

I S B A

IRISH SMALL BUSINESS ALLIANCE



Comments on European
Commission's White Paper On
Damage Actions for breach of
European Community
Anti-Trust Rules

July 15th 2008

1 Development of European Competition Law

- 1.1 The Commissions two recent papers on the development of Private Damage Actions [Green Paper 19/12/2005 and White Paper 2/4/2008] resulting from infringements of European Competition Law are a most welcome development in the fight against hardcore cartels that permeate the European Economic Model. The commitment of Commissioner Neelie Kroes in this area is evidenced in her recent speeches that have vigorously encouraged Private Damage actions.
- 1.2 In addition to the Commission's steadfast work, there has been an equal though less effective discussion concerning the development of Private and Public Enforcement of European and National competition law in various member states.
- 1.3 Hardcore cartels and other serious breaches of European competition law have a disproportionately serious effect on the European Economic Model. Cartel behaviour has served to artificially increase Europe's cost base and thereby impeded the ability of Europe to compete with India, China and the U.S. As "inflation" has risen, jobs have migrated to these lower cost economies. The Commission has recognised the scope and scale of the problem and estimates in the white paper, that the annual cost for hardcore cartels in the E.U. ranges somewhere between €25 billion and €69 billion.

2 Effectiveness of Current Public and Private Enforcement: General Comment

- 2.1 Public Enforcement is crucial in ensuring that effective Private Enforcement measures are readily available to those who have suffered damages arising from competition law infringements. It is submitted that the biggest obstacle for Private Enforcement in this regard is a flawed **Political Culture**.
- 2.2 The Commission continues to lead the way in terms of public enforcement. Fines levied on hardcore cartels have increased from €683m in 2005 to €1,846m in 2006 to €3,334m in 2007. Nevertheless, despite the success of the Commission's leniency program over the last 5 years, it does not currently have the resources to effectively process the large number of leniency applications received. As a matter of urgency, the Commission should therefore consider increasing the resources available to ensure applications are dealt with expeditiously. This is vital from a deterrent point of view. If cartels are allowed to go unpunished, the effectiveness of E.U. procedures in fighting cartels will be diluted. Future cartelists will be unlikely to come forward and be more likely to take their chances on avoiding detection.
- 2.3 However, the position with National Authorities is for the most part not encouraging. Though performances vary from one country to another, progress with cartel detection in member states has to date been abysmal. The high point was the €702 million fine imposed by the German Federal Cartel Office in 2003 on twelve cement manufacturers found to have been operating a hard core cartel in the German cement market since the beginning of the 1990's. In addition, the French Competition Council fined three mobile phone operators a total of €534 million in 2005, for operating a hard core cartel in the mobile phone market between 1997 and 2003.

- 2.4 Other countries, particularly the U.K. and Ireland have not shown this level of resolve. Dr. John Fingleton, former head of the Irish Competition Authority estimated that anti-competitive practises were costing the Irish economy €4 billion per year. Indeed, the Irish Competition Authority has been in operation for 17 years but has made little or no impact in the fight against cartels. Another former head of the authority, Pat Massey resigned his position because the Irish Government refused to provide the necessary funding to allow the authority to investigate Ireland's infamous cement cartel. It is clear that without an effective public enforcement regime, private enforcement will be virtually impossible.
- 2.5 In fact, with the exception of the highly controversial Irish home heating oil cartel convictions, no hardcore cartel has been successfully detected in Ireland. Aside from the above case, the authority has spent scarce resources investigating alleged breaches of Article 81 by the Kennel Club of Ireland and has taken (and lost) a high profile case against the Irish League of Credit Unions. Meanwhile, the many industry sectors engaging in hardcore cartel behaviour continue to act with impunity.
- 2.6 The performance of the Irish Competition Authority mirrors the protectionist policy of successive Irish Governments towards many key sectors of the Irish Economy that have long been engaged in systematic abuses of competition law. Against this background, private enforcement in Ireland is virtually non-existent. The conflict between the role of large corporations in bank rolling the body politic and the body politics' responsibility in policing those same corporations, has in the case of Ireland directly impinged on the rights of direct and indirect purchasers to seek and obtain compensation through private enforcement of competition law.
- 2.7 In its Green Paper, the Commission stated that ***“Competition Law Enforcement is a key element of the “Lisbon Strategy” which aims at making the economy of the European Union grow and create employment for Europe’s citizens”***. In contrast, Ireland's smokescreen approach to public enforcement has provided at worst tacit backing to the myriad of corporations engaged in flouting E.C. Competition Law and killed off any prospects of consumers having access to effective private enforcement remedies. It is very probable that other member states have similar “Political Culture” anomalies that similarly act as severe impediments to the availability of Private Enforcement remedies.

3 Effectiveness of Current Public and Private Enforcement: Specific Comment

- 3.1 Aside from the more general impediments to Private Enforcement described above, there are huge obstacles facing firms or final consumers wishing to enforce their rights to compensation as guaranteed by E.C. law.

To begin with, we must accept that at this point in time “Private Enforcement” is little more than an optical illusion within the E.U. It is a brave concept but nonetheless a concept that has not yet left the womb. Radical and immediate action is required across the Community if the Commission's aspiration ***“that all victims of infringements of E.C. Competition Law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered”*** is to be achieved.

- 3.2 The abject failure of Private Enforcement throughout the Community can be linked directly to two fundamental problems; **the high level of costs associated with bringing an action and the unconscionable time delays involved**. These two obstacles are the key tools of the cartelists in fending off Private Enforcement actions and they must be seen to be emphatically tackled if any progress is to be made in asserting the rights of victims to compensation.

4 Costs

- 4.1 Cartelists look at regulatory authority fines and the associated legal costs of stymieing follow-on private enforcement actions as merely “costs of doing business”. For example, in the German Cement Cartel case, a seemingly significant fine of €702m was imposed by the German Federal Cartel Office. The cartel was found to have been operating since at least the early 1990’s, when in reality, it was part of the European Cement Cartel that operated throughout the 1980’s and was fined by the European Commission in 1994. It can therefore be stated with reasonable certainty that 12 cement producers operated a cartel for around 20 years and were fined €702m. This equates to approximately €3m each per year of the infringement. A senior executive from the cement industry has been quoted as saying, **“we view these fines as mere parking tickets”**.
- 4.2 In contrast, the main victims of this cartel [direct purchasers; i.e. concrete producers] were unable to unilaterally assert their rights because of legal uncertainty, high costs and time delays. The victims had already paid €3m per year to the cartel through artificially inflated prices and are now expected to fund a recovery action that has no semblance of a time frame, astronomical costs and a myriad of procedural hurdles to cross including standing, access to evidence, burdens of proof and passing on defence etc.
- 4.3 As it currently stands, any cost benefit analysis on such an uncertain outcome may well produce a positive outcome, if there is a result within 1 or even 2 years of a Commission or NCA decision. However, when Private Enforcement actions are taking a minimum of 5 years and up to 15 years, as is presently the case, the current regime merely deters victims from attempting to enforce their rights. Conversely, the cartelists are actively encouraged by what they see as effective immunity from Private Enforcement action. As such the following recommendations are suggested:
- 4.3.1 That when fines are levied by the Commission or NCA, that the figure is conditional on the offenders paying full compensation to victims within 2 years of the decision becoming final. If the offenders do not make such compensation available to the satisfaction of the Commission or NCA within the specified time, that the fine is doubled and doubled again in another 2 years and so on. This would be a powerful incentive for cartelists to cease their activities and to ensure that victims are fully compensated.
- 4.3.2 That the Commission sets up a Hedge Fund or similar “for profit” vehicle, which has as its objective, the investment of a small percentage of the revenues derived from fines, into the funding of Private Enforcement cases. This investment would be done on a

normal commercial basis. D.G. 4 is perhaps the only Commission Directorate that produces such enormous surplus revenues. It would be sensible for a tiny portion of such revenues to be used to alleviate one of the biggest hurdles facing the Directorate (the promotion of Private Enforcement actions) and simultaneously enhance Commission revenues.

- 4.4 The above suggestions do not of course obviate the need to streamline costs and the Commission should strive to provide solutions that allow victims to seek redress where victims are in a very weak financial position, as is very often the case.

5 Time Delays

- 5.1 Unconscionable time delays are brought about mainly as a result of procedural hurdles being exploited by defendants. The Commission should seek to have all of the procedural hurdles adjudicated upon on a Pan-European basis in order to bring about some streamlining to the various procedures.

- 5.2 **Passing – On Defence:** As defendants have benefited from the full extent of their overcharging, they should be held responsible for the overcharging in full, as well as any other damages for which they may be liable e.g. exemplary / punitive / loss of profit / interest etc. Whatever anomalies do arise in so far as the breakdown of damages between direct and indirect purchasers is concerned, these are not a matter for the defendants. Accordingly, defendants should not be allowed to muddy the waters and delay procedures by raising the “passing on” defence. Indeed, there are circumstances where defendants might well be held liable for the entire of the overcharge to both direct and indirect consumers.

- 5.3 **Access to Evidence:** Access to evidence is perhaps the greatest single impediment to successful Private Enforcement actions. There is a marked contrast in the approach to “Discovery” between the U.S. Courts and those of Member States and indeed among Member States. Very clear guidelines need to be laid down to ensure that National Courts pursue a uniform and vigorous approach to discovery and that, as with the U.S. a very liberal approach is made to discovery having regard to the covert behaviour of cartels.

Provision should be made for the sharing of all relevant information between the Commission and NCA's and the making available of all relevant information to the courts in Private Enforcement Cases. To avoid a situation where ultra sensitive trade secrets are passed on to plaintiffs, provision should be made for Member State Authorities and/or the Commission to liaise directly with Judges in Private Enforcement actions. It makes no sense that information should be withheld between NCA's / Commission / Private Litigants in cases where the cartel activity is likely to be Pan-European and thereby penalising consumers in other member states. Considerable time and money savings would be generated by the provision of a regime that facilitates an acceptable and necessary level of information transfer between relevant parties.

6 Damages

6.1 The white paper's comments on damages are encouraging. The acceptance of the concept of full compensation, loss of profit and the right to interest to be drawn up in a guidance framework for the quantification and calculation of damages is a positive step. Again, the new framework should be clear and unambiguous in setting guidelines for damages. The framework should also make provision for "exemplary" or "punitive" damages based on the overall conduct of the infringer/s e.g.-

- Is it the first infringement or a repeat infringement;
- The level of profits derived as a result of the infringement;
- The longevity of the infringement.

6.2 A system of damage calculation based on the Commission's proposals is less crude than the "triple damages" model used in the U.S. which has a tendency to give rise to excesses. There is a perception that U.S. Anti-Trust Law is now shrinking because of perceived excesses arising from triple damages / class actions.

Under the model proposed by the Commission, damages may in fact exceed "triple damages" in certain circumstances but the mechanisms proposed will avoid the risk of excesses.

End.

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