



The Competition Authority and Double Bay Enterprises Ltd t/a Brazil Body Sportswear (the Fitflop case)

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The Competition Authority and Double Bay Enterprises Ltd t/a Brazil Body Sportswear *(the Fitflop case)*

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Sinead Eaton*

Introduction

Ireland's first commitment agreement to be ruled by the High Court was ruled on December 18, 2012. The possibility of having it ruled by the High Court arose by virtue of s.14B of the Competition Act 2002 (the "Principal Act"), as inserted by s.5 of the Competition (Amendment) Act 2012 (the "2012 Act").

The commitment agreement is essentially a "settlement agreement" entered into between an undertaking which has been investigated for a competition law breach and the enforcement agency, the Competition Authority (the "Authority").

Commitment, or settlement, agreements had been entered into previously between the Authority and undertakings; however, the statutory basis for those was not clear and was based on a very broad interpretation of the Authority's statutory functions.¹

Ireland's Competition Acts

The Principal Act incorporates the two substantive competition law rules and provides for penalties for breaches of competition law. The 2012 Act increases those penalties.

The 2012 Act also adds to the armoury of the Authority. The new enforcement mechanism is a court-endorsed commitment agreement, whereby the Authority can apply to the High Court to have commitments entered into by undertakings made an order of court. This pragmatic enforcement tool would reduce time and costs where co-operation and commitments were forthcoming from an undertaking.

Typically the mechanism might be used where, on foot of a complaint to the Authority, it would investigate the conduct of certain undertaking(s). Section 14B allows the Authority offer to the undertaking(s) that it will not initiate proceedings if certain commitments are made by the undertaking(s). In that way the undertaking(s) can alter the **commercial conduct at issue** and avoid having findings made against it/them.

Comment [U1]: "commercial conduct in question"?

An equivalent mechanism is provided for in art.9 of Regulation 1/2003² where the EU authority, the Commission, is the agency enforcing competition law.

The legal basis

Section 14B provides an express statutory basis for closing an investigation in exchange for commitments from an undertaking under investigation. Section 14B also allows the Authority

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¹ Martyniszyn and Hinds, *e-Competitions*, April 1, 2013, p.1.

² Regulation 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

apply to the High Court for an order on the terms of the commitment agreement. Failure to comply with the order then constitutes contempt of court.

What facts gave rise to the case?

Double Bay Enterprises Ltd, trading as Brazil Body Sportswear (BBS), was the exclusive distributor in Northern Ireland and in Ireland of footwear sold as “*Fitflops*”. The company supplied various retailers in both jurisdictions. BBS’s contractual terms with its retailers included a prohibition on mail order and internet sales without BBS’s consent. The terms also curtailed the customers to whom the footwear could be sold by the retailers and the territory in which the retailers could sell the footwear.

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These provisions may remind the reader of the facts of *Consten & Grundig v Commission*³ from which the concept of absolute territorial protection became known to European lawyers.

Comment [U2]: Text of fn.3 - please check E.C.R. citation - should it be [1966] E.C.R. 429?

On the operational side, and as a matter of practice, there was evidence that BBS operated, monitored and enforced a resale price maintenance policy.

The Authority received complaints from retailers about these practices and the Authority decided to investigate the allegations of breaches of Irish and European competition law.

In the course of its investigation, the Authority obtained evidence which satisfied it that BBS had policed retailers’ compliance with the various restrictive BBS contractual terms. Email correspondence satisfied the Authority that BBS had also made many attempts to enforce resale price maintenance by requiring retail prices to be increased to set levels, controlling when retailers put the footwear on sale and at what discount, and having retailers inform it of another retailer’s discounting.

The Authority offered BBS the opportunity to avoid enforcement proceedings by entering into an agreement with it to cease operating the restrictions and to have the commitments in that agreement made an order of the High Court. BBS elected not to present any justifications or defences that may have been available to it and agreed to that resolution mechanism.

The agreement contains the commitments sought by the Authority and, in return, it agreed not to bring court proceedings against the undertaking under s.14A of the Principal Act, as inserted by s.4 of the 2012 Act.

Indiscriminate availability

On the one hand, the 2012 Act increases penalties for breaches of competition law but on the other, the 2012 Act allows that commitment agreements be ruled by the court where an investigation has been carried out by the competent authority, and in consideration for the competent authority not bringing proceedings, the undertaking agrees to alter its modus operandi.

There is no limitation to the effect that this is not available where “hardcore” offences are involved. Might it suggest to a business person that the commercial course of action would be

³ Cases 56/64 and 58/64 *Consten & Grundig v Commission* [1969] E.C.R. 299.

to carry on, “confess” if necessary and commit by agreement if that became the pragmatic option?

The Heating Oil cartel in the west of Ireland was estimated to have resulted in illegal profits, in one year only, of €4.4m in the Galway region alone.⁴ The oil companies had domestic and business customers and the author is not convinced that this mechanism should be available were similar circumstances and amounts to arise again in any sector.

Private enforcement of competition law

The Principal Act included, in s.14, a cause of action for the private enforcement of competition law. It provided any person aggrieved by a breach of competition law with a right of action against any participating undertaking or any director, manager or other officer of such undertaking. Relief by way of damages, including exemplary damages, injunction or declaration is provided for within s.14.

The 2012 Act does not comment on the effect a court-ruled commitment agreement is to have on the private right of action and there appears to be no obstacle to a private right to damages in respect of past damage suffered. However, s.8 of the 2012 Act sought to render the evidentiary burden of the private action less onerous by providing:

“Where, in proceedings under Part 2 of the Principal Act, a court finds, as part of a final decision in relation to the matters to which those proceedings relate, that an undertaking contravened section 4 or 5 of that Act, or Article 101 or 102 of the TFEU, then, for the purposes of any subsequent proceedings (other than proceedings for an offence) under that Part, the finding shall be *res judicata*”

Where a commitment agreement is entered into by an undertaking and ruled by a court pursuant to s.14B, that section will not apply. So the evidentiary burden for a private action would remain a heavy one. However, the optics of the situation will be a matter of concern for the undertaking, its directors, managers and other officers, where the scale of operations and value of the market are high.

Conclusion

While the court-ruled commitment agreement has an immediate appeal for those in favour of the enforcement of competition law, the messages of the 2012 Act are somewhat mixed.

⁴ *Connaught Tribune*, Friday, June 8, 2012.