

THE PRIVATE  
ENFORCEMENT OF  
COMPETITION LAW  
IN IRELAND

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David McFadden



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# The Private Enforcement of Competition Law in Ireland

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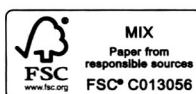
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## THE PRIVATE ENFORCEMENT OF COMPETITION LAW IN IRELAND

Competition is recognised as a key driver of growth and innovation. Competition ensures that businesses continually improve their goods and services whilst striving to reduce their costs. Anti-competitive conduct by businesses, such as price-fixing, causes harm to the economy, to other businesses and to consumers. It is small businesses and the consumer who ultimately pay the price for anti-competitive conduct. A coherent competition policy that is both effectively implemented and effectively enforced is essential in driving growth and innovation in a market economy. The importance of competition was emphasised when the EU/ECB/IMF 'Troika' included a number of competition-specific conditions to the terms of Ireland's bailout.

Both Irish and Community law recognise the right for parties injured by anti-competitive conduct to sue for damages. This right to damages, in theory, allows those that have suffered loss to recover that loss whilst helping to deter others from taking the illegal route to commercial success. However private actions for damages in Ireland are rare.

This book asks what the purpose of private competition litigation is and questions why there has been a dearth of this litigation in Ireland. The author makes a number of suggestions for reform of the law to enable and encourage private competition litigation. The author takes as his starting point the European Commission's initiative on damages actions for breach of the EC antitrust rules and compares the position in Ireland to that currently found in the UK and US.

**Volume 3 in the series Hart Studies in Competition Law**

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

## *Preface*

This book is based on the author's PhD thesis entitled 'Private Actions for Damages in Competition Law in Ireland: Why and How?' which was submitted to the Law School in Trinity College Dublin in October 2010. The book has been updated since the thesis was submitted to take account of some further developments in the area of private enforcement of competition law. The most notable developments have been the recent consultation undertaken by the UK's Department for Business, Innovation and Skills (BIS) entitled 'Private Actions in Competition Law: A Consultation on Options for Reform' which was launched in April 2012 and the enactment of the Competition (Amendment) Act 2012 in Ireland.

Why write a book on private enforcement of competition law in Ireland? Competition is recognised as a key driver of growth and innovation. Competition ensures that businesses continually improve their goods and services whilst at the same time striving to reduce their costs. Competition policy is central to the modern open market economy. The importance of competition was recently emphasised when the EU/ECB/IMF 'Troika' included a number of competition specific conditions to the terms of Ireland's bailout. A coherent competition policy that is both effectively implemented and effectively enforced is essential in ensuring that competition achieves its goal of driving growth and innovation in a market economy.

Competition can be very tough for business. Constantly striving to achieve and maintain market share and to produce improved goods and services is difficult and creates incentives to take short cuts. There is therefore the temptation for those involved in commercial activity to avoid or even to destroy competition, or to seek out easier options such as colluding with competitors rather than competing with them. Central to competition policy is the fact that anti-competitive conduct by businesses causes harm to the economy, to other businesses and to consumers. This harm usually results either in someone paying more than they should for goods or services, or in a reduction in choice or quality of those goods or services, or a combination of these. At the bottom of the distribution chain is the consumer and it is the consumer that ultimately pays the price for anti-competitive conduct. As harm is caused both to business and consumers by anti-competitive conduct, Irish and Community law recognises the right for parties injured by such conduct to sue for damages. This entitlement to damages, in theory, allows those that have suffered loss to recover that loss whilst also deterring others involved in commercial activity from taking the illegal route to commercial success.

Ireland has a reputation for being a particularly litigious society. Despite this reputation and the fact that anti-competitive conduct causes harm to Irish business and consumers, private actions for damages in Ireland are rare. It is because of the importance of competition to a properly functioning market economy and the fact that there has been an absence of private litigation in this area that this author decided to research what purpose private competition litigation should serve and why there has been so little litigation in this field.

The unusual reticence of Irish litigants to sue in competition cases is not unique to Ireland. The European Commission's private antitrust damages initiative revealed that there is a marked underdevelopment of private litigation in competition cases in Europe.

The Commission sought to address this underdevelopment through its antitrust damages initiative and in the process uncovered what it understood to be the reasons for this underdevelopment. The Commission then put forward proposals to address the problem. The principal reason for the Commission undertaking this private antitrust damages initiative was the judgment of the Court of Justice in *Courage v Crehan*. That judgment confirmed that Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard. *Courage v Crehan* together with the subsequent case of *Manfredi* also clarified that it is a requirement of the national law of Member States to provide mechanisms to allow damages actions to be brought by (and against) private parties for infringements of Articles 101 and 102 TFEU. Therefore there would appear to be an imperative on Member States of the European Union to provide mechanisms to allow claimants harmed by anti-competitive conduct to recover damages. The arguments put forward in this book will show that the position in Ireland at the time of writing concerning mechanisms to allow claimants, especially those with small and scattered losses, is well short of that which the Court of Justice appears to demand.

The Commission's antitrust damages initiative started a debate in Europe on the issue of damages actions in competition cases. The debate has been somewhat muted in Ireland, though not so in the UK where there have been a number of recent initiatives in the field of private damages actions in competition law in recent years. This book attempts to address the dearth of literature on private damages in an Irish context by reference to the broader debate occurring in the UK and EU whilst also looking at what can be learned from the experience gained of in excess of 100 years' private antitrust enforcement in the US.

There are many people I would like to thank for the help and encouragement they gave me in writing this book. First I would like to thank my friend and colleague Noreen Mackey whose comments were incisive. In particular, I wish to thank her for reading parts of the book, which benefited from her suggestions and comments. Likewise, I would like to thank my former colleague Kim Watts for her help and for editing suggestions on the chapters she read. Paul Sreenan SC kindly assisted with the injunction portion of chapter eight, helpfully clarifying the arguments he made in court when suggesting there was a deficiency in the power of the court to order injunctive relief.

I would like to thank Dr Eoin O'Dell for admitting me to read for the PhD in the School of Law in Trinity. I would also like to thank Dr Neville Cox for encouraging me to undertake this research, and Dr Caoimhín McMaoláin for his helpful comments.

I would of course like to give special thanks to my supervisor and friend Alex Schuster. Alex was very encouraging of my efforts and positive about my direction. He gave careful attention to my work throughout and provided me with numerous comments and suggestions especially towards the end when he devoted so much time to reading and re-reading the thesis which is the basis for this book. I am very grateful to him.

I would like to thank Professor Richard Whish who not only acted as external examiner for the thesis that is the basis for this work, but also for suggesting and encouraging that the thesis be published as a book.

I would also like to acknowledge the extraordinary work of such people as Professor Rachael Mulheron, Terry Calvani, Wouter Wils, Robert H Lande, Joshua Davis and John M Connor to name just a few. Their research and writing has greatly assisted me in my work in this book. They, along with others, also gave me kind permission to cite and quote their work for this book and even suggested further reading for my research.

Appreciation is of course also owed to Richard Hart and his team at Hart Publishing for agreeing so quickly to publish this book. Hart Publishing has done much to advance legal scholarship and to provide lawyers with a world class outlet for disseminating their ideas.

My former Master, Con O'Connor who trained me as a solicitor, and my friends, Stephen Lalor, Ciarán Quigley, Sandra Rafferty, Paul Gorecki, Nathan Reilly, John Evans, and James Plunkett all encouraged me in my endeavours to complete this work. Sean Murphy and Stephen Calkins provided kind assistance on specific issues that arose when adapting the thesis to a book. The views and arguments contained in this book are mine alone and therefore blame for any errors rest solely with me.

Of course, more than anyone, I wish to thank my wife Caroline, and our four children, Kate, Jimmy, Conor and Alex all of whom endured much as I worked on the thesis and then book.

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