Vertical Agreements

In 34 jurisdictions worldwide

Contributing editor
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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.cccpc.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 and Consumer Protection Commission (CCPC) to make written declarations that, in its opinion, specified categories of agreement comply with the efficiency criteria in section 4(3) 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 10(1)(e) of the Competition and Consumer Protection Act 2014 (the 2014 Act) allows the CCPC to publish notices giving practical guidance as to the operation of provisions of the Act. The CCPC has published a notice and two declarations (each of which is available at www.cccpc.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 CCPC 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 and the alignment with EU law is a deliberate policy of the CCPC 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.

Legal objective

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 CCPC 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’.

Irish competition law pursues purely economic objectives.

Responsible authorities

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.

The CCPC (with the aid of the Irish courts) is responsible for enforcing prohibitions on anti-competitive vertical restraints. The Commission for Communications Regulations (ComReg) has competition powers in respect of vertical restraints in the area of electronic services, electronic communications networks or associated facilities.
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 considered vertical restraints in an extraterritorial context.

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

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 and, where the context so admits, shall include an association of undertakings’.

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 CCPC determined that the Health Service Executive (HSE) was not acting as an undertaking where it administered certain public 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 this 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.

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 CCPC has issued a sector-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 14 April 2015.

The 2014 Act granted the Minister for Jobs the power to introduce secondary legislation for the regulation of certain ‘unfair trading practices’ by a defined group of grocery businesses. This secondary legislation (regulations), when issued, will mandate and/or prohibit certain ‘unfair’ supply chain practices by grocery retailers and suppliers that are part of a group of undertakings with an annual turnover of more than €30 million worldwide, known as ‘relevant grocery good undertakings’. The proposed regulations will have the power to outlaw ‘unfair’ practices in the grocery supply chain. These practices can relate to the form of contracts between suppliers and retailers and how such contracts are varied, terminated, or reviewed. The proposed regulations may also require the relevant grocery undertaking to implement new compliance procedures, including staff training, preparation or annual compliance report, and maintenance of records. Further, the CCPC will have the power to undertake investigations, ‘name and shame’ offenders and issue ‘contravention notices’ directing a relevant grocery undertaking to remedy a contravention of the regulations. Breach of certain of the proposed regulations will amount to an offence, while failure to comply with a contravention notice is also an offence. Both breaches can result in a criminal prosecution (punishable by fines or imprisonment if prosecuted on indictment) or a claim by an aggrieved party. At the time of writing, the Minister for Jobs is consulting on the proposed regulations.

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. In particular, agreements containing vertical restraints that comply with terms and conditions of the CCPC’s Declaration are 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.

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 an ‘agreement’. However, the CCPC and the Irish courts generally follow the approach of the Commission and the EU courts in applying a broad definition to this 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 is 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.

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 CCPC 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 1999), the CCPC 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 CCPC 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(5) of the Act. The CCPC 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. There are no CCPC decisions to date dealing specifically with what constitutes an agent–principal relationship in the online sector.

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 expression 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 general efficiency conditions contained in 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 in each case. In line with the Commission Guidelines, the market positions of other suppliers may be relevant for an individual assessment about the 30 per cent threshold.

The CCPC 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 used by buyers in the market?

As noted in question 16, 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 relevant 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 comparability of an individual restraint with the Declaration provided that the agreement complies with all of the other terms of the Declaration. Again, these factors may be relevant to an assessment of legality if the agreement falls outside the terms of the Declaration. As noted above, the CCPC 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 CCPC has issued 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 CCPC 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/O3/004 and Decision No. E/O3/005 respectively), the CCPC 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/O3/002), the CCPC 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 CCPC following the introduction of the Competition (Amendment) Act 2012 (2012 Act), confirms that the CCPC maintains a strict approach to RPM. The 2012 Act provides a formal basis for the practice of the CCPC, in certain cases, to accept commitments from a party under investigation for breach of the Act, in consideration for agreement by the CCPC not to bring civil enforcement proceedings. In addition, the 2012 Act gave the CCPC 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 CCPC 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 213 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 and active enforcement
approach traditionally adopted by the CCPC in respect of RPM, the CCPC 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 CCPC nor the Irish courts have given specific consideration to RPM in these circumstances. 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 CCPC 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 CCPC took the view that this form of ‘price-matching scheme’ may facilitate tacit price collusion between suppliers. Following an investigation by the CCPC, 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 3), 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 CCPC 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 Explain how a buyer agreeing to set its retail price for supplier A’s products by reference to its retail price for supplier B’s equivalent products is assessed.

Neither the CCPC nor the Irish courts have given specific consideration to such ‘pricing relativity’ agreements. As indicated by its findings in the Statoil case, the CCPC is likely to carefully consider restrictions which affect the parties pricing incentives, depending on the specific circumstances of each case.

24 Explain how a supplier warranting to the buyer that it will supply the contract products on 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 the 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.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

The CCPC has not considered retail MFNs in the online environment and can be expected to be influenced by recent decisions of the European Commission and UK competition authorities in this regard.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

The CCPC has not considered restrictions such as minimum advertised price policies or internet minimum advertised price clauses. Where restrictions interfere with a buyer’s discretion in pricing products for resale, such restrictions may amount to RPM. As noted above, RPM is generally considered to be a per se breach of Irish competition law. As indicated by its findings in the Statoil case, the CCPC is likely to carefully consider restrictions which affect the parties pricing incentives, depending on the specific circumstances of each case.

27 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 above), 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.

28 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, a supplier cannot prevent its 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.

In July 2013, the Irish High Court considered the distinction between active and passive sales in SRI Apparel Limited v Revolution Workwear Limited and Others. Laffoy J confirmed that, in the context of an exclusive distribution agreement, sales by an Irish company on a third-party sales website which facilitated sales (ie, www.amazon.co.uk) constituted active sales within the meaning of the Vertical Declaration and, as such, could lawfully be restricted under the terms of the agreement.

29 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)). However, as under the VBER in the case of exclusively allocated customer groups, a supplier cannot prevent its reseller from making passive sales.

30 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).

31 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 CCPC 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. A subsequent 2013 Irish High Court case (SRI Apparel Limited v Revolution Workwear Limited and Others) considered the distinction between active and passive sales. In this case, sales made by an Irish company on a third-party sales website (ie, www.amazon.co.uk) were found to constitute active sales within the meaning of the Declaration and, as such, could be restricted in the context of an exclusive distribution agreement.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of 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. In SRI Apparel Limited v Revolution Workwear Limited and Others (considered above), the Irish High Court appeared to distinguish between use of a retailer’s own website and third-party internet sales channel.

33 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 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 to 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.

34 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 CCPC 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.

35 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.

36 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.

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

The CCPC 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 suppliers covering more than 50 per cent of a relevant market (article 8). However, the CCPC has as yet never disapplied the Declaration. The CCPC is likely to follow paragraph 179 of the Commission’s Guidelines in relation to the cumulative effect of multiple selective distribution systems.

38 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 CCPC 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 CCPC 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.

39 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, the duration of the obligation does not exceed five years and the other conditions of the Declaration are met. In this regard, the CCPC is likely to follow the provisions of the Commission Guidelines, which prohibit the use of exclusive purchase obligations in selective distribution systems.

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

Neither the CCPC 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'.

41 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.

42 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 CCPC 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. 533 and 554, Dynochem Ireland Limited/Irish Fertiliser Industries Limited (IF) (Urea Supply Agreement and Urea Formaldehyde Concentrate Agreement respectively) (17 May 1999); and Decision No. 472, Bewleys Coffee Machines 2 and Decision No. 473, Bewleys Coffee Machines 2 (12 December 1996).

Neither the CCPC 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.

43 Explain how restricting the supplier’s ability to supply to other buyers is assessed.

As under the VBER, exclusive supply obligations are not listed under the Declaration as either hard-core or excluded restrictions and, as such, are generally permitted where the market share of both the supplier and the buyer does not exceed 30 per cent. Outside the terms of the Declaration, the CCPC can be expected to follow the approach of the Commission as outlined in the Commission Guidelines.

44 Explain how restricting the supplier’s ability to sell directly to end-consumers is assessed.

As with the VBER, the Declaration deals primarily with restrictions that are imposed by the supplier on the buyer and is more permissive in respect of restrictions imposed on the supplier. Accordingly, at or below the 30 per cent market share threshold, the supplier may be restricted from selling to end-users, for example as part of an exclusive distribution agreement. By way of exception, the Declaration lists as a hard-core prohibited restriction a restriction imposed on a supplier of components and a buyer who incorporates those components, on the supplier’s ability to sell the components as spare parts to end-users (or to third-party repairers or other service providers).

45 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

There are no decisions of the CCPC or Irish courts dealing with restrictions on suppliers other than those already considered above.

Notifying agreements

46 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 CCPC 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

47 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 CCPC has issued the Declarations and Notice discussed in question 1. Although the CCPC may be prepared to discuss novel or difficult cases in limited circumstances, the CCPC emphasises that it is no longer the function or policy of the CCPC 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

48 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 CCPC to alleged anti-competitive behaviour through a variety of means, including the CCPC’s online complaints form. The CCPC 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

49 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.

50 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.

51 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 CCPC is not empowered to impose any penalties under the Act. Fines may only be imposed by the Irish courts. The CCPC 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 CCPC 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 €5,000. On indictment, an undertaking may be liable to a fine of the greater of €3 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 provides 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 CCPC 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

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

The CCPC 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 18 and 37 of the 2014 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 CCPC 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 CCPC exercises its dawn raid powers to search premises (including private dwellings and vehicles), the CCPC 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.

The 2014 Act provides a wide and undefined ability for the CCPC to enter and search ‘any place at which any activity in connection with [a] business... is being carried on’. While the 2014 Act does not explicitly provide for the ability of the CCPC to search the private dwelling or vehicles of directors, managers or staff of companies subject to investigation (as was previously the case under the Act), the 2014 Act provides the CCPC with the power to enter and search ‘any place occupied by a director, manager, or member of staff’. This power may only be exercised where there are ‘reasonable grounds’ to believe that records relating to the business are being kept there. The 2014 Act does not define the term ‘occupied’ and, as such, it would fall to be understood according to its plain meaning.

Failure to attend before the CCPC in response to a witness summons or obstructing or impeding the CCPC 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

53 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

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

No.