



Munich Personal RePEc Archive

## **Resale Price Maintenance Guidance in Ireland: A Paradox?**

Gorecki, Paul and O'Toole, Francis

Department of Economics, Trinity College Dublin, Department of  
Economics, Trinity College Dublin

20 April 2022

Online at <https://mpra.ub.uni-muenchen.de/112816/>  
MPRA Paper No. 112816, posted 21 Apr 2022 12:50 UTC

## Resale Price Maintenance Guidance in Ireland: A Paradox?

By

Paul K Gorecki\* & Francis O'Toole\*

### Abstract

In 2021 the Competition and Consumer Protection Commission (CCPC), Ireland's competition agency, advanced the proposition that, in effect, minimum, fixed and, although it appears inadvertent, maximum resale price maintenance (RPM) are per se breaches of competition law. Such a position is inconsistent with the European Commission's Vertical Block Exemption Regulation and Guidance, past CCPC decisional practice and the efficiency provisions of both EU and Irish competition law. Prior to the introduction of civil fines for breaches such as RPM, as part of the implementation of the ECN+ Directive in 2022, the CCPC should state whether it views minimum and fixed RPM as per se breaches of competition law and why; or as seems more likely, that given the hardcore characterisation of minimum and fixed RPM by the European Commission, the CCPC envisages it would be difficult but not impossible for the efficiency defence to be successfully employed to justify such forms of RPM. The agency also needs to clearly articulate its position on maximum RPM, which it also appears to treat – inappropriately – in the same way as minimum and fixed RPM.

Corresponding author: [pkgorecki@gmail.com](mailto:pkgorecki@gmail.com)

Keywords: resale price maintenance; per se; by object; by effect; Competition & Consumer Protection Commission; Competition Act 2002; Article 101(3); Section 4(5); Vertical Block Exemption Regulation; and Guidance.

JEL Codes: L11; L42.

\* Department of Economics, Trinity College Dublin

Acknowledgements: Paul Gorecki was Adjunct Lecturer at Trinity College Dublin between 2013 and 2019 and a member of Competition Authority between 2000 and 2008, where he was responsible for the three resale price maintenance enforcement decisions issued in 2003 and referred to in this paper. Francis O'Toole is an Associate Professor of Economics at Trinity College Dublin. The usual disclaimer applies. All links valid 20 April 2022.

20 April 2022

## I. Introduction

Bright lines that clearly define the dividing line between conduct that is, and conduct that is not, permissible under competition law promotes legal certainty, enabling decisions by business, competition law enforcers and the Courts to be taken quickly and with confidence that decisions will not be challenged successfully or otherwise. The necessity for bright lines often reflects the ambiguous wording of competition law, creating uncertainty and possibly a chilling effect as businesses might act on a conservative legal interpretation of competition law and compete less vigorously than they might otherwise.

Competition law enforcers through publishing guidance and the Courts through rendering judgments (i.e. case law) can mitigate such uncertainty by providing bright line statements on the interpretation of such competition law wording. Of course, competition law enforcers defer to the Courts as the ultimate arbiters of the meaning and interpretation of competition law. Nonetheless, the Courts have not opined on all aspects of competition law, so enforcer guidance can helpfully supplement/complement case law.

While in many instances bright lines can easily identify what is permissible under competition law, there is often a substantial range of conduct that falls within a grey area where it is not clear, a priori, whether the conduct is anticompetitive. Analysis is required in order to determine whether the conduct in such situations has breached competition law. Bright line statements with respect to anticompetitive conduct can either omit or ignore the grey areas or provide more thorough inclusive guidance that covers such areas.

The debate over bright lines arguably parallels another debate, over agreements that breach European Union (EU) and/or Irish competition law by object as compared to breaches by effect.<sup>1</sup> A breach by object is where the impugned conduct is inherently anticompetitive. It is presumed to be anticompetitive. The competition agency only needs to establish that the alleged anticompetitive conduct took place. Bright lines establish where to draw the dividing line with respect to by object breaches of competition law.

In contrast, a breach by effect signals that the impugned conduct is not necessarily, on the face of it, anticompetitive. The competition agency needs to show that the conduct is anticompetitive after “an assessment ... based on a thorough analysis of the economic and legal context in which the agreement at issue ... and the specificities of the relevant market.”<sup>2</sup> By effect breaches of competition law occur in the grey areas outside of the bright lines. Nuance and subtlety means that analysis is required to assess the conduct in question to determine if it is anticompetitive.

Irrespective of whether conduct is assessed to be anticompetitive by object or by effect, the parties to the impugned conduct can argue under EU and Irish competition law that there are offsetting efficiencies that may outweigh the anticompetitive impact of the conduct.<sup>3</sup> In other words, the by

---

<sup>1</sup> For further discussion of the distinction between object and effect see Whish & Bailey (2021, pp. 127-142). Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and Section 4(1) of the Competition Act 2002, as amended (the Act) prohibit “all agreements between undertakings, decisions of association of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition... .”

<sup>2</sup> Whish & Bailey (2021, p. 138).

<sup>3</sup> For further discussion see Whish & Bailey (2021, pp. 155-175). The efficiency defence is set out in Article 101(3) of the TFEU and Section 4(5) of the Act. If the impugned conduct “contributes to improving the production or distribution of goods or the provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not – (a) impose on the undertakings concerned terms

object and by effect findings of anticompetitive conduct are rebuttable. Of course, the more serious the conduct, which is typically a by object breach such as price fixing, the less likely it is that there will be compensating efficiencies that mitigate let alone offset the anticompetitive effects.

One of the areas where these bright line/by object vs grey areas/by effect debates have raged concerns resale price maintenance (RPM), agreements between suppliers and resellers concerning the reseller's price.<sup>4</sup> RPM is usually divided into four categories: minimum; fixed; recommended (or suggested); and maximum. At one extreme the reseller has little or no discretion in setting price (i.e. fixed RPM), at the other complete freedom (i.e. recommended RPM), with minimum and maximum RPM, at least arguably, in between. In practice, recommended RPM is used to disguise minimum or fixed RPM.

In the European Union (EU), the European Commission's Vertical Block Exemption Regulation (VBER) Guidance treats fixed or minimum RPM as a bright line hardcore (i.e. by object) breach of competition law.<sup>5</sup> Nevertheless, the VBER Guidance does provide several efficiency grounds that can be used to justify minimum and fixed RPM as promoting competition and consumer welfare. In contrast, recommended and maximum RPM are treated more leniently. For example, neither is treated as a hardcore restriction.

Against this background, the purpose of this paper is to assess the treatment of RPM in Ireland by the Competition and Consumer Protection Commission (CCPC), Ireland's competition agency. Section II sets out the CCPC's current position with respect to RPM, which is then contrasted with the VBER and VBER Guidance on RPM on which the CCPC relies (Section III). Section IV considers the evolution of the CCPC's position on RPM from the notification system – abolished in 2002 – to the present. Section V concludes.

## **II. CCPC Enforcement & Guidance on RPM: Bright Lines & a Pre Se Approach**

### **2.1 Introduction**

The CCPC has set out its current position on RPM in two publications released in 2021. One is a *Business Guide*, while the second is an *Investigation and Outcome Report*. The former presents CCPC advice to business in the conduct of their affairs; the latter outlines the details of an RPM case in which the CCPC obtained legally binding undertakings from Chairs Limited t/a Coach House (Coach House) that it would not practice minimum, fixed and maximum RPM. Breaching the undertakings is contempt of Court with possible fines and/or imprisonment as penalties. The two publications are connected in that in the *Business Guide* Coach House is included as a case study.

### **2.2 Guidance: *Business Guide***

The CCPC (2021a) is brief and to the point in its RPM guidance for business. RPM, according to the CCPC (2021a, p. 3),

---

which are not indispensable to the attainment of those objectives, [and] (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.”

<sup>4</sup> On the RPM debate see, for example, Bennett et al (2011), Elzinga & Mills (2014) and Peeperkorn (2008) and references cited therein.

<sup>5</sup> More specifically, the European Commission (2010b, para. 48) “agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer.” The VBER and the VBER Guidance are discussed further in Section III.

involves an agreement between a supplier and a reseller, usually a retailer, preventing the reseller from setting its own prices for the goods. The agreement requires the reseller to sell the goods or services at, or above, a specified price or margin, which is usually decided by the supplier.

Such “arrangements prevent the resellers from setting their prices independently. This restricts businesses from competing properly. RPM is a serious breach of competition law” (ibid, 3). Furthermore “consumers lose out because prices are kept artificially high and they have no possibility of shopping around for better value” (ibid, p. 3).

The CCPC (2021a, p. 4) provides guidance on what RPM looks like in terms of breaching competition law: where RPM “[S]ets a specified price or a minimum retail price, [S]ets a specified price, or a minimum margin, at which a product must be resold, [G]rants incentives, such as rebates or bonuses, dependent on resale of the product at a specified/minimum price or margin, [I]mposes restrictions on how much a reseller can discount the price of the product “(ibid, p. 4). In other words, setting a fixed or minimum resale price, either directly or indirectly, is prohibited.

Although the CCPC does not explicitly refer to maximum RPM it appears that the agency takes the view that it, as well as minimum and fixed, breaches competition law. Under ‘Key Points,’ for example, the CCPC (2021a, p. 5) states that “[S]uppliers must not take any action that interferes with a reseller’s ability to set their own price. Any attempt to do so is likely to be illegal.”

In contrast, the CCPC (2021a, p. 4) states that suppliers “are free to recommend prices at which resellers may resell products. This is known as a recommended resale price (RRP) and is not RPM as a reseller may resell products at a price of their own choosing. However, if a supplier tries to force a reseller to sell at the RRP, this is RPM.”

There is no reference to further CCPC and/or European Commission guidance on RPM, nor is there any mention of the efficiency defence.

### **2.3 Enforcement: *Investigation and Outcome Report***

The CCPC (2021b) *Investigation and Outcome Report* on the Coach House RPM case is concerned with RPM in relation to the supply of household furniture products in the State. The CCPC (2021b, para. 1.3) reached the preliminary finding that Coach House, between March 2013 and August 2017, may have engaged in RPM “by enforcing its then suggested selling prices on four resellers of its household furniture products in the State contrary” to Irish and European Union competition law.<sup>6</sup> In other words fixed RPM.

Notwithstanding that Coach House disagreed with the CCPC’s preliminary findings, Coach House agreed to legally binding commitments that it would “not ... impose or agree to any terms and conditions that placed obligations on its resellers to adhere to Coach House’s suggested, minimum or fixed resale prices for household furniture products.”<sup>7</sup> Coach House further agreed “not to restrict the ability of resellers to independently determine the resale price of household furniture products,”<sup>8</sup> which would also cover maximum RPM, although there is not an explicit reference to maximum RPM.

---

<sup>6</sup> Specific reference is made to these arrangements breaching Section 4(1) of the Act and/or Article 101(1) of the TFEU, but there is no reference to the possibility of offsetting efficiencies gains set out in Section 4(5) of the Act and Article 101(3) of the TFEU.

<sup>7</sup> CCPC (2021b, para. 1.5 & Appendix A, Clause 2.a).

<sup>8</sup> Ibid, para. 1.5 & Appendix A, Clause 2b.

On 29 June 2021, under Section 14B of the Act, a High Court order memorialising these commitments came into effect.<sup>9</sup>

The CCPC (2021b, para. 3.11) Coach House investigation began with a complaint that “Coach House had put pressure on a number of resellers of Coach House furniture to fix the minimum retail price of Coach House household furniture products sold online.” The CCPC (2021b, paras. 3.1 – 3.5) investigation involved gathering information with the assistance of the UK’s Competition and Markets Authority.

The CCPC’s preliminary findings established that Coach House was an undertaking; that there were agreements between Coach House; and its resellers and that since Coach House was located in the UK its conduct was capable of affecting trade between Members States and hence subject to Article 101 of the TFEU.

On the substance of the RPM offence the CCPC (2021b, para. 4.7) stated that “the CCPC found evidence that Coach House may have engaged with four of its resellers to enforce its then suggested selling prices in respect of household furniture products.”

No further elaboration is, however, provided in the *Investigation and Outcome Report* as to, for example, the definition of the relevant market, the estimated market share of Coach House, the nature of the RPM agreement (e.g. the actual wording), the methods used by Coach House to enforce RPM (e.g. threatening to withhold or delay supply) and/or the impact of RPM on competition.

There is no reference to further CCPC and/or European Commission guidance on RPM, nor is any consideration given to possible offsetting efficiency gains as mitigating circumstances.

## **2.4 Conclusion**

The CCPC’s *Business Guide* and its *Investigation and Outcome Report* present bright line guidance on minimum or fixed RPM as well as, although perhaps inadvertently, maximum RPM. It is prohibited. No efficiency defences or mitigating circumstances that exist in both Irish and EU competition law are mentioned let alone discussed or considered. No analysis, it appears, of the effects of RPM need be undertaken in order to establish a breach of competition law.

Taken together the guidance provided in these two publications suggests that the CCPC has adopted a per se approach to minimum or fixed RPM and, in practice, although not stated explicitly, maximum RPM. Under the per se approach, employed in US antitrust law, the impugned RPM conduct is anticompetitive “and it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found restrictive of competition.”<sup>10</sup> There is no equivalent in EU and Irish competition law to the per se approach.<sup>11</sup>

---

<sup>9</sup> The legally binding commitments and the Section 14B Order are presented as Appendix A and Appendix B, respectively of CCPC (2021b). For discussion of Section 14B Orders see Gorecki (2019).

<sup>10</sup> Whish & Bailey (2021, p. 132).

<sup>11</sup> See, for example, Bennett et al (2014, pp. 1278-1285), Gippini-Fournier (2010), and Whish & Bailey (2021, p. 132).

### III. Vertical Block Exemption Regulation (VBER)

#### 3.1 Introduction

The Competition Authority (2010a, 2010b), the forerunner of the CCPC, issued a *Declaration* and a *Notice* in 2010 concerning vertical agreements and concerted practices.<sup>12</sup> The *Declaration*, according to the Competition Authority (2011, p. 27) “exempts certain categories of vertical agreements and concerted practices from the prohibition set out in section 4 of the Act.” The “Declaration brings the Irish exemption into line with that of the European Commission.” Accompanying the *Declaration* was a *Notice* that, in essence, committed the Competition Authority (2011, p. 27) to follow European Commission (2010b) VBER Guidance on vertical agreements, with some limited exceptions.

The *Declaration* was due to expire in 2020. However, it was “amended on 30 October 2020 so as to extend its validity until 1 December 2022.”<sup>13</sup> This reflected the fact that the European Commission’s VBER expires on 31 May 2022 with a revised VBER expected to be adopted at or before that date.<sup>14</sup> The European Commission (2021a, 2021b) has issued draft revised VBER and VBER Guidance (Draft Revised VBER and Draft Revised VBER Guidance). The Draft Revised VBER Guidance does not, however, materially change the situation with respect to RPM, but there is some additional elaboration on efficiencies under Article 101(3).

#### 3.2 Minimum and/or Fixed RPM

##### 3.2.1 A Hardcore Restriction

The current and proposed VBER under Articles 2 and 3 provides a safe harbour for certain vertical restraints where each of the upstream (i.e. supplier) and downstream (i.e. buyer) parties has a market share of less than 30 per cent on the relevant market. However, under the current and proposed Article 4 of the VBER the safe harbour does not apply to so-called hardcore (i.e. by object) restrictions including minimum or fixed RPM.

The position of the CCPC outlined in Section II concerning the anticompetitive nature of minimum or fixed RPM is inconsistent with the current and proposed VBER and guidance in that the European Commission does not treat RPM as a per se breach. The European Commission (2021b, para. 180) in its Draft Revised VBER Guidance specifically states that although the European Court has found that minimum or fixed RPM is a by object breach, this “does not mean that agreements that amount to [minimum or fixed] RPM are per se infringements of Article 101. Where undertakings consider that RPM is efficiency enhancing in an individual case, they may bring forward efficiency justifications under Article 101(3).”

##### 3.2.2 Efficiency Defence: Article 101(3) of the TFEU

Despite the fact that VBER classifies minimum or fixed RPM as a hardcore restriction this is not the end of the matter. Like all anticompetitive agreements, whether horizontal or vertical, that breach Article 101(1) of the TFEU, if such agreements have pro-competitive effects under Article 101(3) that outweigh the anticompetitive effects, then overall the agreement may be considered

---

<sup>12</sup> A *Declaration* is similar to a Block Exemption, while a *Notice* is similar to guidance.

<sup>13</sup> <https://www.ccpc.ie/business/enforcement/civil-competition-enforcement/declarations/vertical-agreements-concerted-practices/>.

<sup>14</sup> For details of the VBER review and the accompanying Draft Revised Guidelines see: [https://ec.europa.eu/competition-policy/public-consultations/2018-vber\\_en](https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en).

procompetitive.<sup>15</sup> However, in its VBER Guidance, the European Commission (2010b, para. 47) states that “it is presumed that ... [a hardcore] agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply.”<sup>16</sup> The European Commission (2010b, para. 224) details several ways in which minimum or fixed RPM can damage competition.

Nonetheless, the European Commission’s VBER Guidance does not close the door completely on the successful application of Article 101 (3) to the otherwise anticompetitive minimum or fixed RPM.<sup>17</sup> In particular, the European Commission (2010b, para. 225) specifies a number of instances where such RPM may yield efficiencies that can be assessed under Article 101(3). These include where: a manufacturer introduces a new product and wants to induce distributors and retailers to increase their sales efforts; and a franchise (or similar) system wishes to apply a “coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit consumers.”<sup>18</sup> RPM prevents free riding by resellers. It provides incentives for increased service quality and facilitates lower prices for consumers. Minimum or fixed RPM strengthens interbrand competition and, while reducing intrabrand price competition, increases intrabrand non-price (e.g. service) competition.<sup>19</sup>

It should be noted that if the European Commission (or Member State competition agency) establishes that there is minimum or fixed RPM, it then up to the parties to the RPM agreement to make the case for efficiencies under Article 101(3) (or the corresponding clause in Member State legislation). The competition agency then has to make a judgment based on balancing the competitive harm as against the competitive benefits.

As noted in Section II the CCPC in its *Business Guide* and *Investigation and Outcome Report* made no reference or allusion to efficiencies offsetting the presumed anticompetitive nature of minimum or fixed RPM.

### 3.3 Maximum RPM

Discussions of RPM often divide the practice into several different categories: minimum or fixed; recommended (or suggested as in Coach House); and maximum.<sup>20</sup> The CCPC’s *Business Guide* omits explicit consideration of maximum RPM, but as noted in Section 2.2 the CCPC does implicitly ban maximum RPM. Under the latter form of RPM the reseller cannot sell the suppliers goods or services *above* the maximum price specified by the supplier but can sell *at or below* the maximum RPM.

European Commission (2010b, paras. 226-229) guidance on RPM treats recommended and maximum RPM together.<sup>21</sup> The VBER also usually groups the two together. Under the VBER where the market share of the supplier and the reseller does not exceed 30 per cent then providing that recommended/maximum RPM does not amount to fixed/minimum then recommended/maximum RPM is covered by the Block Exemption.

---

<sup>15</sup> Sections 4(1) and 4(5) are the corresponding provisions of the Act.

<sup>16</sup> The European Commission (2021b, para. 163) Draft Revised VBER Guidance makes a somewhat stronger statement: that, “hardcore restrictions correspond to a category of restrictions under the VBER for which it is presumed that they generally result in harm to competition so that a vertical agreement containing such a hardcore restriction cannot be block exempted pursuant to Article 2(1).”

<sup>17</sup> These grounds are also set out in European Commission (2021b, para. 182) Draft Revised VBER Guidance.

<sup>18</sup> European Commission (2010b, para. 225).

<sup>19</sup> It is possible that intrabrand price competition could increase with minimum or fixed RPM if in the absence of RPM the brand would not have been introduced.

<sup>20</sup> See, for example, European Commission (2010b, paras. 223 & 226).

<sup>21</sup> A similar approach is taken by the European Commission (2021b, paras. 183-186) in its Draft Revised VBER Guidance.



Where the 30 per cent threshold is exceeded then there is a competition risk that recommended/maximum RPM may act so as a focal point for resellers, and/or soften competition or facilitate collusion between suppliers. As the European Commission (2010b, para. 229) notes where recommended/maximum RPM is anticompetitive then the question arises of whether or not there are grounds for an exemption under Article 101(3) of the TFEU arises. The European Commission considers two grounds: avoiding the problem of double marginalisation; and, ensuring that the brand in question competes more forcefully with other brands.

### **3.4 A Paradox?**

Neither the current and proposed VBER and associated guidance treat RPM as per se breach of competition law. Indeed, as noted in Section 3.2, such an interpretation is specifically rejected by the European Commission. This is not, of course, surprising since there are no per se rules under European competition law.<sup>22</sup> It is true, of course, that minimum/fixed RPM is treated as a hardcore offence, but it is recognised that under certain mitigating circumstances such agreements might be found to be procompetitive. In contrast, as argued in Section 2, the CCPC's approach to RPM – as evidenced by its 2021 guidance and enforcement - is as a per se breach of competition law. This creates something of a contradiction or a paradox. One way of exploring this paradox is to examine the CCPC's treatment of RPM prior to the issuance of the *Business Guide* and *Investigation and Outcome Report* in 2021.

## **IV. Current CCPC Treatment of RPM: A Break With Precedent?**

### **4.1 Introduction**

The views of the CCPC on RPM can be divided into the period before and the period after the modernisation of Ireland's competition law with the passage of the Act in 2002.<sup>23</sup> Nonetheless, there is a considerable degree of continuity in the views of the CCPC with respect to RPM pre and post modernisation. It should be noted Ireland's competition enforcer was the Competition Authority up until October 2014 when it was merged with the National Consumer Agency to form the CCPC as both a competition and consumer protection agency. Here reference to the CCPC also captures the record of the Competition Authority.

### **4.2 Pre-2002: the Notification System**

Prior to the modernisation of competition law with the passage of the Act in 2002 there existed a notification system under which agreements, including vertical agreements containing RPM clauses, could be presented to the CCPC. Under the legislation the CCPC could issue licenses to permit an agreement that offended Section 4(1) because of the more than offsetting efficiencies permitted under what is now Section 4(5).<sup>24</sup> In such instances the CCPC would consider whether the efficiencies were able to offset the anticompetitive effects.<sup>25</sup> The CCPC's decision as to whether or not to grant a

---

<sup>22</sup> For discussion, see Whish & Bailey (2021, p. 132).

<sup>23</sup> For discussion of the modernisation of competition law in Ireland see Andrews, Gorecki & McFadden (2015, pp. 7-19).

<sup>24</sup> If the notified agreement did not offend Section 4(1) then the Competition Authority would issue a certificate. For details see Massey & O'Hare (1996, pp. 126-128).

<sup>25</sup> For a discussion of licences see Massey & O'Hare (1996, pp. 128-130).

licence, together with the underlying economic and legal analysis, were published and available on the agency's website.<sup>26</sup>

According to Massey & O'Hare (1996, p. 170) the 1994 Net Book Agreement decision "sets out at length the ... [CCPC] views" on RPM.<sup>27</sup> The CCPC (Competition Authority, 1994, para. 64) defined RPM as "a practice whereby a supplier agrees to supply retailers on condition that they sell the goods at a price specified by the supplier." The particular form of RPM in the Net Book Agreement was minimum RPM. In the CCPC's decision not to grant a licence the CCPC not only defines the relevant product and market, but also briefly reviews the pros and cons of RPM, before moving onto the question of whether the efficiencies flowing from the Net Book Agreement outweighed the anticompetitive effects due to the breach of Section 4(1). In coming to the conclusion that the efficiencies were insufficient, the CCPC took into account a number of precedents including those of the European Courts.

The CCPC's decision to refuse a licence in the Net Book Agreement case was the rule not the exception. As Massey and O'Hare (1996, p. 170) state, the CCPC "has stated consistently in its decisions that resale price maintenance is offensive and it has not licensed it."

### 4.3 Post-2002: Enforcement Decisions

Subsequent to the abolition of the notification system with passage of the Act in 2002, the CCPC continued to opine on RPM, through Enforcement Decisions. Such Decisions, according to the then CCPC website (i.e. [www.tca.ie](http://www.tca.ie)), reflected the CCPC's statutory

role to inform the public about competition issues. From time to time, the Authority will publish reasons for closing investigations, whether because we found no breach of competition law or because we settled the case without having to issue proceedings.

Of the sixteen Enforcement Decisions published between 2002 and 2014 four involved RPM.<sup>28</sup>

In 2003 the Competition Authority (2003a, 2003b) published, separately, Enforcement Decisions on RPM by the *Irish Times* and *Irish Independent*, respectively. In both cases the CCPC's analysis defined the relevant market, considered whether or not RPM breached Section 4(1) – it did<sup>29</sup> – and whether this was offset by the efficiencies under Section 4(5) – it wasn't.<sup>30</sup> The mechanisms by which the *Irish Times* and the *Irish Independent* enforced adherence by retailers to the recommended retail price,

---

<sup>26</sup> Two points: first, in some instances the notifying parties would modify a notified agreement in order for the CCPC to be in a position to grant a licence; and second, at present notification decisions are available from the CCPC on request.

<sup>27</sup> For details see Competition Authority (1994, paras. 64-70).

<sup>28</sup> It appears from an examination of the CCPC's website (i.e. [www.ccpc.ie](http://www.ccpc.ie)) that no Enforcement Decisions were published after 2014. CCPC Investigation and Outcome Reports appear to perform a similar function to Enforcement Decisions. To date there have been three Investigation and Outcome Reports, the first, in 2021, concerned Coach House.

<sup>29</sup> The Competition Authority (2003a, paras. 2.23, 2.29, 2.32; & 2003b, paras. 2.27, 2.33, 2.38) did not distinguish between RPM breaches by object or by effect, typically stating that the conduct offended Section 4(1) which, of course, refers to both object and effect.

<sup>30</sup> In considering the efficiencies under Section 4(5) the Competition Authority (1997a, 1997b) referred back to its consideration of these RPM agreements when they were notified under the pre-2002 competition regime in Ireland. Since the Authority concluded that little had changed since those decisions the previous analysis was still relevant. It should be noted that in the case of the *Irish Times* the Competition Authority (1997a) had issued a certificate after the RPM clause was changed to refer to recommended retail price. However, in 40 per cent of *Irish Times* newspaper retailers no change had been made to the notified agreement so that the offensive RPM clause remained unaltered in the agreement.

typically printed on the newspaper, was detailed. The CCPC referred to the then extant VBER Guidance.

The third Competition Authority (2003c) RPM Enforcement Decision was also released in 2003 and concerned the Price Support Agreement (PSA) between the motor fuels distributor, Statoil, and three of its downstream branded motor fuel retailers in Letterkenny, Co. Donegal. The PSA resulted in Statoil's branded motor fuel retailers (as well as non-Statoil motor fuels retailers) adhering to Statoil's recommended retail prices for motor fuels. The PSA created financial disincentives for the Statoil branded motor fuel retailers to reduce prices below the recommended retail price except as a response to price reductions by strategically placed local rival motor fuels retailers. However, because the latter knew that Statoil would provide financial support to its branded stations to meet the price reduction, this in turn created a strong disincentive for these rival motor fuels retailers to reduce their prices.

The Competition Authority (2003c) set out the legal context, by reference to Section 4(1) and 4(5). In terms of analysis the relevant product (i.e. motor fuels) and geographic (i.e. Letterkenny) markets were defined. The market shares were also estimated which showed that the combined market share of the marker and Statoil motor fuel retailers was 67 per cent.<sup>31</sup> The impact of the PSA was assessed in a number of ways, including a theoretical analysis, testimony of motor fuel retailers in Letterkenny and the pattern of retail motor fuel retail prices in Letterkenny. Statoil did not offer efficiencies as a defence of the PSA, but instead agreed to abandon the scheme on a State-wide basis.

The fourth Competition Authority (2013) RPM Enforcement Decision was released a decade later and again set out the enforcement steps taken by the owner of the FitFlops brand of footwear in order to ensure compliance with its specified minimum or fixed resale price. The CCPC set out the legal context with respect to RPM, referring to Sections 4(1) and 4(5) of the Act, the corresponding provisions of the TFEU and the VBER. Apparently in the interest of securing a rapid resolution of the matter FitFlops owner did not put forward efficiency arguments under Section 4(5) of the Act or Article 101(3) of the TFEU. As a result efficiencies were not considered in the Enforcement Decision.

Despite the fact that the CCPC considered RPM to be a hardcore restriction, thus obviating the need for a competition assessment, the Competition Authority (2013, para. 4.4) nonetheless stated that it "formed the preliminary view ..., given the nature of the evidence gathered and the position of the Products in the overall footwear sector, the BBS [Fitflop's owner] Restrictions were likely to have a not insignificant effect on competition, regardless of how the markets were defined."<sup>32</sup> However, no analysis was provided to substantiate these assertions. The Competition Authority (2013, paras. 1.8-1.9) also set out the methods by which RPM was enforced.

#### **4.4 Paradox Resolved?**

The treatment of RPM by the CCPC pre and post modernisation has been consistent up until the 2021 release of the *Business Guide* and the *Investigation and Outcome Report*. RPM needs to be evaluated under Section 4(1) of the Act and/or Article 101(1) of the TFEU and, where the parties to the agreement put forward arguments, under Section 4(5) of the Act and/or Article 101(3) of the TFEU. Nonetheless irrespective of whether or not the efficiency provisions are invoked a competition assessment is undertaken. Reference is typically made to European Commission guidance on RPM. There is no suggestion in the CCPC analysis of RPM in either notification decisions or enforcement

---

<sup>31</sup> Competition Authority (2003c, para. 2.21).

<sup>32</sup> It should be noted that the restrictions also included other selling restrictions (Competition Authority, 2013, para. 1.10).

decisions that RPM is a per se offence despite the fact that there appears to be no instance of the efficiency conditions being satisfied to such an extent that the RPM is procompetitive.

Notwithstanding this conclusion, on closer inspection it appears that the CCPC’s thinking on RPM has evolved towards its current, in effect, per se approach. Attention is confined to the post 2002 period.<sup>33</sup> CCPC thinking is measured using three sets of indicators: legal context (i.e. did the CCPC outline the efficiency defence and/or refer to European Commission guidance?); economic context (i.e. did the CCPC provide the basis for a competition assessment?); and efficiency defence (i.e. did the parties to the RPM invoke or waived the efficiency defence?).<sup>34</sup> The results are reported in Table 1, where ‘√’ denotes yes, and ‘X’, no, with respect to the various indicators under these three headings.

**Table 1**  
**Resale Price Maintenance, Legal & Economic Context, Efficiency Defence, Enforcement Decisions & Investigation & Outcome Reports, Competition & Consumer Protection Commission, 2003-21**

Legal/Economic Context/Use of Efficiency Defence	Enforcement Decision				Investigation & Outcome Report
	<i>Irish Times</i>	<i>Irish Independent</i>	Statoil	FitFlops	Coach House
<b>Legal Context</b>					
Reference to s. 4(5) &/or Art 101(3)	√	√	√	√	X
Reference to RPM Guidance	√	√	√	√	X
<b>Economic Context</b>					
RPM Mechanism Outlined	√	√	√	√	X
Market Defined	√	√	√	X	X
Market Shares	√	√	√	X	X
Competition Assessment	√	√	√	X	X
<b>Use of Efficiency Defence</b>					
Invoked or Waved	√	√	X	√	X

Note: ‘√’ means that the Enforcement Decision or Investigation and Outcome Report includes the indicator, ‘X’ that it does not. In Statoil and Coach House there is no explicit reference to the efficiency defence being invoked or waived. Resale price maintenance in these five cases was minimum and/or fixed.

Source: Competition Authority (2003a, 2003b, 2003c, 2013) & CCPC (2021b).

The evidence suggest that the three enforcement decision released in 2003 – *Irish Times*, *Irish Independent* and Statoil – tick all the boxes with respect to the three sets of indicators. The efficiency defence was outlined, the elements of a competition assessment presented, and the efficiency defence was invoked and/or waved. The only exception is Statoil where it appears that no reference is explicitly made to the fact that Statoil did not rely on the efficiency defence.

In the FitFlops enforcement decision of 2013 three of the four economic context indicators are absent. This omission, compared to 2003, should not be overstated. As noted above, the CCPC asserted, without any evidence being proffered, that in FitFlops the RPM had a “not insignificant effect on

<sup>33</sup> The conclusion would not change if reference were made for example to the pre-2002 period as the discussion of the Net Book Agreement in Section 4.2 makes clear.

<sup>34</sup> Of course, once the efficiency defence is invoked then a competition assessment is required.

competition.” Since no evidence was presented to substantiate this conclusion, an ‘X’ appears in Table 1 for three of the four economic context indicators.

In FitFlops, like the prior three RPM enforcement decisions but unlike the *Investigation and Outcome Report*, the CCPC sets out the legal context with respect to the efficiency defence. The wording of the Section 14B Order contains specific reference to the fact that FitFlops did not avail of “any justifications and defences that may be available to it ... in order to achieve a speedy resolution of this matter,”<sup>35</sup> while there is no such reference in the Coach House Section 14B Order nor in the body of the corresponding *Investigation and Outcome Report*.

The evolution of the CCPC’s thinking towards RPM suggests, at least from the evidence of the four RPM enforcement decisions and the *Investigation and Outcome Report*, that the agency has shifted its position on RPM. In 2003 all of the economic, legal and use of efficiency defence indicators feature in the CCPC’s enforcement decisions (apart from one apparent exception with respect to Statoil). A decade later in 2013 three of the four economic context indicators are absent – although the importance of this should not be overstated - from the FitFlops enforcement decision. By 2021 none of the indicators is to be found in the *Investigation and Outcome Report* consistent with the position that RPM is treated by the CCPC as though it were a per se offence.

## V. Conclusion: Much Ado About Nothing?

The CCPC in its *Business Guide* and *Investigation and Outcome Report* has provided bright line guidance on RPM on which business and legal practitioners can be expected to rely. Uncertainty is reduced if not eliminated on where the CCPC stands. There has it appears, in Ireland at least, never been a case where fixed or minimum RPM has been able to successfully avail of the efficiency defences. All the CCPC has done, it could be argued, is to recognise this by in effect making minimum or fixed RPM a per se offence. But is legal and other uncertainty reduced? Not necessarily. Indeed, it could be argued that the CCPC has created confusion.

The CCPC’s position on minimum or fixed RPM is at variance with the fact that both the Section 4(5) of the Act and Article 101(3) of the TFEU contain an explicit efficiency defence for RPM. The European Commission’s VBER Guidance, to which in a *Notice* the CCPC defers, details specific instances of these efficiency defences. The current CCPC position of approaching minimum or fixed RPM as a per se breach of competition law is also inconsistent with the agency’s interpretation under the pre-2002 notification system and subsequent decisional practice until at least 2013.

Although not explicitly stated the CCPC appears to adopt an equally robust and negative position with respect to maximum RPM. In both the *Business Guide* and *Investigation and Outcome Report* it appears that maximum RPM is prohibited. This contrasts with the much more permissive approach of the European Commission which allows maximum RPM to avail of the safe harbour in the current and draft VBER as does the CCPC’s 2010 *Declaration*.<sup>36</sup>

Although RPM used to be treated as a per se offence in the US this has changed radically in the past quarter of a century. The US Supreme Court rejected the per se approach to maximum RPM in 1997;<sup>37</sup>

---

<sup>35</sup> Competition Authority (2013, p. 9, para.(F)).

<sup>36</sup> Competition Authority (2010a, Article 4(2)(a)).

<sup>37</sup> As a result of *State Oil v. Khan*, 188, S. Ct. 275 (1997) maximum RPM is treated under the rule of reason. For a discussion of this case see Bamberger (2004).

to minimum or fixed RPM in 2007.<sup>38</sup> Instead, RPM is treated under the rule of reason approach which, according to Whish & Bailey (2021, p. 132), “requires a balancing of the pro- and anti-competitive effects of an agreement.”

Businesses can nevertheless, as the *Business Guide* points out, “seek independent legal advice.”<sup>39</sup> Legal practitioners can, undoubtedly, explain the legal context surrounding RPM including the efficiency defence and rely on VBER Guidance. Notwithstanding such advice even if a business considers that it has a good RPM efficiency defence, it might still decide to forgo potentially societal welfare improving conduct because it does not wish to be investigated by an agency that has demonstrated a clear reluctance to entertain such arguments. The CCPC’s per se approach to RPM is thus likely to chill competition. Consumers and society are worst off.

At a minimum it would seem appropriate for the CCPC to state explicitly that it either views minimum and fixed RPM as a per se breach of competition law together with the justification for such a position (including how such an approach is consistent with Irish and EU competition law) or whether, as seems more likely, that given the hardcore characterisation of minimum and fixed RPM by the European Commission, the CCPC envisages it would be difficult but not impossible for the efficiency defence to be successfully employed to justify such forms of RPM.

The agency also needs to clearly articulate its position on maximum RPM, which is also appears to treat – inappropriately, but perhaps inadvertently – in the same way as minimum and fixed RPM. In order to clarify the situation the CCPC could revise its *Business Guide* and/or in future *Investigation and Outcome Reports* include reference to the efficiency defence, whether it was invoked or waived , together with a competition assessment.

There is, finally, a certain irony in the CCPC position on RPM in view of its proposed new responsibilities with the implementation of the ECN+ Directive. The relevant draft legislation was introduced in January 2022.<sup>40</sup> The CCPC (2022) will be able to impose administrative fines for civil breaches of competition law, including RPM. It seems reasonable to assume that businesses before the CCPC for breaches of RPM will argue the efficiency defence as a way to avoid fines and other possible sanctions. While the CCPC’s per se approach to RPM set out in the *Business Guide* and the *Investigation and Outcome Report* is untenable, it will remain until some entity decides to challenge the agency’s position.

---

<sup>38</sup> As a result of *Leegin Creative Leather Products Inc v PSKS Inc* 555 US 877 (2007) minimum or fixed RPM is treated under the rule of reason. For a discussion of the case and its repercussions see, for example, Baker (2019, pp. 88-89) and Elzinga & Mills (2014).

<sup>39</sup> CCPC (2021a, p. 5).

<sup>40</sup> The Bill and an Explanatory Memorandum is available at: <https://www.oireachtas.ie/en/bills/bill/2022/12/>.

## References

- Andrews, Philip, Paul Gorecki & David McFadden (2015) *Modern Irish Competition Law*. The Netherlands: Kluwer International.
- Baker, Jonathan (2019) *The Antitrust Paradigm. Restoring a Competitive Economy*. Cambridge, Mass: Harvard University Press.
- Bamberger, Gustavo (2004) "Revisiting Maximum Resale price maintenance: *State Oil v. Khan* (1997)." In John Kwoka & Lawrence White (eds) (2004) *The Antitrust Revolution. Economics, Competition and Policy*. Fourth Edition. New York: Oxford University Press, pp. 334-349.
- Bennett, Matthew, Amelia Fletcher, Emanuele Giovannetti, & David Stallibrass (2011) "Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy." *Fordham International Law Journal*, Vol. 33, Issue 4, pp. 1277-1299.
- Competition and Consumer Protection Commission (CCPC) (2021a) *Resale Price Maintenance. What You Need to Know*. Business Guide. Dublin: CCPC.
- Competition and Consumer Protection Commission (CCPC) (2021b) *A Report Detailing Outcome of the CCPC's Investigation into Suspected Anti-Competitive Practices by Chairs Limited, Trading as Coach House*. Investigation & Outcome Report. Dublin: CCPC.
- Competition & Consumer Protection Commission (CCPC) (2022) "The CCPC Welcomes the Publication of the Competition (Amendment) Bill 2022." Press Release. 31 January, available at: <https://www.cpc.ie/business/cpc-welcomes-the-publication-of-the-competition-amendment-bill-2022/>.
- Competition Authority (1994) *Net Book Agreements*, Decision No. 336. Dublin: the Authority, available at; <https://www.casemine.com/judgement/uk/5da048c34653d07f33c3b6f1>.
- Competition Authority (1997a) *Irish Times Newspapers Ltd/Retailers*. Decision No. 477. Dublin: the Authority, available at: <https://www.casemine.com/judgement/uk/5da049334653d07f33c3b77c>.
- Competition Authority (1997b) *Independent Newspapers Marketing Ltd/Retailers*. Decision No. 482. Dublin: the Authority, available at: <https://www.casemine.com/judgement/uk/5da049354653d07f33c3b77e>.
- Competition Authority (2003a) *Agreements between the Irish Times Limited and Newspaper Retailers Allegedly Fixing the Retail Price of The Irish Times Newspaper*. Enforcement Decision No. E/03/004. Dublin: the Authority.
- Competition Authority (2003b) *Agreements between Independent Newspapers (Ireland) Limited and Newspaper Retailers Allegedly Fixing the Retail Price of Independent Newspaper Titles*. Enforcement Decision No. E/03/003. Dublin: the Authority.
- Competition Authority (2003c) *Agreements between Statoil Ireland Limited and Motor Fuels Retailers Allegedly Fixing the Retail Price of Motor Fuels in Letterkenny*. Enforcement Decision No. E/03/002. Dublin: the Authority.
- Competition Authority (2010a) *Declaration in Respect of Vertical Agreements and Concerted Practices*. Dublin: the Authority.

- Competition Authority (2010b) *Notice in Respect of Vertical Agreements and Concerted Practices*. Dublin: the Authority.
- Competition Authority (2011) *Annual Report 2010*. Dublin: the Authority.
- Competition Authority (2013) *Resale Price Maintenance of FitFlop Footwear Products*. Enforcement Decision E/13/01. Dublin: the Authority.
- Elzinga, Kenneth & David Mills (2014) "Resale Price Maintenance Wins A Reprieve: *Leegin v. PSKS* (2007)." In John Kwoka & Lawrence White (eds) (2014) *The Antitrust Revolution. Economics, Competition and Policy*. Sixth Edition. New York: Oxford University Press, pp. 435-457.
- European Commission (2010a) "Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices." *Official Journal*, L102/1-L102/7.
- European Commission (2010b) "Guidelines on Vertical Restraints." *Official Journal*, C 130/1-C 130/46.
- European Commission (2021a) *Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*. 9 July. C(2021) 5026 Final. Brussels: European Commission.
- European Commission (2021b) *Approval of the content of a draft for a Communication from the Commission. Commission Notice Guidelines on Vertical Restraints*. 9 July. C(2021) 5038 Final. Brussels: European Commission.
- Gorecki, Paul (2019) "Section 14B Court Orders and Civil Enforcement of Competition Law in Ireland: A New Direction?" *European Competition Law Review*, Vol. 40, Issue 2, pp. 63-66.
- Massey, Patrick & Paula O'Hare (1996) *Competition Law and Policy in Ireland*. Dublin: Oak Tree Press.
- Peeperkorn, Luc (2008) "Resale Price Maintenance and Its Alleged Efficiencies." *European Competition Journal*. Vol. 4, No. 1, June, pp. 201-212.
- Whish, Richard & David Bailey (2021) *Competition Law*. Tenth Edition. Oxford: Oxford University Press.