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# Competition Issues in Commercial Agreements

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## I. Introduction

Article 81 of the EC Treaty ("Article 81 EC"), which prohibits anti-competitive agreements that affect trade between EU Member States, and Section 4 of the Competition Act 2002<sup>1</sup> ("Section 4 CA") which prohibits anti-competitive agreements having an effect on trade within the State or part of the State, need to be considered in relation to all commercial agreements.

This is so whether such agreements involve vertical relationships between companies operating at different levels of the supply chain ("vertical agreements"), or horizontal arrangements between companies operating at the same level of production or distribution ("horizontal agreements"), or corporate-related issues, such as asset or share sales or purchases ("corporate agreements").

Where one or more of the parties to the commercial agreement has a dominant position in the relevant market, Article 82 of the EC Treaty ("Article 82 EC") and Section 5 of the Competition Act 2002 ("Section 5 CA"), which prohibit an abuse of a dominant position within the common market and the State or part of the State, respectively, will also need to be considered.

This paper considers some of the basic principles for assessing commercial agreements in the light of EC and Irish Competition law.<sup>2</sup> Where possible, this paper briefly examines the tensions that often arise between the commercial objectives of such agreements and the requirements of Irish and/or EC Competition law. Given the breadth and complexity of the subject matter of this paper, the paper does not purport to be in any way a comprehensive analysis of the issues involved, rather it provides an overview of the basic competition law principles involved and identifies the issues to be considered.

## II. Basic Principles of EC and Irish Competition Law

As will be evident, EC and Irish Competition Law share many similarities. Indeed, Sections 4 and 5 of the CA are modelled on Articles 81 and 82 EC. As the reader

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<sup>1</sup> The 2002 Act was amended by the Competition Act 2006, which commenced on 20 March 2006. The principal changes introduced by the 2006 Act are briefly considered later in the paper.

<sup>2</sup> For an analysis of the position solely under EC Competition Law, please see Gorrie, "Commercial agreements and Competition Law" (1996) *The European Anti-Trust Review* 17.

will appreciate, with ongoing globalisation, many agreements will have a potential EU cross-border impact as many goods and services are now traded internationally. Thus, there is not always a clear demarcation line between the respective spheres of EC and Irish Competition law. Nonetheless, this paper will differentiate, where appropriate, between the basic principles under Irish and EC Competition law, respectively, for assessing commercial agreements.

#### *A. EC Competition Law*

Article 81 EC provides:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development, or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
  - any agreement or category of agreements between undertakings;
  - any decision or category of decisions by associations of undertakings;
  - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
    - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
    - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

A breach of Article 81(1) EC will render the agreement void and the parties to the agreement or arrangement, and their directors and senior managers, liable to civil and/or criminal proceedings, as well as third party claims for various reliefs, including damages.

Article 82(1) EC provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

The European Commission is empowered by the EC Treaty to apply the prohibition rules laid down in Articles 81(1) and 82, and enjoys a number of investigative powers to that end (eg, inspection of business and non business premises, written requests for information). It may impose substantial fines for their violations. Since 1 May 2004, all national competition authorities – which in the case of Ireland, includes the courts as well as the Competition Authority (“the Authority”)<sup>3</sup> – are also empowered to apply fully the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions directly so as to protect the individual rights conferred to citizens by the Treaty.

Certain commercial agreements will be exempted from the application of Article 81 EC pursuant to Article 81(3), which provides for block exemption regulations (“BERs”), which establish “safe harbours” for otherwise anti-competitive agreements containing certain restrictions, providing that the conditions stipulated by such BERs are met. Agreements falling within the safe harbours are presumed legal and enforceable.

Where a commercial agreement falls outside the safe harbours a more detailed assessment of the agreement is required in order to assess its compatibility with EC Competition law.

Generally, an exemption will only be available where a commercial agreement does not contain “hardcore restrictions”. These constitute severely anti-competitive restraints, which are prohibited under Article 81(1) EC and, as such, will be unlikely to benefit from an exemption under Article 81(3) EC. This may result in the unenforceability of the entire commercial agreement and may even lead to fines from the European Commission. All block exemptions provide for a list of hardcore restrictions. If one of the listed hardcore restrictions is present in the commercial agreement, the entire agreement will be deprived of the benefit of the relevant BER. Examples of hardcore restrictions include:

- **Vertical Agreements:** resale price maintenance, territorial and customer restrictions on resale.
- **Horizontal Agreements:** price fixing, output or sales limitations, and allocations of markets or customers.

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<sup>3</sup> See European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) Regulations 2004.

In addition to hardcore restrictions, the BER dealing with vertical agreements (“vBER”)<sup>4</sup> and the BER dealing with technology transfer agreements (“ttBER”)<sup>5</sup> contain certain excluded restrictions that fall outside the exemption, such as “non-compete” obligations. Unlike hardcore restrictions, however, these provisions can be severed and the remainder of the agreement can still benefit from the relevant BER.

Guidance is also provided by the European Commission by way of guidelines on the applicability of Article 81 EC through vertical and horizontal agreements. These guidelines are considered in more detail later in this paper.

In addition, vertical and horizontal agreements may fall outside the scope of Article 81 EC on the basis that they have no appreciable effect on competition. In other words, where they have *de minimis* effect on competition within the common market.

The European Commission’s *de minimis* Notice<sup>6</sup> creates a presumption that no Article 81 issues are raised by an agreement between undertakings in the context of:

- Vertical agreements where the market share of each party to the agreement does not exceed 15% of the relevant market, or 5% for vertical agreements where access to the market in question is foreclosed by the cumulative effect of parallel networks of vertical agreements by several companies, and
- Horizontal agreements: where the parties combined market shares in the relevant markets does not exceed 10%.

Commercial agreements between parties where market shares exceed these thresholds may nevertheless still not have an appreciable effect on competition or may benefit from exemption. However, the presumption in the *de minimis* Notice will not apply if the commercial agreement contains hardcore restrictions. All of these issues will be discussed in more detail below.

### *B. Irish Competition Law*

Section 4(1) CA applies wherever undertakings are engaged in arrangements – whether vertical or horizontal – which have as their *object or effect* the prevention, restriction or distortion of competition in trade in any goods and services in the State or in any part of the State. Section 4(1) provides as follows:

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<sup>4</sup> Commission Regulation (EC) 2790/1999, OJ 1999 L 336/21, on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices.

<sup>5</sup> Commission Regulation (EC) 772/2004, OJ 2004 L 123/11, on the Application of Art 81(3) of the Treaty to categories of technology transfer agreements.

<sup>6</sup> Commission Notice on Agreements of minor importance which do not appreciably restrict competition under Art 81(1) of the Treaty establishing the European Community, OJ 2001 C 368/07.

Subject to the provisions of this Section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which –

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
- (b) limit or control production, markets, technical development or investment,
- (c) share markets or sources of supply,
- (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,
- (e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

(Section 3(1) CA defines an “undertaking” as ‘a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply and distribution of goods or the provision of a service.’)

A breach of Section 4(1) CA will render the commercial agreement void,<sup>7</sup> and parties to the agreement or arrangement, and their directors and senior managers, liable to civil and/or criminal proceedings, as well as third party claims for various reliefs, including damages.

Section 5(1) CA provides as follows:

Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.

While the issue of enforcement is outside the scope of this paper, the Monopolies Division of the Authority mainly investigates alleged abuses of a dominant position, but is also responsible for investigating horizontal and vertical agreements. Where the Authority forms the view that there has been a breach of the Competition Act, it can initiate legal proceedings in order to compel the parties to stop what is considered to be illegal activity. Such proceedings are generally civil (through

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<sup>7</sup> In passing, it is also key to include a “severability” clause, as otherwise a single provision of a commercial agreement which falls foul of Section 4(1) and/or Article 81 EC will normally render the entire commercial agreement unenforceable. A sample severability clause is set out, for ease of reference, in Appendix 1.

the High Court), although criminal proceedings may be appropriate depending on the circumstances of each case. In addition, the Authority may also settle cases without recourse to the courts where the offending parties recognize and remedy their anti-competitive behaviour.

In contrast to EC Competition law, there is no *de minimis* threshold under Irish Competition law, thus, it is possible that any minor restriction in competition may be prohibited under Section 4(1) CA. The Authority has adopted what has been described as a “pragmatic” approach.<sup>8</sup> Section 4(1) CA has to be interpreted on a “rule of reason” basis because if it were to be interpreted literally then virtually every formal business agreement could potentially prevent, restrict or distort competition because any agreement effectively prohibits others from concluding the very same contract with the original parties.<sup>9</sup>

Section 4(5) CA provides a safe harbour under Irish Competition law for any otherwise anti-competitive agreement that:

Having regard to all relevant market conditions, contributes to improving the production and distribution of goods or provision of services or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and does not –

- (a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,
- (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

All of these conditions have to be satisfied otherwise the anti-competitive agreement will be prohibited under Section 4(1) CA.

With the abolition of the former notification system which existed under the Competition Acts 1991–1996, which were repealed by the 2002 Act, parties to a commercial agreement are now required to determine themselves whether or not the conditions of Section 4(5) CA are satisfied. This requires the careful assessment of the economic context of the agreement. This involves:

- Defining the relevant product and geographical markets.
- Calculating the market shares of the parties to the agreement.
- Assessing barriers to entry into the relevant market.
- Assessing whether the terms or conditions of the agreement are indispensable for the attainment of its objectives.

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<sup>8</sup> McCarthy and Power, *The Competition Act 2002* (Dublin Butterworths 2003) at 52 (hereinafter “*Competition Law*”).

<sup>9</sup> *Mallen/O’Toole*, decision number 1, NOTIFCA/8/91 (this applied equivalent to Section 4 in the Competition Acts 1991–1996).

As noted earlier, Section 4(1) CA is based on Article 81(1) EC, while Section 4(5) CA is analogous to Article 81(3) EC. Thus, in considering whether any given commercial agreement falls within Section 4(1) CA or whether it is exempted under Section 4(5) CA, it is appropriate not only to have regard to Irish case law, but it is also appropriate to have regard to the case law concerning Articles 81(1) and 81(3) EC of the European Commission (“Commission”), the Court of First Instance (“CFI”) and the European Court of Justice (“ECJ”). In addition, it is appropriate to have regard to the decisions of the Authority, since, until 1 July 2002, the Authority was empowered to grant exemptions under Section 4(5) CA. Since that date the Irish courts have applied this section directly. Helpful guidance is also provided by what is referred to by the Authority as “Enforcement Decisions” which are analogous to decisions of the Commission.

Moreover, the Authority is empowered under Section 4(3) CA to declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with the conditions referred to in Section 4(5) CA.<sup>10</sup> On 5 December 2003, the Authority published its Notice on Vertical Agreements and Concerted Practices (“Notice”)<sup>11</sup> and its Declaration of Vertical Agreements and Concerted Practices (“Declaration”).<sup>12</sup> Under the terms of the Notice, the Authority expresses the view that agreements that fall within the terms thereof do not infringe Section 4(1) CA. The Declaration sets out a defined category of vertical agreements, decisions in concerted practices which the Authority considers to be exempted under Section 4(5) CA. The Notice and Declaration are modelled on the vBER.

### *C. Relationship between EC and Irish Competition Law*

The relationship between EC and Irish Competition law is governed in detail by Council Regulation 1/2003, OJ 2003 L 1/1, on the implementation of rules on competition laid down in Articles 81, 82 of the Treaty (“Modernisation Regulation”).

The Modernisation Regulation specifically excludes the application of national competition law to the following agreements:

- Those which may affect trade between Member States, but do not restrict competition within the meaning of Article 81(1) EC.
- Agreements, decisions or concerted practices which fulfil the conditions for an exemption under Article 81(3) EC; or
- Agreements which are covered by a BER.

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<sup>10</sup> Such a declaration may be revoked by the Authority if it is of the opinion that the category no longer complies with those conditions.

<sup>11</sup> Competition Authority Notice on Vertical Agreements and concerted Practices N/03/002.

<sup>12</sup> Competition Authority Declaration of Vertical Agreement and Concerted Practices – D/03/001.

There are a number of exceptions to the exclusion of national competition law which are as follows:

- Member States may adopt and apply stricter national laws which prohibit or sanction unilateral conduct (such as that prohibited under Section 5 CA).
- Member States competition authorities and courts are free to apply national merger control laws.
- Member States are free to apply national competition laws that predominantly pursue a different objective to those of Articles 81 82 EC.

Accordingly, a commercial agreement or arrangement will be within the ambit of Article 81 EC where it (i) appreciably affects trade between Member States and (ii) appreciably restricts competition within the common market.

The European Commission has published a Notice on the concept of “*affect on trade*” contained in Articles 81 and 82 EC. It is outside the scope of this paper to review that particular Notice, but, suffice to say, the concept of affecting trade between Member States is premised on the party’s market share and Community-wide turnover.<sup>13</sup>

Finally, the Modernisation Regulation has radically over-hauled the former centralized system under the former Regulation 17/62<sup>14</sup> pursuant to which the Commission was given exclusive jurisdiction to grant individual and block exemptions. The Modernisation Regulation has decentralized the implementation of EC Competition law, such that implementation occurs principally at national level.<sup>15</sup> Regulation 1/2003 makes it compulsory for national competition authorities (NCAs) to apply Article 81 EC where they apply national competition law to agreements or concerted practices which may affect trade between EU Member States, and to apply Article 82 EC where they apply national competition law to any abuse prohibited by Article 82 EC.

#### *D. Impact of Article 82 EC / Section 5 CA*

Where a dominant undertaking is party to a commercial agreement, the agreement will also need to be considered in the light of Articles 82 EC and/or Section 5 CA. This will include an assessment of whether the effect of the agreement would be to

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<sup>13</sup> In the Notice, the Commission expresses the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met: the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%; and in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million (different turnover rules apply in the case of vertical agreements).

<sup>14</sup> Council Regulation No 17[0] OJ Sp.Ed. 1962, 204/62 at 87.

<sup>15</sup> See European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) Regulations 2004.

further re-enforce the dominant position of the party in question. This may occur, for example, in the case of long term supply agreements in highly concentrated, newly liberalized markets. Dominance may also have an impact on the availability of exemptions for the agreement.

#### *E. Practical Issues*

When faced with the task of considering competition issues arising in connection with a commercial agreement there are a number of practical steps which need to be taken in most cases which are, as follows:

- The first step is to identify whether the commercial agreement comprises an “agreement” for the purposes of Section 4CA and/or Article 81 EC. Reference must be made to the interpretation of this term by the Irish courts, as well as the CFI and ECJ. Agreements include legally binding agreements, as well as informal agreements whether written or not. The latter includes so called “gentlemen’s agreements”. An agreement is to be distinguished from a “concerted practice” which involves a form of coordination between undertakings without having reached a stage where an agreement has actually been concluded.
- The next step is to identify whether the agreement involves “undertakings”. Reference is made to the definition under Section 3(1) CA, cited above. There is no finite list of undertakings but the following are typical undertakings: companies; partnerships; equity partners; joint ventures; joint venture partners; self employed consultants; self-employed professionals or trades people; farmers; semi-state (companies which engage in largely commercial activities which are owned by the State) and all other persons engaged for gain. It is not necessary that an undertaking be profit making, it is sufficient that they charge for their services.<sup>16</sup>
- The next step is to identify whether EC and/or Irish Competition law applies to the commercial agreement in question. This will involve assessing whether in the first instance the commercial agreement in question has an effect on trade between EC Member States, in accordance with the rules of Regulation 1/2003, and/or whether the arrangement has an effect on trade in Ireland or any part of Ireland.
- The next step is to identify the “relevant market”.<sup>17</sup> There are essentially two dimensions to each market: (a) the *product* market; (b) the *geographical* market. In deciding whether products are within the same market, one must consider whether the products are substitutable with others (ie, whether consumers would substitute product X for product Y (referred to as cross-

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<sup>16</sup> *Deane v VHI* [1992] 2 Irish Reports 319.

<sup>17</sup> See *HB Ice Cream v Masterfoods Limited* [1990] 2 Irish Reports 463.

elasticity of demand between products).<sup>18</sup> Consideration also needs to be given to the relevant geographic market, which has been defined as “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”. In some cases, it will be relatively straightforward to identify the product and geographical markets and, thus, the relevant market. In other cases, however, it may be a more complex exercise in which the assistance of a professional economist may be required.

- Having
  - identified whether the commercial agreement is an agreement between undertakings
  - identified whether EC and/or Irish Competition law applies, and
  - defined the relevant market,

it is then necessary to consider whether the commercial agreement raises issues under Article 81 EC and/or Article 82 and/or Section 4(1) and/or Section 5(1) CA, having regard to the provisions themselves, relevant case law and decisions, guidelines, and the extensive literature in this area.

The remainder of this paper is intended to provide a brief guide to the issues to be considered in this respect in the areas of vertical, horizontal and corporate law agreements.

### III. Vertical Agreements

A variety of vertical agreements, including agency, distribution, purchase and supply agreements as well as franchise agreements need to be considered having regard to Article 81 EC and/or Section 4 CA, as well as the relevant vBER and Horizontal Guidelines<sup>19</sup> and/or Notice or Declaration, respectively. Following a brief overview of the nature of these agreements, we shall first consider the same in the light of EC Competition law and secondly under Irish Competition law.

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<sup>18</sup> McCarthy & Power, *Competition Act 2002* (Dublin Butterworths 2004) 6 (citing Case 85/765 *Hoffmann-La Roche v Commission*, [1979] ECR467 at 516).

<sup>19</sup> Commission Guidelines on Vertical Restraints, OJ 2000 C 291/01.

### *A. Agency Agreements*

An agent is an intermediary involved in making a contract between his principal and the principal's customers.

In practice the concept of agency and distribution are often confused. Unlike an agent a distributor buys goods from the supplier and sells them onto his customers. For the purpose of this paper we do not propose to analyse in detail the advantages and disadvantages of choosing an agent over a distributor, suffice to say that generally speaking, fewer competition law issues arise with agencies than with distribution agreements. While it is also outside the scope of this paper, it is essential to bear in mind the Commercial Agents Regulations (S.I. No33 of 1994 and SI 31 of 1997) and whether or not they apply to a particular situation.<sup>20</sup>

Article 81 EC and Section 4 CA apply only to agreements between economically independent undertakings. In the case of agency agreements, the determining factor is whether the principal and agent are independent of each other. Thus Article 81 EC or Section 4 CA applies where the agent bears significant financial or commercial risk in relation to its agency activities. Examples of these include where:

- title to the goods bought or sold passes to the agent;
- the Agent provides the contract services on its own account;
- the Agent maintains at its own risk or expense stocks of the contract goods;  
or
- the Agent is liable to third parties for damage caused by the products sold.

The criteria for assessing whether an agent is independent of or "integrated" with the principal business was uncertain in the past however the position has now been clarified by:

- the *vBER* discussed below;
- the EU Vertical Guidelines discussed below which set out the Commission's policy on vertical agreements generally. Paragraphs 12 to 20 of the Vertical Guidelines deal with agency agreements and replace the former 1962 Notice on Commercial Agents.

### *B. Distribution, Purchase and Supply Franchise Agreements*

Generally, the same rules apply to distribution, supply and purchase, as well as franchise agreements under EC and Irish Competition law.

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<sup>20</sup> See eg, *Kenny v Ireland ROC Limited* [2005] IEHC 241; and Gibson: "Commercial Agents and the Art of Negotiation" (2006) 1 (2) IBLQ 5.

Under a distribution agreement, the supplier or manufacturer sells his products to the distributor who then sells the products on to his customers, adding a margin to cover his own costs and profits. In purchasing and re-selling the products the distributor contracts both with the supplier and the customer and title to the products in question will pass to and from him. This is in contrast to the agency position where the only contract for the sale of products is made between the principal and the customer and the agent generally has no contractual liability to the customer. The advantage of appointing a distributor rather than an agent is that the Commercial Agents Regulations will not apply to distributorship agreements.

The EU Vertical Guidelines identify four main types of distributorship arrangements:

*1. Exclusive Distributorship*

This occurs where a supplier agrees to sell the contract products only to the distributor within a certain defined territory and agrees not to appoint other distributors or to sell the products directly to other customers within the defined territory.

*2. Sole Distributorship*

This occurs where supplier appoints a distributor as his only distributor within a territory, but where the supplier reserves the right to supply the products directly to end-users. Typically, such arrangements contain similar provisions to those involved in an exclusive distributorship, while affording more control to the supplier over the territory in the event the distributor should fail to meet the required minimum purchase targets.

*3. Non-exclusive Distributorship*

This arises where the supplier has complete freedom both to sell directly and appoint other distributors within the defined territory.

*4. Selective Distributorship*

This occurs where appointing a distributor as part of a selective distribution system, the supplier agrees to appoint additional distributors only if they meet certain specified criteria. This effectively limits the number of additional distributors who have been appointed for any given territory. As such, these agreements can have a potentially exclusionary effect which has an affect on competition. That being said, they are often justified where significant investment in the sale and marketing of the products in question is required. Products which a selective distribution system has been held to be justified include high value cosmetics, pharmaceutical products and electrical goods.

*Franchise agreement*

A franchise agreement must have the following elements:

- The franchisor allows the franchisee use a name which is associated with the franchisor.
- The franchisor exercises continuing control over the franchisee.
- The franchisor provides assistance to the franchisee.
- The franchisee periodically has to make payments to the franchisor.

The term “franchise” or “franchise agreement” is generally taken to mean the legal arrangement whereby one party grants a licence to another for the purpose of retailing its goods or services, often in a specified area or territory. This type of arrangement is usually called a “business format” or “turnkey” franchise because the franchisor presents the franchisee with a model of how the business will operate and imposes stringent controls on the franchisee in respect of that business.

How to establish a franchise system and indeed what issues arise in the context of franchise agreements are outside the scope of this paper save for the EC and Irish Competition Law issues that may arise which are considered below.

### *C. EC Competition Law*

#### *1. vBER*

As noted earlier, the vBER provides a “safe harbour” for certain vertical agreements. Where a vertical agreement falls within the scope of the vBER the agreement is permissible, guaranteeing enforceability of the agreement and guaranteeing protection from prosecution. Outside the safe harbour, the guidelines on Vertical Restraints (“Vertical Guidelines”) published by the European Commission provide a helpful guide to the assessment of such agreements under Article 81(3) EC.

The vBER covers a broad range of vertical agreements, including exclusive dealing, exclusive purchasing, exclusive supply, franchising, selective distribution and “non-genuine agency agreements”. However, it excludes motor vehicle agreements, and technology-transfer agreements (see below).

The vBER applies to all vertical agreements provided:

- The suppliers (or in the case of an exclusive supply obligation, the buyer’s) market share does not exceed 30% of the relevant market, and
- The agreement does not contain “hardcore” restrictions.

In the latter respect, the vBER does not apply to vertical agreements, which directly or indirectly, in isolation or in combination with other factors under the control of the parties, and have certain anti-competitive objects. Where an agreement contains just one “hardcore restriction” the entire agreement loses the benefit of the vBER. Such hardcore restrictions include:

- Price restrictions
- Restrictions of sale to certain territories or customers
- Certain restrictions regarding selective distribution systems
- Certain restrictions regarding spare parts

The issue of “hardcore restrictions” is considered in more detail in the section of this paper dealing with Irish Competition law, below.

The vBER contains specific rules regarding non-compete clauses, that is to say, any direct or indirect obligation that requires the buyer either:

- Does not manufacture, purchase, sell or resell goods or services that compete with the contract of goods or services, or
- Purchases from the supplier, or from another undertaking designated by the supplier, more than 80% of the buyer’s total purchases of the contract goods or services.

The vBER does not cover any such non-compete obligations for an indefinite period of time or for in excess of five years. This is subject to the exception where the buyer sells the contract goods or services from premises and land owned by the supplier, or leased by the supplier from third parties not connected with the buyer. In that case, the duration of the non-compete obligation may not exceed the period of occupancy of the premises and land by the buyer.

The vBER is not available for agreements relating to the licensing or assignment of intellectual property (“IP”) rights if the IP rights provisions constitute the primary object of agreement.

The benefit of the vBER may be withdrawn by the Commission if it is found that the vertical agreement, whether in isolation or in conjunction with other similar agreements, nonetheless assert effects which are incompatible with the Article 81(3) EC exemption criteria. Moreover, in the case of the vBER the Commission may declare that the vBER does not apply where there are parallel networks of vertical agreements with similar substantive effects and together these networks cover more than 50% of a relevant market.

### *1. Vertical Guidelines*

The Vertical Guidelines set out the principles for the assessment of vertical agreements under Article 81(3) EC.

It should be borne in mind that the principles laid down in the Vertical Guidelines are not formally binding and are subject to approval by the CFI and the ECJ on a case by case basis. Nonetheless they offer helpful guidance on vertical restraints in commercial agreements, including discussions of vertical agreements which fall outside the scope of Article 81(1) EC (such as agency agreements, agreements of minor importance), the application of the vBER, market definition and market share calculation issues, and the general framework of analysis and the enforcement policy of the European Commission in individual cases concerning vertical agreements, particularly those that are not covered by the vBER.

Commercial agreements which are not covered by the vBER, or its equivalent in Irish Competition law, are considered in more detail later in this paper.

*D. Irish Competition Law*

Vertical agreements require to be considered, insofar as Irish competition law is concerned, under Sections 4(1) and (5) CA together with the Notice and Declaration published by the Authority on 5 December 2003. The Notice and Declaration are modelled on the vBER.

*1. The Notice*

The purpose of the Notice is to provide guidance as to the types of vertical agreements, which the Authority considers do not infringe Section 4(1) CA.

The Notice provides that:

- Nonexclusive distribution agreements, and
- “genuine agency agreements”

do not infringe Section 4(1) CA.

The definitions provided in the Notice of these Agreements or arrangements are as follows:

- **Nonexclusive Distribution Agreement:** an agreement where the supplier agrees to supply the contract goods or services to the buyer for a certain territory but without any restriction on supplying other buyers within that territory. This extends to where the supplier enters into an agreement with only one single buyer within the territory.
- **Genuine Agency Agreement:** an agreement whereby the agent is vested with the power to negotiate and/or conclude contracts on behalf of the principal either in the agent’s own name or in the name of the principal in situations where the agent does not bear or bears only insignificant risks in relation to the contracts concluded and/or negotiated on behalf the principal and in relation to market specific investments for that field of activity.

Furthermore, the Notice provides that the following agreements do not infringe Section 4(1) CA:

- Exclusive Distribution Agreements
- Exclusive Purchasing Agreements
- Select Distribution Systems
- Franchising Agreements

**provided** that the market share of the parties on the relevant market does not exceed 15%.

## 2. *The Declaration*

The Declaration sets out the Authority's opinion on circumstances in which vertical agreements are regarded as complying with the conditions for exemptions specified in Section 4(5) CA.

For the purpose of the Declaration "vertical agreements" are defined as agreements or concerted practices entered into between one or more undertakings which operate, for the purpose of the agreement, at a different level of the production/distribution chain, and which relate to the conditions under which the parties may purchase, sell or re-sell certain goods or services. Such agreements may include provisions relating to the assignment to the buyer or the use by the buyer of intellectual property rights provided that such provisions do not constitute the primary object of such arrangements and are directly related to the use, sale or resale of goods or services by the buyer or its customers.

The Declaration only applies where the market share held by the supplier does not exceed 30% of the relevant market of the contract goods or services. Where a vertical agreement contains an exclusive supply obligation, the Declaration shall only apply on condition that the market share held by the buyer does not exceed 30% of the relevant market.

## 3. *Hardcore Restrictions*

Both the Notice and the Declaration specify that they will not apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the buyer's ability to determine the sale price. (This does not affect the ability of suppliers to impose maximum sale price or a recommended sale price, provided they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties);
- (b) the restriction of the territory into which, all of the customers to whom, the buyer may sell the contract goods or services, except:
  - The restriction of actual sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such restriction does not limit sales by the customers of the buyer,
  - The restriction of sales to End Users by a buyer operating at the wholesale level of trade,
  - The restriction of sales to unauthorized distributors by the members of a selective distribution system, and
  - The restriction of the buyer's ability to sell components, supplied for the purposes of incorporation to customers who will use them to manufacture the same type of goods as those produced by the supplier.
- (c) The restriction of active or passive sales to End Users by members of a selective distribution system operating at the retail level of trade, without prejudice

to the possibility of prohibiting a member of the system from operating out of an unauthorized place of establishment.

- (d) The restriction of cross-supplies between distributors within a select distribution system, including between distributors operating at different levels of trade.
- (e) The restriction agreed between the supplier of components and the buyer who incorporates those components, which limit the supplier to selling the components as spare parts to End Users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Furthermore, the Declaration is specified not to apply to vertical agreements which contain any of the following obligations:

- (a) Any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. A non-compete obligation which is tacitly renewable beyond a period of five years is deemed to have been included for an indefinite duration. However, the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or at least by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.
- (b) Any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, unless such obligation:
  - Relates to goods and services which compete with the contract goods and services; and
  - Is limited to the premises and the land from which the buyers operated during the contract period, and
  - Is indispensable to protect know-how transferred by the supplier to the buyer,

and provided that the duration of such non-compete obligations is limited to a period of one year after termination of the agreement; this obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain,

- (c) Any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

The Notice and Declaration do not apply to exclusive purchasing agreements whereby the buyer is not free to buy and sell competing products in respect of motor fuels and liquefied petroleum gas.

Thus, in summary, under Irish Competition law, when considering whether a vertical agreement, including an agency agreement, distribution agreement, supply

and agreement, or franchise agreement, is potentially in breach of Section 4(1) CA, one should first have regard to the Notice, provided of course that the market share of the parties to the agreement does not exceed 15% of the relevant market.

In the case of where the parties market share exceeds the 15% threshold, or where the agreement does not otherwise comply with the requirements of the Notice, for example, where an agency agreement does not qualify as a “genuine agency agreement”, it may still be possible that the agreement would meet the conditions for exemptions set out in Section 4(5) CA in accordance with the terms of the Declaration, provided of course that the market share of the supplier does not exceed 30% of the relevant market (and in the case of an exclusive supply obligation, the share of the buyer does not exceed 30%).

It is also possible that certain vertical agreements falling outside the terms of the Declaration may nonetheless satisfy the criteria specified for exemption in Section 4(5) CA. In this respect, regard should be had to the Vertical Guidelines published by the Commission and, preferably, expert economic advice should be obtained in such circumstances.

In any event, a vertical agreement containing the types of hardcore restrictions mentioned above will entirely exclude the possibility of the vertical agreement benefiting from either the Notice or Declaration, as applicable.

#### *E. Self Assessment*

Commercial agreements falling outside the safe harbours created by the vBER and the Declaration will not necessarily be unlawful. Instead, with the abolition of notifications systems under EC and Irish Competition law, the parties to such a commercial agreement are required to self assess the compatibility of their agreements with Article 81 EC as the case may be.

In this respect, there are a number of issues to consider, including:

- Does the vertical agreement contain a “hardcore” restriction?
- What is the relevant market affected by the vertical agreement?
- In the case of Article 81 EC is there an affect on trade between EU Member States? (If not, Section 4 CA will need to be considered; see above).

Other considerations include:

- The suppliers’ and buyers’ respective market positions.
- Competitors’ market positions.
- Buyer power.
- Entry barriers and likelihood of market entry.
- Nature of the goods or services the subject matter of the vertical agreement.

Where Article 81(1) or Section 4(1) may be applicable, as the case may be, it will be necessary to consider whether the vertical agreement has sufficient benefits

to meet the criteria for exemptions set out in respect of Article 81(3) EC. In this respect, the parties will have to assess whether the vertical agreement:

- Offers efficiency benefits by contributing to improving production and/or distribution or to promoting technical or economic progress.
- Offers consumer benefits.
- Does not impose any obligations (such as vertical restraints) on the parties which are not indispensable to the attainment of the efficiency benefits offered by the agreement.
- Does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products, the subject matter of the agreement.

Vertical restraints in a commercial agreement to which a dominant undertaking is party will not normally benefit from an exemption under Article 81(3). In this respect, there is a presumption of dominance where an undertaking has a market share in excess of 50% of the relevant market. It is presumed that the undertaking is not dominant where it has a market share of less than 40% of the relevant market.

Moreover, even where a commercial agreement to which a dominant undertaking is party contains no vertical restraints, the agreement will need to be considered in the light of Articles 82 EC and Section 5 CA to assess whether the effect of the agreement would be to further re-enforce the dominant position of the party in question. This may occur, for example, in the case of long term supply agreements in highly concentrated, newly liberalized markets.

#### *F. Technology Transfer Agreements*

Technology Transfer Agreements concern the licensing of technology where the licensor permits the licensee to exploit the licence technology for the production of goods or services. The Technology Transfer Block Exemption Regulation (“ttBER”) provides two separate lists of hardcore restrictions catering respectively for agreements between the competitors and agreements between non-competitors. The general principles as to *de minimis* apply ie for agreements between non-competitors, each party’s market share should not exceed 15%; for agreements between competitors the combined market share should not exceed 10%.

The ttBER is available to agreements between the competitors where the combined market share of the parties does not exceed 20% on either the relevant product and geographic market or the relevant technology market. In the case of agreements between non-competitors neither party must have a share in excess of 30% on either the relevant product and geographic market or the relevant technology market.

The Commission takes the view that outside the area of hardcore restrictions Article 81 is unlikely to be infringed where there are four or more independent controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user. Absent this a full analysis of the agreement’s effects on competition ought to be undertaken.

#### IV. Horizontal Agreements

##### A. Overview

In general, horizontal agreements and arrangements give rise to greater concern from a competition law perspective than vertical agreements and arrangements. As a result, horizontal agreements will tend to be reviewed more critically under EC and Irish Competition law than in the case of vertical agreements.

There is extensive guidance under EC law. There are a number of BERs and horizontal guidelines<sup>21</sup> (“Horizontal Guidelines”) which provide detailed guidance for parties as to the circumstances in which a horizontal agreement may infringe Article 81 EC or may benefit from an exemption under Article 81(3) EC.

There is no equivalent under Irish law to either the BERs or Horizontal Guidelines, nor are there any general guidelines on the approach of the Authority to horizontal agreements.<sup>22</sup> Accordingly, the focus of this section of the paper is on the BERs and the Horizontal Guidelines, which it is suggested are of relevance in considering the compatibility of any given horizontal agreement with Section 4(1) CA and/or the manner in which it might qualify for an exemption pursuant to Section 4(5) CA.

Five categories of co-operation between actual or potential competitors, which may potentially offer efficiency benefits in circumstances are identified in the Commissions Horizontal Guidelines as follows:

- Agreements on research and development (“R & D”).
- Production and specialisation agreements.
- Purchasing agreements.
- Commercialisation agreements.
- Agreements on standards.

The Horizontal Guidelines recognize that many horizontal agreements (involving cooperation between actual potential competitors) may offer beneficial effects and should not be prohibited pursuant to Article 81 EC.

However, horizontal agreements may have anti-competitive effects where the parties enjoy market power. In other words, co-operation between parties enjoying market power such that they have the ability to cause negative market effects as to prices, output, innovation or the variety or quality of goods and services avail-

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<sup>21</sup> Commission Notice – Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Co-Operation Agreements, OJ 2001 C 3/02.

<sup>22</sup> The leading Enforcement Decision in the area of horizontal agreements in Irish Competition law is the *Glassmatics* Decision of the Authority, Decision No E/03/001 (which considered horizontal agreement and arrangements between competitors for the development of software for a crash repair estimation system for Ireland, and related horizontal arrangements between the parties in connection with the implementation thereof).

able, may breach Articles 81 EC or Section 4 CA, as the case may be. Conversely, where the parties have a low combined market share, and therefore limited market power, the anti-competitive effect of the horizontal agreement in question is unlikely. In this respect, where the party's combined market share in the relevant market does not exceed 10%, the horizontal agreement will benefit from the *de minimis* Notice.

If the parties combined market shares are in excess of 10%, a horizontal agreement may nonetheless in certain cases enjoy the safe harbour as provided by the R & D BER<sup>23</sup> or the specialisation agreement BER.<sup>24</sup> Generally, this will not be the case for joint commercialisation agreements, save in limited circumstances where the vBER may apply.

### *B. R & D Agreements*

Research and development can be defined as any project to resolve scientific or technological uncertainty aimed at achieving an advance in science or technology. Advances include new or improved products, processes and services.

R & D agreements usually involve collaborative research projects but their contents vary depending on what the parties agree. For example, some grant non-exclusive licences to one party (sponsor) to use the results in a specified business area and/or a geographical area. The key issues in any such agreement relate to who is to own the intellectual property and how the results are to be utilized. Frequently such agreements involve background technology and set out fields of use.

Not surprisingly, R & D agreements will often include restrictions on the party's ability to act independently in the field the subject matter of their collaboration. Thus, if the commercial agreement governs manufacturing and marketing, there may be restrictions on the party's ability to exploit the results of their collaboration.

As with other commercial agreements, the presence of any hardcore restrictions will exclude the R & D agreement from benefiting from the relevant BER.

In the absence of any such "hardcore" restrictions, the availability of the R & D BER will depend principally on whether the parties are actual potential competitors. If the parties are not actual potential competitors, the parties may benefit from the R & D BER irrespective of market share. However, if they are actual potential competitors, the agreement will only benefit from the relevant BER if at the time it was entered into, the parties combined market share does not exceed 25% of the relevant market. In those circumstances, the parties may rely on the BER for the entire duration of the joint R & D.

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<sup>23</sup> Commission Regulation (EC) 2659/2000, OJ 2000 L 304/7, on the application of Art 81(3) of the Treaty to categories of research and development agreements.

<sup>24</sup> Commission Regulation (EC) 2668/2000, OJ 2000 L 306/11, on the application of Art 8(3) of the Treaty to categories of specialisation agreements.

Where the R & D agreement also governs joint exploitation of the contract products, the parties are permitted to rely on the R & D BER for seven years from the date the contract products are first put into the market in the EU. Following that period, the agreement will only benefit from exemption for as long as the parties combined market share does not exceed 25% of the relevant market.

As with other BERs, the Commission may withdraw the benefit thereof in respect of any agreement in the event of the agreement having effects incompatible with Article 81(3) EC.

Where an R & D agreement does not benefit from the R & D BER, for example, where the parties have significant market shares in the relevant market, they will have to self assess the agreement for its compatibility with Article 81 EC.

It is important to bear in mind that a geographic market may relate to the smallest possible geographic market in Ireland, such as a university, an airport, a shopping centre or a seaport.<sup>25</sup> Equally, however, a commercial agreement involving a global or EU-wide geographic market may still fall to be assessed under Section 4(1) CA.<sup>26</sup>

In the appraisal of an R & D agreement falling outside the BER one should have regard to:

- The product markets directly concerned by the collaboration of the parties (this will involve identifying the market or markets in which the contract products may compete).
- Any neighbouring product markets closely related to the product markets directly concerned.
- Technology markets where the research and development will result in IP rights capable of being licensed to customers.

### *C. Joint Production Agreements*

Production agreements are agreements between two or more parties relating to the conditions under which they will co-operate to produce goods or provide services.

These may include:

- Joint production agreements – where the parties agree to produce certain goods jointly.
- Specialisation agreements – where the parties agree to cease or refrain from producing certain products and commit to purchase them from another party.

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<sup>25</sup> *Competition Law*, op cit at 55.

<sup>26</sup> See eg Dec No 28 GEC/GP 9 September 1993.

- Sub-contracting agreements – where one party entrusts the production of goods or the supply of services to another party.

Absent any hardcore restrictions, certain production agreements may benefit from the specialisation BER and, therefore, will be valid and enforceable. The availability of the specialisation BER will depend, inter alia, on whether the party's combined market share exceeds 20% of the relevant market. Below this threshold, it is presumed that specialisation agreements, as a general rule, give rise to economic benefits while allowing consumers a fair share of the resulting benefits.

Again, the benefit of the specialisation BER may be withdrawn in respect of a production agreement whose effects are incompatible with the criteria of Article 81(3) EC.

For production agreements which do not benefit from the specialisation BER, it may be necessary for the parties to self assess its compatibility with the EC or Irish Competition rules, as the case may be. In this respect a full analysis of the extent to which the production agreement may restrict actual potential competition between the parties and whether it is likely to afford the parties the possibility of eliminating competition ("foreclosure effect") needs to be carried out. Any such appraisal ought to be undertaken by reference to its effects on:

- The market or markets directly concerned by the co-operation.
- Any upstream markets (for inputs), downstream markets (for final products) or any other "spill over markets" (neighbouring markets to the markets directly concerned).

As with other horizontal agreements, the party's market power will determine to a large extent whether the production agreement will cause negative market effects.

#### *D. Joint Commercialisation Agreements*

Commercialisation Agreements often concern the development of national and international commercialisation of cutting edge technology and include provisions dealing with intellectual property such as licensing and manufacturing rights.

Considering that such agreements may involve co-operation between actual potential competitors in the sale, distribution or promotion of the contract products, such arrangements are likely to have negative market effects where the parties enjoy appreciable market power.

In the case of a distribution agreement concluded between two competitors, the vBER may apply if the agreement is non-reciprocal and

- The buyer has an annual turnover not exceeding €100,000,000 or
- The supplier is a manufacturer and distributor and the buyer is a distributor only, or

- The buyer does not supply competing services at the same level of trade as the supplier.

Aside from this, there is no BER providing a safe harbour above a *de minimis* threshold (10% combined market share of the parties to the agreement).

Absent hardcore restrictions, a commercialisation agreement between parties with little market power is unlikely to infringe Article 81 or Section 4 CA, for example, where the parties have market share of less than 15%.

Horizontal agreements, in particular commercialisation agreements, provide the scope for actual or potential competitors exchanging sensitive commercial information, such as price and market strategy. Moreover, competition issues will arise where a significant portion of the party's final costs are common, which will give rise to the potential for reduction and elimination of price competition. This may be offset if the collaboration involves significant efficiencies and associated consumer benefits.

In addition, as is the case for all horizontal agreements, where one of the parties is a dominant undertaking in a relevant market, the agreement is less likely to satisfy the requirements of Article 81(3) or Section 4(5) criteria.

Moreover, as noted earlier, any commercial agreement, including horizontal agreements, where one or more of the parties enjoys a dominant position in the relevant market, would have to be carefully considered under Article 82 EC or Section 5 CA to determine whether the agreement will constitute an abuse or strengthening of the dominant position enjoyed by the dominant undertaking(s).

## V. Corporate Agreements

### A. Overview

Irish and EC Competition law also impacts on general corporate agreements such as share and asset sale and purchase agreements. As stated above as a general guideline EC Competition law applies to commercial agreements with a potential EC cross-border impact, whereas Irish Competition law applies to commercial agreements having an effect on competition within the Republic of Ireland whether at a regional, county, city or local level. Each of these are considered separately below.

It is not unusual for competition issues to be considered at a late stage in commercial negotiations after all the other commercial terms are agreed. As a result, it may only emerge at a late stage that proposed non-compete covenants may not be enforceable under Irish or EC Competition law considering the area and indeed the time frame desired by the client. Often such non-compete covenants are of fundamental importance to a purchaser of a business who is paying a substantial sum for either goodwill or intellectual property and hence they are seeking to pro-

protect their investment by inserting an appropriately drafted non-compete covenant from the vendors.

A share or asset purchase agreement usually makes provision to restrict the vendor from competing with the business being sold. These restrictions are commonly referred to as ancillary restrictions or restrictive covenants. Mergers and acquisitions usually involve the transfer of the goodwill of the vendor to the purchaser. Hence, the question of ancillary restraints will arise most commonly in the context of merger control, which is considered briefly in the following section.

As a general principle, restrictions on the vendor which are necessary to protect goodwill are permissible provided they do not go beyond that which is necessary to secure the adequate transfer of the goodwill being acquired.

### *B. EC Competition Law*

In 2005 the European Commission adopted a new Notice on restrictions directly related and necessary to concentrations (ancillary restrictions),<sup>27</sup> which replaced the previous 2001 Notice. This Notice continues the regime introduced in the 2001 Notice whereby the Commission no longer assesses whether any restrictions entered into by parties in the context of a merger are ancillary. The main objective of the new Notice is to continue the regime of self assessment introduced in 2001 namely, to provide legal certainty to undertakings and their lawyers regarding ancillary restrictions and to provide guidance on the interpretation of such restrictions. The Notice reflects the essence of the Commission's practice and sets out the principles for assessing whether and to what extent the most common types of agreements are deemed to be ancillary restraints.

Disputes as to whether restrictions are directly related and necessary to the implementation of the concentration and thus automatically covered by the Commission's clearance decision may be resolved before national courts.

If a case presents a 'novel or unresolved question giving rise to genuine uncertainty' not covered by the Notice the Commission may at the request of the undertakings concerned expressly assess the ancillary character of the restraints.

To the extent restrictions are directly related and necessary to the implementation of the concentration, the Notice is stated to apply to the exclusion of Council Regulations 1/2003, 1017/68 and 4056/86.

Some important points to note arising out of the new Notice are as follows:

- Non-competition clauses are justified for periods of up to three years when the transfer of the undertaking includes the transfer of customer loyalty in the form of goodwill and know how whereas when only goodwill is included they are justified for periods up to two years. Non solicitation and confidentiality clauses are to be evaluated in a similar way to non-competition clauses.

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<sup>27</sup> Notice on restrictions directly related and necessary to concentrations, OJ 2005 C 56/03).

- The Notice also deals with licence agreements and purchase and supply obligations entered into in the case of joint ventures and the acquisition of an undertaking or part thereof.
- The Notice states non-competition obligations between parent undertakings and a joint venture are directly related and necessary where they correspond to the products, services and territories covered by the joint venture and are for the lifetime of the joint venture. The same principles as for non-competition clauses apply to non-solicitation and confidentiality clauses.

Clauses which cannot be considered ancillary are not per se illegal. They will not automatically be covered by a merger decision of the Commission.

### *C. Irish Competition Law*

The Authority issued a Notice in respect of agreements involving a merger and/or sale of the business (N/02/001) in 2002.<sup>28</sup> The Notice was only effective until 31 December 2002.

While the Notice which expired in 2002 gives some form of guidance we understand that the Authority do not currently rely on it in making their decisions and are in fact considering issuing a new Notice. We understand the Authority's current position on ancillary restrictions is that they look at the restriction in the context of the particular merger and the individual sector. Consequently the Authority recommends reviewing its determinations in this area to give useful guidance on its current position on ancillary restrictions. We consider some recent determinations below.

#### *1. Determinations*

- *Musgrave Limited/Express Checkout Limited* – Notification Number M/03/001. In that case a very wide ranging non-compete clause was imposed on the vendor which in the Authority's view went beyond what was reasonable and proportionate to ensure the protection of the purchaser's legitimate business concerns. The provision which was unacceptable to the Authority related to the vendor being restricted from (a) being involved in any business competing with the targets *anywhere in the island of Ireland* (b) soliciting business from any customers or suppliers of the targets *for any purpose* and (c) engaging, employing or soliciting any employee of the targets *for any purpose* for a period of two years after the proposed transaction was complete and from *ever* doing or saying anything which 'is harmful to the reputation' of the group or which 'may lead any person to cease to deal with any group company on substantially equivalent terms to those previously offered or at all.'

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<sup>28</sup> Competition Authority Notice in respect of Agreements involving a Merger and/or a Sale of Business –N/02/001.

This clause had to be revised so that the vendor would be restricted from the above outlined behaviour only for the purposes of any business competing with the targets, in the geographic area of the target companies and for a period of two years.

- *Kingspan/Century Homes* – Notification Number M/05/009. The share purchase agreement provided for deferred consideration to be payable (“earn-out”) during a period when the vendors were to be involved in the business. The share purchase agreement also contained non-compete and non-solicitation restrictions for a “Restricted Period” and a “Restricted Business Area”. The Authority found that the “Restricted Period” was inflexible and did not account for contingencies as it commenced for two years from the end of the “earn out” period. And also the “Restricted Business Area” was not directly or indirectly related and necessary to the implementation of the proposal and consequently the parties re-submitted revised definitions of “Restricted Business Area” and “Restricted Period” which the Authority accepted.

## VI. Other Competition Related Issues

The rules laid down by Articles 81 and 82 EC and Sections 4 and 5 CA are only one aspect – albeit a central aspect – of EC and Irish competition policy. It is important to bear this in mind when considering competition issues in commercial agreements. EC competition policy, and to a lesser extent, Irish competition policy, focus on a number of other important areas, as follows:

### *A. Merger Control*

This is the control of mergers between undertakings or firms.

#### *1. EC Law*

Merger control within the European Communities is governed by the new Merger Regulation (Regulation (EC) No 139/2004).<sup>29</sup> The Merger Regulation, which replaced former Regulation No 4064/89, OJ L257/90 prohibits a merger or more accurately a “concentration” with a Community dimension which creates or strengthens a dominant position within the common market such as to ‘significantly impede effective competition’.

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<sup>29</sup> Council Regulations (EC) 139/2004 on the Control of Concentrations Between Undertakings, OJ 2005 L 24/1.

## *2. Irish Merger Control*

Merger control in Ireland is governed by Part III of the Competition Act 2002, which entered into force on 1 January 2003. Part III CA prohibits mergers or acquisitions, whose result would be to 'substantially lessen competition in markets for goods and services in the State'.

### *A. State Aid Control*

This comprises the control of State aid measures by Member State governments to ensure that such measures do not distort competition in the common market (eg, the prohibition of a State grant designed to keep a loss-making firm in business even though it has no prospect of recovery).

#### *1. EC Law*

The ability of EU Member States to grant aid is governed by Articles 87 to 89 EC. Article 87 EC states that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings in the production of certain goods shall, insofar as it affects trade between Member States be incompatible with the common market". The concept of aid has been interpreted by both the European Commission and the ECJ. Thus, Articles 87 to 89 catch a large number of aid measures, whether direct or indirect, of all types. There is not an absolute ban on State aid and thus Article 87 provides for a number of exceptions. It is the task of the European Commission to ensure that EU Member States grant only aid which is compatible with the common market.

#### *2. Irish Law*

The Competition Act 2002 does not deal with the issue of State aid and, thus, aid which does not have an effect on trade between member states is not prohibited, at least insofar as Irish competition policy is concerned, in this State.

#### *3. General*

Thus, commercial agreements which relate to or involve the granting of aid, whether direct or indirect to an undertaking need to be carefully considered in the light of the EC rules governing State aid. Again, it is outside the scope of this paper to consider in detail the application of the rules of State aid to commercial agreements.

### *C. Sectoral Competition Rules*

There are specific sectoral rules, which endeavour to introduce competition in existing or former monopolistic economic sectors, such as energy, postal services, telecommunications and transport, to name a few.

### *1. EC Law*

As a general matter, Article 86 EC prohibits Member States from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular, the rules on competition. Article 86(2) permits some exceptions to the general rules of the Treaty in respect of enterprises 'entrusted with the operation of services of general economic interest', which are subject to the rules of competition only 'insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

The European Commission has focused on liberalising the sectors by introducing rules obliging monopolists to grant access to third parties as regards the services offered. This is based on Article 86(3) EC which allows the European Commission to address appropriate directives and decisions to Member States.

In other areas of economic activity, such as agriculture, more limited competition has been introduced.

### *2. Irish Law*

Liberalisation of former monopolistic markets, such as telecommunications and energy, in Ireland has been driven largely by EC Directives and Decisions.

One particular sector of note is the grocery sector in Ireland. Up to recently the area was governed by the Restricted Practices (Groceries) Order 1997 (more commonly known as the "Groceries Order"), which imposed a ban on selling certain grocery products below "net invoice price".

The Competition Act 2006, which amends the Competition Act 2002, entered into force on 20 March 2006. It prohibits various activities which have as their aim or result a negative effect on competition in the grocery trade in Ireland, such as attempts to coerce the imposition of resale price maintenance, apply to similar conditions to dissimilar transactions, or to pay "hello money" for stocking a product in certain outlets.

### *3. General*

Thus, when advising on commercial agreements in certain sectors, it should be borne in mind that there may be alternative, additional and/or complementary competition rules particular to that sector which need to be considered in addition to or in substitution for the competition rules set out in Articles 81 and 82 EC and/or Sections 4 and/or 5 CA.

## **VII. Conclusion**

All commercial agreements, whether horizontal, vertical or corporate, particularly those containing potential restrictions in competition, will need to be carefully considered under Article 81 EC or Section 4 CA, as the case may be, and, in certain cases, Article 82 EC or Section 5 CA.

Where safe harbours exist under the relevant BER or Competition Authority Notice and Declaration, the agreement in question may benefit from an exemption.

Absent hardcore restrictions and where the party's market shares are below the requisite levels, there is quite a significant amount of guidance available to the parties and their legal advisers as to circumstances in which the block exemptions or Declaration shall apply.

Where the commercial agreement falls outside a safe harbour, it will be necessary to undertake a more detailed market analysis, possibly involving the assistance of economists (and if significant market share is available directly from the clients) to determine the compatibility of the commercial agreement with EC or Irish Competition law, as the case may be.

As regards ancillary restrictions, regard must be had to the 2005 Commission Notice and relevant Authority Determinations.

It is of course essential to bring to your clients attention as early as possible in any commercial arrangement the issues discussed above so they can tailor their negotiations accordingly.

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**Appendix 1**

The following is an example of a boilerplate clause that deals with severance:

- 1.1 If any provision of this Agreement shall be found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of the Agreement which shall remain in full force and effect.
- [1.2 If any provision of this Agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it valid.]
- [1.3 The parties agree, in the circumstances referred to in sub-clause [1.1] [and if sub-clause [1.2] does apply], to attempt to substitute for any invalid or unenforceable provision a valid or enforceable provision. [The obligations of the parties under any invalid or unenforceable provision of this Agreement shall be suspended whilst an attempt at such substitution is made.

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