

Competition Rule Changes in 2010

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E X P E C T E X C E L L E N C E

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1. If the world was ruled by economics alone, there would be no need for competition law in its various forms. Unrestricted free trade would happen “sua sponte”.
2. But we do not live in such a world. Rather we live in an imperfect world driven by political and commercial interests which often do not have consumer welfare as a principal focus. Hence the need for competition laws which apply to states and economic operators or undertakings.
3. This speech is about the EU and Irish competition rules applicable to undertakings as distinct from EU competition rules applicable to Member States of the EU such as State aid rules and public procurement rules.
4. More specifically this speech is about likely changes in the interpretation and application of Article 81(1) of the EC Treaty prohibiting agreements between undertakings which appreciably restrict competition and have a likely effect on trade between Member States of the EU unless the so-called efficiency conditions in Article 81(3) can be satisfied.
5. I will discuss the possible implications of some of the likely changes which are currently envisaged at the EU level but more generally I examine the scope of what I believe are necessary changes in approach from the European Commission (“the Commission”) and the Competition Authority on the question of the assistance that could be offered to undertakings to facilitate a more informed self assessment of compatibility of arrangements with Article 81 (3) in specific individual difficult cases.
6. As set out in its Article 81 (3) guidelines, the objective of Article 81 is to protect competition¹ as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.² In this speech, I will address, among other things, how some of the proposed changes at the EU level, though well meaning, might not in practice achieve this ultimate goal.
7. I will consider more specifically some selected parts of the Commission’s draft block exemption regulation on vertical restraints and draft vertical guidelines especially in the area of restrictions to on-line selling in vertical agreements.
8. Firstly, however I want to make some general comments on the approach of the Commission in analysing both vertical and horizontal agreements for compatibility with Article 81(1) and Article 81(3).
9. The likely changes for the analysis of vertical agreements arise out of a back drop of changes in the market in the last ten years and changes in the analytical framework in applying Article 81, as a whole, brought about by the introduction in May 2004 of Regulation 1/2003, termed modernisation³ which I sometimes refer to as “Vatican II for competition law”.
10. When the existing vertical restraints regulation was first introduced, almost ten years ago, the Commission still had exclusive jurisdiction to apply Article 81(3). Undertakings could notify arrangements to the Commission to seek an individual exemption under Article 81(3) from the

¹ The Irish Supreme Court went further in ILCU case Competition Authority v O’Regan & Ors in its judgement of 8 May 2007 where Fennelly J stated at paragraph 106 of the judgement that “the entire aim and object of competition law is consumer welfare”.

² Commission Communication - Guidelines on the application of Article 81(3) of the Treaty [Official Journal No C 101, 27.04.2004].

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [Official Journal No. L 1, 4.1.2003].

prohibition in Article 81(1); national courts and national competition authorities could not apply Article 81(3).

11. Modernisation gave national courts and national competition authorities the right and obligation to apply Article 81(1) and Article 81(3). The system of notification to the Commission, which applied for nearly half a century previously, was abolished.
12. There is now an effects based approach to the application of Article 81. The emphasis is now on likely economic effects of certain practices in the market in order to “self-assess” whether a given agreement falls foul of Article 81(1) and if so whether the four conditions of Article 81(3) are satisfied, so as to exempt an agreement which would otherwise be illegal and unenforceable.
13. In theory, this reduces the number of agreements which can potentially fall under Article 81(1) (with the exception of agreements which restrict competition by object) as such requires the demonstration of actual or likely appreciable anti-competitive effects.
14. It is claimed that modernisation has led to greater legal certainty, now that undertakings can self-assess whether their arrangements fall inside or outside of Article 81(1), and if they fall within, whether the cumulative efficiency conditions in Article 81(3) are satisfied.
15. Indeed the Commission is of the view that undertakings are generally well placed to assess the legality of their actions and to take informed decisions on whether to go ahead with an agreement or practice and in what form, as they are closest to the facts. They also have, at their disposal, the framework of block exemption regulations, case law, case practice and extensive guidance in Commission guidelines and notices.⁴
16. Despite what the Commission says it is often difficult for undertakings to make an informed judgement call and in difficult cases the costs of engaging legal and economic advisors to carry out the necessary self assessment may be prohibitive, particularly in the current economic climate.
17. Sometimes carrying out a self assessment seems like a game of “Russian Roulette”. Most times there are no consequences but sometimes you end up taking a bullet. In the absence of an appropriate and cost efficient forum for testing the enforceability and legality of proposed agreements prior to their implementation undertakings are faced with the choice of: (i) proceeding in the knowledge that their agreement might be subsequently challenged by a competition authority or a private party; (ii) deciding not to proceed because either a self assessment reveals that there is a risk of infringement with little chance of demonstrating that all the conditions of Article 81(3) could be established or the self assessment is not sufficiently definitive; (iii) avoid the transaction because the process is too costly in the first place.
18. In order to aid self assessment of Article 81(3) the Commission introduced its Article 81(3) guidelines and is making further efforts in the draft vertical guidelines to set out hypothetical examples of when an arrangement may or may not satisfy 81(3). These developments are to be welcomed.
19. It is also expected that the current consultation process on the Commission’s existing horizontal guidelines (introduced before modernisation) will lead to an improved analytical framework on what types of agreement can benefit from an exemption under Article 81(3); albeit I would like to see this conclude with more worked through positive hypothetical examples for difficult cases.
20. Despite these undoubtedly helpful anticipated changes, I believe that the Commission could and should go further with true fact real world examples, particularly at a time when there is great global

⁴ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [Official Journal No C 101, 27.04.2004]

uncertainty and perhaps a pent-up desire for certain forms of co-operation between undertakings, including co-operation between competitors which may not have been envisaged in previous published decisions or guidelines.

21. The Commission has the power to take, what I would term, positive decisions under Article 10 of Regulation 1/2003, but has of yet failed to do so. The Commission also has the power to issue guidance letters to undertakings relating to novel questions concerning Article 81 and Article 82 that arise in individual cases but it does not appear to have utilised this either (according to the Commission's notice on this area guidance letters must be published on its website).
22. I believe, with other commentators, that the criteria for the Commission to accept a request for a guidance letter are too burdensome and ought to be relaxed.
23. Under Irish competition law, the Competition Authority, to its credit, has decided to publish what it terms "enforcement decisions". These enforcement decisions, often maligned and criticised, are helpful in practice as they have gone beyond the hypothetical by drawing on real facts to demonstrate how the Competition Authority analyse and apply Section 4 of the Competition Act 2002, (the equivalent of Article 81 EC).
24. According to its website, the Competition Authority intends the publication of enforcement decisions to increase transparency and predictability in the enforcement of the 2002 Act in order to achieve greater legal certainty and reduce compliance costs for undertakings.
25. In relation to vertical agreements, the Competition Authority in 2005 published a detailed decision concerning alleged excessive booking fees by Ticketmaster and its exclusive contractual relations with MCD Promotion and Aiken Promotions Limited. In August 2009 the Competition Authority published a notice on pay-tv exclusivity. Most recently, the Competition Authority published its notice in respect of collective action in the community pharmacy sector on 23 September 2009⁵. Previously the Competition Authority published enforcement decisions in relation to the Irish Times and the Irish Independent on alleged resale price maintenance. Notably, in the Ticketmaster and pay-tv cases the Competition Authority assessed efficiencies under Section 4(1) and not under Section 4(5), (the equivalent of Article 81(3) EC).
26. These enforcement decisions, though not legally binding on any party, clearly demonstrate an effects based approach in that they clarify how some agreements which might initially appear anti-competitive may not lead to consumer harm on a thorough analysis of the facts.
27. That said, the enforcement decisions so far fall short of the Competition Authority arriving at "decisions" in individual cases which demonstrate that despite an arrangement falling under Section 4(1) it nevertheless satisfied the conditions of Section 4(5).
28. The Competition Authority has utilised its powers, under the Competition Act 2002, to adopt a declaration on the vertical agreements deemed to comply with the conditions in Section 4(5).
29. This declaration is virtually identical to the Commission's vertical restraints block exemption regulation and has the same effect. No individual analysis or self assessment of each of the conditions of Section 4(5) is necessary for agreements falling within its terms, and a defendant can rely on an agreement coming within the declaration as a defence in Court proceedings.
30. The Competition Authority's declaration expires at the same time as the Commission's vertical restraints block exemption regulation. Presumably the Competition Authority will adopt a new

⁵ Competition Authority Notice N/09/001. This note provides guidance on the application of competition law to collective action by community pharmacy contractors, and other relevant professionals, when engaging with the Health Services Executive. The guidance clarifies the limits competition law places on co-ordinated action by self-employed health professionals in relation to major competitive areas such as fees.

declaration identical to the regulation the Commission will ultimately adopt, but this remains to be seen, particularly with regard the approach to restrictions of online retailing commented on below.

31. Turning back to Article 81 (3) for the moment. The Commission has, through its Article 81(3) guidelines, set out what it considers the proper analysis and tests for the application of the provision; it sets a high standard for the satisfaction of each of the conditions.
32. Naturally, the Commission's emphasis is on compliance with the prohibition in Article 81(1) and its analytical framework for assessment of Article 81(3) favours the interests of consumers. Furthermore, under Regulation 1/2003, it is for the plaintiff to show that Article 81(1) is breached after which the onus of proof is on the defendant to demonstrate that the efficiency conditions in Article 81(3) are satisfied.
33. The question arises, post modernisation, as to whether the Commission and competition authorities of the Member States have any residual obligation to take more than their current passive role in assisting undertakings in an assessment of the conditions of Article 81(3) (in a case that falls outside the safe harbour provided for in the block exemption regulation and assistance provided in general guidance notices).
34. The Commission and the competition authorities of the Member States would likely answer this in the negative pointing to the provisions of Regulation 1/2003, but others including myself, are of the view that, while modernisation has changed the means of applying Article 81(3) the fundamental right of the defence, as set out in the EC Treaty, has not changed. In my view, the Commission, national competition authorities and national courts should not engage in any practice that would deny the practical effectiveness of Article 81(3)⁶. Just as Article 81(3) post modernisation has direct applicability it also has direct effect in that it embodies a right which undertakings are entitled to rely on directly in national courts.
35. One set of commentators⁷ is of the view, which I share, that the framework of analysis of Article 81(3), advocated by the Commission in its guidelines, goes significantly beyond the requirements the Commission has imposed on itself in the past. These commentators go on to say that the Commission's past exemption decisions contain hardly any quantification of the benefits under Article 81(3), let alone an elaborate discussion of the magnitude of the identified efficiencies and the reasons why they benefited consumers.
36. It is of course reasonable that the Commission seeks to ensure that the application of Article 81(3) meets higher and clearer standards than it has applied in the past as the old approach under Article 81(3) might have resulted in under enforcement of Article 81 as a whole or, so termed, "type 2 errors".
37. However, this should not imply the raising of the evidentiary threshold under Article 81(3) to the extent that it is often doubtful whether there is a realistic possibility for undertakings to demonstrate that its conditions are met.
38. There is concern for legal certainty and for whether the practical effectiveness of the constitutional right of defence in Article 81(3), set out in the original Treaty and substantively unchanged by any amending Treaty since, is seriously undermined or even eliminated by virtue of the high standards recommended by the Commission for satisfaction of the conditions in Article 81(3) and by the lack of specific Commission precedent decisions positively applying Article 81(3) post modernisation.

⁶ This concern seems to have been picked up by Advocate General Trstenjak in her opinion earlier this year in the long-running case regarding Glaxo Smith Kline's ("GSK's") sales conditions for Spanish retailers, recommending that the European Court of Justice ("ECJ") uphold the findings of the Court of First Instance ("CFI") that the Commission should re-examine whether the requirements for exemption pursuant to Article 81(3) were fulfilled. The Advocate General agreed with the CFI that the Commission's dismissal of GSK's arguments for an exemption under Article 81(3) was defective in its reasoning because it did not fully address GSK's detailed evidence.

⁷ Lugard P. & Hancher L., "Honey, I Shrank the Article! A critical assessment of the Commission's notice on Article 81(3) of the EC Treaty" 2004 ECLR.

39. As an exception it follows that Article 81(3) should be narrowly construed and the Commission has been careful in its Article 81(3) guidelines to state that in principle any restrictive agreement can benefit from Article 81(3) but that some serious infringements of Article 81(1) such as price fixing and market sharing among competitors are highly unlikely to satisfy it.
40. That is understandable, but a recent report published by the European Commission on the application of Article 81(3) in national courts since modernisation has revealed that in almost no case has the defendant successfully relied upon a defence under the provision.
41. Of course every case depends upon its facts but the findings of the report are consistent with my concern that the right of defence under Article 81(3) may have been eroded by Regulation 1/2003 and the publication of the Commission's Article 81(3) guidelines. The legitimate principal aim of better and consistent EU-wide enforcement of Article 81 has clearly been achieved through modernisation, but in my view, at the possible expense of the right of defence under Article 81(3).
42. Often it is hard to sort the malign from the benign, and the cost of carrying out the necessary analysis can sometimes be prohibitive for undertakings, leading to what is referred to in US competition literature as "type 1 errors" of false positives.
43. In other words, concerns about legality and enforceability of certain agreements and the lack of a suitable form to test these concerns prior to implementation, leads some firms to decide not to proceed with an arrangement even though the economic benefits might very well outweigh any harm to competition.
44. There may also be a negative effect on consumer welfare from such inaction, as consumers might lose the benefits of new or improved products or services and the benefits which flow from efficiencies.
45. On the enforcement side of modernisation, the Commission has recently estimated⁸ that the cost to consumers of unlawful cartels between 2005 and 2007 was at least €7.6 billion. However, we do not know how many billions in cost savings due to efficiencies and potential sales of new and innovative products have been lost by undertakings deciding not to adopt a particular course of action because of uncertainty of the enforceability of their anticipated arrangements.
46. In the current climate of stagnation with focus firmly on cost saving and despite the new regime change post modernisation, I believe, it is both insufficient and inefficient for the Commission to load the burden in difficult cases completely on economic operators to assess whether their envisaged arrangements satisfy the conditions of Article 81(3).
47. I am not advocating a return to the notification system; that ship has sailed. I am advocating the use by the Commission of its powers under Regulation 1/2003 to take positive Article 10 decisions based on an assessment of real facts in the real economy so that we all can see how it interprets its own guidelines in the real and imperfect world in which we live. An open engagement with undertakings who seek informal guidance would also be helpful and could be facilitated by a relaxing of the Commission's criteria in this area.
48. The same applies to the Irish Competition Authority. Admittedly, it does not have the same powers under Irish law as the Commission has under Regulation 1/2003 and it has finite resources which it must employ as it sees fit as mandated under the Competition Act 2002.
49. However, there is nothing under Irish law or Regulation 1/2003 which prevents the Competition Authority from having a form of meaningful informal engagement with undertakings on the question of whether a given set of arrangements, though raising concerns about infringing Section 4(1)/Article 81(1), might nevertheless satisfy the conditions of Section 4(5)/Article 81(3).

⁸ See, Commission Report on Competition Policy 2008, COM(2009) 374, 23.7.2009 and Press Release IP/09/1241, 19.8.2009.

50. Naturally, as the Competition Authority's principal mandate is enforcement of EU and Irish competition law, it might take the view that it is in its remit to assist undertakings in assessing whether their arrangements might benefit from an exemption and that any change in its approach in this issue would be wasteful of its resources.
51. This is a fair argument under normal circumstances but we are now experiencing some of the most extraordinary economic conditions ever faced by the State and economic operators in the State.
52. Given that the Competition Authority is a well run organization, staffed by legal and economic experts, is it too much to ask that in the current climate it change its approach and divert some of its resources to assisting economic operators in Ireland to assess their proposed arrangements for compatibility with Section 4(5)/Article 81(3).
53. Further, if there is a concern that such engagement might undermine the Competition Authority's enforcement role, then any such 'informal guidance' could be conducted on a without prejudice basis.
54. The current adversarial approach itself leads to inefficiencies and unnecessary costs. A more positive approach from the Competition Authority might yield results that are in the consumer interests on many fronts, for instance, by avoiding unnecessary litigation and by facilitating the implementation of agreements with ultimate consumer benefits, despite initial concerns regarding restriction of competition - agreements which may otherwise have been thwarted.
55. I am not advocating the Competition Authority adopt this new approach in all cases. It should be reserved for difficult cases where the cost/benefit analysis for overall consumer welfare is finely balanced. The current legal framework for settling these issues under Irish law has proved to be overly adversarial, time consuming and costly.⁹
56. Irish business does not have the luxury of time and money to engage in lengthy litigation on issues which might be resolvable through meaningful positive engagement. Whatever the current legal framework, in my view, it is incumbent on the Competition Authority to relax its approach and to ensure the that talents of its people are also used in a positive.
57. Only so many problems can be solved by State intervention. The vast majority of undertakings in Ireland will need to find their own imaginative and innovative ways to survive this recession and build viable businesses for the future. Inevitably, in some cases this will involve co-operation between undertakings at the horizontal and vertical level and possibly in forms which have not yet been analysed by the Commission or competition authorities of the Member States. It is in these circumstances where meaningful engagement with the Competition Authority may be the most efficient use of State resources for all concerned.

New Vertical Restraints Regime

58. On 31 May 2010 the Commission's current vertical restraints block exemption regulation will expire. In light of this, the Commission has recently completed a consultation process with a view to

⁹ The author of this paper is the instructing solicitor in a case brought by the Competition Authority in the Irish courts for alleged infringement of Article 81(1) of certain arrangements entered into by the Beef Industry Development Society Ltd (BIDS) and its members to restructure the beef processing industry in Ireland. It is not intended to comment on the specifics of the BIDS case pending the outcome of the Supreme Court's decision where it remains to be decided whether the BIDS arrangements, though found by the European Court of Justice as a restriction of competition by object under Article 81(1), satisfy the conditions of Article 81(3).

adopting a new vertical restraints block exemption regulation and new vertical restraints guidelines.¹⁰ It has published a draft vertical restraints block exemption regulation¹¹ and draft guidelines¹².

59. The Commission takes the general view that, while the vertical restraints regime has worked well over the last decade, certain amendments are necessary to reflect legal and economic developments since its introduction.
60. The principal proposed change in the block exemption regulation is that the 30% market share threshold, below which undertakings can benefit from the block exemption regulation (provided that the agreement does not contain any hardcore blacklisted restrictions), will apply not only to the market share of the supplier but also to the market share of the buyer. This has implications considered below.
61. Other principal changes to the vertical restraints regime are found in the draft guidelines. These relate to, among other things, a revised approach to analysing restrictions on internet sales, new thinking on resale price maintenance, and the assessment of certain practices in the retail area not previously analysed, such as, up-front access payments and category management.
62. Before turning to specifics, let us remind ourselves that the principal advantage of falling within the safe harbours of a block exemption regulation is that the parties to the agreement do not face the burden of having to provide evidence to demonstrate why their agreement, if found to fall within Article 81(1), satisfies each of the conditions in Article 81(3). Various forms of evidence are necessary such as factual evidence, witness statements and expert economic evidence.
63. As the effects based approach analyses likely impact on potential and actual competition, the role of expert economic evidence becomes important in predicting likely outcomes. Some commentators are of the view that economic evidence takes on a disproportionately important role and criticise the so called “science” of economics as not predictive. I read the following commentary on a website recently: “Economics has much more in common with science fiction than science. Both make stuff up and they try to make it as believable as possible”.
64. This criticism is a bit harsh but many plaintiffs and defendants in competition law cases might share this view, particularly when they see economists on both sides using either different modelling or, often, the same model or theory to produce diametrically opposed outcomes. In practice this can result in the economic testimony of one party cancelling out the economic testimony of another; as neither is shown to be sufficiently credible the judge then falls back on the other streams of evidence to decide the case.
65. This results in the use of significant court time on issues which may not, ultimately, be decisive to the outcome of the case. Consequently, costs will unavoidably increase unless the parties can narrow the areas of disagreement on economic evidence before the commencement of the hearing. This is difficult to achieve in practice as one party might feel such prior engagement would prejudice its position.
66. Another tool for analysis is the application of the so-called “counterfactual”. A tool advocated in the Commission’s draft guidelines where practical examples are provided. The counterfactual looks at what the state of competition would be in the absence of the agreement and examines whether the agreement would then lead to a lessening of competition.

¹⁰ See, Press Release IP/09/1197, dated 28 July 2009. The Consultation closed on the 28 September 2009.

¹¹ Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

¹² Draft Commission Notice - Guidelines on Vertical Restraints, available at: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html

67. An interesting practical example of the application of this counterfactual test is the Amrac¹³ case in the UK decided on appeal in July of this year. A collective agreement among racecourses was ultimately held not to infringe Article 81 (1) because the agreement in question would not have led to a significant lessening of competition as there was no scope for actual or potential competition in the market concerned, in the absence of the agreement.¹⁴
68. At paragraph 92 of its judgment the UK Supreme Court of Appeal reasoned as follows: “at a more basic level, Mr. Roth argued that there cannot be an agreement whose object (or for that matter whose effect) is to restrict competition if at the relevant time there is no competition to be restricted. That could be on the basis that the parties are not competitors; as already mentioned that is one aspect of his argument. But it could also be because, even if otherwise they would compete with each other, they do not and cannot do so because such competition (here, as sellers) depends upon their being more than one buyer. Since there was only the one buyer, there was no competition to be restricted. That seems to be correct in principal, and correctly applied to the facts of this case. Mr. Vajda submitted that Article 81 applies not to only actual but also to potential competition. However, that comment attracts the same response; unless a second undertaking became active in the upstream market, there could be neither actual nor potential competition. Arrangements whose objects was to enable such an undertaking to enter the market could not therefore be restrictive of competition that did not and could not exist at the time”.
69. Amrac also acts as an example of a case where a considerable amount of court time was spent assessing the expert economic evidence of both parties only for the Judges in the High Court and Court of Appeal to decide the case without reference to it.

30% Market Share Threshold

70. The Commission considers it is now necessary to apply the 30% market share threshold to buyers as well as suppliers, given the increased consolidation of retailers and distributors at the national level and increase in market power with a possible effect on inter brand competition.
71. This proposal has been criticised at many public conferences. Among other things, suppliers have argued that these changes will needlessly remove forms of vertical agreement from the protection of the block exemption regulation and thereby impose increased compliance costs on suppliers, particularly where they sell to many hundreds if not thousands of retailers in many markets throughout the EU.
72. They argue that it is almost impossible for them to assess whether each arrangement benefits from the new block exemption regulation as a buyer’s market share may be difficult to establish, particularly if the market is a local market.
73. Though not specifically addressed by these commentators, an increase in compliance costs will have to be recovered somewhere if they cannot be absorbed and may ultimately result in increased prices to consumers.

¹³ Bookmakers’ Afternoon Greyhound Services Ltd and ors v Amalgamated Racing Ltd and ors (Case No: A3 2008/2874) [2009] EWCA Civ 750 (28 July 2009), (“the Amrac case”).

¹⁴ *Ibid.*, In the Amrac case, on 28 July 2009 the Court of Appeal (“CA”) rejected an appeal by Bookmakers’ Afternoon Greyhound services & others claiming that arrangements amongst racecourses for the sale and licensing of media rights amounted to an abuse of Article 81(1) EC Treaty. The CA upheld the initial judgment of the High Court in finding that the arrangements did not have an anti-competitive object or effect. Rather, the CA found that the arrangements had the legitimate aim of the establishment of a competing broadcaster into a market which previously had only one incumbent. The Court stated:

“There cannot be an agreement whose object... is to restrict competition, if at the relevant time, there is no competition to restrict”.

74. Accordingly, it is ironic that the new proposed 30% threshold, designed to protect competition as a means of protecting consumer welfare, may in practice have the opposite effect in some cases.
75. Retailers with market power will likely be able to resist attempts by suppliers with market power to pass costs on to them. However, suppliers with market power may well succeed in passing on the costs to smaller more vulnerable retailers.
76. On the assumption that the Competition Authority will adopt a new declaration in respect of virtual agreements identical to that which the Commission will adopt (both to commence on 1 June 2010), the question arises as to the practical effects for the purposes of Irish competition law in cases where only Section 4(1) could apply.
77. Arguably, there will be little practical impact on public enforcement of vertical restraints under Irish competition law as there has been little or no enforcement of non-price vertical restraints by the Competition Authority. This is understandable as non-price vertical restraints are less likely to lead to consumer harm on an effects based approach, and the Competition Authority, in applying Section 4, does not have to concern itself with the Article 81 prohibition on agreements which lead to the partition of markets along national lines.
78. From the private litigation perspective, the application of the 30% threshold in general to buyers as well as suppliers will inevitably result in more agreements falling outside the benefit of the declaration, though it is difficult to say how many.
79. You might ask what difference does this make when there is no presumption of illegality where one of the parties exceeds the market share threshold. That said, there is undoubted comfort in the legal certainty of knowing that an agreement benefits from the declaration and is effectively immune from challenge under Section 4.
80. In the absence of the benefit of the declaration the parties need to carry out a self-assessment to determine whether they have an argument for infringement of Section 4(1) or a likely defence, as the case may be.
81. In any event, it is rare to come across cases where a given distribution arrangement neatly falls within the declaration, so a form of self-assessment is usually required in practice. I do not see the change in the market share threshold giving rise to more civil litigation in Ireland.
82. In my view, the more significant aspect of the Commission's proposed changes are in relation to its revised thinking on resale price maintenance, contained in the new draft guidelines.
83. If followed by the Competition Authority, which I believe is likely, even if specific Irish guidelines are not published, then a greater legal certainty will be achieved in an area the Authority have had enforcement activity in the past.

Resale Price Maintenance

84. The new guidelines continue to blacklist resale price maintenance ("RPM") as a hardcore restriction and so the block exemption regulation does not apply regardless of market share thresholds. However, the draft guidelines now helpfully specify that RPM might satisfy the criteria for exemption under Article 81(3) and may therefore be permissible, even though outside the protection of the block exemption regulation.
85. The draft guidelines set out the following circumstances where RPM might satisfy the efficiency conditions in Article 81(3) or even fall outside of the scope of Article 81(1):

- Where a manufacturer *introduces a new brand or enters a new market*, RPM may be helpful to induce distributors to better take into account the manufacturer's interest of developing demand for the product. RPM may provide the distributors with the means to increase promotional efforts and if the distributors in this new market are under competitive pressure this may induce them to expand overall demand for the product and make the entry a success, also for the benefit of consumers.
 - *Fixed resale prices*, and not just maximum resale prices, may be necessary to organise (in a franchise system or similar distribution system) a *co-ordinated short-term low price campaign which will also benefit consumers*. The Commission specifies two to six weeks as short-term and indicates that given the short-term nature of the promotion there may be no appreciable negative effects in any event and therefore no infringement of Article 81(1).
 - Occasionally, RPM may also be useful to avoid that a large distributor uses a particular brand *as a loss leader*. This practice of selling below cost as a loss leader will in the short run benefit consumers but may also, if the product is delisted by other retailers, lead to a reduction of inter-brand competition over time to the disadvantage of consumers.
86. Finally, the Commission provides that where appreciable anti-competitive effects are established for maximum or recommended resale prices, the exemption under Article 81(3) may apply. This is due to the possibility of efficiencies arising, such as the avoidance of double marginalisation.
87. The Commission's new thinking on RPM and in particular its inclusion of scenarios where even fixed RPM might satisfy the efficiency conditions in Article 81(3) is helpful, though obviously great care should be taken in any self-assessment given that RPM is blacklisted in general as a hard core restriction.

Online Commerce

88. The Commission's proposals on internet sales in the draft guidelines are somewhat informed by the outcome of its online commerce roundtable report on opportunities and barriers to online retailing.¹⁵ The Commission is concerned about restrictions which prevent EU consumers from legally accessing and benefiting from goods sold online, wherever consumers are located, despite the technology available and growing demand for such goods and services.¹⁶
89. The guiding principal under the draft regulation and draft guidelines is the same, that is, every distributor must be free to use the internet to advertise or sell its products. It also remains permissible to have restrictions on active sales into the territory of another distributor or to a customer group reserved for the supplier but not permissible to restrict passive sales.
90. In general, the use of the internet is not considered as active sales as it is a reasonable way to "reach every customer". Sales resulting from orders made over the internet are still regarded by the Commission as un-solicited passive sales. This seems to be the case even if the website of a distributor in an exclusive territory is translated into the language of another territory, which seems an unusual conclusion. It would appear to me at first sight that translation of a website into the language of another distribution territory has the sole purpose of targeting, or actively selling, to customers outside of the distributor's territory but the Commission does not share that view.

¹⁵ Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing, dated 26 May 2009, available at: http://ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf. See also The Contributions submitted by Interested Parties, on 31 August 2009, available at: http://ec.europa.eu/competition/consultations/2009_online_commerce/index.html.

¹⁶ *Ibid.*, Participants included e-Bay, Apple, EMI and the consumer interest group Which?.

91. That said, the draft guidelines indicate that there would be active selling if a website or online advertising specifically targets or addresses certain customers, or if general advertising or promotion involves investments that are attractive only because they reach customers outside the distributor's exclusive territory or customer group and the Commission highlights, in its revised definition of "active sales", that the sending of unsolicited e-mails constitutes active sales.
92. The following examples of hardcore restrictions on passive internet sales have been specifically included in the draft guidelines:¹⁷
 - Requiring a (exclusive) distributor to prevent customers located in another (exclusive) territory from viewing its website or requiring the distributor to put on its website automatic re-routing of customers to a manufacturer's or other (exclusive) distributor's websites.
 - Requiring a (exclusive) distributor to terminate consumers' transactions over internet once credit card data reveals an address that is not within the distributor's (exclusive) territory.
 - Requiring a distributor to limit the proportion of sales made over internet.
 - Requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line.
93. Under the block exemption regulation the supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a bricks and mortar shop or for advertising or promotion in general. This may be relevant in particular for selective distribution where a supplier may require its distributors to have a brick and mortar shop or showroom before engaging in online distribution. The same considerations apply to selling by catalogue.
94. Many commentators have been particularly critical of what they perceive as the Commission's overly prescriptive approach to its analysis of restrictions in distribution agreements concerning internet retailing.
95. In particular, they accuse the Commission of failing to properly acknowledge the concerns of suppliers and bricks and mortar retailers about e-tailers free riding on the significant investments made by suppliers and bricks and mortar retailers in building and promoting brands and investing in the physical infrastructure and other tangible and intangible assets necessary to do this.¹⁸
96. The Commission's approach is seen by some as straying into unnecessary regulation, particularly where neither the supplier nor the buyer has market power¹⁹. In their view, in the absence of market power, suppliers should enjoy a broad discretion in deciding whether to sell online and under what conditions in order to protect their brand value and incentivise an adequate bricks and mortar offline presence.
97. The online commerce roundtable report revealed concerns by some of the participants (notably eBay) regarding restrictions to online retailers in distribution arrangements, but it also noted comments from contributors regarding the prevalence of online piracy and counterfeiting and the need for further harmonisation of contract and consumer law to unlock the full potential of online markets.

¹⁷ Draft Guidelines at paragraph 52.

¹⁸ Caffarra, C., & Kuhn, K., "Selective distribution of luxury goods in the age of E-commerce" (Vol. 16, Ed. 5., Competition Press).

¹⁹ Carlin F., & Haegenanm K., of Baker & MacKenzie "Europe's Competition Rules on Online Sales - A Plea for Regulatory Restraint", PLC (5 August 2009), available at: <http://uk.practicallaw.com/2-388-0584>.

98. While the Commission has estimated the loss to consumers from cartels between 2005 and 2007 at €7.6 billion, an OECD report approximated the impact of counterfeiting and piracy in international trade in 2005 at US\$200 billion, a figure which excludes domestic consumption of fake goods.²⁰ This is clearly a significant multiple of consumer harm as compared with cartels, even if the OECD figure is for international trade Worldwide and not for trade in the EU.
99. Admittedly, competition policy and consumer policy are different but the ultimate objective of both is consumer welfare even if this is achieved in a different manner and through different legal instruments. The point I am making, however, is that an overly prescriptive application of competition law rules in the online retailing area might result in more rather than less consumer harm. Suppliers and bricks and mortar retailers might lose their incentives to invest in the creation of new products and brands and the physical and other infrastructure necessary for the promotion of high value branded luxury goods for which consumers are prepared to pay a premium, as clearly attested to by several hundred billion US\$ in international trade in counterfeit and pirated goods.
100. Just as suppliers and retailers in their distribution arrangements ought to adopt proportionate provisions which are the least restrictive means necessary to achieve legitimate objectives, the Commission in promoting competition policy ought to adopt measures which are proportionate and the least harmful to the legitimate interests of suppliers retaining control of how best to market and distribute their products.

Upfront Access Payments

101. Upfront Access Payments are defined in the draft guidelines as “fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the supplier by the retailers. This category includes various practices such as slotting allowances (fixed fees that manufacturers pay to retailers in order to get access to their shelf space), so called pay-to-stay fees (lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period) payments to have access to a distributor’s promotion campaign etc”.²¹
102. These are block exempted where the suppliers and buyers market share on their respective downstream markets do not exceed 30%.
103. Above the 30% market share threshold the draft guidelines set out a number of examples of positive and negative effects to be considered when assessing compatibility with Article 81. However, the draft guidelines are somewhat vague and unspecific and it is questionable whether they add anything concrete to the existing level of understanding of when such practices might be prohibited or be permissible.
104. On the positive side the Commission recognises that upfront access payments can generate efficiencies such as the efficient allocation of shelf space for new products. On the negative side, the draft guidelines state that upfront access payments may also result in anti-competitive foreclosure of other suppliers if their widespread use increases barriers to entry for small entrants, and they refer, by analogy, to their analysis in the draft guidelines of the negative effects of single branding or exclusive purchase obligations on buyers. In many member states including Ireland the use of upfront access payments is widespread but to my knowledge have not been successfully challenged let alone investigated as a potential infringement of the prohibition on anti-competitive agreements.
105. That is not to say that upfront access payments do not lead to problems in practice. With the abolition of the Groceries Order in Ireland significant concern about these payments and other conduct by

²⁰ OECD, “The Economic Impact of Counterfeiting and Piracy”, July 2007.

²¹ Draft Guidelines, at paragraph 199.

retailers led to the introduction of combating provisions in the Competition (Amendment) Act, 2006 but these provisions have never been invoked by the Competition Authority or by third parties.

106. The consultation process initiated by the Department of Enterprise Trade and Employment on whether a code of conduct for retailers should be introduced has also recently ended and we await to see the outcome.
107. All in all, it is apparent that there are concerns about upfront access payments and their effects on retailers but it seems difficult to find the appropriate legal instrument to police the activity.
108. In practice upfront access payments seem to straddle the boundaries between the unilateral conduct of a retailer and an agreement between a supplier and a retailer. As unilateral conduct, unless the retailer could be said to exercise a dominant position on the relevant purchasing market, it would not be possible to take action for abuse of a dominant position, and if the supplier has no real choice but to “agree” to the upfront access payment for fear of being de-listed then can it really be said that there is an agreement.
109. The Commission, in its draft guidelines, introduces this topic as “fixed fees that suppliers pay to distributors *in the framework of a vertical relationship*...” (emphasis added), a manner which suggests that it is not even clear that such practices might amount to an agreement between undertakings.
110. That said, the Commission seems concerned that such practices may amount to foreclosure for third parties and if this is the effect, if not the object, of the “agreement” between the supplier and the retailer then such conduct could be caught by the prohibition on restrictive agreements.

Category Management

111. Category management is another new area considered in the draft guidelines but again the commentary is not very specific and does not add significantly to an understanding of potential competition law problems in specific cases.
112. Rather, the commentary seems to focus on the potential benefits of category management, such as, better use of shelf space, promotion resources, and greater consumer satisfaction.
113. Again, just as with upfront access payments, the principal concern seems to be the possibility of anti-competitive foreclosure “where the category captain is able, due to its influence over its marketing decisions of the distributor, to limit or disadvantage the distribution of products or competing suppliers”. This is a potential theoretical concern but in previous cases in the UK and at the at the EU level theories of potential consumer harm relating to category management where dismissed as lacking creditability.

Review of Horizontal Guidelines

114. The following sets out some contributions made to the Commission’s consultation process on a review of its horizontal guidelines and its specialisation and research and development block exemption regulations:
 - A suggestion of a uniform market share threshold of possibly 25% as a indicator of market power in both of the block exemption regulations and the horizontal guidelines;
 - The need for the introduction for specific guidelines on the exchange of information between competitors. The Commission has already introduced specific guidelines for the exchange of information between competitors in the maritime transport sector;

- The inclusion in revised horizontal guidelines of more specific positive examples of when agreements between competitors which fall under Article 81(1) can satisfy the conditions in Article 81(3);
 - More use by the Commission of positive Article 10 decisions under Regulation 1/2003 in individual difficult cases;
 - More use by the Commission of its informal guidance process;
115. Improved guidelines on joint purchasing arrangements. The 15% threshold is too low. It is easier to get approval under merger control rules for a full function joint venture than it is to self assess a joint purchasing arrangement.

Conclusion

The Commission's initiatives to update its vertical block exemption regulation and guidelines and its consultation process with a view to updating its horizontal guidelines are welcome and necessary in light of changes brought about by modernisation. In general, some of the suggested changes will assist the often difficult task of self assessment of agreements which raise issues under Article 81, but other suggested changes arguably stray into unnecessary regulation and may significantly increase compliance costs. In addition to general guidance, it is also suggested in this paper that the Commission (and the Competition Authority to a lesser extent) take the initiative to provide more guidance in difficult individual cases on examples of where the conditions for exemption under Article 81 (3) might be satisfied.

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