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**SUPREME COURT OVERTURNS HIGH COURT'S FINDING OF ABUSE OF
DOMINANCE BY THE IRISH LEAGUE OF CREDIT UNIONS (ILCU) IN THE
PROVISION OF A SAVINGS PROTECTION SCHEME (SPS) AND
REPRESENTATIONAL SERVICES**

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Introduction

On 22 October 2004, the High Court decided in favour of the Competition Authority in its claim against the ILCU for abuse of a dominant position in the distinct product markets for credit union representation services and savings protection schemes in contravention of section 5 of the Competition Act, 2002 (the Competition Act) and Article 82 of the EC Treaty. The High Court also found a breach by the ILCU of section 4(1) of the Competition Act and Article 81(1) of the EC Treaty in respect of the conduct at issue.¹ The ILCU appealed the High Court decision to the Supreme Court.

Background

¹ Please see the article on the High Court decision in the March 2005 issue of the European Competition Journal.

In accordance with section 4 of the Competition Act, 1991, the ILCU notified its rules to the Competition Authority on 28 September 1992, in order to obtain a decision as to whether they complied with the 1991 Act and did not form an agreement leading to a distortion of competition. The Competition Authority was concerned with ILCU's provision of insurance services (known as loan protection/life savings insurance (LP/LS)) to its member credit unions. All member credit unions were required to carry this insurance, which is provided by ECCU Assurance Company Limited (ECCU). ECCU is wholly owned and controlled by ILCU. The Competition Authority found that the rules did not breach section 4(1) of the 1991 Act as the market for LP/LS services did not constitute a separate product market, but rather formed part of the market for life assurance generally.

Following this decision, some member credit unions expressed dissatisfaction regarding the level of LP/LS premiums and, in particular, the possibility of disaffiliation if the insurance requirement was not observed. Termination of membership in ILCU would lead to compulsory expulsion from the SPS (explained below). As a result, on 28 June 2002 the Competition Authority overturned its 1996 decision by considerably narrowing its market definition to the market for LP/LS insurance for credit unions. It suggested that the product market for credit union representation services (including the provision of LP/LS insurance) was tied to the market for SPS services. The Competition Authority exchanged correspondence with ILCU claiming that a breach of section 5 of the Competition Act had occurred due to the "associated loss of access and/or no refund from the SPS" which resulted from disaffiliation.

Savings Protection Scheme

In 1968, ILCU launched a savings protection scheme. Section 46(2) of the Credit Union Act, 1997 defines an SPS as:

"a scheme established to protect, in whole or in part, the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union..."

The SPS allows ILCU to monitor and advise individual credit unions on how to improve efficiency. In order to fulfil this role and with a view to preserving public confidence, a fund was put in place so that ILCU could assist any credit unions in financial difficulties. No

single credit union has a right to financial assistance or a proprietary interest in the SPS. ILCU only offers discretionary assistance. If any member credit union refused to obtain LP/LS insurance from ECCU, ILCU could disaffiliate them, with the consequence of losing access to the SPS fund since it is only open to ILCU members.

High Court Judgment

In the High Court, Kearns J. found that tying had occurred on the basis that representation services and SPS should be deemed to be distinct products offered in distinct product markets. He preferred to use the “innate-characteristics” test put forward on behalf of the Competition Authority rather than the SSNIP test put forward on behalf of ILCU to reach this conclusion, stating that ILCU enjoyed a presumption of dominance on the basis that it held 80% of the market share for credit representation services and 100% of the market for SPS services. He held that it was therefore:

“common sense that as the sole supplier of SPS, ILCU would be immune from a 5 to 10% increase given the absence of any alternative product”.

He also accepted that the ILCU rules constituted an abuse of dominance since the arrangement in place tied the purchase of SPS services to the purchase of representation services.

Supreme Court Judgment

Fennelly J. considered the High Court judgment under three principal headings:

Whether credit union representation services and SPS should be considered distinct products and in different relevant product markets;

Whether ILCU enjoys a dominant position in the market for either of those services (especially SPS) assuming them to be in separate relevant product markets; and

Whether ILCU had abused its alleged dominant position in the market for SPS, principally by tying its provision to the provision of a separate product, namely credit union representation services but alternatively by abusive refusal to supply.

Fennelly J. stated that in order for the Competition Authority's case to succeed, the first question had to be answered in the affirmative.

In determining whether SPS constituted a separate product, Fennelly J. referred to settled UK² and Community case law³ as well as O'Donoghue and Padilla's "*The Law and Economics of Article 82EC*", in which it was noted that:

"The first key question in cases involving allegations of illegal tying and bundling is to establish whether A and B are "separate products" from the viewpoint of customer demand or whether instead they should be treated as components of a single product. Two products can only be tied if they are genuinely distinct products. That is, when an independent product market exists for each of them; or in other words, whether there are separate product markets for both A and B [...] However under the competitive market practices test, a distinct market for the tied item does not imply separate products absent widespread sales of the tying item in unbundled form [...] Two items constitute one product under the market practices test unless each could efficiently be sold without the other".

In consequence of these decisions and academic authorities and evidence given during the case illustrating that no other insurance company on the market was prepared to provide a stabilisation service such as the SPS, Fennelly J. held that SPS could not be viewed as a distinct product in its own product market. The service was provided as part of a bundle of services provided by the ILCU and not as an individual product.

Fennelly J. stated that it was unnecessary for the purposes of the case to consider whether representation services formed an independent product. However, he found the Competition Authority's claim that potentially any and every association of business undertakings should be held automatically to be engaged in a business consisting of the provision of services for reward to be troubling. If this were the case, any trade association representing a substantial

² BT Analyst decision available at

http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/btanalyst.pdf.

³ C-3/37.792 *Microsoft*; C-6/72 *Europemballage Corporation and Continental Can v Commission* [1973] ECR 215 at paragraph 32; C-27/76 *United Brands v Commission* [1978] ECR 207 at paragraph 22; C-333/94 *Tetra Pak Rausing v Commission* [1996] ECR I-5951 (also Case T-51/89 [1990] ECR II-309); C-53/92 *Hilti AG v Commission* [1994] ECR I-667 (also T-30/89 [1991] ECR II-1439); C-95/04P *BA v Commission* (also T-219/99 *British Airways v Commission* [2003] ECR II-05917).

percentage of a particular trade could be deemed to hold a dominant position in a market for representation services in the trade or profession in question.

The Court concluded that since the Competition Authority had failed to establish that SPS and representation services could be regarded as distinct products in distinct product markets, it was not necessary to respond to the second and third questions before the Court and the case for tying abuse failed. As the action failed under section 5 of the Competition Act, it also failed under section 4(1) of the Competition Act.