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Green Light for Ticket Distribution Arrangements.

Introduction.
On 16th March, the Competition Authority announced that it had concluded that TicketMaster Ireland's conduct in the ticket distribution business did not constitute an abuse of a dominant position (contrary to Section 5 of the Competition Act, 2002). It also concluded that the agreements between TicketMaster Ireland and the two largest event promoters in Ireland, did not prevent, restrict or distort competition (contrary to Section 4 of the Competition Act, 2002). At the same time the Authority published a copy of its decision, dated 26th September, 2005, on its website.[1] The Authority's decision raises a number of interesting economic issues, not least its finding that a firm with a 100% market share does not have a dominant position.

Background.
The Authority launched an investigation into arrangements for the sale and distribution of tickets for major live entertainment events in early 2003. The investigation was launched, according to the Authority, in response to complaints from a significant number of consumers alleging that TicketMaster's fees in relation to service and handling charges for the sale of tickets to live events were excessive. The complainants included 8,017 individual consumers who signed a website petition. According to the Authority, a number of complaints were also made regarding excusive arrangements between TicketMaster and the two largest event promoters in the State: MCD Productions Limited and Aiken Promotions and their respective affiliated companies.

According to the Authority the principal activity of TicketMaster Ireland is the sale of tickets to live events in the State and in Northern Ireland. It noted that TicketMaster described itself as Ireland's leading ticketing company and that it had sold [2-3]m tickets in 2004. TicketMaster sold tickets via the telephone, the Internet and through a chain of retail outlets located throughout the island of Ireland. The report indicated that TicketMaster had arrangements with around 100 retail outlets for the sale of tickets.

The report also noted that TicketMaster Ireland had exclusive distribution arrangements with two of the largest event promoters in the island of Ireland: MCD and Aiken. The Authority noted that the agreements were not fully exclusive as they provided that TicketMaster would handle [75-85]% of all tickets for a particular event. The principal activity of both MCD and

[1] Enforcement Decision E/06/001.

Aiken is the promotion of live events within the island of Ireland.

The Relevant Market.

The Authority concluded that the relevant market was "the market for outsourced ticketing services for events with a national or international appeal in the island of Ireland." In other words the Authority concluded that the relevant market was the upstream market in which promoters and organisers of certain entertainment events purchased sales and distribution services for their tickets. Significantly it did not consider the downstream or retail market in which TicketMaster sold tickets. Arguably if TicketMaster were abusing a dominant position by charging excessive prices this is the market in which the abuse would take place.

The upstream market would certainly seem to be the relevant market as far as consideration of the exclusive agreements between TicketMaster and the promoters are concerned. It would also be the relevant market if there were allegations that TicketMaster was abusing its market power vis a vis the promoters.

The other interesting aspect of the market definition chosen by the Authority is that it decided that outsourced ticketing services for events of national or international importance constituted a separate market to outsourced ticketing services for events of a regional or local appeal and for insourced ticketing services for events or either national/international or regional/local appeal. The Authority also decided that outsourced ticketing service providers located outside the island of Ireland did not compete with those located within Ireland.

The main reason advanced by the Authority for excluding these various alternatives was their lack of a network of retail sales outlets covering the island of Ireland. According to the report [50-60]% of ticket sales are made through retail outlets, a figure which appears surprisingly high. The Authority argues (on page 16) that it was unlikely that a regional outsourced ticketing service provider, or one located in Great Britain could switch existing facilities easily and risklessly enter the market within a comparatively short period of time, e.g. six months.

Countervailing Buyer Power.

The Authority's report states that TicketMaster "currently accounts for 100% of the market for outsourced ticketing services for events of national or international appeal." (p.2) It nevertheless concludes that there is "compelling evidence that TicketMaster Ireland is not dominant." (p.39)

The main reason advanced by the Authority for finding that TicketMaster was not dominant is that the promoters have countervailing buyer power. It argues that, if TicketMaster was to raise its prices above the competitive level, the promoters could either switch to other suppliers or establish their own sales and distribution arrangements. There are several problems with this argument.

The first relates to market definition. The Authority concluded that outsourced ticketing services for events of national or international appeal constituted a separate market from similar services for regional or local events and from insourced ticketing services to both kinds of events. It argued that the lack of an island wide chain of retail outlets meant that such alternatives were not part of the same market and went on to argue that providers of such services could not establish such a network as they would not be able to generate sufficient ticket sales to justify the costs. In arguing that promoters could switch to other suppliers, the Authority suggests that, if an alternative supplier had the certainty of a contract to distribute tickets with one of the major promoters, this would enable it to develop such a network. If the promoters could switch to other suppliers or provide the services themselves, then such alternatives would appear to be part of the relevant market.

The second involves a seeming inconsistency in the Authority's reasoning. In support of its argument that the buyers of ticketing services can switch to other suppliers, the Authority cites the example of a tender run by the GAA for the distribution of tickets for events at Croke Park. It noted that 11 companies had expressed an interest and that a short-list of five were invited to bid.

The Authority reported that the GAA selected TicketMaster Ireland because of its "knowledge of GAA, experience in the global market, and ability to provide *an immediate national infrastructure of outlets countrywide*". It goes on to state that two other companies were considered by the GAA "to offer a ticketing service comparable to that offered by TicketMaster Ireland in all but one key area, *namely the absence of a network of retail outlets located around the island of Ireland.*" (p.38 emphasis added). In effect not having an island wide distribution network was the main reason rival firms failed to get the ticketing contract. This seems inconsistent with the view that other suppliers would be capable of establishing such a network if they obtained a distribution contract.

The third point goes to the heart of the Authority decision. It argues that if TicketMaster "could on a sustainable basis raise the price of its outsourced ticketing services above the competitive level this would demonstrate it had market power." On the other hand if promoters "had alternative sources of supply and there were low costs associated with sourcing their demands elsewhere, it would undermine the ability of TicketMaster Ireland, despite its large market share, to profitably increase its prices above the competitive level." (p.21)

The Authority overlooks one very fundamental point, it has not established that prices are currently at competitive levels. A dominant firm has the power to raise prices above the competitive level but there is a limit to how high it can raise prices. At some point customers will switch to alternatives even though they may not be good substitutes. A dominant firm will generally raise prices to just below the level at which customers would switch with the result that there appear to be substitute products available which act as a constraint on the firm's ability to raise price indicating that it is not dominant. This is the well-known "cellophane fallacy". Thus, while the Authority concludes that the evidence that promoters could switch to other suppliers of ticket services means that TicketMaster is not dominant, this need not necessarily be the case. It may be that the ability of promoters to switch acts as a constraint on TicketMaster raising its prices any further, but it does not prove that TicketMaster is not dominant. In order to establish that TicketMaster is not dominant it would be necessary to establish that prices are currently at their competitive level.

In fairness to the Authority, trying to establish whether prices are above the competitive level is notoriously difficult in potential dominance cases. If it were easy to establish the competitive price then one would only have to demonstrate that the existing price was above that, to show that a firm was dominant. It should be stressed that this does not mean that the Authority's conclusions are wrong. All one can say is that the evidence relied upon by the Authority is not conclusive. Some consideration should have been given to the possibility that prices were already above the competitive level.

Finally it is worth noting that in the Irish League of Credit Unions case, the court rejected arguments that an undertaking that was forced to revise its pricing behaviour due to the establishment of a rival body could not be regarded as dominant.[2]

In arguing that the ability of buyers to switch to alternative sources of supply means that even a firm with a 100% market share cannot be regarded as dominant, the Authority seems to have adopted a contrary position to the one it argued in the ILCU case.

Are Prices Excessive?

The Authority also found that TicketMaster did not charge excessive service and handling fees to consumers. It noted that such fees were set in agreement with the promoters and that, while there was a percentage add-on charge in the case of tickets priced at more than €25, this was subject to a ceiling of €5.95.

The Authority argued that it was in the promoters' interests to ensure that TicketMaster did not impose excessive service and handling fees. This is based on the standard "double marginalization" justification for vertical restraints. An upstream supplier with market power, which sells to a distributor will not want the distributor to add its own monopoly mark-up, since this will reduce overall sales and the supplier's profits. Economists generally see such arguments as justifying maximum RPM, for example. The Authority's argument, while consistent with economic theory, raises a couple of interesting issues.

The Authority finds that, without the cap on handling charges imposed by promoters, TicketMaster would set such charges at the monopoly level. (p.38) A clear implication of such a finding is that TicketMaster is dominant in the downstream retail market.

The finding that the cap imposed by promoters prevents TicketMaster from imposing excessive service and handling charges allows the Authority to avoid the potential minefield that arguments of excessive pricing give rise to.

There is a fundamental difference in the way US and EU competition law treat excessive pricing. Charging excessive

[2] *Competition Authority v. John O'Regan & Others,* judgment of 22nd October 2004, p.157. Compecon's Patrick Massey was an expert witness for the ILCU in that case.

pricing has never been considered illegal under US competition law and it has proven to be a highly controversial topic in EU law.

Economists generally argue that the concept of “excessive prices” is somewhat meaningless. The obvious question is “excessive relative to what?” Even if it were possible to identify the competitive price in markets where firms have market power, how far above that level would prices have to go before they could be regarded as excessive. The EU view that excessive pricing can constitute an abuse of dominance has also been criticised for creating a scenario whereby competition agencies can claim *ex post* that a firm’s prices were too high with the associated risks of wrongful findings of abuse.

The Exclusive Agreements.

The Authority found that the exclusive agreements were not anti-competitive but rather gave rise to various efficiencies and that consumers benefited as a result. It recognised that, as the economic literature points out, vertical restraints can serve strategic purposes and be used to dampen competition upstream, in this case between the promoters. It cites various indicators which suggest that there is strong competition between promoters and various factors which would tend to prevent collusion in rejecting an anti-competitive explanation of vertical restraints in this case.

Some Conclusions.

It is up to the courts to decide whether or not parties are in breach of competition legislation in Ireland. The decision by the Competition Authority to publish a detailed explanation of why it decided not to take action in a case such as this is most welcome, although perhaps some title other than “enforcement decision” could be used. It certainly provides businesses and their advisors with useful insights into the Authority’s views. It can also serve to promote a useful debate on important legal and economic issues that arise in competition cases.

The Authority’s document in this case runs to 45 pages. It is well argued and clearly outlines the Authority’s reasoning. Certain aspects of its economic arguments are open to question but that is probably inevitable in what is a relatively complex case. It has fortunately managed to side-step the economic and legal morass of excessive pricing.

DG Comp Proposes Reform of Article 82.

Introduction.

Shortly before Christmas, DG Competition issued a discussion paper on the application of Article 82 to what it described as exclusionary abuses of a dominant position.[3] It invited interested parties to make submissions on or before 31st March.

The publication of the discussion paper marks a further step in the modernisation of EU competition law which has involved a more economics based approach by the EU Commission. This began with the Commission’s reform of

[3] *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses.*

the rules for vertical restraints and continued with the revisions to the Merger Regulation and the switch from a “dominance test” to the “Effective Competition” test. A move to a more economics based approach to the application of Article 82 was seen by many commentators as the next logical step in the modernisation process.

Exclusionary Behaviour.
The discussion paper deals only with certain types of abusive behaviour, those which it describes as exclusionary behaviour. The paper offers the following definition of such behaviour.

> “By exclusionary abuses are meant behaviours by dominant firms which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers.” (Page 4)

A distinction is drawn between this class of behaviour and what might be described as “exploitative abuses” where a dominant firm uses its market power to harm consumers directly and “discriminatory abuses”. Charging excessive prices, for example, might be regarded as an exploitative abuse, although as pointed out in the previous article, the issue of excessive pricing is highly controversial. This may be one of the reasons why the Commission decided to limit the discussion paper to exclusionary behaviour.

The Commission’s definition of exclusionary behaviour refers to practices which are likely to have a foreclosure effect but it goes on to state that the concern with such practices arises where they ultimately harm consumers. This seems to represent a response to a criticism that is often made of Commission decisions in Article 82 cases that it tends to focus on protecting competitors rather than protecting competition. Focussing on whether behaviour is likely to be ultimately detrimental to consumers provides an important check.

The discussion paper points out that foreclosure can arise even if rivals are not forced to exit the market. It is sufficient that they are disadvantaged and thus compete less aggressively.

> “Rivals may be disadvantaged where the dominant company is able to directly raise rivals’ costs or reduce demand for the rivals’ products.” (page18)

The paper states that the general premise in exclusionary cases is that only behaviour that would exclude a hypothetical “as efficient” competitor should be regarded as abusive. The question to be asked in such cases is “whether the dominant company itself would be able to survive the exclusionary conduct in the event that it would be the target”. (p.20) Economic theory tells us that competition forces firms to operate efficiently. Consequently competition law should not concern itself with protecting less efficient firms. Asking whether the dominant firm itself would be foreclosed by the alleged exclusionary behaviour is the correct yardstick to apply. Somewhat worryingly, however, the discussion paper goes on to state that:

> “…it may sometimes be necessary in the consumers’ interests to also protect competitors that are not (yet)

as efficient as the dominant company". (p.21)

This raises all sorts of serious issues, not least because it seems to represent a partial rowing back from the general principal that the law should only be concerned with behaviour that excludes equally efficient rivals to the dominant firm and creates scope for "protecting competitors" rather than competition. The document states that this will involve applying the "as efficient competitor test" in its specific market context "for instance taking account of economies of scale and scope, learning curve effects or first mover advantages that later entrants cannot be expected to match even if they were able to achieve the same production volumes as the dominant company." (p.21)

One presumes that, as the paper refers to firms that are not yet as efficient as the dominant firm, such protection is intended to be temporary. The obvious question is how long should such protection last? If there are likely efficiencies from "learning by doing" then some period of time might be afforded a new entrant for this. First mover advantages, however, may persist for some time, in which case the period for special treatment to less efficient firms may become open ended.

A more basic problem with this proposal is that it provides a disincentive for firms to become more efficient. The reward for becoming as efficient as the dominant firm may be that the dominant firm is freed to compete more aggressively.

The discussion paper lists a number of practices as coming within the definition of exclusionary behaviour, namely:

- Predatory Pricing;
- Single Branding and Rebates;
- Tying and Bundling; and
- Refusal to Supply.

The document outlines the circumstances in which such practices will be considered abusive.

Conclusions.
The discussion paper represents a further step in the ongoing modernisation of EU competition law. It represents an attempt by the Commission to introduce a more economics based approach to Article 82. While the broad thrust of the proposals are consistent with economic views of competition, in particular, its espousal of the "as efficient competitor" test as the benchmark for deciding when behaviour is exclusionary. The qualification that sometimes it may be necessary to apply a different standard where firms are "not yet" as efficient as the incumbent poses some difficulties.

Competition Authority Looks at Medical Fees.

Introduction.
In January the Competition Authority issued a consultation document on the collective negotiation of medical fees.[4] This followed the settlement of legal

[4] Competition Authority: *Consultation on Guidance in respect of Collective Negotiations relating to the setting of Medical Fees,* January 2006.

proceedings brought by the Authority against the Irish Hospital Consultants Association (IHCA) last September. The Authority, in the consultation document states that it "is concerned that there may be instances of conduct amongst doctors which are in breach of the Competition Act." It goes on to state that these concerns have arisen as a result of its recent investigations and relate to the regular negotiations on private fees between the medical profession and large buyers of such services such as private health insurers and hospitals. The Authority notes its belief "that the same principles may have wider application in other medical markets."

Collective Fee Negotiations.
The Authority states in the consultation paper its view that collective negotiations on fees between a representative body and a private health insurer are prohibited under Section 4(1) of the Competition Act, 2002. The Authority goes on to list alternative mechanisms for setting medical fees that are unlikely to breach the Competition Act. These are:

- Fee setting by the payor;
- Application of a messenger model; and
- Contracting with hospitals.

The first of these involves the purchaser of the service, e.g. the health insurance company deciding what rates it is prepared to pay for particular services. It would then be up to each individual medical practitioner to decide whether or not to agree to provide services for the offered rate.

The messenger model as outlined would involve doctors hiring a third party to act as a messenger. This third party would obtain from each doctor concerned information regarding the level of fees they would accept from an insurer for their services. They then provide this information to the insurer who then decides how much to offer for services. The messenger does not enter into negotiations nor would it have any role in advising the insurer in respect of rates.

The third option involves the insurer contracting with a hospital for the provision of medical services, it then being a matter for the hospital to agree fees with individual consultants.

The note is significant in that it sets out the Authority's strong opposition to any collective negotiation on fees. This issue has implications far beyond the medical profession.

Partnerships Under Scrutiny.
Another issue raised in the note is the question of medical partnerships. The note states that "doctors who are engaged in a genuine partnership will likely be considered a single economic entity". Agreements on fees between members of a partnership are considered by the Authority as unlikely to breach Section 4(1). The document suggests that a partnership must involve sharing "substantial economic and financial risks". One of the questions posed in the consultation is:

> "Are partnerships amongst doctors in general formed with the express intent of fixing prices or is the setting of prices generally necessary to realise efficiencies arising from such partnerships?" (page11)

Partnerships should not be regarded as automatically suspect from a competition perspective.