelines on Solicitors Fees

The Solicitors Guide to Professional Conduct[83] sets out amongst other matters the rules for solicitors in the conduct of their business with their clients in Ireland. In relation to fee agreements, the Guide has this to say...

> Restriction on Calculation of Charges as a Percentage of Damages:
>
> In contentious matters a solicitor may **not** calculate charges as a specified percentage or proportion of any damages or other monies that may become payable to the client and any such charges are unenforceable in any action to recover them except in debt collection matters.[84] (Emphasis added)

The Guide clearly states that solicitors cannot charge their clients a fee based on a percentage or proportion of any damages or other monies that may become payable to the client. This passage in the Guide is taken from section 68(3) of the Solicitors (Amendment) Act 1994. That section reads...

> (3) A solicitor shall not deduct or appropriate any amount in respect of all or any part of his charges from the amount of any damages or other moneys that become payable to a client of that solicitor arising out of any contentious business carried out on behalf of that client by that solicitor...

Section 68(9) defines charges as...

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[83] 'A Guide to Professional Conduct of Solicitors in Ireland', 2nd Ed., available at the Law Society of Ireland's website at http://www.lawsociety.ie/Documents/committees/conduct2.pdf and accessed on the 4th October 2010.

[84] Ibid at 10.3.

> (9) In this section "charges" includes fees, outlays, disbursements and expenses...

In Ireland, there is therefore a statutory prohibition on solicitors charging what are, in effect, contingency fees.

Despite this clear statutory prohibition on lawyers charging their clients contingency fees, the Competition Authority found in its study of the legal profession that in fact, there was strong evidence to suggest that lawyers' fees are often charged based on the quantum of damages recovered in a successful action. This finding by the Competition Authority appears in its report of the legal profession.[85] There, the Authority found that...

> ...analysis of data from legal costs accountants - undertaken by Dr. Vincent Hogan, UCD, on behalf of the Competition Authority - indicates that the size of the damages awarded in a particular case is a much more important determinant in the taxation of costs than the actual legal work done on a case.[86]

The Competition Authority's research found the following...

> Generally, it would be expected that uncontested cases would involve somewhat less work than contested cases and should attract lower fees. Similarly, the number of motions presented in a case can indicate how active a solicitor was on a case. However, neither of these two factors appear to influence the level of costs allowed when these costs are taxed. Instead, to a large extent, the fees allowed can be calculated as a percentage of the amount awarded.[87]

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[85] The Competition Authority, 'Competition in Professional Services: Solicitors and Barristers', (Report) December 2006, available at the Competition Authority website at http://www.tca.ie/EN/Promoting-Competition/Market-Studies/Professions/Solicitors--Barristers.aspx accessed on the 4th October 2010.

[86] Ibid 6.60, 161.

[87] Ibid 6.62.

This position is at complete variance to both the Solicitors Guide to Professional Conduct and to 68(3) of the Solicitors (Amendment) Act 1994 quoted above. The Competition Authority points out that they are not alone in reaching this conclusion. The Authority cites the 'Report of the Legal Costs Working Group' which the Authority states as presenting...

> ...a similar analysis on a much larger data set, relating to High Court cases taken from the records of the Taxing Master's Office and data from four Circuit Courts (Dublin, Cork, Limerick and Sligo)...
>
> In the High Court, the most important determinant of fees charged in PI cases would seem to be the level of the award made to the plaintiff. Measures of the quality/quantity of legal services provided do not appear to be major factors.[88]

The Law Society made a submission to the Competition Authority in advance of the publication by the Authority of its report on Solicitors and Barristers. In that submission, the Law Society justified the calculation by solicitors of their fees based on the size of the damages awarded in a case as follows...

> The size of an award provides a guideline against which the element of risk assumed by the solicitor in proceeding with an action can be measured. An acknowledgement, in the determination of allowable costs, of the element of risk assumed by a service-provider is neither anti-competitive nor unusual. In the legal context, solicitors assume significant financial risks, particularly in litigation, where they often fund all outlays for the duration of the

[88] Ibid 6.63.

> proceedings with no certainty of recovery, particularly in 'no win, no fee' cases.[89]

The issue of 'no win, no fee', also known as 'no foal, no fee', will be dealt with in more detail below. For now it is instructive that the Law Society acknowledges that solicitors' fees in contentious damages cases are calculated, at least in part, on the size of the award made or agreed in that case. This, according to the Law Society, allows the solicitor to measure the element of risk involved in a case, especially as the solicitor may be taking the case on a 'no win, no fee' basis. If the solicitor calculates the level of fee based on the size of the award won in damages, and is working on a 'no win, no fee' basis, that solicitor is clearly hoping to be paid his fees as a percentage of the damages awarded to his client. This is clearly a form of contingent fee agreement of the type prohibited in Irish Law. This is contrary to both section 68(3) of the Solicitors (Amendment) Act 1994 and to the Law Society's own Solicitors Guide to Professional Conduct. Indeed it will be recalled that the Solicitors Guide to Professional Conduct specifically states...

> In contentious matters a solicitor may not calculate charges as a specified percentage or proportion of any damages or other monies that may become payable to the client...[90]

The Law Society's position on the calculation of fees for solicitors is inconsistent and likely to be contrary to the Solicitors (Amendment) Act 1994. The Competition Authority acknowledges in its final report that there is a need to allow solicitors use the size of the award in a damages action to calculate their fees...

> A blanket ban on the size of an award as a relevant factor would be likely to deter lawyers from taking on certain cases. The risk which lawyers take on in certain cases is

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[89] Ibid 6.66, 162, citing 'Submission of the Law Society of Ireland to the Competition Authority', July 2005, p. 74.

[90] 'A Guide to Professional Conduct of Solicitors in Ireland', 10.3, (n83).

> valuable to clients and ensures that certain cases are able to run through to conclusion.[91]

However, the Authority sums up by stating that...

> Nevertheless, the size of the award should not be the primary determinant in the awarding of costs. The evidence above indicates that this is indeed currently the case. The Taxing Master should, therefore, place far less emphasis on the size of the award when assessing costs and more on the amount and value of the work done.[92]

The Competition Authority recommends that: 'Legal costs should be assessed on the basis of work done.'[93] The Authority then gives details of this recommendation as follows...

> Legal costs should be primarily assessed on the basis of work undertaken by individual lawyers and not primarily on the basis of the size of the award as is currently the case.[94]

This recommendation is addressed to the Taxing Master and County Registrars who arbitrate on legal costs and the time frame within which this recommendation is to be implemented is marked as: 'Immediate'.

The Competition Authority's recommendation may make sense in a strictly 'competition' sense in that it would ensure that consumers are not ripped off by paying too much for legal services. However, it may not help consumers gain access to justice when they have been injured by anti-competitive agreements. Therefore, incentivising lawyers to take difficult and costly cases for otherwise impecunious clients through a contingency fee agreement has real potential benefits from a competition law perspective. The Law Society's inconsistent approach to the matter of charging fees based on the size of the damages

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[91] 'Competition in Professional Services: Solicitors and Barristers', 6.68, (n85).

[92] Ibid 6.69.

[93] Ibid, Recommendation 26

[94] Ibid.

awarded in a case together with the prohibition contained in the Solicitors (Amendment) Act 1994 leads to confusion and a lack of clarity as to the basis on which solicitors can charge fees for clients in complex competition damages claims.

'No foal, no fee' or *'no win, no fee'*

Although contingency fees are unlawful in Ireland, a form of conditional fee agreement, known as 'no foal, no fee' or 'no win, no fee' is apparently permitted. This arrangement has been described in the following terms...

> Barristers and solicitors can agree instructions based on a "no-foal/no-fee" basis. This means that if you lose, you do not have to pay your lawyers' fees. However, you may still be liable for the other side's costs and if you pull out of the action, a fee may be payable, but this will be a matter between the solicitor and client.[95]

The language of the Guide to Professional Conduct for Solicitors is decidedly unhelpful in matters touching upon the calculation of solicitors professional fees. As has already been shown, the Guide clarifies that solicitors are not allowed '...to calculate charges as a specified percentage or proportion of any damages or other monies that may become payable to the client...'[96] However, the only mention made in the Guide to 'no foal, no fee' arrangements is found at paragraph 7.6 which deals with the transfer of files between solicitors. There, the Guide has this to say...

> If costs are due, a bill of costs should be furnished without delay. Costs may be agreed, arbitrated or taxed. No foal, no fee arrangements are determined if the client moves to another solicitor. It can be implied in these contingency

[95] L Kennedy and G Dillon-Leetch, 'The International Comparative Guide to: Class and Group Actions 2009, A practical insight to cross border Class and Group Actions Work', (Report) Global Legal Group, Chapter 16 Ireland, available at www.ICLG.co.uk and accessed on 4th October 2010.

[96] A Guide to Professional Conduct of Solicitors in Ireland' paragraph 10.3, (n83).

> fee arrangements that they are conditional on the first solicitor continuing to have prosecution of the case.[97]

This single reference to 'no foal, no fee' arrangements in the Guide to Professional Conduct only adds to the confusion on how solicitors fees are to be calculated. Reference to the existence of contingency fee arrangements may simply be an unfortunate use of language and may have been intended in a different context. However, given that the Law Society in its submission to the Competition Authority referred to solicitors working on a 'no win, no fee' basis for, presumably impecunious clients, one might have thought that rules governing how solicitors conduct their business in a professional manner in these circumstances would be laid out clearly by the Law Society of Ireland in its Guide to the profession.

In fact to add to the confusion on how solicitors can calculate fees owed by their clients is the fact that there is a complete prohibition on any form of advertising that includes 'no foal, no fee' arrangements in them. This is clear from Article 9(a) of the Solicitors (Advertising) Regulations.[98] That regulation reads, *inter alia*...

> ...an advertisement published or caused to be published by a solicitor shall not –
>
> (i) include words or phrases such as "no win no fee", "no foal no fee"...

Do 'no win, no fee' arrangements really exist?

It is in fact questionable whether 'no win, no fee' agreements actually mean what they appear to say. 'No win, no fee' agreements might not actually mean that lawyers are willing to take cases on the understanding that they will only receive payment if they win the case on behalf of their client.

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[97] Ibid, para 7.6.

[98] The Solicitors (Advertising) Regulations, 2002 (Statutory Instrument No.518 of 2002) pursuant to Section 4 of the Solicitors (Amendment) Act 2002, available at the Law Society's website at http://www.lawsociety.ie/Pages/Public-Make-a-Complaint-CMS/Rules-Applying-to-Solicitors/ and accessed on the 4th October 2010.

The LRC in its Report on Multi-Party Litigation[99] referred to 'no win, no fee' agreements as being really a form of 'Deferred Payment'.[100] This means that '...these agreements do not, at least formally, insulate the client from costs in the event of an unsuccessful claim.'[101] The reason for this is that lawyers in fact defer payment of costs owing to them by their client until the completion of the action. The client therefore does not have to pay various costs and fees up front or on account. Instead the lawyer funds these costs himself with liberty to pursue the costs from the client after the case is completed. The LRC made the point that...

> In reality this scenario will often tally with the substance of a no win, no fee arrangement as the solicitor may decide against the pursuit of these costs.[102]

The LRC points out that there are valid reasons why client fees must remain due and owing to the lawyer even in a 'no win, no fee' arrangement. The LRC explained the point thus...

> ...the conditions for recovery of costs from an unsuccessful defendant have implications for the terms of the agreement between the solicitor and the client. Where the costs order is made in favour of the client, the solicitor will recoup their fees from the defendant. Of course, even under the terms of a true no win, no fee arrangement, the successful solicitor would look to the defendant for costs. However, the costs liability of the unsuccessful party to an action reflects the risk of exposure undertaken by the successful party. In order for the claimant's solicitor to receive costs from the defendant, it must be the case that the claimant would have been liable for these costs had the action been taken unsuccessfully and costs had followed the event. Under a true no win, no fee

[99] Law Reform Commission, 'Report: Multi-Party Litigation', (LRC 76-2005)

[100] Ibid 3.08 – 3.12.

[101] Ibid 3.08.

[102] Ibid.

> arrangement, the claimant in these circumstances would have been exposed to potential liability for the defendant's costs, but not for those of their own representatives as these would have been absorbed by the solicitor in accordance with the terms of the agreement. Thus in order for the successful party to recoup legal costs, the agreement between the claimant and the solicitor must be phrased in terms of deferment rather than indemnity.[103]

The point that the LRC make is clear. In essence, a form of charade must be kept up by lawyers acting on a 'no win, no fee' basis. The lawyer must maintain the pretence that their client is in fact liable to pay their costs should the action fail so that, if the action succeeds, the lawyer can recover his costs from the defendant.

The LRC then direct us to a second reason for arguing that 'no win, no fee' arrangements are really a form of deferred payment. According to the LRC...

> ...the deferred payment system may be regarded as a mechanism for the solicitors of claimants to avoid charges of champerty and maintenance.[104]

The LRC quoted Lord Claire LC from an old Irish House of Lords case of *Kenny v Browne*[105] describing maintenance and champerty as follows...

> It is a crime at common law to maintain a suit in which the man maintaining is not interested, and the particular species of maintenance of which the appellant has been guilty is called champerty – that is maintaining a suit in consideration of having some part of the thing in dispute.

According to the LRC, a 'no win, no fee' agreement would...

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[103] Ibid 3.09.

[104] Ibid 310.

[105] Ibid 3.10 at footnote 4, citing Lord Claire LC in *Kenny v Browne* (1796) 3 Ridg. Par. Cas. 462, 498.

> ...tie the financial interests of the solicitor to the outcome of the dispute. Although under the terms of such a no win, no fee agreement, the client would likely be obliged to pay for certain administrative costs in the running of the action, their ultimate indemnification as to the legal fees incurred by their representative might raise the spectre of maintenance and champerty.[106]

This brings us back to the issue of maintenance and champerty and its impact on funding arrangements in litigation in Ireland.

Public Policy on Maintenance and Champerty in the Irish Cases

As has already been shown, maintenance and champerty remain indictable misdemeanours at common law and constitute actionable torts at the suit of the person injured as a result of the action.[107] This was confirmed in the Statute Law Revision Act 2007. Section 2(2) of that Act saves those Acts enacted before 6 December 1922 which are listed in Schedule 1 of the Act. In Schedule 1, under the title 'Statutes of uncertain date', is listed Conspiracy: maintenance and champerty, with a short title given in section 6 of the same Act as 'Champerty Act, 1305', replacing the previous title of 'Statute of Conspiracy (Maintenance and Champerty)'. An opportunity in that piece of legislation presented itself to repeal the crimes and torts of maintenance and champerty but that opportunity was passed up by the Oireachtas.

The courts probably provide the only assistance on what the public policy currently is in relation to maintenance and champerty. Even there though, the Irish courts are unhelpful. In *McElroy v Flynn*, Blayney J said that '...the agreement induced by the defendant is one in the nature of champerty and void as being contrary to the policy of

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[106] Ibid 3.11

[107] SE Quinn, *Criminal Law in Ireland*, (n21) and E Quill, *Torts in Ireland*, (n22).

the law.'[108] Blayney did not elaborate what this public policy concern was.

When *Fraser v Buckle* had been before the High Court, Costello J,[109] addressed the question of what the public policy was in relation to the law on maintenance and champerty. There he said the following...

> The term "public policy" needs to be understood. It is used in different senses and there are different and distinct heads of public policy which the courts will seek to enforce. Steyn LJ in *Giles v Thompson* ... recently identified them under three separate headings:-
>
> The criterion of public policy or public interest in the restraint of trade field is based on an economic view of the needs of society. Other contracts may be held illegal on the ground that they endanger fundamental moral values of our society, such as certain agreements in restraint of marriage. A third head of public policy serves to protect the integrity of institutions of government in the broad sense of the word. And the public policy which renders champertous agreements illegal clearly falls in this third category. It will be seen that this head of public policy rests on the perceived need to protect the integrity of public justice.[110]

Costello J further elaborated on his reasoning that champertous agreements were contrary to public policy by referring to Lord Denning's decision in *In re Trepca Mines Ltd* (No 2)[111] when he said...

> ...the reason why the law condemns champertous agreements is, as Lord Denning MR pointed out ... because of the dangers associated with such agreements,

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[108] *McElroy v Flynn*, [1991] ILRM 294 (n23).

[109] *Simon Fraser and another v Denis Buckle and others*, High Court, [1994] 1 IR 01.

[110] Ibid, citing Steyn LJ in *Giles v Thompson* [1993] 3 All ER 321.

[111] *In re Trepca Mines Ltd* (No 2) (n14).

> namely the temptation that the maintainer might inflame the damages, suppress evidence or suborn witnesses.[112]

Costello J then finished by reiterating that...

> It is necessary also to appreciate that the reason why such agreements are contrary to public policy is that these associated dangers, if realised, could compromise the proper administration of justice because of the unjust adjudications likely to result.[113]

Given the development in thinking in England and Wales on the issue of litigation funding and ensuring that access to justice is not denied through the inability to secure funding it is questionable today whether Costello J was correct in his statement on what the public policy of the law in this area is. Quoting Steyn LJ in *Giles v Thompson*[114] Costello J had said that '...the public policy which renders champertous agreements illegal ... rests on the perceived need to protect the integrity of public justice.'[115]

The Supreme Court reaffirmed the decision of Costello J in the High Court in *Fraser v Buckle*, but did not elaborate on the public policy concerns in forbidding champertous agreements. As Capper said of the judgement of the Supreme Court in *Fraser v Buckle*, it was...

> ...deeply disappointing for its failure to examine whether the dictates of public policy really require heir-locator agreements to be void in the present age.[116]

The Court in *O'Keeffe v Linda Scales* again merely stated that...

> A person who assists another to maintain or defend proceedings without having a bona fide interest

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[112] *Fraser v Buckle*, High Court (n25).

[113] Ibid.

[114] Ibid, citing *Giles v Thompson* (n120 below).

[115] Ibid.

[116] D Capper, 'The Heir-Locators Lost Inheritance', (n20).

> independent of that other person in the prosecution or defence of those proceedings acts unlawfully and contrary to public policy and cannot enforce an agreement with that other person for any form of benefit whether it be a share of the proceeds of the litigation or a promise of remuneration such as money or a transfer of property if the claim is successfully defended.[117]

There was no elaboration by the court in *O'Keeffe* as to what the public policy concern in these matters was.

Public Policy and the Law of Maintenance and Champerty in England & Wales

Whereas there has been little discussion let alone development on the law of maintenance and champerty in the Irish courts, there have been numerous cases dealing with this area in England and Wales and it is clear that the law on litigation funding is developing and changing rapidly.

Legislative Change

The first major step in this development came with the enactment of the Criminal Law Act 1967. Section 13 of that Act abolished maintenance and champerty as criminal offences. Up until that time they had been offences under the criminal law in England and Wales. Champerty, according to Lord Denning MR in *Trepca Mines Limited No. 2* did '...not form part of the law of Scotland...'[118] but as will be recalled, still forms part of the law in Ireland to this day. Section 14 (1) of the 1967 Act states that no one can be liable in tort for any conduct amounting to maintenance or champerty. However, section 14(2) of the Act kept open the possibility that public policy might demand in certain circumstances that certain contracts could still offend against these otherwise abolished provisions. Section 14(2) of the Act reads...

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[117] *O'Keeffe and Anor v Linda Scales*, [1998] (n29).

[118] *In Re Trepca Mines Ltd.* (No. 2). Court of Appeal 30 July 1962 [1963] Ch. 199, at 208.

> The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.[119]

Therefore, champerty survives as a rule of public policy capable of rendering a contract unenforceable. This means that having abolished the common law offences of maintenance and champerty and removed the possibility of tortious liability for conduct amounting to maintenance or champerty, Parliament retained the possibility on grounds of public policy that certain contracts may still offend these provisions.

In *Giles v Thompson*,[120] the House of Lords held that...

> The law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.

In *R (Factortame Ltd. and Others) v Secretary of State for Transport*,[121] the Court of Appeal reiterated *Giles v Thompson* by stating that...

> The modern doctrine of champerty is one of public policy which changes over time.

Section 58 of the Courts and Legal Services Act 1990 permitted Conditional fee agreements in England and Wales. This only came into force in 1995[122] and was extended to all civil proceedings except family law cases in 1999.[123] In *R (Factortame Ltd. & Others)*, Lord Philips MR,

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[119] Criminal Law Act 1967, accessed on the 4th October 2010 and available at http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1186125

[120] *Giles Respondent v Thompson Appellant, Devlin Respondent v Baslington Appellant*, House of Lords 26 May 1993, [1993] 2 W.L.R. 908 [1994] 1 A.C. 142, at 143.

[121] *R (Factortame Ltd. and Others) v Secretary of State for Transport, Local Government and the Regions (No.8)*, Court of Appeal, 3 July 2002, [2002] EWCA Civ 932, [2003] Q.B. 381.

[122] The Conditional Fee Agreements Order 1995 No.1674.

[123] Section27 of the Access to Justice Act 1999 inserted a new section 58 into the Courts and Legal Services Act 1990.

delivering the judgement of the Court said in relation to conditional fee agreements that...

> ...section 58 evidences a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees will be contingent upon success. Whereas before this practice was outlawed, it is now permissible - subject to the requirements imposed by the section...[124]

Recent caselaw and changing judicial attitudes to funding litigation

There have been a number of cases in the UK in recent years dealing with litigation funding by third parties.[125] Two of the more important cases on this evolving area of the law are *R (Factortame Ltd. and Others) v Secretary of State for Transport, Local Government and the Regions (No.8)* and *Arkin v Borchard Lines Ltd and others*.

R (Factortame Ltd. & Others), revealed how much judicial thinking on litigation funding has advanced in the UK. That case involved extremely complex litigation that proceeded back and forth between the UK and European Courts for in excess of a decade. The claimants, Spanish fishermen, established that the UK authorities had been incorrect in removing the claimants' fishing vessels from the British registry, with the effect that they were no longer entitled to fish in United Kingdom waters. The claimants brought judicial review proceedings in which they challenged the legality of the Act and the Regulations used to remove them from the registry on the grounds that they violated the provisions of the EC Treaty.

After an extremely drawn out legal quest through the various UK and European courts, the claimants finally won their action and then sought damages against the Secretary of State for the unlawful prohibition of

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[124] *R (Factortame Ltd. and Others) v Secretary of State for Transport, Local Government and the Regions (No.8),* at 62.

[125] See for example *Giles v Thompson* [1993] 2 W.L.R. 908 [1994] 1 A.C. 142, *Hamilton v Al Fayed* [2002] EWCA Civ 665 which dealt with the issue of 'pure' as opposed to 'professional' funders and *Thai Trading Co v Taylor* [1998] Q.B. 781.

fishing in UK territorial waters. The claimants sought to recover as costs, fees paid to a firm of well known accountants, Grant Thornton. Grant Thornton who were forensic accounting experts, were retained to help assess the damages owing to the plaintiffs. Grant Thornton also provided other support for the litigation such as collecting documentary evidence, and advising on offers to settle the case. Grant Thornton agreed to prepare and submit the plaintiffs' claims for loss or damage in return for professional fees. Those fees were to be paid pursuant to an agreement under which the claimants agreed to pay Grant Thornton 8% 'of the final settlement received'. The minister contended that this agreement between the claimants and Grant Thornton was champertous and, therefore, unenforceable and that the claimants were not entitled to recover as costs any sums paid to Grant Thornton pursuant to that agreement.

As the Court of Appeal made clear, '...the claimants were in a parlous financial state...' by the time the matter of damages came to be decided. The Court quoted a Mr Swabey as describing the claimants' position as follows...

> ...the financial position of the Anglo-Spanish fleet in 1997 was parlous in the extreme. Of 100 or so claimants, a large number had given up fishing, sold their vessels and licences and were holding their creditors at bay pending the outcome of the litigation. Many had gone into liquidation, others had been dissolved and a significant number languished in a sort of insolvent dormancy while the Inland Revenue, the VAT authorities, banks, trade creditors and others anxiously awaited the outcome of the litigation.[126]

The Court of Appeal acknowledged that amongst the anxious creditors referred to were Grant Thornton, who had provided accountancy services to a number of the claimants and who were owed fees of approximately £200,000 plus substantial interest in respect of those

[126] *R (Factortame Ltd. and Others)*, 392, (n124).

fees. Grant Thornton had a vested interest in the outcome of the litigation and therefore had an incentive in investing in the case to its conclusion. This was acknowledged by the Court of Appeal, because according to the Court, Grant Thornton...

> ...appreciated that the only prospect that they had of recovering these fees was if their clients succeeded in recovering substantial damages from the Government.[127]

The Court held in *R (Factortame Ltd. & Others)*...

> ...that it was a question of existing public policy directed to protecting the integrity of public justice whether agreements in support of litigation were lawful, and express legal provisions such as the Courts and Legal Services Act 1990 provided a powerful indication of the limits of public policy in analogous situations;[128]

The approach adopted by the Court of Appeal was that any agreement, by which someone funds or maintains litigation, will be decided on a case by case basis as noted at paragraph 36 of that court's decision...

> Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.[129]

The Court then made the point that there '...is good reason why principles of maintenance and champerty should apply with particular

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[127] *R (Factortame Ltd. and Others)*, 392, (n124).

[128] Ibid.

[129] Ibid 36.

rigour to those conducting litigation or appearing as advocates.' The Court cited a passage in the judgment of Buckley LJ in *Wallersteiner v Moir*[130] to make their point...

> A contingency fee, that is, an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal adviser. Moreover where, as is usual in such a case, the remuneration which the adviser is to receive is to be, or to be measured by, a proportion of the fund or of the value of the property recovered, the arrangement may fall within that particular class of maintenance called champerty ... It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations ...

The Court of Appeal went on to hold that the contingency fee agreements in *R (Factortame Ltd. & Others)*, were not champertous or subject to the constraints of maintenance because in that case, Grant

[130] *Wallersteiner v Moir* [1975] QB, 373, 401 – 402.

Thornton were not actually giving evidence as independent experts but had retained other experts not on a contingency basis to do so.

Then in *Arkin v Borchard Lines Ltd and others*[131] the Court of Appeal returned to the question of litigation funding. This case is probably the most important on the issue of litigation funding by third parties in England and Wales in recent times.

Unlike the position in *R (Factortame Ltd. & Others)*, the professional funder in *Arkin v Borchard Lines* was not due to receive any recovery from the suit, as the funded client, Yeheshkel Arkin lost his action in damages. Instead, the issue in *Arkin* was about what exposure to the winning defendant's costs the funder should properly bear, given that the agreement was silent about that issue. This is of course a very serious issue in litigation funding. It is one thing for an impecunious plaintiff to receive funding from a third party to assist them in bringing an action they could not otherwise afford to take. However, if the defendant wins such a case as happened in *Arkin*, how can that defendant recover the costs he has expended in defending the action if the plaintiff is a man without means? Incidentally, Arkin's claim was an action in damages arising from an alleged cartel amongst shipping conferences contrary to Article 101 TFEU.

The Court of Appeal addressed the question of successful defendants recovering their costs in *Arkin* and clarified how the courts should address this issue in future. First, in its judgement, the court acknowledged that the plaintiff, Arkin '...was a man without means.'[132] In order to bring his case his...

> ...lawyers were acting for him under conditional fee agreements. He was, however, only able to pursue his claim to judgment because of the financial support

[131] *Arkin v Borchard Lines Ltd and others*, Court Of Appeal, (Civil Division) [2005] EWCA Civ 655, [2005] 3 All ER 613.

[132] Ibid.

> provided by a professional funder, Managers and Processors of Claim Ltd (MPC).[133]

MPC was in the business of providing assistance in funding litigation in circumstances where legal aid was not available. In such circumstances, the funding was provided on terms that MPC would receive a percentage of the recovery if the claim succeeded and nothing if it did not. As the court pointed out...

> Under their agreement with Mr Arkin, MPC undertook to instruct, engage and pay for one or more expert forensic accountants in the firm of Ernst & Young to provide a report on the quantum of [the plaintiff's] loss attributable to the actions of the defendants. They also agreed to provide various services ancillary to this accountancy exercise, including secretarial services. Their agreed remuneration was 25% of recoveries from the litigation up to £ 5m and 23% thereafter. In addition they were to receive any payments in respect of costs of witnesses in relation to quantum recovered from the defendants.[134]

The court noted that the funder, MPC, took no part in the decision making in Arkin's case, nor did they attempt to control the litigation in any way. Mr Arkin's claim failed in what the court referred to as '...a disastrous piece of litigation.' His lawyers recovered nothing. According to the court...

> MPC's support has cost them in excess of £1.3m, for no return. Very substantial costs [were] incurred by the defendants...

The court found in *Arkin* that it would be...

> ...unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all

[133] Ibid.

[134] Ibid 13.

> liability for the costs of the opposing party if the funded party fails in the action.[135]

The court felt that there was a need to devise a way...

> ...whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.[136]

The court then set out in paragraph 39 of its decision the vital role that litigation funders play in allowing otherwise impecunious plaintiffs gain access to justice. The court pointed out the need to balance on the one hand the rights of successful defendants to recover costs while on the other hand, the need to ensure that litigation funding is not discouraged as it might no longer be a viable commercial transaction...

> If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.[137]

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[135] Ibid 38.

[136] Ibid.

[137] Ibid 39.

The court in *Arkin* then proceeded to direct how the courts should deal in future with the balancing act involved in a case involving litigation funding...

> Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.
>
> We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.[138]

The Court of Appeal therefore acknowledged the important role that professional or 'commercial' litigation funders play in allowing impecunious plaintiffs to gain access to justice which might otherwise be denied through lack of funds. The court was anxious to balance the right of successful defendants to recover costs where litigation brought against them was funded by third parties, against the need not to

[138] Ibid at para 40 and 41.

discourage funders from helping plaintiffs from gaining access to justice.

Developments in Australia

In *Arkin*, the Court of Appeal noted that the funder took no part in the decision making in the case, nor did the funder attempt to control the litigation in any way. The case of *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (Fostif)[139] shows how the boundaries in relation to litigation funding have been pushed to an extreme that could never have been imagined even a few years ago.

The Australian High Court in 2006 in *Fostif*[140] found in a 5:2 majority decision that litigation funding was not an abuse of process or contrary to public policy. It should be noted that in the Australian States of New South Wales, South Australia, Victoria and Australian Capital Territory, the crimes and torts of maintenance and champerty have been abolished.[141]

The *Fostif* case involved claims for the recovery of amounts of money paid by tobacco retailers, including Fostif, to tobacco wholesalers, allegedly for the purposes of the wholesalers paying a licence fee, later found to be unconstitutional. Some individual retailers had made claims and recovered the small amounts owing to them, mostly in or about AUS$1,000 or so each. However, most retailers affected by the decision had not taken any action to recover sums they were owed. A firm of accountants, Firmstones, realising that there were a large number of potential litigants with outstanding claims, proactively instituted representative proceedings (a form of class action) under the Supreme Court Rules of 1970. The Australian representative action involves an 'opt-in' process and Firmstones in this instance instituted proceedings without first gathering in any injured parties as named plaintiffs, with the sole exception of Fostif. Firmstones sought out

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[139] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (HC (Aus)).

[140] Ibid.

[141] See for example Section 6 of the Maintenance, Champerty and Barratry Abolition Act, 1993 New South Wales.

claimants to be included in the 'opt-in' representative action through an extensive advertising and direct marketing campaign and organised the claimants into the proceedings. The funding agreement that Firmstones used, included the following terms and conditions...

- Firmstones retained the firm of solicitors to act for the claimants and in the agreement forbade the solicitor from directly liaising with any of the individual claimants;

- Firmstones gave all instructions to the solicitor in relation to the conduct of the proceedings and retained the power to settle the claims with the defendants (provided the amount of the settlement was not less then 75% of the amount claimed);

- Firmstones would receive up to 33.3% of any amounts recovered by the claimants and would retain any amounts awarded to the claimants for costs.

In the action for damages, the defendants eventually won on appeal in the Australian High Court on the grounds that the action was not a true representative action as it did not meet the requirements for a representative proceeding under Supreme Court Rules 1970, Pt 8, r.13 that "numerous persons have the same interest" in the proceedings.

However, although Firmstones (and Fostif) lost the damages action, the court took the opportunity to clarify the law in relation to litigation funding in Australia, at least in those States where maintenance and champerty were no longer crimes or torts. The majority decision of the court in a joint judgment of three of the judges Gummow, Hayne and Crennan JJ stated, *inter alia*...

> Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstones' seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of

> these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.
>
> ...many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned ... And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?[142]

The position now reached in Australia is at the opposite extreme to that currently found in Ireland. In *Fostif* it would be fair to say that the litigation instituted in that case was not that of, or by, the injured parties. Rather, the litigation was in fact a business venture instigated by the litigation funders (Firmstones) with an interest solely driven by profit. Strictly speaking, the funders were not responding to a cry for help from impecunious plaintiffs. In fact, the funders saw a business opportunity to make a profit from litigation where the injured parties, most likely, were not bothered to take an action in their own right.

In Australia, this position is now accepted on the basis that funding litigation affords access to justice where access to justice might otherwise be denied. In *Fostif*, it was pointed out that there were two possible fears associated with litigation funding. These fears were

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[142] Ibid 88 – 89.

about the possible adverse effects on the litigation process, in other words that there could be an abuse of process, and fears about the fairness of the bargain struck between the funder and the client. The court concluded that...

> To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears...[143]

Conclusion: Litigation funding and contingency or conditional fees for Damages Actions in Ireland?

When the Commission embarked on its consultation process in the Green and White Papers, it initiated a debate on why damages actions should and could be brought, and how damages actions might be both encouraged and assisted. It is clear, in Ireland and elsewhere that one of the principal barriers to bringing private actions for damages in competition cases are the costs involved in such complex and risky litigation. The Commission avoided this issue almost entirely during the consultation process for both the Green and White Papers this despite the fact that the costs involved in such cases are a major obstacle to them being brought by claimants. These costs are principally legal, but can also include specialist forensic accounting and economist costs as well as case management and administrative costs.

The law in Ireland in relation to costs and the funding of litigation is archaic and has not kept up with developments in other common law jurisdictions. It is also obvious that the interpretation and application of the law and rules on the calculation of legal professional fees is both inconsistent and contradictory. Though there may have been sound reasons grounded in public policy in the distant past to prohibit third parties or lawyers from funding litigation, it is clear that thinking on these issues in other common law jurisdictions such as England and Wales, the United States and Australia have developed and the laws in those jurisdictions have adapted and changed to keep pace with this evolution in thinking.

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[143] Ibid 91.

It is clear in particular that there has been an extraordinary shift in thinking on the public policy needs in the area of funding litigation in the United Kingdom. This in turn has lead to a sea change in attitudes amongst the judiciary in dealing with the question of litigation funding by third parties. Whereas at one time this might have been seen as '...the officious intermeddling with the disputes of others...'[144] today the opposite is the case. As former Master of the Rolls Lord Philips has said in the *Gulf of Azov* case...

> Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.[145]

If litigation funding by third parties, or indeed if contingency fees are to be allowed in private actions for damages in the Irish courts there will need to be legislative change to de-criminalise maintenance and champerty. This will in turn allow the courts to look at the issue afresh to see if the ethical issues that these rules were designed to protect against are real or are in fact simply imagined. If there are concerns regarding the ethical issues that might arise by allowing third party funding or contingency fees in Ireland these could be addressed by the formulation of the appropriate rules in the Rules of the Superior Courts, or by the regulation of third party litigation funding. As Aileen Murtagh argued in her Law Society Gazette article...

> There is no question but that the Irish market is ripe for the introduction of third-party funding. There is a constitutional right of access to the courts to litigate reasonably stateable cases. Unfortunately, economic factors are depriving many of this right, even where there is a meritorious claim. Third-party funding is one way to

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[144] Per Fletcher Moulton LJ in *British Cash and Parcel Conveyors, Limited v Lamson Store Service Company, Limited,* (n16).

[145] *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA 92 at [54].

ensure that individuals are not precluded from vindicating their rights due to excessive costs.[146]

[146] A Murtagh, 'Other People's Money', Law Society Gazette, November 2009, (n62)

CHAPTER 7: INCENTIVISING PRIVATE ACTIONS

Introduction:

It is clear from the issues raised in this thesis that bringing a private action for damages in a competition case is not for the faint hearted. There are numerous difficulties associated with such cases. The bulk of these difficulties can be reduced to the two overarching problems of complexity and cost.

If policy makers are truly concerned at ensuring that those harmed by anti-competitive conduct are able to recover for the loss they have suffered, then the possibility of incentivising such actions may need to be considered. Such incentives might encourage more private antitrust damages actions and could thereby ensure greater levels of deterrence of illegal conduct. However, as already argued in Chapter 2 of this thesis, if public enforcement action has already been taken, then encouraging private follow-on actions for damages cannot be to fulfil an enforcement function as the enforcement function is already spent. Incentivising private actions that they may fulfil an enforcement function can therefore only arise in standalone cases. Standalone actions in competition cases can address two separate goals. Those goals are enforcement and compensation of victims of competition infringements. It might therefore be appropriate to consider incentives in the mix of reforms required to effect such change.

Amongst the options initially considered by the Commission for incentivising private actions was the possibility of introducing double damages for successful plaintiffs in certain private antitrust actions. However as will be seen, the Commission had not differentiated the roles of standalone and follow-on actions in an enforcement context when suggesting that incentives be considered for private actions. Indeed, the Commission was concerned instead to offer incentives for types of antitrust offence rather than for types of potential antitrust plaintiff. The Commission considered the introduction of incentives by way of double damages as an option for hard-core infringements of the Treaty, rather than incentivising plaintiffs to take action in standalone

cases where there had been no public enforcement action to follow-on from.

The Green Paper and Double Damages

In its Green Paper, the Commission suggested the possibility that double damages could be an option in private antitrust litigation. The Commission suggested...

> ...doubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements.[1]

As mentioned in Chapter 3 of this thesis, the Commission put forward four options numbered 14 – 17 under the Damages Head in its Green Paper. Options 14 and 15 were considered in Chapter 3 in relation to the definition and quantification of damages in competition cases. Option 16 suggested the possible availability of double damages in competition cases. That option read...

> Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.[2]

Option 16 was suggested by the Commission in a slightly different context to options 14 and 15 in the Green Paper. This was clarified in the Staff Working Paper that accompanied the Green Paper. There the Commission explained...

> In order to create a clear incentive for claimants to bring antitrust damages cases, it could be envisaged to award double damages in case of the most serious antitrust infringements, i.e. horizontal cartels. Comments are invited as to whether, if it is introduced, such award is

[1] Green Paper on Damages actions for breach of the EC antitrust rules; Com (2005) 672, SEC (2005) 1732 at para 2.3, page 7.

[2] Ibid.

> considered useful, it would be automatic, conditional or at the discretion of the national court.[3]

The Commission saw the potential benefit of introducing incentives to encourage private antitrust damages actions. However, the incentive envisaged by the Commission, would have applied only to cases '...of the most serious antitrust infringements, i.e. horizontal cartels.' Furthermore, the Commission suggestion left it open to respondents to decide whether the double damages incentive should be mandatory or discretionary.

By the time the Commission published its White Paper on Damages actions in antitrust cases, it had dropped the proposal to introduce double damages. Even so, the need to find incentives to encourage private actions was still recognised by the Commission. In its Staff Working Paper accompanying the White Paper, the Commission argued...

> ...one also has to take into account the fact that the risk/reward balance in antitrust damages litigation is skewed against bringing actions. The Commission considers it necessary to address this negative balance by ensuring that there are sufficient incentives for victims of competition law infringements to bring meritorious claims.[4]

According to the Commission, one way of incentivising private actions in competition cases...

> '...would be to assure the claimant *a priori* that if he wins the case, he will be awarded damages that are higher than the loss actually suffered.'[5]

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[3] Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules Com (2005) 672 Final, at para 150, page 43.

[4] 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', Brussels 2.4.2008, SEC (2008) 404, at para 195, page 59.

[5] Ibid.

The Commission did not feel that at the time of publishing its White Paper on damages actions there was a need, or more likely, a desire to incentivise actions by way of double damages. In fact it is more accurate to say that the Commission met with stiff opposition on the idea of introducing multiple damages awards in competition cases. For example, the German Federal Ministry of Economics and Technology and the Federal Cartel Office made a joint submission[6] to the Commission on the Green Paper. In answer to Question E in the Green Paper, 'How should damages be defined?' the joint submission of the Ministry and Cartel Office simply stated... 'The introduction of multiple damages (Option 16) should be rejected in all forms.'[7] The joint submission further pointed out that...

> In the judgment in the *Courage* matter, the ECJ also established that damage compensation claims of injured legal personalities serve to compensate the losses suffered. The goal is not punishment or a deterrent effect (beyond the compensation as such).[8]

The Department of Trade and Industry on behalf of the Government of the United Kingdom also raised concerns on the possibility of introducing double damages...

> Option 16 proposes double damages for horizontal cartels. While there is some scope in the UK for punitive damages, they are only available in very limited circumstances and there is no decided competition case where punitive damages have been considered. The Government's current policy is that there should be no further lessening through statute of the restrictions on the availability of punitive damages in civil proceedings. This reflects the

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[6] 'Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission: Damages actions for breach of the EC antitrust rules', accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/bundesministerium_fur_wtb_en.pdf

[7] Ibid page 6.

[8] Ibid.

> view that the primary purpose of civil law on damages is to provide for loss, and not to punish.[9]

Similarly, the International Bar Association (the 'IBA') argued against the introduction of double damages. In its submission it argued amongst other things...

> The Working Group does not believe that double damages as a matter of course are appropriate even in cases involving horizontal cartels. To the extent that the EC and Member States believe that it is appropriate to impose a financial penalty for certain types of infringements, the view of the Working Group is that this should primarily be addressed through public enforcement mechanisms.[10]

It should be noted however, that the IBA did acknowledge that there may be some merit to introducing double damages to encourage the initiation of standalone actions. The IBA argued...

> To the extent that the Commission believes that double damages are needed to promote private enforcement, it is likely worth distinguishing between private actions brought prior to or in the absence of any public enforcement and follow-on claims brought subsequent to successful public enforcement initiatives ... Should one of the Commission's policy objectives be to encourage private claims in situations where there has been no public enforcement action and it believes that increasing the quantum of damages available to claimants is necessary to achieve this goal, it may be appropriate to

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[9] The Department of Trade and Industry, Comments on 'Commission Green Paper on Damages actions for breach of the EC antitrust rules', 21st April 2006, para 70, pages 14 – 15, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/dti.pdf and accessed on the 4th October 2010.

[10] International Bar Association Antitrust Committee Working Group On Private Antitrust Litigation In Europe, 'Submission Regarding The European Commission's Green Paper On Damages Actions For Breach Of The EC Antitrust Rules', page 14, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/iba.pdf and accessed on the 4th October 2010.

> make increased amounts of damages available in such situations.[11]

Numerous submissions to the Commission expressed hostility to the idea of introducing double damages. A common thread was the fact that double damages are punitive in nature and that punishment of infringements should be reserved to action taken by public authorities.

Though the Commission shied away in the White Paper from pursuing double damages it made clear that it would revisit the issue in the future if there was still a need to consider ways of incentivising private actions...

> If it were to emerge, though, that the current situation in Europe of very limited repair of the harm caused by infringements of the competition rules does not structurally change over the coming years, it should be considered what further incentives are required to ensure that victims of competition law infringements actually bring their antitrust damages action. In that context the appropriateness of the current definition of damages might have to be reconsidered.[12]

It has been argued in this thesis (and clarified by the Commission's initiative on damages actions in competition cases), that most forms of competition case involve a degree of complexity and expense that would effectively preclude many potential plaintiffs from instituting a competition damages action. However, the degree of complexity is not evenly applied to all instances where plaintiffs can bring damages actions. Instituting competition damages actions is slightly easier in the case of follow-on actions than in standalone actions. In a follow-on action, illegal antitrust activity has already been detected and prosecuted. Evidence of that illegal activity is in the possession of the investigative agency (the NCA). Evidence will also be in the possession

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[11] Ibid.

[12] 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' at para 195, page 59 (n4).

of the defendant in the public enforcement action as the defendant will have been served with various papers upon which the public authority has based its case. That evidence of wrongdoing by the defendant is potentially available to injured third parties through an application for discovery in a follow-on action. At the very least, prospective plaintiffs will know of the fact of the infringement after proceedings have been instituted by the public enforcement agency. They can then identify some or all of the perpetrators of the infringement. The prospective private plaintiff to a follow-on action will also be at least vaguely aware of some of the evidence that is potentially available in the case through media reports of trials and/or sentencing of the defendants. This knowledge arms a potential litigant so that they can make the appropriate applications for discovery once they have initiated proceedings.

Standalone actions do not enjoy the same advantages just outlined in the case of follow-on actions. In a standalone action, assuming that the private litigant is aware that there has been an infringement and is also aware of the identity of the wrongdoer, he then, amongst other things, has to uncover evidence of wrongdoing without the benefit of the investigative tools that an enforcement agency enjoys.

Taking any private competition damages case is potentially difficult. The degree of difficulty rises if the action is initiated as a standalone action. The purpose of providing incentives for private competition cases is to encourage potential claimants to take private actions that might not otherwise be taken because of the risks that are involved in such cases. It would seem obvious that those incentives are more important in standalone actions than in follow-on cases as the plaintiff does not have the comfort or indeed knowledge of a prior finding of wrongdoing by the defendant. True, the fact that there has been a finding of prior wrongdoing might not in itself be admissible in a follow-on action. However, knowledge of the fact of the breach and knowledge that evidence of the breach are in existence are a tremendous head start for private litigants in a follow-on action that are absent in standalone cases.

Greenfield and Olsky made this point in an article on treble damages. They acknowledged that arguments for treble damages include the need to incentivise private antitrust actions. However, in relation to treble damage awards in follow-on cases, they argued that...

> ... it is questionable whether treble damages are truly necessary to create adequate incentives to bring litigations that follow government prosecutions.[13]

The authors did not argue against the need for treble damages per se. In fact they concluded that there was a need for incentives such as treble damages, though they felt there should be some discretion as to when treble damages should be applied rather than awarding treble damages automatically once there is an infringement finding.

The case for multiple damages

The Commission undoubtedly took its inspiration from the United States when it suggested in the Green Paper the possibility of introducing double damages in competition cases in Europe. In the United States, treble damages are available in competition cases pursuant to section 4 of the Clayton Act 1914, having first been introduced in the Sherman Act 1890. Section 4 of the Clayton Act reads...

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

The courts are obliged to automatically treble damages once there has been an adverse finding against the defendant in an antitrust case.[14]

[13] LB Greenfield and DF Olsky, 'Treble Damages: To What Purpose and to What Effect?' (February 2007) 10, presented at a conference entitled "International Cartels – Comparative Perspectives on Practice, Procedure and Substance," hosted by the British Institute of International and Comparative Law (BIICL) and available at http://www.wilmerhale.com/files/Publication/dc8754ff-a713-459e-80aa-f8e5cf50cf12/Presentation/PublicationAttachment/98011e52-2e46-41c1-ae26-019292035734/Treble%20Damages%20Article_%20BIICL%20conference.pdf and accessed on the 4th October 2010.

There are some exceptions to this rule of automatic trebling of damages.[15] The availability of treble damages in private antitrust cases has been the cause of ongoing controversy in the United States almost since they were first introduced in the Sherman Act in 1890. According to David Boies...

> The rationale for treble damages, and potential problems that treble damages cause, have been the subject of discussion and debate for much of the 115-year history of the Sherman Act. The strength of the rationale has meant that, despite proposals for change as early as 1898, the treble damage remedy has remained intact.[16]

According to Boies, the rationale for treble damages in antitrust damages cases included...

> 1. deterrence of violations,
>
> 2. depriving violators of the benefits of their illegal conduct,
>
> 3. adequate compensation of victims, and
>
> 4. incentivizing "private attorneys general" to uncover and pursue violations that are often difficult to detect and complicated and costly to pursue.[17]

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[14] 15 U.S.C. § 15(a). See for example, Greenfield and Olsky at page 1 (n7) and ED Cavanagh, 'Statement of Edward D. Cavanagh before The Antitrust Modernization Commission', July 28, 2005, at page 3, accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Cavanagh.pdf

[15] According to Greenfield and Olsky, 'the National Cooperative Research and Production Act, 15 U.S.C. § 4303, limits recovery to actual damages for certain joint venture conduct that government agencies have reviewed and approved. Similarly, through the Export Trading Company Act, 15 U.S.C. § 4016(a), Congress has provided immunity from treble damages to export trading companies and their members that receive certificates of review from the Department of Commerce for activities within the ambit of the certificate.' Footnote 4, pages 1 – 2 of 'Treble Damages: To What Purpose and to What Effect?' (n13).

[16] D Boies, 'The Continuing Need for Treble Damages', Written Testimony of David Boies to the Antitrust Modernization Commission, July 28, 2005, Hearing on Civil Remedies Issues, available on http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Boies-revd.pdf and accessed on the 4th October 2010.

[17] Ibid at 1.

In relation to the fourth of these listed reasons for retaining the treble damages award, Boies pointed out that...

> Treble damages give private plaintiffs an increased incentive to take the risks and expend the resources necessary to bring claims. Such incentive is important because private enforcement is an indispensable augmentation of necessarily selective public enforcement.[18]

The issue of using private actions as enforcement mechanism was addressed in Chapter 2. It was argued in that chapter that private actions should only have an enforcement function, if at all, in standalone cases. It was also argued in Chapter 2 that private actions in follow-on cases can only have a compensatory function as the enforcement function is already spent. This point was made by the IBA in its submission to the Commission on the Green Paper...

> In this regard, the relatively few members of the Working Group who support this policy objective believe that the quantum of damages available should only be increased where there has been no public enforcement action taken.[19]

In his statement to the Antitrust Modernization Commission (the 'AMC'), Edward Cavanagh listed similar reasons for the availability of treble damages in antitrust suits to those listed by Boies. In his statement Cavanagh argued...

> Historically, mandatory trebling in private antitrust actions has served four interrelated goals: (1) compensation of

[18] Ibid at 7.

[19] International Bar Association Antitrust Committee Working Group On Private Antitrust Litigation In Europe, 'Submission Regarding The European Commission's Green Paper On Damages Actions For Breach Of The EC Antitrust Rules', page 15, (n10).

> victims; (2) deterrence; (3) forfeiture of ill-gotten gains; and (4) punishment.[20]

Under the first heading of compensation of victims, Cavanagh explained that...

> Antitrust violations are frequently difficult to detect and generally very expensive to prosecute. Trebling provides a powerful incentive to investigate, detect, and prosecute antitrust violations.[21]

According to Cavanagh, single damages would provide insufficient incentive to private actors to bring antitrust damages actions. Cavanagh argued that '...the uncertainties and high costs of antitrust litigation...'[22] would give private actors '...little motivation to sue.'[23]

Cavanagh's views on the difficulty and expense of detecting and prosecuting antitrust violations, which in turn present strong arguments for retaining treble damages, was mirrored in the comments of the self styled 'Thirty Antitrust Practitioners' to the AMC on civil remedies in antitrust cases. The Thirty Antitrust Practitioners argued that...

> The weight of existing evidence is that mandatory trebling of damages deters antitrust violations. Because (a) many, if not most, antitrust violations are committed in secret (in whole or part), and hence can be difficult or impossible to detect, and (b) proving antitrust liability is often difficult, time consuming, and expensive, the practical reality is that the risk of being caught and punished for engaging in illegal anticompetitive conduct is not

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[20] ED Cavanagh, 'Statement of Edward D. Cavanagh before The Antitrust Modernization Commission', July 28, 2005, at page 3, accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Cavanagh.pdf

[21] Ibid.

[22] Ibid.

[23] Ibid.

> commensurate with the potentially enormous rewards for getting away with it.[24]

Robert Lande also argued in his submission to the AMC in favour of retaining treble damages. He however, addressed the issue from a slightly different perspective. He pointed to the need to retain treble damages as an incentive to bring rule of reason type cases and not just for hard-core *per se* type actions...

> Treble damages were adopted in part to provide an incentive for private litigants to find and prove violations. Rule of reason cases are tremendously difficult factually, risky, protracted, and expensive. Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement.[25]

Lande's point is that price-fixing cases, though difficult to detect are not conceptually difficult for courts and juries to understand once prosecuted. The harm in price-fixing is easily recognised and understood both by the judiciary and by juries. Price-fixing is seen as the most egregious form of anti-competitive conduct in the United States and is therefore treated as being illegal *per se*. Other forms of anti-competitive conduct such as vertical restraints and abuse of dominance usually require very complex economic analysis to determine, amongst other things, the product and geographic markets before ascertaining whether there was an anti-competitive effect on the market by the impugned conduct. Indeed there may be countervailing arguments that the conduct was pro-competitive. For this reason 'rule of reason' analysis is required in such cases.

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[24] 'Comments Of Thirty Antitrust Practitioners (And Their Firms) Responding to the Antitrust Modernization Commission's May 19, 2005 Questions Re Antitrust Remedies', 2, available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/30_AT_Practitioners_Remedies.pdf and accessed on the 4th October 2010.

[25] R Lande, 'The Four Myths About Antitrust Damages', Prepared Statement of Robert H. Lande Venable Professor of Law, University of Baltimore School of Law, and Director, American Antitrust Institute: Before the Antitrust Modernization Commission Hearing on Civil Remedies: Damages Multiplier, Attorneys' Fees, and Prejudgment Interest, (July 2005), 18, accessed on 4th October 2010 and available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Lande.pdf

The use in the United States of rule of reason analysis as a judicial tool evolved in early cases such as *Standard Oil*[26] and *American Tobacco.*[27] Justice Brandeis in the *Chicago Board of Trade*[28] case explained rule of reason analysis as follows...

> The true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition...To [answer] that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature and effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Lande's argument is that incentives such as multiple damages are just as important in rule of reason cases as they are in hard-core cases. This runs counter to the suggestion made by the European Commission in its Green Paper on damages actions. It will be recalled that in its Green Paper on damages actions the Commission suggested that double damages be available for hard-core restrictions only. According to Lande, if damages are de-trebled for non hard-core cases then the...

> ... number of uncontested rule of reason violations would be likely to increase tremendously.[29]

Lande was not alone in his view that it would be dangerous to de-treble damages in rule of reason cases. The American Antitrust Institute submitted its comments to the AMC and argued...

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[26] *Standard Oil Co. of New Jersey v. United States,* 221 US 1 (1911).

[27] *United States v. American Tobacco Co.,* 221 US 106 (1911).

[28] *Chicago Board of Trade v U.S.,* 246 U.S. 231, 238 (1918).

[29] R Lande, 'The Four Myths about Antitrust Damages', Prepared Statement [for] the AMC, 18 (n25).

> Detrebling of non-criminal cases or non-hard-core cartels would be counterproductive because there would be virtually no deterrence left in the system. Such cases are not "easy" to find and in fact are usually more difficult to prove than hard-core violations.[30]

The American Antitrust Institute made the following point in support of the argument that incentives are necessary in private actions for damages...

> For the private remedy to deter the wrongdoer with the credible threat of a costly prosecution by his victim, it has to provide the victim with the necessary incentive and wherewithal to take defendant on. As far as we know, no one has suggested that private antitrust enforcement would be viable in the absence of contingent fees or that statutory damages less certain than treble damages ... would generate a reasonable likelihood that potential plaintiffs in putative antitrust cases would be able to obtain representation. Thus, any attack on attorney's fees or treble damages should be viewed as an attack on the fundamental idea of private enforcement of the antitrust laws.[31]

The Antitrust Modernization Commission clearly agreed with these arguments. In its final report to Congress, the AMC recommended that no change be made to the availability of the treble damages remedy in private antitrust actions. Amongst the reasons given by the AMC for reaching this view were...

> *Creating incentives for "private attorneys general."* Finally, providing treble damages creates incentives for private enforcement of the antitrust laws. This is of particular importance in light of limited government

[30] Comments of the American Antitrust Institute to the AMC Working Party on Remedies, page 5, accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf

[31] Ibid at page 9.

> resources to identify and prosecute all anticompetitive conduct. Incentives for private enforcement reinforce the other objectives of treble damages by increasing the likelihood that claims will be brought against violators, thereby enhancing deterrence, appropriate disgorgement and punishment, and compensation to victims.[32]

The AMC therefore recognised the need for incentives for private litigants to bring private actions in antitrust cases and therefore recommended there be no change to the current laws that made an award of treble damages mandatory. Indeed, the AMC agreed with the arguments made by Lande and others outlined above, that de-trebling in non hard-core cases would be counter-productive and would hamper the initiation of such cases by private actors...

> Furthermore, there is anticompetitive conduct that is not per se unlawful can cause as much damage as per se violations such as price-fixing. Indeed, eliminating treble damages for such cases could greatly hamper incentives to bring actions, and thus reduce deterrence too much.[33]

In fact, the AMC dismissed all arguments that might favour the abolition of treble damages in antitrust cases either in part or in their entirety. The AMC was clear about the important role that treble damages awards played in private antitrust cases in the United States...

> The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which

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[32] Antitrust Modernization Commission Report and Recommendations (the "AMC Report"), 246 - 247 (Apr. 2007), accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf

[33] Ibid 247.

> allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs.[34]

The group of Attorneys General representing 46 of the States of the United States also made a joint submission to the AMC on civil remedies in antitrust cases. Amongst their comments on treble damages was the following comment which sums up the prevailing views of enforcers on the need for treble damages to encourage private actions for damages...

> The antitrust laws have served this nation well, and the treble damages provision of section 4 has long been significantly intertwined with how the antitrust laws operate. Any change to the treble damages provision – either increasing or decreasing the multiplier – would significantly rewrite the antitrust laws...The states are not aware of any evidence presented to the AMC, or otherwise, supporting the view that the treble damage remedy represents a significant problem.[35]

It is clear from the extensive review conducted in 2005 and 2006 by the AMC, that treble damages are an essential component to the system of private enforcement and damages actions for compensation in antitrust in the United States. The AMC recommended to Congress that treble damages remain in their current form as they provide an incentive to private actors to bring actions in all forms of competition case and not just in hard-core cases. This is at variance to the proposal that the Commission had made in the Green Paper where it suggested double damages for hard-core cases only. Of course, it needs to be remembered that treble damages are awarded automatically even in follow-on actions in the United States. This means that companies may have already been fined severely by the courts and could then face treble damage awards if they do not settle follow-on actions before a

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[34] Ibid 241.

[35] Comments of 46 State Attorneys General to the Antitrust Modernization Commission, July 2006, Page 13, available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/060720-StateAGsRemediesRev2.pdf and accessed on the 4th October 2010.

court determines a private follow-on case against them. Any incentive involving multiple damages in a competition case in Ireland could only be applicable in a standalone action, otherwise the defendant would in effect be punished twice for the same infringement.

Double Damages: A punitive remedy

Double damages would almost certainly be viewed by the Irish Courts as a punitive sanction. It was outlined earlier that numerous submissions made to the Commission on the Green Paper by interested parties argued that double damages are a form of punitive sanction rather than a quantum of compensation for injured parties. This caused concern for those who made these submissions and clearly had the effect of dissuading the Commission from pursuing double damages in the White Paper.

One of the stated purposes of the treble damages award in the United States is that treble damages punish transgressors. In the United States, once there has been a finding of a violation of the antitrust laws treble damages are mandatory, with only some rare exceptions.[36] Donald Baker, speaking of treble damages in the context of criminal cartel cases made the point that...

> ...awarding treble damages on top of large fines in such cases does not allow a lot of debate or dissent. Both remedies are penal and both must necessarily add something to the cartel deterrence package...[37]

The penal nature of treble damages is confirmed by the Antitrust Modernization Commission[38]. The AMC listed what it saw were the five goals of treble damages. The first two of these according to the AMC

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[36] Section 4 of the Clayton Act, 15 U.S.C. § 15. See Edward D Cavanagh, 'The Private Antitrust Remedy: Lessons from the American Experience' at page 2 where he states: 'Section 4 further provides that: ... any damage award from the jury is automatically trebled by the court...'

[37] DI Baker, 'Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) Loyola Consumer Law Review 16, 383.

[38] Antitrust Modernization Commission Report and Recommendations (the "AMC Report"), 241 (Apr. 2007), accessed on the 4th October 2010 and available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf

are to deter anticompetitive conduct and to punish violators of the antitrust laws.

Edward Cavanagh, when arguing the case in support of treble damages in competition cases, listed five separate reasons[39] for retaining them in private actions. He argued...

> ...the case for multiple damages in private antitrust actions is powerful... some antitrust violations – horizontal price-fixing, for example – serve no purpose other than to destroy competition and therefore should be punished.[40]

There is no doubt that in the United States, treble damages are considered punitive in nature. As was argued in Chapter 2 of this thesis, private actions for damages in the United States play a central role in the enforcement of the antitrust laws. The automatic trebling of damages in private actions serves as the punitive sanction that fines and imprisonment serve in criminal public enforcement.

Damages awards under section 14 of the Competition Act 2002 contain a punitive element where the courts can make an award of exemplary or aggravated damages in a case. Therefore, if multiple damages such as the double damages awards suggested by the Commission in the Green Paper were introduced in Ireland, the concept of damages containing an element of punishment would not be entirely alien. However, the courts would certainly be reluctant to make an award of multiple damages in a follow-on action if such an award was discretionary. If the defendant has already been sanctioned for an infringement of competition law arising from the same set of facts that gave rise to the follow-on civil action, then further punitive sanctions would not be available to the court.

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[39] The five separate reasons for retaining treble damages given by Cavanagh are set out in the Conclusion to this Chapter. They are found in: Edward D Cavanagh, 'The Private Antitrust Remedy: Lessons from the American Experience', accessed on the 4th October 2010 and available at http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=edward_cavanagh

[40] Ibid, at page 16.

If the award of double damages in a private action in competition law in Ireland was mandatory as it is under the Clayton Act in the United States, the provision would most likely be challenged on the basis that it exposed defendants to the possibility of being punished twice for the same illegal conduct. The reason for this was outlined in Chapter 2. Where a defendant has already been punished for a breach of the law, he cannot be punished for a second time in a separate, follow-on action as this would offend against the common law rules of *res judicata* and double jeopardy. It would also offend the civil law concept of *non bis in idem*.

However, double damages in a standalone action might not give cause for concern in *res judicata* or double jeopardy. The obvious reason for this is that there has not been any prior enforcement action taken by a public body such as an NCA and therefore the defendant has not already been punished. It will be recalled that the Commission's damages initiative was based on the idea of encouraging damages actions so that injured parties could receive compensation and that anti-competitive conduct would be deterred. In its Staff Working Paper accompanying the Green Paper, the Commission made the point that...

> Private litigation can in particular deal with cases which the public authorities will not deal with, in particular due to resource constraints and other prioritisation needs.[41]

The Commission was at pains to emphasise in the Green Paper and the Staff Working Paper that accompanied it that it did not see private actions replacing public enforcement of competition law...

> Private action should not and cannot replace public enforcement. The role of the public authorities will continue to be of critical importance in detecting anti-competitive practices...[42]

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[41] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, {COM(2005) 672 final}, para 14, page 8.

[42] Ibid, para 13.

On the contrary, the Commission saw private actions before national courts as a complement to public enforcement. Private actions would fill in the gap where public enforcement action was not taken. However, the Commission may have erred in its reasoning when it suggested that double damages could have a role in the enforcement and punishment of hard-core infringements of the Treaty. This would be problematic if public enforcement has already occurred. As discussed in Chapter 2, it is clear from the decision in the English High Court in the *Devenish* case that exemplary damages are precluded in follow-on actions where the defendants have been fined or otherwise punished. It will be recalled that the court in that case held that...

> The principle of non bis in idem precluded the award of exemplary damages in a case in which the defendants had already been fined (or had fines imposed and then reduced or commuted) by the European Commission. That principle prohibited the same person from being sanctioned more than once for the same unlawful conduct...[43]

However, double damages would be appropriate in standalone actions for infringements of competition law. The punitive nature of the award would not be problematic in a standalone action as there would not have been a prior finding by an enforcement agency and therefore the defendants would not be facing further sanctions. The increased damage award in a standalone private action would assume the role of sanctions such as fines which would otherwise be imposed in a public enforcement action. Unfortunately, the Commission did not pursue double damages in the White Paper on damages actions as the proposal proved too controversial for member states.

Double Damages: Overcompensation for Plaintiffs?

One of the obvious problems with the introduction of multiple damages is that plaintiffs will be overcompensated by such awards. This was

[43] *Devenish Nutrition Limited & Others v Sanofi Aventis SA*, [2007] EWHC 2394 (Ch), [2008] 2 All ER 249, 1.

acknowledged in a number of places in the report prepared for the Commission entitled 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' ('External Impact Assessment Report').[44] For example, the External impact Assessment report makes the following point...

> Double damages (including prejudgment interest) are likely to overcompensate plaintiffs with respect to the actual loss sustained. However, (a) as we observed in Part I of this Report, most cases can be expected to settle before trial for amounts lower than the nominal damage claim; (b) damage awards are most often underestimated with respect to the actual loss sustained; and (c) legal expenses and the opportunity cost of plaintiffs' internal staff allocated to litigation are not always fully compensated.[45]

The authors of the External Impact Assessment Report for the Commission argued that in fact '...full compensation would probably require a damage multiple greater than one.'[46] The Report pointed out that the rationale for this was due to the fact that competition litigation could be very lengthy and claims were difficult to substantiate. The authors of the report argued that...

> ...although double damages plus prejudgment interest lead to overcompensation of the claimant, this problem will be less evident when the claimant has undergone extensive litigation, and has not been able to recover all legal expenses...[47]

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[44] 'Report for the European Commission', Contract DG COMP/2006/A3/012, December 2007, accessed on the 4th October 2010 and available on the Commission website at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441

[45] Ibid at 567.

[46] Ibid.

[47] Ibid.

Contrary to the assumption that double damages would automatically lead to overcompensation of injured parties, it has been argued by various commentators that the automatic treble damages award in antitrust cases in the United States does not lead to an award of treble damages at all. These arguments are to the effect that damages recovered in an antitrust damages action are closer to being single damages or possibly lower than single damages. For example, Robert Lande in a seminal article on this question entitled 'Are Antitrust "Treble" Damages really Single Damages', argued that...

> ...when viewed correctly, antitrust damages awards are approximately equal to, or less than, the actual damages caused by antitrust violations.[48]

Lande argued that there were at least eight separate factors that reduced the treble damage award to equal or less than actual damages. These were...

> ...(1) the lack of prejudgment interest; (2) the effects of the statute of limitations; (3) plaintiffs' attorneys' fees and costs; (4) other costs to plaintiffs pursuing cases; (5) costs to the judicial system in handling antitrust cases; (6) umbrella effects of market power;[49] (7) allocative inefficiency effects of market power; and (8) tax effects...[50]

Most, though not all of the factors listed by Lande are probably applicable to a damages case in Ireland. It should be noted that unlike in the United States, it is possible to recover pre-judgement interest in a damages action in Ireland. Such an award is discretionary under section 22 of the Courts Act 1981. Section 22 (1) reads...

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[48] RH Lande, 'Are Antitrust "Treble" Damages really Single Damages', (1993) 54 Ohio State Law Review 115, at 118.

[49] The umbrella effects of market power was explained by the American Antitrust Institute in its statement to the AMC as the situation '...where non-participants in the anticompetitive behavior nonetheless reap the benefits by being able to raise their prices right along with the violators...' 'Comments of the American Antitrust Institute to the AMC Working Party on Remedies', 2 (n30).

[50] Ibid.

> Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgement.

Section 22 of the 1981 Act allows the payment of pre-judgement interest from the date when the cause of action accrued up to and including the date of the judgement in the case. In a competition case the period of time for which interest is recoverable could be very lengthy indeed. That period of time would include the time taken to litigate the matter and under Order 58, Rule 20 of the Rules of the Superior Courts, the interest continues to accrue notwithstanding an appeal to the Supreme Court.[51] According to O'Floinn and Gannon,[52] the current rate of interest applicable is governed by S.I. 12/1989 and stands at 8%. It should be noted however, that the award of interest is discretionary and therefore it should not be presumed that the award of interest will be made in every case. The discretionary nature of the award of interest by a Judge of the High Court was outlined in *Mellowhide Products Limited v Barry Agencies Limited.*[53] There Finlay P said...

> I should make it clear, however, that my decision to grant an order for the payment of interest under Section 22

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[51] Order 58, Rule 20, states *inter alia*: On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed, unless the Supreme Court otherwise orders... Accessed on the 4th October 2010 and available at http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/aab93d875e7532ff80256d2b0046b3f1?OpenDocument

[52] B O'Floinn and The Honourable Mr. Justice S Gannon, *Practice and Procedure in the Superior Courts*, (Butterworths, Dublin 1996) 113.

[53] *Mellowhide Products Limited v Barry agencies Limited*, [1983] ILRM 152. The discretionary nature of the award of interest was considered and confirmed again by the Supreme Court in *The Matter Of An Appeal Pursuant To Section 15(5) Of The Hepatitis C Compensation Tribunal Act, 1997; M. O'C V The Minister For Health*, [2001] IESC 72.

> relies upon the particular facts of this case which I have outlined.[54]

According to Lande one of the most important reasons for considering treble damage awards as being something less than treble the actual damage is the fact that pre-judgement interest is not available in antitrust damages actions in the United States. Lande cites Judge Frank Easterbrook on the point...

> [T]he time value of money works in defendants' favor. Antitrust cases can be long-lived affairs. This one has lasted 14 years, 2-1/2 of which passed between the finding of liability and the award of damages. During all of the time, the defendants held the stakes and earned interest ... To deny prejudgment interest is to allow the defendants to profit from their wrong, and because 14 years is a long time the profit may be substantial.[55]

Prejudgement interest cannot be assumed in a damages action in Ireland as it is discretionary at the election of the Judge. If prejudgement interest is not awarded in a damages case in Ireland, it is easy to see how the defendant escapes by paying something less than single damages. It should be noted that Lande had not listed all possible factors that impact on a damages award. Lande's article questions whether treble damages awards in antitrust cases in the United States are really only single damages, or less. Given that multiple damages are unavailable in Ireland and prejudgement interest is a discretionary additional remedy, damages awards may fall below what a plaintiff actually lost, thereby further reducing the plaintiff's incentive to sue. That reluctance to sue would surely increase in standalone actions which have the attendant additional difficulties already pointed to above. The Commission merely suggested that 'double' damages be available in competition cases, a substantially

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[54] Ibid 9.

[55] RH Lande, 'The Four Myths About Antitrust Damages', 3 (n25), citing Judge F Easterbrook in *Fishman et al. v. Estate Of Arthur M. Wirtz, et al.*, 807 F.2d 520 (7th Cir. 1986)

lower multiple than the treble damages multiple used in the United States.

Even assuming that prejudgement interest is available and awarded in an action in Ireland, other factors listed by Lande impact on the calculation of damages awards in antitrust cases. For example, Lande pointed to the 'allocative inefficiency effects of market power' as having an impact on the true worth of a treble damages award. He argued in his statement to the AMC[56] that this factor alone probably reduced the treble damages award by a multiple of one (treble down to double damages). Lande argues that '...antitrust violations give rise to allocative inefficiency, a damage that never is awarded in antitrust cases.'[57] In relation to this omission and again citing Easterbrook, Lande argued that...

> ...due to the omission from antitrust damages awards of this factor alone, "'Treble damages' are really [only] double the starting point of overcharge plus allocative loss...[58]

Cavanagh also argued in his statement to the AMC that allocative inefficiency is a net loss to society as a whole. He made the point that the quantum of such loss '...varies from case to case depending on the nature of the restraint, the industry involved, and the scope of the conspiracy.'[59] He further argued that...

> Since it is impractical to measure damages based on the loss of allocative efficiency, trebling actual damages may serve as a surrogate measure, exacting from perpetrators a rough measure of the harm inflicted by their wrongdoing.[60]

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[56] RH Lande, 'The Four Myths About Antitrust Damages', pages 4 – 5, (n25).

[57] Ibid, page 4.

[58] Ibid, page 5, citing Judge Frank Easterbrook, 'Detrebling Antitrust Damages', 28 J. L. Econ. 445, 455 (1985).

[59] ED Cavanagh, 'Statement ... before The Antitrust Modernization Commission', page 4 (n20).

[60] Ibid.

As can be seen, it has been strongly argued in the United States that a treble damages award really only represents single damages or less even though treble damages are automatic in antitrust cases. Not all of the factors that give rise to this calculation would necessarily apply to a damages calculation in a private competition case in Ireland. In any event, if we are to accept that the lower multiple of double damages in competition cases in Ireland were to lead to a measure of overcompensation, would such a result be unwelcome?

It should be recalled that the Ashurst Report commissioned by the Commission found that...

> While Community law ... demands an effective system for damages claims for infringements of antitrust rules, this area of the law in the 25 Member States presents a picture of "total underdevelopment."[61]

If the problem of the underdevelopment of private actions is to be addressed then incentives such as double damages might be necessary to encourage private actions. These incentives if available for standalone damages cases could have the dual effect of encouraging those who have suffered injury to seek redress whilst increasing enforcement and overall deterrence through the initiation of standalone actions that would not otherwise have been taken. The cost of achieving this increased standalone private litigation in competition law would be borne by defendants paying increased damages to plaintiffs for their infringements. However, as discussed in this chapter, the increased damages in a competition case are unlikely to equate to a true increase on the loss and harm suffered by victims of a competition law infringement.

In any event, the risk of an increased award of damages up to and including an award of double damages might encourage standalone

[61] Study on the conditions of claims for damages in case of infringement of EC competition rules, accessed on the 4th October 2010 and available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

actions to be initiated whilst encouraging defendants to consider settlement before trial to avoid higher pay outs.

Double Damages in Ireland: A Fanciful Idea?

The possible introduction of double damages in Ireland may seem like a fanciful thought. However, it is worth noting that the Competition Authority suggested the introduction of double damages to the Department of Enterprise, Trade and Employment in September 2009, for a breach of the Competition (Amendment) Act, 2006 (the '2006 Act'). That Act inserted a new Section 15A into the Competition Act 2002, which was intended to prevent certain unfair trading practices in the groceries trade.

The then Tánaiste and Minister for Enterprise, Trade and Employment had sought submissions on her intention to introduce a Code of Practice for Grocery Goods Undertakings. The Competition Authority made a submission[62] to the Department of Enterprise, Trade and Employment on the proposal to introduce a Code of Practice. According to the Competition Authority's submission to the Department, the intention of introducing the Code of Practice was to address...

> ...the need to achieve a balance in the relationship between grocery goods undertakings, taking into account the need for a fair return to both suppliers and retailers, the need to enhance consumer welfare and the need to ensure that there is no impediment to the passing-on of lower prices to consumers...[63]

The introduction of the Code of Practice would also lead to the establishment of an independent ombudsman who would arbitrate in disputes between producers/suppliers and the retailers.

The Competition Authority pointed to the fact that much of the conduct at issue in the proposed Code of Practice was already prohibited by the

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[62] 'Submission to the Department of Enterprise, Trade and Employment: Code of Practice for Grocery Goods Undertakings, Consultation Paper Submission' S/09/003 (September 2009), available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S09003 accessed on

[63] Ibid, para 1.2, page 1.

Competition (Amendment) Act 2006. That Act had inserted a new Section 15A into the Competition Act 2002 and had been introduced to prevent certain unfair trading practices in the grocery trade. Enforcement of this provision, according to the Competition Authority was '...by either a private plaintiff (aggrieved party) or by the Competition Authority.'[64] The remedies available to a private plaintiff were declaration, injunction and damages, including exemplary damages. The Competition Authority could only seek declaratory and injunctive relief.

The Competition Authority pointed out that up to the date of its submission, no cases had been brought before the courts for a breach of the existing provision in the Competition Act 2006, either by the Competition Authority or by private plaintiffs. The Competition Authority explained its understanding of the failure by private plaintiffs or the Authority to bring cases under the 2006 Act...

> Certain industry sources have indicated that suppliers are reluctant to bring actions or make complaints under Part 2A of the Act out of fear of being delisted by retailers...[65]

The Competition Authority was unimpressed with the idea of introducing a Code of Practice in this sector and did not see the value of creating an ombudsman to arbitrate in disputes between producers/suppliers on the one hand and retailers on the other...

> It is not clear why it is thought that the attitude of suppliers towards making complaints would change if a Code of Practice were introduced, especially given that the strongest duty of the proposed ombudsman appears to be to merely act as an arbitrator in relation to disputes arising under the Code of Practice. [66]

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[64] Ibid, para 2.7, page 3.

[65] Ibid, para 2.9, page 3.

[66] Ibid.

An Alternative Approach

The Competition Authority suggested an alternative approach to the introduction of a Code of Practice and the establishment of an ombudsman for the groceries sector. First of all, the Authority made clear that...

> The behaviour which the proposed Code of Practice seeks to address, such as coercion of slotting allowances and retaliatory delisting by supermarket retailers against suppliers, is more appropriate for private action than for public enforcement.[67]

The Competition Authority explained that in relation to the behaviour that the proposed Code of Practice sought to address, private action would be superior to public enforcement by the Authority or indeed to arbitration by an ombudsman. The reasons for this according to the Competition Authority were that an identifiable private plaintiff...

> ...will have in their possession all relevant evidence necessary to prove the elements of the case and will be able to quantify their financial loss to the court.[68]

Such a plaintiff will be able to recover damages if successful in a private action. If however, the injured party decides to complain to the Competition Authority, that party becomes a mere witness to an action that the Competition Authority might take. The most that an injured party in that instance can hope to achieve is that the Competition Authority would succeed in its action and that the Court makes a declaration and/or grants an injunction. The injured party would still have to issue fresh proceedings to obtain damages in a follow-on action if it is to be recompensed for the damage that it claims to have suffered because of the conduct of the defendant retailer. A point the Competition Authority did not make in its submission to the Department was that a plaintiff supplier who may be in a precarious

[67] Ibid, para 3.3, page 4.

[68] Ibid, para 3.4, page 4.

financial position, would have to wait quite a while before it would receive any damages. It would have to await the outcome of the Competition Authority's investigation which could take a considerable amount of time and then hope that the Authority succeeds in proceedings against the defendant retailer, if indeed it takes proceedings at all. It is possible that the retailer might settle with the Competition Authority and agree not to conduct business again in the future in the way that gave rise to the Authority's threat to take proceedings. Such a settlement might be on the basis that there is no admission of liability by the defendant retailer. Even if the Competition Authority's investigation were to result in proceedings, only then would the producer/supplier have the opportunity to initiate follow-on proceedings with all the attendant risk and costs that that would involve. The plaintiff supplier could well have gone out of business long before any damages award was made.

The Authority also pointed out the further obvious problem that a complainant would have...

> If the supplier complains to the Authority, this does not vitiate the requirement that the supplier in the end must come forward and give evidence as a witness in both the Authority's case and any subsequent follow on action that the supplier might bring.[69]

This means that the complainant risks retaliation by the supplier including the possibility of being delisted having complained to the Competition Authority.

The Authority argued that serious consideration be given to strengthening the provisions of Section 2A of the 2006 Act '...in order to encourage and incentivise private actions by injured parties under the Act.'[70] The Authority in fact felt that it would be better to describe such a change as '...overcoming the strong disincentives for plaintiffs

[69] Ibid, para 3.5, page 4.

[70] Ibid, para 3.6, page 4.

for commencing a private action.'[71] The Competition Authority made the following argument in relation to strengthening private enforcement in the context of the Competition (Amendment) Act 2006...

> What is clearly required is a method of encouraging injured parties ... to overcome their fear of retaliation by retailers for taking action and their fear of the downside risks of litigation. Cases under the Competition Act are usually complex and expensive and as with all litigation carry a risk that the case, no matter how well founded, might fail. Encouraging private actions in this instance must include incentives for the plaintiff to bring an action in the first place. With a robust basis for private action, and with effective remedies for an injured plaintiff, there would be no need to set up another State body.[72]

The Competition Authority then put forward a number of suggestions for amendments to Part 2A of the Competition (Amendment) Act 2006 that it felt would help private parties to bring actions against suppliers. Amongst these suggestions was the possibility that plaintiffs could recover double damages. The Competition Authority's proposal read as follows...

> As competition cases are potentially complex and very expensive and the risks to the plaintiff are high, consideration should be given to incentivising private actions under Part 2A of the Act by allowing for the award of higher damages to the plaintiff. Higher damages in this instance are damages that are over and above the quantifiable loss suffered by the plaintiff and should be a remedy available at the discretion of the court such as an award of double damages as suggested in the 2005 Commission Green Paper. This award of higher damages

[71] Ibid.

[72] Ibid, pages 4 – 5.

> not only would encourage private actions by plaintiffs who are best placed to institute such proceedings, but would also have a strong deterrent effect on would be offenders. Higher damages should be an option to the court in addition to the existing remedies of declaration, injunction and 'ordinary' damages (including exemplary damages).[73]

The Authority recognised the strong disincentives to plaintiffs taking private competition cases. These disincentives included the costs and complexity of competition cases as well as the added fear of retaliation by vengeful and powerful retailers. Retaliation might happen whether the private action succeeded or not. However, the incentive of higher damages could help overcome some of these disincentives for plaintiffs as well as acting as a strong deterrent to would be offenders. The award of double damages suggested by the Competition Authority would be at the discretion of the court rather than the mandatory award of treble damages found under the Clayton Act in the United States. This built in discretion might undermine the double damages incentive if the plaintiff could not be sure in advance of initiating proceedings that he will receive double damages if he won his case.

The Department's Response

Introducing incentives such as enhanced double damages was a novel suggestion made by the Competition Authority to solve a very difficult problem. The response to this suggestion from the Department of Enterprise, Trade and Innovation[74] can be gleaned from its press release of the 23rd March 2010.[75] The Tánaiste and then Minister for Enterprise, Trade and Employment announced that she was appointing

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[73] Ibid, para 3.10, page 5.

[74] The Department of Enterprise, Trade and Employment was renamed the Department of Enterprise Trade and Innovation. This change was announced in a speech to Dail Eireann by the Taoiseach Mr Brian Cowen TD on the 23rd March 2010. In that speech, the Taoiseach commented: 'I propose to sharpen this focus within the Department of Enterprise, Trade and Employment, which will be renamed the Department of Enterprise, Trade and Innovation, by transferring to it funding for the Programme for Research in Third Level Institutions.' The speech is available at http://www.taoiseach.gov.ie/eng/Government_Press_Office/Taoiseach's%20Speeches%202010/Speech_by_the_Taoiseach,_Mr_Brian_Cowen,_TD,_D%C3%A1il_%C3%89ireann,_Nomination_of_Members_of_Government,_23rd_March,_2010.html and accessed on the 4th October 2010.

[75] 'Tánaiste Announces Byrne As Code Of Practice Facilitator', accessed on the 4th October 2010 and available at http://www.deti.ie/press/2010/20100323.htm

the former Attorney General David Byrne '...as facilitator in the development of a Code of Practice for Grocery Goods Undertakings.'[76] The Tánaiste referred to the commitment contained in the Renewed Programme for Government which promised to...

> ...implement a Code of Practice for doing business in the Grocery Goods sector to develop a fair trading relationship between retailers and their suppliers [and] to review progress of the Code and if necessary to put in place a mandatory code...[77]

In her press release, the Tánaiste made a commitment to introducing statutory Codes of Practice in the grocery goods sector. Until legislation was enacted that could give effect to this Code of Practice in the grocery goods sector, the Tánaiste would look to the introduction of a voluntary Code of Practice. The facilitator, David Byrne, was to conduct a review and consultation process with stakeholders with the intention that he report back to the Tánaiste with recommendations on the introduction of this voluntary Code of Practice. In other words, the Tánaiste was proceeding with a Code of Practice notwithstanding the Competition Authority's concerns and she was ignoring the suggestions made by the Authority on incentivising private action by injured parties.

David Byrne was unable to pursue the task and was replaced in this endeavour by John Travers whose appointment was announced in the new Minister's press release[78] of the 12th May 2010. The remit given to John Travers remained the same as that given previously to David Byrne.

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[76] Ibid.

[77] Ibid. See also 'Renewed Programme for Government', 10th October 2009, page 6, available at http://www.taoiseach.gov.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government,_October_2009.pdf and accessed on the 4th October 2010.

[78] 'Minister O'Keeffe appoints John Travers as facilitator for grocery goods code', available at http://www.deti.ie/press/2010/20100512b.htm and accessed on the 4th October 2010.

If the Oireachtas was minded to introduce a double damages award in competition cases there would undoubtedly be concerns regarding the appropriateness of using private civil actions as a method of enforcing the law and punishing offenders for infringing competition law. As argued in this chapter, double damages, if made available to the courts in competition cases, should be available to rule of reason as well as hard-core infringements of competition law. The award of double damages should only be available in a standalone action.

It might also be necessary to build in a discretionary element to the double damages award. The discretion would be for the court to decide whether, on a case by case basis, an award of up to a maximum of double damages should be available in a given case depending on the nature and extent of the breach of competition law, the duration of the infringement, whether the infringement was secretive or overt and the conduct of the defendant in defending the action. The position of the plaintiff should also be considered. The plaintiff might be a comparatively wealthy company or alternatively, it might be a large and dispersed group of small businesses or indeed consumers (if class actions have been introduced).

The difficulty of introducing a discretionary element to the award of double damages is that it reduces the incentive to bring such actions. One of the primary purposes of the double damages award is to incentivise the initiation of complex and costly cases that would not otherwise be brought.

Conclusion: Double damages for standalone actions

The Commission took a bold step in suggesting double damages as a possible method of encouraging private actions in competition cases. The Commission met with firm resistance when it suggested the introduction of such a remedy and therefore shied away from pursuing this option when it published its White Paper on damages actions. It was unfortunate that the Commission did not pursue the debate on the

use of double damages in competition cases further. Such a debate may have helped to nuance its initial suggestion that double damages be available in hard-core cases only. As has been argued in this chapter, there are good arguments for considering the introduction of double damages awards in antitrust cases. These arguments have been summed up by Cavanagh where he said...

> ...the case for multiple damages in private antitrust actions is powerful. First, many antitrust violations are covert and hence are difficult to detect and prosecute. Second, antitrust violations may so dislocate competitive conditions as to make re-creation of a "but for" market as a yardstick for damages impossible. In that regard, multiple damages may provide rough justice for injured plaintiffs. Third, antitrust litigation is both complex and costly, making it an even riskier enterprise than other forms of litigation. Multiple damages provide an incentive to undertake the enhanced risk of litigating private antitrust suits. Fourth, multiple damages provide a higher degree of deterrence than actual damages. Fifth, some antitrust violations – horizontal price-fixing, for example – serve no purpose other than to destroy competition and therefore should be punished.[79]

There is no doubt that the introduction of double damages in competition cases in Ireland would mark a radical departure in the application of damages awards in civil actions. To introduce double damages in competition cases would require the introduction of primary legislation which in any event would be open to undoubted challenge.

Double damages should only be considered in standalone competition cases so that there could be no possibility of defendants being punished twice for the same infringement of competition law. A

[79] Edward D Cavanagh, 'The Private Antitrust Remedy: Lessons from the American Experience', page 16 (n39).

discretionary element would also most likely be necessary so that the court could award up to a maximum of double damages on a case by case basis and then only in those cases that warranted such an award.

CHAPTER 8: CONCLUSIONS

Findings and recommendations

The principal thrust of this thesis involved an examination of the current state of the law in Ireland in relation to competition damages actions in both domestic and Community law. This examination led to a number of findings in relation to the law as well as recommendations for reform.

The findings in the thesis start with the purpose that private actions are meant to serve. Although private actions in antitrust serve an enforcement function in other jurisdictions, it was argued that this would be an inappropriate function for private 'follow-on' actions in Ireland. Only in standalone actions could it be argued that an enforcement function may arise.

In essence, the central findings in the thesis are that the right to sue for most consumers in Ireland who have suffered competition related injury is at best theoretical. Ireland has failed to put in place procedures such as effective collective redress to safeguard citizens' rights under domestic and Community law and Ireland's laws relating to litigation funding are both archaic and contradictory and are a further obstacle to consumer redress in competition cases. Furthermore, policy makers in Ireland do not appear to understand the issues and do not realise there is a problem that requires solution. It has been argued in this thesis that policy makers mistakenly believe that Irish law is more than adequate for plaintiffs suing for damages in a competition case. For this reason amongst others it is clear that Ireland is paying lip service to the idea that claimants can sue for damages in domestic and Community competition law.

The recommendations in this Chapter can be summed up in a single sentence: There is a need for reform. The reform that is required includes the introduction of an 'opt-out' class action that allows an award of damages to plaintiffs with small claims. The laws on litigation funding, and the underlying policy upon which those laws are built,

also requires reform. Finally, incentives may be required to encourage competition damages actions in standalone cases. These incentives would simultaneously encourage both private enforcement and the payment of compensation to plaintiffs in standalone cases.

Private actions for damages in Ireland: Why and How?

In Chapter 1 of the thesis the question was asked, 'Private actions for damages in Ireland: Why and How?'

In attempting to answer that question, a number of issues were examined. In Chapter 2, the first part of the question, (i.e. 'Private actions for damages in Ireland: Why?') was addressed. This involved an examination of the exact purpose that private damages actions in competition law are supposed to serve in Ireland. Thereafter, the second part of the question (i.e. 'Private actions for damages in Ireland: How?') was addressed. This included, amongst other things, an examination of the various obstacles to private actions that exist such as the lack of collective redress that allows awards of damages as well as the funding barrier to complex litigation.

Further related questions were also asked in Chapter 1. The question of whether the Irish legal system merely pays lip service to the right to sue in damages in competition cases – under Community or domestic law was a subtext to the thesis, especially in Chapters 5 and 6 which dealt with collective redress and litigation funding in Ireland. Linked to this was the question of whether the legal system in Ireland is geared to allow effective redress for plaintiffs with small claims in competition cases.

Recap: Private actions for damages in Ireland - Why?

In Chapter 2 it became clear that the Commission in its Green Paper saw damages actions playing a role in enforcing competition law. The concept of 'private enforcement' is a well known and accepted feature of American antitrust law. Private enforcement of competition law was also the initial choice of the Oireachtas for enforcing competition law in

Ireland through the Competition Act 1991. The Commission, after receiving the comments of interested parties appeared to change emphasis in its White Paper and instead saw private actions more in a compensatory role than an enforcement one. However, the Commission did not entirely abandon the idea of private actions playing an enforcement role in competition law.

It was argued in Chapter 2 that private actions for damages in competition cases should not have an enforcement role in follow-on actions. In follow-on cases, enforcement has already occurred and therefore that function is spent. If a sanction has been applied in the public enforcement action, then damages in a follow-on action can only be intended to compensate plaintiffs. Exemplary or punitive damages should not be available in a follow-on action as this would offend against the principle of *non bis in idem*, or double jeopardy.

However, private actions may have a role in enforcing competition law in standalone damages cases. In standalone cases, there has not been a prior public enforcement action. Exemplary or punitive damages should be available in those cases, where appropriate and if the national law allows, as exemplary or punitive damages in a standalone action would not offend the principle of *non bis in idem*.

Private actions for damages in Ireland - How?

In Chapter 3 some of the numerous complex issues involved in damages actions in competition law were outlined. These issues have not yet been addressed or even thought of by Irish policy makers or the courts in a competition law context. It was explained by analogy with more mature private antitrust jurisdictions that these issues will have to be addressed in the future if private competition litigation becomes more commonplace.

Thereafter, in Chapters 4 – 7, certain core issues, or obstacles, were highlighted that require attention if private competition litigation is to become a reality before the Irish Courts. Chapters 4 and 5 dealt with collective redress. As many injured parties in competition damages

cases will have suffered small, low value, scattered losses, the only realistic hope of redress will be by way of group action for these claimants.

The need for effective collective redress

It was shown in Chapter 4 that the Commission recognised the need for an effective form of collective redress for claimants who have suffered small, low value losses. The Commission sought views from interested parties on proposals for reform in this area, believing that legislation might be necessary to effect change. The Commission's proposals for collective redress contained in the White Paper were limited and somewhat disappointing. The proposals were limited in that they took a conservative approach to the problem suggesting only that nominated representative bodies should be allowed to take group actions on an 'opt-in' basis, or possibly, that a class action could be initiated by a class representative, but again on an 'opt-in' basis. The proposals were disappointing because the Commission's initiative in the Green Paper had held out the promise of a more expansive approach to collective redress.

The Commission shied away from proposing a more expansive and effective form of class action, such as that found in the United States. The Commission admitted that there had been resistance to such proposals being adopted owing to fears expressed by interested parties of importing into the European legal order, some of the excesses of the American model. On examination of the American model, it was clear that there are excesses, but it was also clear that many of these excesses were either exaggerated or imagined. Through examination of the literature and caselaw, it became clear that there is much to commend the American model of class action. That model allows redress for claimants with small claims who might not otherwise have been able to take action. Though there are excesses, the United States Congress has reformed the law, most notably through the Class Action Fairness Act 2005 (the 'CAFA'). The judiciary also have a role in guarding defendant's (and absent class members) interests, a role that

has been strengthened by the CAFA. Lessons that could have been learned from the American class action experience were missed due to fears, some unfounded, of the excesses of that system. A more careful examination of the American model and how it works in practice might have led the Commission to make different proposals for collective redress.

The experience in Britain of allowing plaintiffs with small claims in competition cases obtain redress through group action reveals that the Commission's suggested model is probably flawed. There has been an active debate in Britain on the question of collective redress, in competition law, as well as in other areas involving mass small claims. The experience of the consumer group *Which?* in recovering damages for claimants in the *JJB Sports* follow-on class action has convinced those involved directly in the case, as well as other commentators, of the need for an American style 'opt-out' class action with the possibility of excess proceeds being applied cy-pres.

In Chapter 5 it was argued that there is no effective method in Ireland that allows for collective redress for damages in competition cases. This means that at present, the State is not complying with requirements set down in Community law, notably in the *Manfredi* case, on safeguarding citizens' rights derived from the Treaty. A citizen's right to claim damages caused by injury from an infringement of Article 101 or 102 TFEU, is currently almost impossible if that claim is for a small sum. Although there is a right to sue for damages for an infringement of domestic law, that right is rendered ineffective in relation to small claims. An action must be instituted in a higher court (the Circuit or High Court) than the small claim merits which is an unrealistic proposition for small individual consumer claims. The more appropriate and effective method of safeguarding citizens' rights under Community and domestic law is by collective redress as was argued in Chapter 4, but which, as mentioned, is currently unavailable in Ireland.

Worryingly, policy makers in the State do not appear to understand the problem and incorrectly believe that there is no problem requiring a

solution at present. The reason for this, according to those policy makers is the fact that there have been few if any private claims made in competition law in Ireland. The submission made to the Commission on its White Paper by the Department of Enterprise, Trade and Employment, reveals that the Government Department charged with making policy in this area, incorrectly believes that there are adequate methods of redress in Irish law. Therefore, the Department responsible for government competition policy believes that there is no need for reform in the area as they believe that there are adequate procedures for redress and as there have been no claims, there must be no problem to be solved.

There is no doubt that if citizens' rights under both domestic and Community law are to be safeguarded, then an effective method of collective redress is required. As policy makers in Ireland currently cannot see that a problem exists, it is unlikely that legislation will be introduced to solve the problem. This is in complete contrast with the position in Britain where there is currently a lively debate on these issues. Policy makers and Parliamentarians in Britain amongst others are aware of the problem and appear willing to consider mechanisms that will address it. In the meantime, the best that can be hoped for by consumers in Ireland is that the Commission perseveres in its private actions initiative and legislates to create a mechanism for collective redress for breaches of Community competition law. As ineffective as the current Commission proposal for reform is, it is superior to the non-existent mechanism for collective redress in damages claims that exists in Ireland today.

Litigation funding

In Chapter 6, it was argued that the laws in Ireland on lawyers' fees and litigation funding are archaic and contradictory. Funding complex, costly and risky litigation is a vital area that needs to be addressed if private actions for damages are to become a reality in Ireland under Community or domestic law. The rules governing payment of lawyers' fees and litigation funding were imported from the old English common

law. Unlike in England and Wales where these laws have been repealed and where the law and policy on litigation funding has developed radically in recent decades, the comparable laws and policy in Ireland have remained unchanged.

As with collective redress, there is a need for reform and that reform will require legislation. For reform to occur there is a need for debate on the issues. Unfortunately, there is at present an almost deafening silence on the question of lawyers' fees and litigation funding. What remains in that silence is a contradictory set of rules on fee arrangements. For example, lawyers must engage in a charade when they are engaged in a case on a 'no foal – no fee' basis. Pretence must be maintained by the lawyers that they intend to bill their client at the close of proceedings if they hope to recover their costs from the other side should they win. Lawyers are prohibited by regulation (and by the law in relation to maintenance and champerty) from calculating their fees based on a percentage of the damages that their client is awarded. Despite this fact, lawyers, with the assistance of the Taxing Master, as a matter of practice calculate their fees based on a percentage of the award made to a client. Surprisingly, the Law Society, whose own Guide to Professional Conduct specifically states that this conduct is forbidden, has defended the practice to the Competition Authority.

Developments in the United Kingdom in the area of litigation funding are bringing about radical change and making possible, the initiation of costly and risky cases that might not otherwise be taken. Those developments are taking place almost unnoticed in Ireland. In fact recent caselaw suggests that the Irish judiciary are still looking to older English decisions in the area of litigation funding and ignoring the developments that have taken place in English law since the beginning of the 20th Century. True, matters are not helped by the fact that ancient laws on maintenance and champerty are still in force in Ireland whereas they have been repealed in Britain. There is a lack of awareness of the potential that recent developments in English law on litigation funding have of allowing greater access to justice. This is

unfortunate as changes in the law in relation to litigation funding would greatly assist the initiation of private actions for damages in competition cases. This in turn would help the State to comply with the requirement to safeguard citizens' rights under the Treaty.

Incentivising private actions

In Chapter 7, the Commission's suggestion in the Green Paper that multiple damages be available in competition cases was revisited. Double damages were initially suggested by the Commission as a method of incentivising private actions. The availability of double damages in private competition cases might have some merit, if they are available in standalone cases. It was argued in Chapter 2 that standalone private actions may still have a role in enforcing competition law. By making an award of double damages available in such cases, this enforcement function would be strengthened. Incentivising standalone actions with double damages might lead to more cases being initiated and the double damage award would act as a form of sanction as well as an incentive to the private litigant.

As with collective redress and litigation funding, the introduction of double damages would require legislation. It is doubtful whether there is the will for such legislation.

Conclusion: Damages actions in Ireland, where are we now?

As mentioned, the question, 'Private actions for damages in Ireland: Why and How?' was asked in the Introduction in Chapter 1 of this thesis. A question also asked in Chapter 1, as a subtext, was whether the Irish legal system merely pays lip service to the right to sue in damages in competition cases – under Community or domestic law? A further question was linked to these questions: is the legal system in Ireland is geared to allow effective redress for claimants in private competition cases?

After examining the issues in this area in some detail in this thesis, it can be safely said that the Irish legal system recognises a private right

of action in competition law without creating the mechanisms that makes that right of action either real or effective. It is particularly clear that consumers with small claims arising from a competition law infringement have little hope of redress before the Irish courts.

What is of real concern and was argued in this thesis is the fact that policy makers in Ireland responsible for competition law and policy are unaware of the problems facing private litigants in competition cases. This is despite the fact that the Commission through its initiative on damages actions in antitrust law has highlighted the complete underdevelopment of the law in this area and outlined the reasons for this underdevelopment. The Commission showed that there was a need, amongst other things, for effective mechanisms of collective redress in competition cases. Unfortunately, policy makers in Ireland, and in particular, the Department of Enterprise, Trade and Innovation (formerly Enterprise, Trade and Employment when making the submission on the White Paper) do not understand the need for reform, despite the efforts of the Commission through its damages initiative.

As the Department fails to appreciate the need for reform in the field of collective redress, there appears to be even less hope for reform in the area of litigation funding. This is unfortunate. The laws in this area in Ireland have remained unchanged and have not responded to the needs of an evolving modern society. As outlined in Chapter 6 by reference to case law in the United Kingdom (e.g. *Gulf of Azov* and *Arkin* cases) the judiciary have responded to the changing needs of society by interpreting the public policy need for third party funding to allow access to justice.

The rules in relation to legal fees and litigation funding are not only outdated, but they are frequently contradictory. This was shown amongst other things in the contradictory rules governing the calculation of fees by solicitors. As Aileen Murtagh pointed out, this contradiction also reveals itself in the fact that there is a constitutional right of access to the courts to litigate reasonably stateable cases, but

as many persons cannot fund their litigation, access to the courts is denied.

The requirement for '...the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...' (*Manfredi*) is not being fully complied with at this time by Ireland. There is little hope that Ireland will take the positive steps to bring about this change unless policy makers are made aware of the requirement and thus the need for reform. In these circumstances, it is very unlikely that double damages will be considered let alone introduced in competition litigation any time soon.

With policy makers having such a lack of understanding on the need for reform in the area of collective redress and litigation funding, there is real concern that they might have difficulty dealing with some of the issues described in Chapter 3 (indirect purchaser standing, passing on defence etc.) should they arise in litigation and require legislation to remedy.

Ireland is today undoubtedly paying mere lip service to the concept of private actions for damages in competition cases, especially for plaintiffs with small claims. Merely creating a right of action in section 14 of the Competition Act 2002 for any person aggrieved in consequence of a breach of sections 4 and 5 of the Act does not address the many problems that injured parties, especially consumers with small claims, will encounter if trying to assert their rights under the Act or under the Treaty. There is a need for a debate in Ireland on these issues which would hopefully highlight the need for reform. An opportunity to engage in such a debate presented itself with the Commission damages initiative, but was spurned.

Until policy makers in Ireland realise the need for reform, the best that can be hoped for in Ireland is that the Commission pursues its initiative to a successful conclusion and introduces legislation. Such legislation

would highlight the differences between asserting Community rights and identical domestic rights.

And Finally

Through the research undertaken in this thesis, the author admits that he has undergone an epiphany and agrees there is a need for reform. The arguments made in this thesis represent a volte face from the submissions made by the Competition Authority in 2003 to the Law Reform Commission consultation paper on multi-party actions and the Commission Green Paper on damages actions, both of which submissions the author worked on as legal advisor with the Competition Authority.

Through the extensive research conducted in this thesis, the author's eyes have been opened. It is not safe to simply believe without questioning that all the bad things said about one legal system (the American in this case) are true. Nor is it safe to assume that all is fine in the Irish legal system either.

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