



## Vertical Agreements 2013

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# Ireland

Helen Kelly and Bonnie Costelloe

Matheson

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## Antitrust law

- 1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

Section 4(1) of the Competition Act, 2002 (as amended) (the Act) (available at [www.tca.ie](http://www.tca.ie)) prohibits anti-competitive agreements between undertakings and is equivalent at national level to article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 4(3) of the Act allows the Competition Authority (the Authority) to make written declarations that, in its opinion, specified categories of agreement comply with the efficiency criteria in section 4(5) of the Act (equivalent to the power of the European Commission (the Commission) to grant block exemptions for categories of agreement that comply with the conditions in article 101(3) TFEU). In addition, section 30(1)(d) of the Act allows the Authority to publish notices giving practical guidance as to the operation of provisions of the Act. The Authority has published a notice and two declarations (each of which is available at [www.tca.ie](http://www.tca.ie)) applicable to vertical restraints, as follows:

- Declaration in respect of vertical agreements and concerted practices (Decision No. D/10/001) (the Declaration);
- Notice in respect of vertical agreements and concerted practices (Decision No. N/10/001) (the Notice); and
- Declaration in respect of exclusive purchasing agreements for cylinder liquefied petroleum gas (Decision No. D/05/001) (the Cylinder LPG Declaration).

The Notice and the Declaration were introduced by the Authority following a review of the Irish competition rules applicable to vertical agreements further to the introduction by the Commission of Regulation No. 330/2010 (the Vertical Block Exemption Regulation (VBER)).

The Notice provides practical guidance as to the application of the Act and the Declaration. The Notice expressly provides that reference may be made to the Commission's Guidelines on Vertical Restraints (the Commission Guidelines) for guidance as to whether an agreement is likely to fall outside of section 4(1) of the Act. However, two exceptions are noted in this regard. First, the exemption provided for in the VBER in respect of vertical agreements entered into by retailer buyer pools where no individual member (together with its connected undertakings) has an annual turnover in excess of 50 million does not apply under the Declaration. In separate guidance (specifically, the Authority's notice on activities of trade associations and compliance with competition law, N/09/002 dated 9 November 2009) the Authority confirmed that it would follow the approach indicated by the Commission in its Guidelines on Horizontal Cooperation Agreements that group purchasing arrangements where the parties have a combined market share of less than 15 per cent in both the purchasing and selling markets are unlikely to raise competition concerns. Second, paragraphs 8 to 11 of the Commission Guidelines in respect of agreements of

minor importance do not apply since there is no equivalent to the Commission's De Minimis Notice under Irish law.

The Declaration and Notice expire on 1 December 2020. The Cylinder LPG Declaration (see question 7) expires on 14 April 2015.

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## Types of vertical restraint

- 2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The Declaration is closely modelled on the VBER and the alignment with EU law is a deliberate policy of the Authority designed to facilitate self-assessment and to minimise compliance costs to businesses. 'Vertical agreements' are defined in article 1 of the Declaration as agreements or concerted practices between undertakings 'each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.

- The types of vertical restraint covered by the Declaration include:
- non-compete obligations: any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 per cent of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year;
  - exclusivity provisions: including exclusive purchasing agreements, exclusive supply obligations, and exclusive distribution agreements in respect of a given territory or customer group; and
  - selective distribution systems: a distribution system whereby the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria, and where these distributors undertake not to sell such goods or services to unauthorised distributors.

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## Legal objective

- 3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

Irish competition law pursues purely economic objectives.

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**Responsible authorities**

- 4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Authority (with the aid of the Irish courts) is responsible for enforcing prohibitions on anti-competitive vertical restraints.

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**Jurisdiction**

- 5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

In order to be subject to antitrust law in Ireland, the object or effect of the restraint in question must be to prevent, restrict or distort competition in trade in any goods or services in Ireland (or any part of Ireland), irrespective of the location or domicile of the undertakings involved.

The Irish courts have not previously considered vertical restraints in an extraterritorial context.

Neither the Authority nor the Irish courts have as yet applied the rules on vertical restraints in a pure internet context.

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**Agreements concluded by public entities**

- 6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Irish competition law applies to agreements concluded by public or state-owned entities insofar as they constitute 'undertakings' for the purposes of the Act.

An 'undertaking' is defined in section 3 of the Act as 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service'. An activity may be carried on 'for gain' irrespective of whether the undertaking is profit-making or not; the key criterion is that the undertaking charges for the product or service supplied.

Public bodies may not be considered to be undertakings when they exercise certain functions involving the exercise of official authority or where the functions in question operate on the basis of 'solidarity'. On this basis the Authority determined that the Health Service Executive (HSE) was not an undertaking where it administered certain drug distribution schemes (Decision No. E/08/01).

That a public body may constitute an undertaking for certain purposes and not for others was upheld by the High Court in *Medicall Ambulance Ltd v HSE* (High Court, 8 March 2011). In that case, the High Court found that the HSE was an undertaking for the purposes of the Competition Act where, in certain cases, vehicles from the National Ambulance Service (part of the HSE) were used for the transfer of private patients. By contrast, in *Lifeline Ambulance Services v HSE* (High Court, 23 October 2012), the Court found that the HSE did not operate as an undertaking when using its ambulance fleet for emergency services and the transport of public patients.

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**Sector-specific rules**

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

The Authority has issued a specific declaration in respect of agreements for supply to independent retailers (or dealers) of liquefied

petroleum gas (LPG) in cylinders. The Cylinder LPG Declaration limits exclusive purchasing obligations in such agreements to a duration of two years. This declaration entered into force on 1 April 2005 and expires on 31 March 2015.

The Competition (Amendment) Act 2006 introduced certain sector-specific rules in respect of agreements between suppliers and retailers in the grocery goods sector. The Department of Jobs, Enterprise and Innovation has also published a draft Code of Practice for the grocery sector. It is thought that the proposed new Consumer and Competition Bill, which should be introduced in 2013, will make the new Code binding on certain designated 'grocery goods undertakings'.

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**General exceptions**

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

Where a restraint satisfies the efficiency conditions set out in section 4(5) of the Act, it will be exempt from the section 4(1) prohibition. These conditions effectively mirror article 101(3) TFEU. As noted above, agreements containing vertical restraints that comply with terms of an Authority declaration or notice are also exempt from the general prohibition in section 4(1). However, Irish competition law does not provide for a *de minimis* exception similar to that under EU law.

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**Agreements**

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The Act does not provide a definition of 'agreement'. However, the Authority and the Irish courts generally follow the approach of the Commission and the EU courts in applying a broad definition to the concept.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

Section 4 of the Act covers agreements between undertakings, decisions of associations of undertakings and concerted practices. The concept of an 'agreement' or 'concerted practice' between undertakings will be interpreted broadly and is understood in functional rather than in formal or written contractual terms. The essential feature of the concept is that the 'agreement' or 'concerted practice' relates to conduct distinguishable from the unilateral conduct of an undertaking.

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**Parent and related-company agreements**

- 11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Section 4 of the Act applies only to agreements between independent undertakings. In 1992 the Authority found that two companies that were wholly-owned subsidiaries of the same holding company were not independent undertakings but were in fact separate arms of the same organisation and were therefore not in competition with each other (*AGF Life Holdings*, Decision dated 14 May 1992).

In *AGF-Irish Life/NEM Insurance* (Decision dated 9 June 1993), the Authority found that the test to be applied is whether parties which are subsidiaries of a single parent form an economic unit within which they have no real freedom to determine their course of action on the market. Although the undertakings in this case were not wholly-owned subsidiaries, the Authority found that they did not

have sufficient commercial autonomy from their common majority shareholder to operate independently.

### Agent–principal agreements

- 12** In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier’s behalf for a sales-based commission payment?

Genuine agency agreements are outside the scope of section 4(1) of the Act. The Authority follows the approach of the Commission in this regard. Accordingly, an agreement whereby a legal or physical person (the agent) is vested with the power to negotiate or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal, and where the agent does not bear any, or bears only insignificant, risk in relation to the contracts concluded or negotiated on behalf of the principal and in relation to market-specific investments for the field of activity will fall outside the scope of section 4(1) of the Act.

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

Pursuant to the Notice, parties can refer to the relevant section of the Commission Guidelines (paragraphs 12 to 21) for guidance as to what constitutes an agent–principal relationship.

### Intellectual property rights

- 14** Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

No, the Declaration applies to agreements containing provisions granting IPRs provided that the IPRs are merely ancillary to the primary purpose of the agreement.

### Analytical framework for assessment

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The first step is to ascertain whether section 4(1) of the Act applies to the restraint, namely whether the parties to the agreement are independent undertakings and whether the restraint has the object or effect of preventing, restricting or distorting competition in Ireland. Assuming the Act applies, it is then necessary to look at whether the restraint in question falls within the scope of the exemptions in the declarations referred to above. This involves an analysis of (inter alia) the parties’ market shares and the relevant provisions of the agreement. Hard-core restrictions such as vertical price fixing and certain sales restrictions are treated like per se offences in the United States, and the object or effect of such agreements will automatically be presumed to restrict competition, irrespective of market share.

In the event that the parties are not able to avail themselves of one of the specific exemptions (declarations) from section 4(1) of the Act, the parties then need to consider whether the restraint otherwise satisfies the efficiency conditions of section 4(5) of the Act. The Commission Guidelines may be of assistance in this regard. To the extent that this is not possible, the parties should consider whether they can disapply the restraint by severing it from the rest of the agreement in which it is contained, otherwise they risk the whole agreement being deemed anti-competitive.

- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

In order for a vertical restraint to benefit from the Declaration the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services must not exceed 30 per cent.

The Authority also has express power to disapply the Declaration where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant market (article 8 of the Declaration).

The Cylinder LPG Declaration does not contain market share thresholds but does require that the restrictions be of a permitted type and that the agreement does not contain any hard-core restrictions.

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

As noted in 16 above, in order for a vertical restriction to benefit from the Declaration the market share of the buyer must not exceed 30 per cent of the market on which it purchases the contract goods or services. The relative market position or conduct of other buyers or willingness of buyers in the market to accept a particular type of restraint will not affect the compatibility of an individual restraint with the Declaration provided that the agreement complies with all of the other terms of the Declaration. However, as noted above, the Authority can disapply the Declaration where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant market.

### Block exemption and safe harbour

- 18** Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

As noted above, the Authority has a number of declarations in respect of vertical restraints which are equivalent to a block exemption or safe harbour and, where relevant, are subject to the market share thresholds referred to in question 16.

### Types of restraint

- 19** How is restricting the buyer’s ability to determine its resale price assessed under antitrust law?

Any restriction on a buyer’s ability to set its own resale prices is treated as a hard-core infringement of section 4(1) of the Act, irrespective of the parties’ market shares. This is without prejudice, however, to the ability of suppliers within the scope of the Declaration to set recommended resale prices or maximum resale prices, provided that this does not amount to an indirect fixed or minimum resale price.

The Authority has adopted a strict (per se) approach to resale price maintenance (RPM) to date, irrespective of the particular circumstances. For example, in its investigations of *The Irish Times Limited* and *Independent Newspapers (Ireland) Limited* (Decision

No. E/03/004 and Decision No. E/03/003 respectively), the Authority confirmed that the sending of circulars or mailshots informing retailers of revised cover prices, along with a reference to retailers' margins, was likely to amount to encouragement or instruction to apply the cover prices determined by the publishers. In *Statoil* (Decision No. E/03/002), the Authority considered that a price-support mechanism, which provided for maximum resale prices, combined with a price-matching scheme and a price floor, below which retailers could not sell if they wished to take advantage of the price support offered by Statoil Ireland, constituted unlawful RPM.

The recent use of new enforcement tools available to the Authority following the introduction of the Competition (Amendment) Act 2012 (2012 Act), confirms that the Authority maintains a strict approach to RPM. The 2012 Act provides a formal basis for the practice of the Authority, in certain cases, to accept commitments from a party under investigation for breach of the Act, in consideration for agreement by the Authority not to bring civil enforcement proceedings. In addition, the 2012 Act gave the Authority a new power to seek an order from the High Court compelling the party involved to comply with its commitments, such that failure to do so would constitute contempt of court. In *Competition Authority v Double Bay Enterprises Limited Trading as Brazil Body Sportswear* (High Court 18 December 2012), the Authority sought an Order under the 2012 Act for the first time, following an investigation into alleged RPM by Double Bay Enterprises, the exclusive Irish distributor of the Fitflop brand of footwear. The High Court granted an Order in respect of commitments given by Double Bay Enterprises not to restrict retailers from deciding their own pricing and discount policies.

While paragraphs 223 to 229 of the Commission Guidelines acknowledge the possibility of RPM being justifiable under article 101(3) TFEU where it results in efficiencies, given the strict approach traditionally adopted by the Authority in respect of RPM in the past, the Authority is unlikely to take the view that RPM satisfies the section 4(5) criteria, save in very exceptional circumstances.

- 20** Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

Neither the Authority nor the Irish courts have given specific consideration to RPM in these circumstances. Minimum RPM is generally considered to be a per se breach of Irish competition law.

- 21** Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Yes. In its investigation of *Statoil* (Decision No. E/03/002), the Authority gave consideration to the possible link between RPM and tacit price collusion between suppliers. Statoil Ireland had introduced a price-support scheme for its independent motor fuel resellers. Under the price-support scheme, Statoil Ireland provided financial support to retailers to compete with retailers of competing motor fuels. Retailers in receipt of such financial support were required by Statoil Ireland not to sell motor fuel above the recommended resale price or below the price of certain competing retailers. The Authority took the view that this form of 'price-matching scheme' may facilitate tacit price collusion between suppliers. Following an investigation by the Authority, Statoil Ireland undertook to withdraw the price-support scheme.

- 22** Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Since the Notice does not exclude the application of the section of the Commission's Guidelines relevant to RPM (as it does in the case of other areas discussed in question 1), the Commission's Guidelines in respect of RPM are applicable in interpreting the application of section 4 of the Act. Accordingly, while it is possible that the Authority or the Irish courts may be prepared to analyse minimum RPM agreements under the efficiency criteria set out in article 4(5), as yet there is no example in practice of such an analysis.

- 23** How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Any restriction on the territory into which the buyer may resell products is treated as falling within the prohibition in section 4(1) of the Act. However, as under the VBER, the Declaration permits the restriction of active sales into certain territories in the context of an exclusive distribution network that complies with the terms of the Declaration (article 4(2)(b) of the Declaration).

However, the supplier cannot prevent the buyer from making passive sales to customers in other territories, even where the supplier has appointed another exclusive distributor. In the recent Fitflop case (see question 19), Double Bay Enterprises also gave commitments, subsequently made a binding Order of Court, not to restrict its retailers' freedom to supply products to any customer, regardless of location, who sends unsolicited orders for products to such retailers.

- 24** Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

A restriction on the buyer's freedom to sell contract products to certain customers falls within the scope of section 4(1) of the Act. However, as under the VBER, under the Declaration a supplier may restrict the customers to whom a buyer may resell contract products in certain circumstances (ie, in the context of an exclusive or a selective distribution network that complies with the terms of the Declaration; or a prohibition on the buyer selling products to end-users where the buyer operates at the wholesale level; or a restriction on the buyer's ability to sell components, supplied for the purposes of incorporation, to customers for use in the manufacture of products that compete with the supplier's products (article 4(2)(b) of the Declaration)).

- 25** How is restricting the uses to which a buyer puts the contract products assessed?

A restriction on the uses to which a buyer (or subsequent buyer) may put the contract products is capable of breaching section 4(1) of the Act. However, the supplier may restrict the use of the contract products where the agreement falls within the Declaration safe harbour thresholds and the restriction prohibits the buyer from selling to customers who would incorporate the contract products into the same type of goods as those produced by the supplier (article 4(2)(b) of the Declaration).

- 26** How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Under the Notice, the sections of the Commission Guidelines relevant to internet sales are applicable to the interpretation of section

4 of the Act. The FitFlop case in 2012 was the first time that the Authority took action against a supplier for an alleged internet selling restriction. In particular, the investigation involved an allegation that Double Bay Enterprises had infringed section 4 of the Act by requiring retailers not to make sales of products through mail order, Internet or other electronic media without prior written consent.

**27** Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

Under the Notice, the sections of the Commission Guidelines relevant to internet sales are applicable to the interpretation of section 4 of the Act. Neither the Authority nor the Irish courts have distinguished to date between the different types of internet sales channel.

**28** Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Selective distribution systems where the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services do not exceed 30 per cent may be able to benefit from the Declaration. Permissible restrictions include a restriction on supplying unauthorised distributors outside the network. The supplier may not however, prohibit its distributors from making cross-supplies to one another, including distributors operating at different trade levels within the network (for example, to avoid parallel imports or to maintain differential pricing or RPM) (article 5 of the Declaration).

As for establishing a selective distribution network, Irish competition law generally follows EU competition law regarding permissible qualitative and quantitative criteria. In addition, the Cylinder LPG Declaration specifically prohibits a supplier from limiting the number of resellers for reasons other than objective grounds of safety, and in particular from selecting resellers on the basis of quantitative, subjective or discriminatory criteria.

**29** Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

Neither the Declaration nor the Notice is limited in respect of the types of products to which they apply. However, the Authority is likely to take account of the Commission's view (expressed in the Commission Guidelines) that in order to fall outside the prohibition in section 4(1), the nature of the product in question should necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use.

**30** In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

Under the Notice, the sections of the Commission Guidelines relevant to internet sales are applicable to the interpretation of section 4 of the Act.

**31** Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

The Irish courts have not yet taken any decision relating to the enforcement of selective distribution agreements. However, provided that any restrictions in such agreements fall within the scope of the Declaration, it is likely that an Irish court would enforce them against an authorised reseller.

**32** Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

The Authority can disapply the Declaration where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant market (article 8). However, the Authority has as yet never disappplied the Declaration. The Authority is likely to follow paragraph 179 of the Commission's Guidelines in relation to the cumulative effect of multiple selective distribution systems.

**33** Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

Neither the Authority nor the Irish courts have taken any decision dealing with the possible links between selective distribution systems and RPM policies.

**34** Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

We are not aware of specific decisions of the Authority regarding selective distribution agreements combined with restrictions on the territory into which approved buyers may resell the contract products. However, pursuant to the Notice, the Authority would be expected to follow paragraph 152 of the Commission Guidelines which prohibits the combination of selective distribution systems with restrictions on active sales into other territories.

**35** How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Exclusive purchasing obligations are covered by the Declaration provided that the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services do not exceed 30 per cent and the other conditions of the Declaration are met. In this regard, the Authority is likely to follow the provisions of the Commission Guidelines, which prohibit the use of exclusive purchase obligations in selective distribution systems.

**36** How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Neither the Authority nor the Irish courts have taken any specific decision in respect of restrictions on a buyer's ability to sell such products. However, they would be likely to consider whether the restriction in question was objectively justifiable taking account of

the nature of both the contract products and the products deemed by the supplier to be 'inappropriate'.

- 37** Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 per cent of the buyer's total purchases of the contract products and their substitutes on the relevant market is covered by the Declaration, provided that the duration of the obligation does not exceed five years and the market share and other conditions of the Declaration are met. In the event that the duration of the non-compete obligation is for a period in excess of five years, the obligation will not automatically breach section 4, but may need to be justified by the parties. In addition, while a non-compete obligation in excess of five years falls outside the Declaration, it does not affect the validity of the remainder of the agreement.

- 38** How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

According to the Declaration, a buyer may be required to purchase 80 per cent or more of its needs from the supplier where the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services do not exceed 30 per cent and the duration of the obligation is for a maximum period of five years.

When looking at cases in this area, the Authority pays particular attention to the level of commitment required under the obligation in terms of the buyer's percentage needs as well as the duration of the obligation itself. Examples include Decisions No. 553 and 554, *Dynochem Ireland Limited/Irish Fertiliser Industries Limited (IFI)* (Urea Supply Agreement and Urea Formaldehyde Concentrate Agreement respectively) (27 May 1999); and Decision No. 472, *Bewleys Coffee Machines 1*, and Decision No. 473, *Bewleys Coffee Machines 2* (12 December 1996).

Neither the Authority nor the Irish courts have to date taken any decision in respect of an obligation to carry a full range of a supplier's products. However, in the absence of dominance, such a requirement is unlikely to give rise to competition concerns.

- 39** Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

A restriction on the supplier's ability to supply to other buyers or customers is capable of breaching section 4 of the Act.

However, under the Notice, the Authority would be expected to follow the Commission's approach in permitting exclusive supply obligations where the market shares of both the supplier and the buyer do not exceed 30 per cent.

- 40** To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

Paragraph 189 of the Commission Guidelines notes that franchise agreements contain licences of IPRs relating in particular to trademarks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance.

Certain restrictions may be necessary to protect the franchisor's

industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network. Such restrictions will not automatically breach section 4 of the Act (eg, obligation to communicate any experience gained in exploiting the franchise, to grant to the franchisor and other franchisees a non-exclusive licence for know-how resulting from that experience, to inform the franchisor of any infringements of licensed intellectual property rights and either to take legal action himself against the infringer or to assist the franchisor in any such action). However, where the obligations go beyond what is reasonable, they may breach section 4 of the Act.

For example, in Decision No. 447, *Computa Tune Services Franchise* (15 December 1995) a franchise agreement was found by the Authority to have breached section 4 of the Act owing to a post-term non-solicitation obligation and a restriction on the disclosure of certain intellectual property rights and know-how, which applied even after such information came into the public domain.

- 41** Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed.

We are not aware of any consideration of 'most-favoured customer' clauses under Irish competition law and so there is little definitive guidance available. These clauses may potentially give rise to competition issues where either party to the agreement has a market share above the 30 per cent threshold in the Declaration or, alternatively, if the parties are aware that a large number of competing suppliers use such clauses (in which case, there is a risk that they may facilitate price collusion among sellers).

In the case of a dominant supplier, the application of similar pricing to dissimilar customers could constitute an abuse of dominance, in breach of section 5 of the Act. Equally, in the case of a dominant customer, the application of a most-favoured-customer clause may reduce the scope for the supplier to reduce its prices to other customers and could also constitute an abuse of dominance in breach of section 5 of the Act. Most-favoured-customer clauses should be distinguished from 'English clauses' (ie, a clause whereby the buyer can purchase from alternative suppliers provided that it informs its supplier of the alternative supplier's terms and its supplier fails to match or better them), which may give rise to competition issues depending, inter alia, on the market share of the supplier or the structure of the market in question.

- 42** Explain whether and in what circumstances a supplier may apply different prices or conditions to similarly placed buyers and explain how, in such circumstances, the application of different prices or conditions is assessed?

In general, an undertaking is free to determine pricing and conditions of sale for each and every buyer of its goods or services. However, where an undertaking occupies a position of dominance on a particular market, section 5 of the Act (equivalent at national level to article 102 of the TFEU) prohibits such an undertaking from applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Whether a price differentiation could be considered lawful would require a dominant firm to demonstrate the existence of an objective justification for any difference in treatment.

### Update and trends

The first major development in 2012 was the commencement of the Competition (Amendment) Act 2012 (2012 Act) on 3 July 2012. The 2012 Act was introduced to meet commitments given under Ireland's Memorandum of Understanding with the EU/IMF and is designed to increase the penalties for hard-core cartel offences under the 2002 Act and to strengthen the enforcement of the competition rules.

The 2012 Act provided for an increase in the maximum penalty for individuals convicted of hard-core cartel offences from five years' imprisonment to 10 years, and for an increase in the maximum fine for competition offences from €4 million to €5 million (or 10 per cent of turnover, whichever is greater). The potential application of the Probation of Offenders Act 1907 is also disappplied in the case of competition offences, such that a criminal conviction must be recorded against an individual found guilty of an offence under the Competition Act. The 2012 Act also provides for a procedure for commitments given to the Authority in settlement of a competition investigation to be restated as Court Orders (such that breach of such

commitments would amount to contempt of court) and for findings of breach of the competition rules to be admissible as evidence in subsequent civil proceedings (in order to facility follow-on private litigation).

The second major development was the FitFlop case in which the Authority brought its first application for a commitment order under the 2012 Act before the High Court on 18 December 2012. The action was taken following an investigation into alleged vertical sales restrictions.

Finally, looking forward, the government is expected to publish the Consumer and Competition Bill in the first half of 2013. The bill is designed to amalgamate the National Consumer Agency and the Authority and to give effect to other changes to competition and consumer law including making provision for a statutory code of conduct for the grocery goods sector and giving effect to the recommendations of the Advisory Group on Media Mergers.

- 43 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

Similar to the approach adopted in respect of most-favoured-customer clauses (discussed in question 41), most-favoured-supplier clauses may potentially give rise to competition issues where either party to the agreement has a market share above the 30 per cent threshold in the Declaration.

### Notifying agreements

- 44 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

In line with the EU regime, it is not possible to notify individual agreements to the Authority for clearance. Instead, it is up to the individual parties (and their advisers) to determine whether section 4(1) applies and, if so, whether the efficiency conditions in section 4(5) of the Act apply.

### Authority guidance

- 45 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

The primary principle is one of self-assessment. To assist parties in this respect, the Authority has issued the Declarations and Notice discussed in question 1. Although the Authority may be prepared to discuss novel or difficult cases in limited circumstances, the Authority emphasises that it is no longer the function or policy of the Authority to comment on individual agreements, decisions or concerted practices notified to it and that it will not be able to give comfort to undertakings in relation to their agreements.

### Complaints procedure for private parties

- 46 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Complainants may alert the Authority to alleged anti-competitive behaviour through a variety of means, including the Authority's online complaints form. The Authority will consider the matter and, should it decide that there is sufficient evidence, may carry out a formal investigation. There is no formal timetable; investigations

may last only a few months or many months depending upon the complexity of the issues concerned. Complaints may be submitted anonymously.

### Enforcement

- 47 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Average figures are not available. Since the commencement of the Act, there have been only a small number of published cases in which vertical restraints were at issue. The majority of these cases involved alleged RPM.

- 48 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

An agreement that breaches section 4(1) of the Act will be void and unenforceable. In certain instances, however, it may be possible to sever the offending provisions while leaving the remainder of the agreement intact. This exercise is carried out in accordance with Irish legal principles of severance.

- 49 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The Authority is not empowered to impose any penalties under the Act. Fines may only be imposed by the Irish courts. The Authority may, however, issue non-binding enforcement decisions declaring whether, in its view, a particular restraint breaches section 4 of the Act. Further, under a new commitment order procedure introduced by the 2012 Act (see question 19 above), the Authority may accept commitments provided by an undertaking not to engage in anti-competitive behaviour and may apply to the High Court for such commitments to be made binding. Breach of such commitments would amount to contempt of court.

Civil or criminal sanctions may be imposed by the courts depending upon the severity of the infringement. The civil sanctions that may be imposed by the courts are a declaration that the conduct in question amounts to a breach of the Act and an injunction to bring such conduct to an end. Criminal sanctions will generally only be pursued in the case of hard-core infringements (eg, price fixing).

The maximum criminal sanctions for breach of the Act were

increased in 2012 by the commencement of the 2012 Act. Any undertaking or individual guilty of breaching section 4 of the Act will be liable on summary conviction to a fine of up to €3,000. On indictment, an undertaking may be liable to a fine of the greater of €5 million or 10 per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction, or in the case of an individual, to a fine of up to €5 million or 10 per cent of the turnover of the individual in the financial year ending in the 12 months prior to the conviction. Additional fines of €300 on summary conviction, and €50,000 on indictment, may be imposed for each day that the contravention continues.

While the Act now makes provision for imprisonment for up to 10 years for competition offences, such penalties only apply in respect of hard-core cartel offences (ie, agreements or concerted practices between competitors such as price fixing, output limitation or market sharing).

In October 2000, Estuary Fuels Limited was convicted of two breaches of section 4(1) of the Competition Act 1991 (the predecessor to the Act) for entering into and implementing an agreement imposing minimum resale prices for diesel and unleaded petrol in a filling station. The court imposed a fine of IR£500 in respect of each charge.

More recently, the Authority has issued reasoned enforcement decisions in a number of cases in which it investigated allegations of RPM and obtained undertakings from the parties involved that they would cease or amend their conduct to comply with the Act. Such undertakings can now be made a binding Order of court (see above).

#### Investigative powers of the authority

**50** What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The Authority has statutory powers to carry out investigations, either on its own initiative or in response to a complaint made to it by any person, into any breach of the Act that may be occurring or has occurred. These powers are set out in sections 31 and 45 of the Act and include the power to collect evidence by means of information requests (voluntary), interviews (including by means of a formal witness summons procedure under which witnesses are compelled to attend before the Authority and to give evidence under oath) and the ability to carry out dawn raids. Original books, documents or records (including electronic records) may be seized and copies may be taken.

Before the Authority exercises its dawn raid powers to search premises (including private dwellings and vehicles), the Authority must first obtain a warrant from the district court.

- A warrant will only be issued where the court is satisfied that:
- it is appropriate to grant the warrant;
  - there is no other reasonable way of obtaining the information in question;
  - there is a reasonable suspicion that a criminal offence (and not just a civil wrong) has been committed or that there is evidence relating to a criminal offence; and
  - the constitutional rights of the persons involved will be protected.

Failure to attend before the Authority in response to a witness summons or obstructing or impeding the Authority from exercising its dawn raid powers under warrant is an offence, punishable on summary conviction, with a fine of up to €3,000 or imprisonment for a term not exceeding six months, or both.

#### Private enforcement

**51** To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Section 14(1) of the Act provides a right for any person (including the parties themselves) who is aggrieved in consequence of any agreement, decision, concerted practice or abuse, prohibited under sections 4 or 5 to bring a civil law action seeking relief against the relevant undertaking or individual concerned. An action for relief may be brought in either the Circuit Court or the High Court. The reliefs available include:

- an injunction;
- a declaration;
- damages; or
- exemplary damages.

The successful party is normally able to recover its legal costs, subject to standard litigation rules regarding maximum costs recoverable.

#### Other issues

**52** Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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