

**A League of Their Own:
Landmark Supreme Court Judgment Clears Irish League of
Credit Unions of Abuse of Dominance.**

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Abstract: In a unanimous judgment handed down on 8th May 2007, the Irish Supreme Court upheld an appeal by the Irish League of Credit Unions (ILCU) against a High Court judgment that ILCU had abused a dominant position. The Irish Competition Authority had alleged that ILCU had abused its dominant position in the market for savings protection services (SPS) by limiting access to SPS services to its own members. The Authority claimed that credit unions wishing to obtain SPS services were required to also purchase credit union representation services from ILCU and that such tying amounted to an abuse of dominance by ILCU. This was the first abuse of dominance case brought by the Irish Competition Authority to go to a full hearing, the first to be appealed to the Supreme Court and the first Irish case under EC Regulation 1/2003. The case raised a number of interesting economic issues, which are of interest in the context of the debate on the need for a more economics based approach to Article 82. It has also resulted in some significant innovations in the hearing of competition cases by the Irish courts.

1. Introduction.

In a unanimous judgment delivered on 8 May 2007, the Irish Supreme Court found that the Irish League of Credit Unions (ILCU) had not abused a dominant position by refusing to grant access to its savings protection scheme (SPS) to non-ILCU credit unions, overturning an earlier High Court judgment.¹ The case was notable for a number of reasons. It was the first abuse of dominance case brought by the Competition Authority to go to a full hearing and the first such case to be appealed to the Supreme Court. The case raised a number of interesting economic issues, particularly with respect to the treatment of market definition and refusal to supply by a dominant firm, which are of interest in the context of the debate on the need for a more economics based approach to Article 82.² It was also the first Irish case under Regulation/1/2003 and so is of interest in the context of the decentralised application of EU competition law.³ It has also resulted in some significant innovations in the hearing of competition cases by the Irish courts.

The case arose out of a decision by ILCU to disaffiliate a number of member credit unions for refusing to purchase certain types of insurance cover from ILCU's own insurance subsidiary, ECCU Ltd. The Competition Authority originally claimed that this action was anti-competitive. It subsequently altered its position and claimed that ILCU's refusal to grant non-member credit unions access to the SPS created an entry barrier to what the Authority described as the market for "credit union representation services", thereby preventing the entry of rival providers of such services and restricting competition in that market. The Authority argued that this amounted to an abuse of a dominant position by ILCU. When the case came to trial the Authority introduced a new line of argument, claiming that restricting access to the SPS to member credit unions amounted to anti-competitive tying on the grounds that any credit union wishing to obtain

¹ *Competition Authority v. John O'Regan & Others*, High Court Kearns, J. 22 October 2004, Supreme Court 8 May 2007. ILCU is an unincorporated body and its directors were nominated as defendants. For convenience the present paper refers to the defendants as ILCU.

² See, for example, D.G. Competition, (2005), *Discussion Paper on the Application of Article 82 to Exclusionary Abuses*, Brussels: EU Commission; and J. Vickers, (2005): *Abuse of Market Power*, *Economic Journal*, 115: F244-61.

³ Regulation 1/2003 provides that national competition authorities must apply EU competition law where a case involves inter state trade using their existing national competition law procedures. In Ireland decisions on whether or not there has been a breach of competition law are a matter for the courts. Three agencies have been designated as national competition authorities for the purposes of the Regulation, namely the Competition Authority; the Courts and the Director of Public Prosecutions.

the benefit of the SPS was also required to purchase credit union representation services from ILCU. The High Court accepted the Authority's argument that there were two separate markets and held that ILCU had abused its dominant position by tying credit union representation services to the provision of SPS services. ILCU then appealed the judgment to the Supreme Court.

2. Development of Credit Unions in Ireland.

A credit union is defined as an individual autonomous savings and credit cooperative established by individuals who have a common bond. The Credit Union Act, 1997, requires that all credit unions must be registered by the Registrar of Friendly Societies (since replaced by the Central Bank and Financial Services Authority of Ireland (CBFSAI)) and no entity may use the term credit union unless it is registered. The 1997 Act provides that individuals may only join a particular credit union if they have a common bond with the other members. The most usual type of common bond is that of living or working within a particular community. The bulk of the remaining credit unions are credit unions involving individuals working for a particular organisation, i.e. the common bond involves working for a particular company or industry.

Credit unions pool the savings of their members and provide loans to them. They compete with other financial institutions such as banks, building societies, insurance companies in the personal savings and lending markets. The average size of loan provided by credit unions at the time the Authority commenced proceedings in 2003 was €6,700. In many instances credit unions provide loans on attractive terms to individuals who might not be catered for by other financial institutions for various reasons.

ILCU was originally established in 1960 when four credit unions came together to try and ensure that credit unions would conduct their affairs on the basis of a set of agreed operating principles and to present a united front to government and state agencies in relation to the legislative problems of credit unions. According to its 2003 Annual Report, ILCU had 532 affiliated credit unions throughout the island of Ireland with an estimated total membership of 2.7m individuals. 431 of ILCU affiliated credit unions were located within the Republic of Ireland and they had a total membership of 2.3m

individuals.⁴ The balance of ILCU membership consists of credit unions located in Northern Ireland.

In 1968 ILCU established a savings protection scheme (SPS). The SPS is not a deposit insurance or savings guarantee scheme. No credit union has any guarantee that it will be rescued by the SPS if it is in financial difficulties and members of credit unions have no guarantee that their savings will be secure by virtue of the SPS. At ILCU's discretion loans may be advanced from the SPS fund to member credit unions that are in financial difficulties. There is also a discretionary power to pay individual credit union members up to €12,700 from the SPS fund in the event of a collapse of a credit union. All ILCU member credit unions are required to participate in the SPS; while participation in the SPS is confined to credit unions which are ILCU members. Credit unions participating in the SPS must permit ILCU to inspect and monitor their activities and comply with reserve requirements, operating ratios, insurance requirements, and such other operational and management standards as may be set down by ILCU.

The 1997 Credit Union Act provides that, any credit union established after 1st August, 2001 is obliged to either operate or participate in a SPS, which must be approved by the CBFSAI.⁵ Section 47 of the Credit Union Act, 1997, also obliges credit unions to insure against any losses arising from fraud or dishonesty by its officers or volunteers.

Since 1976 ILCU has provided loan protection/life savings (LP/LS) to its member credit unions through its wholly owned subsidiary, ECCU, which is an authorised insurer.⁶ At the time of the case all ILCU member credit unions were required to obtain LP/LS cover from ECCU. ILCU rules provide that member credit unions may be expelled by the board of directors for breaches of its rules.

Sometime around 2000/2001 disputes arose within ILCU after it incurred large costs in the unsuccessful development of IT systems for credit unions. In 2001 a number of credit unions established a new representative body, the Credit Union Development

⁴ It is believed that there were less than 10 credit unions operating in the Republic of Ireland that were not members of ILCU.

⁵ At the time of the High Court hearing, ILCU had applied to have its SPS approved but the CBFSAI had not taken a decision on the application.

⁶ LP/LS insurance pays off any outstanding loans of an individual credit union member on the death of that member, although there are limits on the amounts covered in the case of individuals over a certain age, and pays up to twice the level of a deceased member's savings to their next of kin.

Association (CUDA). CUDA had 21 member credit unions in 2002 although its members were generally larger than most of the ILCU member credit unions.⁷

Up to 2004, the activities of ILCU were funded by surpluses earned by ECCU, most of whose income came from the provision of LP/LS insurance to member credit unions. Around 2000/2001 a number of credit unions, mainly CUDA members, decided to purchase LP/LS insurance from insurers other than ECCU as they were unhappy with the level of premiums being charged by ECCU. Some voluntarily disaffiliated, In January 2003, ILCU wrote to twelve credit unions indicating that it proposed to disaffiliate them for failing to purchase LP/LS insurance from ECCU.

3. Background to the Case

Following the passage of the Competition Act, 1991, ILCU notified its rules to the Competition Authority.⁸ In a decision dated 20th November 1995, the Authority found that the obligation for ILCU members to purchase LP/LS insurance from ECCU was not anti-competitive. The Authority concluded that the relevant market was the market for life insurance and ECCU had less than 1% of that market and the arrangements could not therefore have any impact on competition.

CUDA subsequently complained to the Authority that the LP/LS requirement was anti-competitive as it prevented credit unions from obtaining cheaper LP/LS insurance from other sources. On 28th June 2002, the Authority revoked its earlier decision clearing these arrangements, citing changes in circumstances since the original decision.⁹ In particular it argued that the emergence of some ILCU members who now objected to the LP/LS arrangements and the fact that participation in SPS had been made compulsory constituted a change in circumstances.

Following a complaint by CUDA, the Authority wrote to ILCU stating that, in its view, disaffiliating credit unions for purchasing LP/LS insurance from an insurer other than ECCU would constitute an abuse of a dominant position. The Authority

⁷ Although CUDA members accounted for only 4% of all credit unions, they accounted for 14% of credit union membership and 15% of total credit union assets.

⁸ The Competition Act, 1991, established a system for parties to notify agreements and request a certificate (negative clearance) or licence (exemption). The Competition Act, 2002, abolished the notification system.

⁹ The Competition Act, 2002, which came into force three days later on 1st July 2002, revoked all certificates issued under the 1991 Act.

subsequently instituted legal proceedings in July 2003. The case came before the High Court in June 2004.

4. The Authority's Case.

The Authority wrote to ILCU's solicitors on 4 April 2003 suggesting, for the first time, that the conduct of ILCU (in relation to the supply of LP/LS) "might constitute a breach of section 5 in the market for representation of credit unions, where ILCU arguably holds a dominant position".¹⁰ In a subsequent letter dated 27 May 2003, the Authority indicated that it was not stating that ILCU could not make LP/LS insurance mandatory or disaffiliate members for not complying with that rule. Instead it argued that the breach of section 5 arose from the associated loss of access and/or no refund from the SPS.

The Authority claimed that the loss of access to the SPS as a result of disaffiliation imposed an exit cost on ILCU member credit unions that discouraged them from leaving ILCU to join rival credit union representation undertakings, such as CUDA, and that it therefore unlawfully raised a barrier to entry for rival credit union representation undertakings. It thus argued that the refusal by ILCU to supply access to the SPS to non-member or disaffiliated credit unions constituted an abuse of its dominant position in the market for credit union representation.

At the trial hearing, the Authority put forward a somewhat different argument. It suggested that there were two relevant markets: - a market for SPS services and a market for credit union representation services. It argued that the fact that access to the SPS was limited to credit unions that were members of ILCU amounted to an illegal tying arrangement whereby credit unions wishing to participate in the SPS were forced to purchase credit union representation services from ILCU. Alternatively the Authority suggested that the rules amounted to a refusal to supply SPS services to credit unions that were not members of ILCU. The defence chose not to object to the Authority changing its case at trial. The High Court accepted the Authority's argument that there were two separate markets and held that ILCU had abused its dominant position by tying credit

¹⁰ Supreme Court judgment at 16.

union representation services to the provision of SPS services. ILCU then appealed the judgment to the Supreme Court which overturned the High Court judgment.

5. The Relevant Market

As is frequently true in abuse of dominance cases, market definition played a key role in the ILCU case. The Authority's statement of claim defined the relevant market as the market for "credit union representation services". It defined such services as the entire composite of all ILCU services including advocacy, lobbying, financial services and the SPS. At the trial, the Authority put forward a different argument and claimed that there were two relevant markets, a market for SPS and a market for credit union representation services which it re-defined as comprising all ILCU services except SPS. The case raised issues about the methodology applied by the Authority and the courts to define the relevant market as well as the market definitions advanced by the Authority.

(a) Defining the Relevant Market.

In its Statement of Claim, the Competition Authority argued that "credit unions would not switch away from the purchase of specialist credit union representation services, such as those provided by ILCU, in response to *a small but significant non-transitory increase in the price of those products or services.*" (Emphasis added).

The wording used clearly echoes the language of the standard economic test for market definition, the SSNIP test, which asks whether a hypothetical monopolist could impose a small significant non-transitory increase in price, but the Authority cited no empirical evidence in support of its contention and failed to define what was meant by the price of such services.¹¹ The report of the Authority's expert economist stated that he was unaware of any quantitative economic study that sought to estimate demand elasticities for the various services provided by ILCU for the purposes of establishing a market definition.

¹¹ The bulk of ILCU's income which it used to finance its activities came from insurance commissions and surplus earnings of ECCU, while member credit unions paid a nominal affiliation fee in respect of their individual members. The present author who was an expert economist for ILCU suggested that the price could be measured by dividing ILCU's total income by the total number of credit union members to obtain a cost per member, or alternatively the price of LP/LS insurance was the relevant price.

ILCU's expert economist argued that if ILCU sought to impose a 5% price increase, the likelihood was that it would lose a sufficient number of customers as to render the price increase unprofitable suggesting that for a 5% price increase the critical loss was around 7.5%.¹² A low critical loss is an indication that the product market has been defined too narrowly as the likelihood is that the actual loss in sales that might be expected as a result of a 5% price increase would exceed the critical loss.¹³ The CUDA credit unions were unlikely to pay such an increase, given that they had already expressed dissatisfaction with the cost of LP/LS insurance provided by ECCU.¹⁴ As CUDA accounted for 15% of all credit union members, this would render such a price increase unprofitable.

The Authority argued in the High Court that the SSNIP test was only one of the possible tests of market definition, citing the EU Commission decision in *Virgin/British Airways*. It urged the Court to apply the characteristics test which the Authority argued indicated that credit union representation services, (excluding SPS), constituted a relevant product market.¹⁵ The judge agreed, ruling that "having considered both the SSNIP test and the economic evidence regarding market definition, I prefer to adopt the 'intuitive' or 'innate characteristics' test to find that there are two markets at work in the instant case being respectively a market for credit union representation services (excluding SPS), and the savings protection market."¹⁶

In this respect the judgement is in line with a number of previous Irish court judgements which have relied on the subjective 'innate characteristics' test rather than quantitative economic evidence. In *Mars/HB*, Keane J defined the market as being that

¹² Estimates of critical loss are commonly used to apply the SSNIP test. The critical loss is defined as the maximum loss in sales that could be incurred as a result of a 5% price increase such that profits would be unchanged on their previous level. If evidence suggests that the likely loss in sales would exceed the critical loss, then a 5% price increase would not be profitable which means that the products involved do not constitute a relevant product market. For a more detailed description of critical loss see P. Massey and D. Daly, (2003): *Competition and Regulation in Ireland The Law and Economics*, Dublin: Oak Tree Press, chapter 5.

¹³ O'Brien and Wickelgren caution, however, that a low critical loss cannot be regarded as definitive evidence that a wider market definition is required. D. O'Brien and A. Wickelgren, (2003): *A Critical Analysis of Critical Loss Analysis*, Washington DC, Federal Trade Commission.

¹⁴ The price for LP/LS insurance effectively included a price for ILCU services.

¹⁵ *Virgin/British Airways* case No. (T219/99) OJ 2000 L30/1; [2000] CMLR 999. The SSNIP test is the only test of market definition set out by the Competition Authority *Notice in Respect of Guidelines for Merger Analysis*, 16 December 2002.

¹⁶ High Court judgment at 131.

for impulse ice-cream products “largely on what has been described as the ‘common sense’ or ‘innate characteristics’ test” and stated: “I do not think that someone going into a confectioner’s or newsagent to buy an ice cream who finds the cabinet temporarily empty would treat their appetite as slaked by a can of coke or a bag of crisps.”¹⁷

In *Ballina Mineral Water Company v. Heineken*¹⁸ Kearns, J., who was also the judge in the ILCU High Court case, held that lager did not constitute a separate product market and was part of the wider beer market. Referring to the ECJ judgement in *United Brands* he stated: “Again, one can, I think...substitute the word ‘lager’ there for the word ‘banana’ and other beer products for other fruit products, and one arrives at a situation where on the application of that test, it seems to me that the appropriate market definition or product market is the beer market.”¹⁹

The preference shown by the Irish courts for subjective tests to define markets is highly unsatisfactory. Massey and Daly have pointed out that such tests inevitably introduce considerable uncertainty into the process, are unlikely by their nature to take all relevant variables into account, and increase the likelihood of error.²⁰ Neven et. al. have criticised the EU Commission for relying “on qualitative assertions and hunches even when more quantitative evidence could have been made available” in dominance cases.²¹ The EU Commission has correctly pointed out that the SSNIP test may be unreliable in dominance cases observing that: “It is necessary to rely on a variety of methods for checking the robustness of possible alternative market definitions.”²² Even allowing for such shortcomings, relying on intuitive tests that support a narrower market definition appears problematic. As NERA observed with regard to the Commission decision in *Virgin/British Airways*: “Any statement to the effect that SSNIP is just one example of how to define a relevant market without clearly specifying what the alternative to SSNIP

¹⁷ *Masterfoods t/a Mars v. HB Ice Cream Ltd.*, [1993] ILRM 145.

¹⁸ *Ballina Mineral Water Company v. Heineken Ireland Limited*, Kearns, J., 31.5.2002. It should be noted, however, that the plaintiff in this case put forward no expert economic evidence to support its claim that lager was the relevant product market.

¹⁹ *Competition*, Vol.11(5), p151.

²⁰ Massey and Daly above note 12.

²¹ D. Neven, R. Nuttall and P. Seabright, (1998): *The Merger Decisions of the European Commission* in L. Philips ed., *Applied Industrial Economics*, Cambridge University Press.

²² DG Competition (2005), above note 2 at 7.

might be, clearly runs the risk of a return to a process of market definition by *ad hoc* reference to product characteristics.”²³

The Supreme Court in its judgement on the ILCU appeal offered some support for this position. Delivering the Court’s judgment, Mr Justice Fennelly observed: “If it is to arise in another case, I would hope that the Authority would produce cogent factual evidence of the existence of such a product market in representation services.”²⁴ While admittedly *obiter dicta* it, nevertheless, suggests that quantitative evidence is to be favoured in respect of market definition.

(b) SPS as a Separate Market.

Although the Authority had originally claimed that SPS was part of “representation services”, at the High Court trial it contended that there were in fact two relevant markets, one for SPS services and one for credit union representation services. The report of the Authority’s expert argued that SPS constituted a separate market because a credit union that did not have SPS cover might lose business and this would probably make it willing to pay a price even ten percent above the competitive level for SPS, although no empirical evidence was cited to support this claim. Rather the Authority’s expert economist argued that “even in the absence of quantitative data, it seems reasonable to argue that both representation services and SPS may be considered distinct relevant markets.”²⁵

The High Court accepted the Authority’s revised argument that “there are two markets at work in the instant case being respectively a market for credit union representation services (excluding SPS), and the savings protection market.”²⁶

The Supreme Court noted that the existence of two separate markets had not been included in the list of issues to be decided dated 18 June 2004, although the trial commenced on June 22. “The concept of a market for SPS was first introduced in the

²³ NERA, (2001): *The Role of Market Definition in Monopoly and Dominance Inquiries*, Office of Fair Trading, Economic Discussion Paper 2, London: Office of Fair Trading., at 19

²⁴ Supreme Court judgment at 55.

²⁵ Competition Authority v. Irish League of Credit Unions Economic Effects on Competition of the Rules and Practices of the ILCU, P. Seabright, 24 May 2004, mimeo., at 2.

²⁶ High Court judgment at 131.

expert report of Professor Seabright on behalf of the Authority. That report was dated 24 May 2004 and was delivered shortly before the hearing.”²⁷

The Supreme Court found that the Authority had failed to establish that SPS constituted a distinct product and a distinct product market which it noted was essential for the Authority’s claim of abusive tying to succeed. Mr. Justice Fennelly stated: “To consider that the representation services and SPS, which has always been provided to their own members, are distinct products is counter-intuitive. In my view it is artificial.”²⁸ The judgement went on to point out that there was no evidence of an independent commercially provided SPS anywhere in the world

(c) The ‘Credit Union Representation Services’ Market.

In his evidence to the High Court, ILCU’s expert economist observed that “representation services” were not purchased through the market from firms or individuals providing such services. Instead those engaged in a particular industry or profession generally established their own representative body, whose activities were overseen by representatives of firms in the industry or profession, while employing staff to carry out day to day activities. Citing the Coasian argument that firms and markets were alternative ways of providing goods and services, he argued that the reason why groups established their own representative body and did not purchase such services through the market was attributable to the fact that transaction costs meant that it was not possible to purchase such services through the market.”²⁹

This argument was rejected by the High Court on the grounds that the proposition “if correct, would provide a wide range of activities with a shield against competition law scrutiny”.³⁰ The judge went on to state that because firms have an option to provide services on an in-house basis, and choose to do so, does not prevent the existence of a market, again citing the Commission decision in *Virgin/British Airways*.³¹

“This practice in the air transport industry creates a market in air travel agency services, which are purchased from travel agents by airlines. The fact that airlines

²⁷ Supreme Court judgment at 21.

²⁸ Id. at 51.

²⁹ R. Coase, (1937): The Nature of the Firm, *Economica*, 4, 386-405.

³⁰ High Court judgment at 108.

are increasing their efforts to perform these activities themselves, in effect to perform these services “in-house” rather than buying the services of travel agents, does not alter the fact that this is a distinct market. There are many markets where customers have the option of producing some or all of their requirements for a product themselves. This does not prevent there being a relevant market for these products, but does affect the market power of the various suppliers and purchasers.”³²

In contrast to *Virgin/British Airways*, where airlines could purchase services from travel agents or provide the same services in-house, the defence argument in ILCU was that there were no independent providers of representation services. Trade and professional associations were established by their members because this was the only way in which representation services could be provided. There was no example of a trade or professional body ‘purchasing’ representation services on an arms length basis from a separate undertaking. Those credit unions that were dissatisfied with ILCU had chosen to establish their own representative body rather than purchase ‘representation services’ from a third party. This argument was supported by evidence from an expert on the US credit union movement that there had never been any third-party providers of representation services to credit unions in the United States other than credit union leagues.

The view that credit union representation services constituted a relevant market, which was accepted by the High Court, had potentially far reaching implications. Such an interpretation would mean that arguably any trade association or representative body could be considered dominant in the provision of representation services to its members. In a presentation to the Oireachtas (Parliamentary) Public Accounts Committee, the Authority Chairman stated: “This case has implications way beyond credit unions. What the High Court decides in terms of monopolisation of representative services will be relevant to a wide range of other markets, including legal services where monopoly representation exists at the moment.”³³

³¹ Above note 16.

³² High Court judgement at 102.

³³ Committee of Public Accounts, Hearing of 22 July 2004.

While noting that it was not necessary to deal with the question of whether there was a market for credit union representation services, once it had held that there was no market for SPS services, the Supreme Court nevertheless addressed that issue stating that it found “it troubling that any and every association of business undertakings should be held, for the purposes of competition law, automatically to be engaged in a business consisting of the provision of services for reward.”³⁴ It referred to the evidence of ILCU’s economic expert that one did not find ‘suppliers of representation services generally’ which might be expected if there were a market for representation services. Instead “representative services” were “provided by representative organisations comprising their own members”. All sorts of organisations had concluded that it was not possible to buy adequate representation services in the market and there was therefore no such market. Mr. Justice Fennelly stated: “This seems to me to represent common sense observation.”³⁵

The Authority’s economic expert also claimed that credit union representation services appeared to have the characteristics of ‘two-sided’ or ‘matching’ markets, i.e. one in which the parties on either side need the help of some intermediary to identify suitable counterparties.³⁶ The fact that credit unions had established and operated their own representative body indicated that they had no need for such intermediation.

6. Dominance.

The High Court found that ILCU was dominant in both the SPS and credit union representation markets. As the Supreme Court found that neither of these constituted a relevant product market it decided that it was not necessary to deal with the issue of dominance or abuse. The High Court findings on dominance nevertheless raise a number of issues.

The defence cited evidence that ILCU had been forced to revise its pricing strategy as a result of the decision by a number of member credit unions to purchase LP/LS insurance cover other than through ECCU and argued that this was a clear indication that

³⁴ Supreme Court judgment at 53.

³⁵ *Id.* at 54.

³⁶ See, J-C. Rochet and J. Tirole, (2003): Platform Competition in Two-Sided Markets, *Journal of the European Economic Association*, 1(4): 902-1029.

it was not dominant, citing the European Court of Justice judgement in *Hoffman LaRoche*: “..the fact that an undertaking is compelled by the pressure of its competitors’ price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position”.³⁷

This argument was rejected by the High Court which ruled that: “Furthermore, one can only see the revision of its pricing policy by ILCU as a form of back-tracking on an aggressive pricing policy in the credit union representation services market which is being belatedly undertaken in an attempt to either drive out or weaken ILCU’s main rival, CUDA, from that market.”³⁸

The Authority never claimed that ILCU had engaged in predatory pricing, nor was it ever suggested that the revised pricing and funding arrangements adopted by ILCU resulted in it selling at a loss. The change in pricing policy would appear therefore to represent a response to competitive pressures. The fact that changes in pricing behaviour in response to entry should be considered as an attempt to eliminate or weaken a rival, absent any evidence of predation, is worrying.

7. Abuse of Dominance.

(a) The Need for SPS Services

Key to the Authority’s case was its claim that credit unions would not be able to compete without access to SPS and the fact that they would lose such access if they ceased to be members of ILCU deterred them from leaving ILCU and joining a rival organisation, thereby preventing competition in what the Authority described as the market for credit union representation services.

ILCU argued that the fact that a number of individual credit unions had decided to purchase LP/LS insurance other than through ECCU, knowing that this could result in their disaffiliation from ILCU indicated that the SPS did not constitute a barrier to exit. In support of this argument it cited a memo prepared for the board of one credit union which stated: “A consequence of obtaining LP/LS from other than the League appears to be

³⁷ Case C-85/76 *Hoffman LaRoche v. Commission* [1979] ECR 461.

³⁸ High Court judgment at 157

disaffiliation. ... We do not have a problem with this, and believe that in the end we would be better off all things considered.” The defence also pointed to the fact that:

- three other credit unions had notified ILCU of their intention to disaffiliate before June 2003;
- credit unions established before August 2001 were not legally obliged to operate or participate in a savings protection scheme; and
- annual accounts of three non-ILCU credit unions showed that they had operated successfully without access to the SPS for a number of years. One of these had been disaffiliated by ILCU in 1998 for breach of the LP/LS requirement.

The Authority’s economic expert argued (a) that credit unions might not have believed that ILCU would disaffiliate them, in spite of the rules; and (b) more credit unions might have left ILCU to join CUDA in the absence of a tie-in. The first argument ignores the fact that ILCU had previously disaffiliated credit unions for failing to purchase LP/LS insurance from ECCU as well as documentary evidence indicating that, at least one of the CUDA credit unions knew that a breach of this rule would result in disaffiliation. No evidence was introduced to support the hypotheses that more credit unions would have left ILCU to join CUDA if they could retain access to ILCU’s SPS.

The High Court judge nevertheless concluded: “On any view, it is extremely important for a credit union to be covered by an SPS. This requirement will clearly discourage ILCU member credit unions from leaving ILCU, thus preventing, restricting or distorting competition in the market for representation services.”³⁹

(b) The Tying Argument.

The issue of tying has been the subject of considerable debate in the economics literature. Chicago economists have been highly dismissive of the view that tying can be anti-competitive arguing that, a firm that is dominant in the market for one product can extract the full monopoly rent from that product and gains nothing from trying to leverage its dominant position into the second market.⁴⁰ A number of arguments have been developed which demonstrate that there are circumstances in which it may make

³⁹ High Court judgment at 167.

sense for a firm that is dominant in one market to use tying as a way of extending its dominant position into a related market.⁴¹

If goods are complements, i.e. they are normally consumed together, then the Chicago “one monopoly profit” argument will generally hold true. As the products are consumed together, consumers will arguably focus on the combined price of the products. Suppose a firm is dominant in the case of one good but faces competition in the market for a complementary good. Trying to force customers to buy the complementary product from it makes no sense. The only reason for doing so is so that it can charge above the competitive price for the complement. If it increases the price of the complement, this will increase the combined price, so that any increase in profits of the tied good will be offset by lower sales and profits for the tying good. Even if the goods are not perfect complements, the gains from charging a higher price for the tied good will need to offset the losses on the tying good.⁴²

An alternative explanation of tying in the case of complementary goods is that its objective is to protect existing monopoly profits on the tying good rather than to extract additional monopoly profits. There are two possible reasons for this. Rival firms in the competitive market may, as a result of participating in that market, obtain the capability to enter the tying good market. Tying to foreclose the competitive market, may represent a way of preventing this. Alternatively the incumbent firm may face potential entrants in both markets, in which case tying may be designed to force competitors to enter both markets simultaneously, thus reducing the likelihood of successful entry. The Authority argued, and the judge accepted, that it would not be possible for alternative providers of credit union representation services to provide SPS services as it would require a very large number, possibly several hundred credit unions to participate in such an arrangement.⁴³ If entry to the SPS market was not possible then neither of these anti-

⁴⁰ See, for example, R. Posner, *Antitrust Law: An Economics Perspective*, University of Chicago Press, Chicago, 1976.

⁴¹ On this point see, for example, M. Whinston, “Tying, Foreclosure and Exclusion”, (1990) 80 *American Economic Review*, 4: 837.

⁴² Department of Trade and Industry, *Bundling, Tying, and Portfolio Effects*, DTI Economics Paper No. 1, Department of Trade and Industry, London, 2003.

⁴³ A US credit union expert retained by ILCU stated that even a relatively small number of credit unions could establish an SPS. As it was not a deposit insurance scheme, the requirement to have a large number of participants in order to ensure sufficient diversity of risk, as argued by witnesses for the Authority, did not arise. Had the Authority argued that entry was possible in the SPS market, it would have undermined its

competitive theories of tying would apply.

In the case of independent goods there is arguably less incentive to impose a tie. A firm that was dominant in one market could, nevertheless impose a tie in order to try and drive rivals out of another market by committing itself to a more aggressive pricing policy in that market. Such behaviour might enable the firm to discourage entry or induce exit, allowing it to gain market power in the second market. As the Authority's own expert pointed out, however, this can only be profitable if it succeeds in forcing a rival out of the second market, or sufficiently weakening it so that it is no longer a serious competitor. If it does not effectively eliminate competition, tying in these circumstances increases the intensity of price competition, benefiting consumers, at the expense of the firms.

An obvious difficulty in the ILCU case was that the tie had not eliminated competition, although it is recognised that this is not essential to establish that tying is abusive. In fact a rival credit union representative body had been established. The Authority's economist argued, however, that there "is a high probability that without access to the SPS, CUDA will be unable to continue as a significant competitor in the credit union representation services market."⁴⁴ The judge accepted this argument and concluded: "I conclude that it is incontestable in the present case that ILCU's conduct may in time foreclose the market, but already it certainly distorts and weakens it."⁴⁵

Gorecki argues that an economics based approach is superior to a form based approach in abuse of dominance cases.⁴⁶ Salinger observes that an economics based approach to abuse of dominance cases involves setting out a theory of anti-competitive behaviour in model form as this requires a rigorous analysis of why (a) a practice is profitable and (ii) why it is harmful.⁴⁷ The economic foundations of the Authority's tying claim appear to have been somewhat tenuous. Given that the competitive effects of tying are ambiguous,

claim that loss of access to ILCU's SPS was a barrier to credit unions leaving ILCU and joining another representative body and thus prevented entry of new credit union representative bodies. The Authority argued that SPS and representation services were independent goods rather than complements.

⁴⁴ High Court judgment at 133.

⁴⁵ High Court judgment at 159.

⁴⁶ P. Gorecki, "Form Versus Effects-Based Approaches to the Abuse of a Dominant Position: The Case of Ticketmaster Ireland", (2006), 2 *Journal of Competition Law & Economics* 3, 533.

⁴⁷ M. Salinger, (2005): Can Economics Bridge the Atlantic? Monopolization Under Section 2, Dominance Under Article 82 and Fouls in Football, Federal Trade Commission, *mimeo*.

the obvious question is whether there was sufficient evidence to enable the court to distinguish between pro- and anti-competitive behaviour in this specific case. At the very least one might ask whether the finding that ILCU's conduct "may in time foreclose the market" is sufficient to find the "tying arrangements" anti-competitive.

(c) Refusal to Supply.

ILCU had argued that, in seeking to have the Court order that ILCU should grant non-member credit unions access to the SPS, the Authority was effectively arguing that the SPS was an essential facility. It argued that the criteria set by the European Court of Justice in *Oscar Bronner* were not satisfied in this case.⁴⁸ The judge found that the SPS was not an essential facility noting that "while access to the SPS is extremely important and desirable, I do not think it can ultimately be described as essential, at least not in the sense in which that word is used when describing certain infrastructural services without which a competitor simply cannot function".⁴⁹ He then referred a number of factors in support of this point:

1. Credit unions in Northern Ireland operated without savings protection or deposit guarantee insurance.
2. CUDA credit unions had continued to grow their turnover from the time of their disaffiliation from ILCU without SPS, albeit, they claimed, at a significant disadvantage.
3. A number of large credit unions had elected to "go it alone" without savings protection.

He concluded therefore:

"For these reasons, I do not see that having access to a savings protection scheme is absolutely indispensable in the short term to the provision by a representative body of credit union representation services. Such a body may function for a time without it, just as a householder may elect to forego house insurance, or an employer may forego accident cover for employees."⁵⁰

⁴⁸ Case c-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG*, [1998] ECR I-1799.

⁴⁹ High Court judgment at 152.

⁵⁰ High Court judgment at 153.

Both case law and economic theory recognise that the fact that it may be difficult for rival firms to operate in a market without access to a particular facility owned by a dominant incumbent does not mean that such a facility constitutes an essential facility.⁵¹ The conclusion that SPS did not constitute an essential facility because there was evidence of credit unions operating without SPS in Northern Ireland and to a lesser extent in the Republic of Ireland sits somewhat uneasily with the High Court’s findings that the need for SPS cover would discourage credit unions from leaving ILCU and joining a rival body.

(d) Consumer Harm.

Most economists would take the view that behaviour should not be considered anti-competitive in the absence of evidence of harm to consumers. As Vickers put it:

“In the limit, the idea that there could be harms to the competitive process, justifying competition policy intervention, that are not even capable of harming consumers is unattractive. Competition to serve the needs of the general public of consumers – not some abstract notion of competition for its own sake – is the point of competition policy.”⁵²

Similarly Gorecki observed: “Allegations of abuse should be addressed by asking: are consumers harmed by the conduct of the dominant firm?”⁵³ This point is also recognised in DG Competition’s consultation paper on Article 82. “For a refusal to supply to be abusive, it must, however, have a likely anticompetitive effect on the market which is detrimental to consumer welfare.”⁵⁴

Evidence of consumer harm is arguably all the more necessary when allegations of anti-competitive behaviour are advanced by rivals of the supposedly dominant firm.

The Competition Authority argued that the exclusion of rival providers of credit union representation services resulted in higher prices for credit union representation services to the detriment of credit unions and ultimately their members. The Authority provided no

⁵¹ This was recognised by the European Court of Justice in *Oscar Bronner*, for example. For a discussion on the economics of the essential facilities doctrine see, for example, P. Areeda, “Essential Facilities: An Epithet in Need of Limiting Principles”, (1989), 58 *Antitrust Law Journal*, 3 841 and G. Werden, “The Law and Economics of the Essential Facility Doctrine”, (1987), 32 *Saint Louis University Law Journal*, 2 433.

⁵² Above note 2 at 259.

⁵³ Above note 46 at 533.

evidence to support this allegation of consumer harm. The defence pointed out that the majority of credit unions paid higher rates of interest on savings than the banks and argued that this suggested that ILCU did not operate to the detriment of consumers.⁵⁵

Perhaps the most significant aspect of the Supreme Court judgment lies in its ruling that consumer welfare is the sole objective of competition law.

“The entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose. Competition law, as is often said, is about protecting competition, not competitors, even if it is competitors who most frequently invoke it.”⁵⁶

(e) Other Issues.

The High Court had ordered ILCU to supply SPS services to credit unions regardless of whether or not they were ILCU members. This raises an obvious question. Would ILCU have established an SPS if it had anticipated that it would be compelled to allow non members to participate or would it have decided that this was a public good that should be provided by the State? In other words, the finding that refusal to provide SPS services to non-members amounted to an abuse of a dominant position, is based on an *ex post* evaluation when arguably the correct approach is to consider the position *ex ante* and ask whether such a requirement might remove the incentive to establish such a scheme at all.

9. Procedural Issues.

The Supreme Court judgment referred to the roles of the courts and the Competition Authority in the application of competition law in Ireland, noting that in contrast to the EU and most other Member States, in Ireland the issue of deciding breaches of competition law is a matter for the courts. Referring to the role of the Authority, the Supreme Court stated: “The Authority has not made any decision other than to institute

⁵⁴ Above at note 2.

⁵⁵ Average interest rates paid to households by Irish financial institutions other than credit unions were around 2% during 2003. According to ILCU Annual Report 2003, 50% of credit unions paid members a dividend of 3-3.99% on their savings while a further 15% paid members dividends of 4-4.99% and 1.5% paid 5-5.99%.

proceedings. It identifies market conduct and invites the Court to condemn it. There is no *prima facie* legal presumption in favour of the Authority's view. The Authority carries the normal civil burden of proof."⁵⁷ Irish courts normally adopt a degree of judicial deference to a regulatory body with decision making powers in respect of an appeal or judicial review of a decision. The Court judgment establishes that such deference should not apply when the Authority brings proceedings alleging an infringement of competition law.

The High Court judge adopted an active role in the management of the case from an early stage. In particular he directed the parties to prepare a summary of issues agreed between them and a memorandum of issues agreed and in dispute. This seems to have been prompted by concerns that a number of competition cases involving private litigants that had previously come before the Irish courts proved to be extremely long drawn out affairs.

An interesting development, at least in an Irish legal context, was the decision by the judge to appoint an economist to advise on the merits of the economic evidence.⁵⁸ The relative novelty of this approach meant that the role of the Court's economist was somewhat unclear. The judge indicated that the economist would assist him by explaining the economic evidence and that, if his decision was in conflict with the views of the economic assessor, the judge would inform the parties and ask for submissions on the views of the assessor. As it transpired this did not arise. A further complication arose because of the fact that the judge announced his decision to appoint an economist to assist him after both sides' economic experts had completed giving their testimony. Consequently the assessor was confined to reviewing the written reports and transcripts of the oral evidence presented by the two experts. In particular, as he was not present while they were giving their evidence, he could not suggest possible questions which the judge might have addressed to them.

The issues of case management and the appointment of independent court experts are both issues that have been addressed at some length in new procedures which have been

⁵⁶ Supreme Court judgment at 38. Article 81 of course allows of efficiency gains arguments, hence in principle it is concerned with efficiency as well as consumer welfare considerations

⁵⁷ Supreme Court judgement at 38.

drawn up for the hearing of competition cases since the ILCU case.⁵⁹ The new rules provide that the Judge in charge of the High Court Competition List can direct that any expert witnesses in a case consult with each other to:

- identify the issues in respect of which they intend to give evidence;
- reach agreement, where possible, on the evidence they intend to give in respect of these issues; and
- provide a memo to the Judge and to the parties detailing the outcome of their consultations.⁶⁰

The rules also provide that the proceedings be subject to a ‘case management conference’. This conference will be chaired and regulated by the Judge and must be attended by solicitors for each party.⁶¹ The moving party must prepare a case booklet to be lodged and served on the other party not later than four clear days before the case management conference.⁶² The Court can appoint an expert to advise the Court. Where it considers it appropriate in the interests of justice, parties will be informed of such advice or information and will be allowed an opportunity to make submissions on it.⁶³ A party intending to introduce oral evidence must serve on the other side a written statement outlining the essential elements of the evidence, signed and dated by the expert witness. This statement may, in exceptional circumstances, be treated as the evidence in chief of the witness.⁶⁴

These rules should address some of the procedural issues that arose during the ILCU case. They clarify the role of expert witnesses and of independent experts appointed to advise the Court. The provisions regarding exchanges between experts should avoid the situation where one party significantly alters its case at the last minute as the Authority had done in ILCU.

10. Conclusions.

⁵⁸ The use of court appointed assessors in competition cases was recommended in *The Final Report of the Competition and Merger Review Group*, Dublin: Stationery Office, March 2000.

⁵⁹ *Rules of the Superior Courts (Competition Proceedings)*, 2005, SI 130/2005, Dublin: Stationery Office.

⁶⁰ Id. Rule 6(1)(ix).

⁶¹ Id. Rule 13(1).

⁶² Id. Rule 13 (9)-(10).

⁶³ Id. Rule 23.

⁶⁴ Id. Rule 27.

The ILCU case was significant in a number of respects. It was the first abuse of dominance case brought by the Competition Authority and the first Irish competition case since the introduction of Regulation/1/2003. Since the case was heard, new rules have been introduced governing the hearing of competition cases which should facilitate the trial of such cases in the future.

The Supreme Court overturned the High Court judgement on the grounds that there was no evidence to support the Authority's contention that SPS constituted a distinct product and that there was a market for the provision of SPS services. The Court also set out its views *orbiter dicta* on the Authority's claim that credit union representation services constituted a distinct product market. Had such a finding been upheld it would arguably have had profound implications for all sorts of trade and professional associations. Most important of all the Supreme Court has stated that consumer welfare is the sole objective of competition law.

A disturbing aspect of the High Court judgement, from an economics perspective, is its continuation of the trend by the Irish judiciary to reject quantitative evidence in favour of subjective tests in respect of the key issue of market definition. The EU Commission decision in *Virgin/British Airways* unfortunately provides support for such an approach. The Supreme Court, however, appeared to suggest that quantitative evidence was to be preferred to intuitive approaches to market definition.

Other aspects of the High Court judgement are also somewhat unsatisfactory, particularly as these were not addressed by the Supreme Court. There was evidence that ILCU was forced to amend its pricing policies, which is inconsistent with the finding that it had a dominant position. Equally, while economic theories suggest that for tying to be anti-competitive it must eliminate or seriously weaken competitors, the evidence in this instance was that a new entrant had managed to recruit some of the largest credit unions in the State. The High Court judgment illustrates the problems involved in asking national courts to decide on complex economic issues which has implications for the adoption of a more economics based approach to applying Article 82.

The case ultimately argued by the Authority only emerged rather late in the day and was rather different from that on which it had initially decided to bring proceedings. This raises questions about the initial decision to bring proceedings and, in particular, the

economic theory that underlay that decision. The Supreme Court clearly indicated its unease at the repeated shifts in the Authority's position.

“It is not altogether surprising that the Authority had failed to provide a convincing analysis of ILCU's activities as being anti-competitive. The history shows that it has changed its position in relation to ILCU on several occasions. It was permitted finally to change its stance from that advanced in the statement of claim only because Mr Collins decided not to object, believing that this radical change of position demonstrated the lack of credibility in the Authority's case. It certainly seems to me to undermine confidence in the Authority's consistency.”⁶⁵

Massey and Daly have criticised the Authority's record on enforcement.⁶⁶ The Authority has stated that it only has the capacity to complete one criminal cartel investigation and bring a handful of civil actions in any one year with its existing resources.⁶⁷ In six and a half years up to the end of 2002, the Authority received 404 complaints alleging an abuse of dominance.⁶⁸ Assuming that one third of these complaints were supported by reasonable evidence leaves 141 cases.⁶⁹ Prior to the ILCU case, the Authority had issued proceedings in only two such cases, neither of which went to a full hearing. The complainant CUDA included among its members some of the largest credit unions in the State. The Supreme Court stated that the Authority “appeared to stand in the shoes of potential complainant credit unions”.⁷⁰ Given that the Authority can only bring a limited number of actions, one might ask why it felt it necessary to bring proceedings in a case where the complainants would appear to have been quite capable of bringing a private action.

⁶⁵ Supreme Court judgment at 52.

⁶⁶ Above note 12.

⁶⁷ Competition Authority *Annual Report 2003*. The Authority has indicated that abuse of dominance cases are likely to be dealt with by means of civil proceedings.

⁶⁸ The Authority's 2003 Annual Report did not disclose the number of dominance complaints received in that year, the first time such figures were not included.

⁶⁹ The Authority's 2001 Annual Report indicated that there were reasonable grounds to support around one third of abuse of dominance complaints received that year. This is the only year for which the Authority has published such information. Obviously there is no way of knowing whether the results for 2001 are representative of complaints received over the entire 1996-2002 period.

⁷⁰ Supreme Court judgment at 33.