COMPETITION AUTHORITY

Submission to the Law Reform Commission on its Consultation Paper on multi-party litigation (class actions)

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1 INTRODUCTION

1.1 The Competition Authority ("the Authority") has read with interest the Law Reform Commission's recommendation for the introduction of a class action procedure, and welcomes the opportunity to make a submission. As the Commission points out, the phenomenon of multiple suits involving claims against the same defendants is no longer rare in our society. We welcome the fact that the Commission wishes to address this issue.

1.2 The Commission in its consultation paper has pointed to situations where the class action procedure would be particularly suitable – deprivation of social welfare entitlements through state mismanagement and consumer claims against private sector defendants. We agree that the class action procedure may well be appropriate for the first-named category – or indeed for actions in tort involving a large number of plaintiffs, as in the so-called "army deafness" cases – but we have serious doubts as to its suitability for actions involving large classes of consumers, particularly in the area of competition law.

1.3 Competition law is one area where potentially large groups of consumers may suffer injury. Sections 4 and 5 of the Competition Act, 2003 prohibit certain types of anti-competitive behaviour. Although the Authority has the statutory function of enforcing these provisions, section 14 of the Act confers a right of action upon *"any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or section 5 … for relief against either or both of the following, namely –*

(a) Any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse

(b) *Any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or*

> *consented to, as the case may be, the entry by the undertaking into, or the implementation by it of, the agreement or decision, the engaging by it in the concerted The section goes on to provide that the court may grant a plaintiff in such cases relief by way of injunction or declaration or damages, including exemplary damages."*

1.4 We regard section 14 as a valuable additional means of enforcing the competition rules by means of private action. Such action can often result in important judicial decisions on the interpretation of the legislation. For example, *Deane v VHI* [1], an action taken by private individuals, resulted in a judgment which clarified the meaning of the term "engaged for gain" as used in the Competition Act 1991, a forerunner of the present legislation, in which the same term is repeated.

1.5 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.

1.6 We believe that there are better ways of addressing this problem than by the use of class actions. We believe 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. We will develop this further in the following paragraphs. We believe that the Commission ought to consider in more depth possible alternatives to the class action procedure – alternatives that might be better suited

[1] [1992] 2 IR 319, 29 July 1992

to cases involving injury to large groups of consumers. We will suggest some possible options at the end of this submission.

2 POSSIBILITY OF ABUSE

2.1 In the United States, the procedure has led to serious abuses. If class actions are to be introduced in Ireland, it is important that we learn from this experience.

2.2 Cost to the economy

The Commission underlines in its consultation paper that its recommendations are intended to strengthen the civil justice system, and ultimately to redound to the benefit of all participants in the legal process. However, this has not been the experience in the United States, 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

2.3 No reward for plaintiffs

But this is not the only problem with the American model. As pointed out in the Commission's consultation paper, most class actions are settled. It quite frequently happens in such cases that plaintiffs receive nothing. For example, in one American case where the defendant was an airline, 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 share of the settlement. Very few people – if any – were able to avail of this offer.

2.4 A substantial number of settlements have involved the payment of coupons to injured buyers. Such a payment can be very attractive to settling defendants, as the coupons have the potential to generate profitable sales. (A legal newsletter reported one such case where the class received a $13 coupon on a new $250

computer monitor, while on the other hand class counsel received a $5,000,000 fee.)

2.5 *Disproportionate rewards for lawyers*

Class actions, particularly in the area of antitrust, produce in the main rewards for counsel rather than for the plaintiffs. The classic multiple principal problem arises here. Where you have one agent and multiple principals, the normal relationship will be reversed. Multiple principals will not be able to control a single agent. The lawyer-agent is in control. Defendants are generally keen to settle at any cost, and will try to strike attractive deals with counsel in order to do so. Although class action settlements in the United States are subject to the approval of the court, judges will in general accept counsel's view of the settlement, and will take the position that it is not for the court to intervene if the plaintiffs are content with the settlement.

2.6 In a proposed settlement of a class action against MassMutual (since withdrawn, following a challenge by a group called Trial Lawyers for Public Justice, who challenged the deal as an abuse of the class action procedure and as an abuse of the class members themselves). The class members received no money, but class counsel was to receive $5,000,000 in cash, a $3,000,000 insurance policy and an annual payment of $250,000 for life. The details of the action and settlement are instructive. The plaintiffs had alleged that MassMutual failed to disclose adequately the fees that its life and disability policyholders would incur if they chose to pay their premiums on a monthly, quarterly, or semiannual basis, instead of in a yearly lump sum. The complaint in the case, filed in 1998 on behalf of approximately 6.5 million MassMutual policyholders, sought both damages and injunctive relief, i.e., a court order requiring appropriate disclosure in the future.

2.7 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.

2.8 In the competition arena, the U.S. Federal Trade Commission has identified antitrust class actions as a problem area, and has started to intervene in cases where it believes that counsels' fees are disproportionate to the relief obtained for the class and the work done in that regard. [2]

2.9 *Initiation of cases by legal firms*

The problem of counsels' fees is frequently linked to the selection of the class representatives. The high settlement fees are an incentive to legal firms to themselves initiate class actions by selecting a suitable plaintiff. The Authority recommends that criteria should be set in place to prevent the possibility of this arising in Ireland. The class representative should be required to satisfy the court that he or she is initiating the proceedings voluntarily.

3 DIFFICULTY OF IDENTIFYING THE CORRECT PLAINTIFF IN COMPETITION CASES

3.1 In Ireland, allocative efficiency occupies a very important place as a policy objective for competition. From that perspective, the parties who are injured by a breach of competition law are not those consumers who purchased at the anticompetitive price, but rather those who purchased less desirable (and cheaper) goods or services instead.

3.2 However, it would be next to impossible to compensate such injured parties. If such a plaintiff came forward, the cost of identifying the members of the class – i.e., those who *would* have purchased at a competitive price but did not, would be prohibitive

[2] Cf for example ***Amicus Curiae*** **Filings of the Federal Trade Commission in** ***Michael Erikson v. Ameritech Corporation*** **available on http://www.ftc.gov/**

3.3 The class, then, is more likely to consist of those who purchased at an anti-competitive price. Again, however, there will be difficulty in identifying who in fact paid more for the goods or services. Is it the direct or the indirect purchaser who ought to have standing to sue? The reality is that in some instances, it is the direct purchaser and in others the indirect purchaser. And in most, probably some mix.

3.4 Finally, because most class actions are settled, the advantage of private actions that we have already mentioned – namely, the creation of legal precedents – will not occur.

4 POSSIBLE ALTERNATIVES TO THE CLASS ACTION PROCEDURE

4.1 *An extension of the role of the Attorney General in relator proceedings*

At present, the Attorney General may act in order to assert or protect public rights. [3] Such proceedings have been brought, *inter alia*, to obtain a declaration or injunction to restrain a corporation from exceeding its statutory powers, or to prevent the repeated commission of a statutory offence.[4]

4.2 Article 30.1 of the Constitution provides that the Attorney General is to exercise and perform all the powers, duties and functions conferred on him either by the Constitution or by law. The Authority therefore suggests that the Commission consider whether it might be appropriate to provide by law for the extension of the role of the Attorney General as it presently exists in relator actions so as to encompass suing for damages on behalf of large groups of plaintiffs. The *parens patriae* procedure in the United States is a good example of what might be undertaken in this area. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 [5]authorises a state attorney general to bring an action for injuries to natural persons residing within the state. Damages established are trebled and may

[3] Ministers and Secretaries Act, 1924, section 6(1)

[4] Cf Collins & O'Reilly: *Civil Proceedings and the State in Ireland*, Chapter 7.

[5] 15 U.S.C. § 15c(a)(1).

either be distributed in a manner authorised by the court, or be awarded to the state as a civil penalty, subject in each case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the award. The Act also provides for the recovery of reasonable attorneys' fees following the successful outcome of the litigation.[6]

4.3 Empowering bodies such as the Authority to institute civil actions on behalf of consumers

Again, an American precedent may be helpful. Section 19(b) of the FTC Act[7] allows the Federal Trade Commission to institute a civil action seeking redress for consumers who have been injured by violations of the antitrust rules. The court may order a wide variety of remedies, including restitution in the form of monetary refunds. Disgorgement 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.

4.4 Improving the existing representative action

Notwithstanding the difficulties which the Commission states are inherent in the task of improving the existing procedure, the Authority believes that the Commission should give further thought to this option. It might indeed be possible to devise a combination of all three options that we have suggested, drawing the best and most appropriate elements from each

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[6] A useful discussion of the *parens patriae* action can be found in *ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) Vol. 1* page 807 ff.

[7] 15 U.S.C. § 57b(b) (2000)

5 CONCLUSION

The Authority recommends that the Commission consider possible alternatives to the class action procedure. In particular, we recommend that the Commission study:

(a) Whether the existing relator action might form the basis for a wider role for the Attorney General in representing private citizens in actions akin to the *parens patriae* procedure in the United States.

(b) Whether regulatory bodies might be empowered to sue on behalf of consumers

(c) Whether the existing representative action might be improved.