Enforcement Decision Series (E/09/001)

Competition Act 2002

Decision of The Competition Authority (Case COM/06/06)

Alleged anticompetitive practices in the provision of pay-TV infrastructure and services to apartment developments

14th August 2009

SUMMARY

i. The Competition Authority has received a large number of complaints concerning the supply on an exclusive basis of pay-TV to apartment developments, predominantly in the Greater Dublin Area. It is alleged that this practice constitutes a breach of either section 4, which prohibits anti-competitive agreements, or section 5, which prohibits the abuse of a dominant position, of the Competition Act 2002 ("the Act"). The practice also falls for consideration under the analogous EU legislation, in this case Articles 81 and 82 of the EC Treaty.

ii. This Enforcement Decision constitutes the Authority's findings in this specific matter. However, it is the role of the Courts to make a final determination on whether the Act has been breached. This Enforcement Decision is published without prejudice to the right of any party to take a private action under section 14 of the Act.

iii. The Authority has conducted extensive analysis into this issue. In the Authority's view, no one provider of pay-TV services is dominant in the State. Accordingly, the Authority's analysis has focussed on whether agreements for the supply of pay-TV to apartment developments made between pay-TV service providers and certain construction firms constitute anti-competitive agreements in breach of section 4 of the Act and/or Article 81 of the Treaty.

iv. On the basis of its analysis, the Competition Authority has formed the view that the agreements entered into by the parties listed at section 6.1 below are unlikely to breach section 4 of the Act and/or Article 81 of the Treaty. This is because the agreements made between each of the named parties are limited both in time and in scope, and therefore allow for alternative pay-TV service provision at the developments in question following the conclusion of a limited period of exclusivity.

v. In the view of the Authority, exclusivity terms in agreements between developers and pay-TV service providers for the purpose of supplying pay-TV to residents of apartment developments are generally unlikely to breach section 4 of the Act and/or Article 81 of the Treaty where they allow for exclusive provision for a period of time no greater than two years in duration.

vi. In the case of agreements which exceed this time period, they may still comply with competition law where they satisfy the exemption criteria detailed at section 4(5) of the Act and Article 81(3) of the Treaty. However, the burden of proving that the agreements satisfy the exemption criteria, to the satisfaction of the Authority, lies with the parties claiming the benefit of the exemptions.

vii. This Enforcement Decision addresses a specified number of agreements. Given the number of complaints submitted to the Authority on this issue, separate Guidance has been produced which is published alongside this decision. This Guidance gives further advice to consumers and businesses on whether exclusivity agreements are likely to breach section 4 and/or Article 81 of the Treaty.

1. THE ISSUES

The Complaint

1.1 The Competition Authority has conducted an investigation into consumer allegations concerning exclusive agreements between property developers and pay-TV providers for the provision of pay-TV infrastructure and services to apartment developments. These agreements are alleged to grant an effective monopoly to the pay-TV service provider. Residents are typically not permitted to erect satellite dishes, and are therefore unable to substitute away from the service provider to a comparable form of pay-TV service provision.

1.2 Complaints centred on the apparent monopolies granted by the agreements, and the lack of choice for residents, given the service provider-exclusivity in each new development. Complainants asserted they could not change service providers even where they were unhappy with the service provided. Dissatisfaction ranged from claims of poor quality of transmission, poor selection of channels offered and high prices. These complaints have been examined under both sections 4 and 5 of the Competition Act 2002.

1.3 Service providers offer various telecommunications packages, ranging from TV-only packages to so-called "triple play" packages, which offer consumers bundled broadband, TV and telephone services. Prices for various TV-only packages to these developments range from €15 to €40 per month. Table 1 below lists the firms that are engaged in the provision of pay-TV services to apartment complexes of which the Competition Authority is aware.

Table 1: Apartment Complex Pay-TV Service Providers

Provider	Service
HomeVision	Triple Play, Broadband & phone, Broadband & TV
Sky Conway[1]	TV, Broadband
Smart Telecom	Triple Play, Broadband, Digital TV, Telephony
UPC (Chorus/ntl)	Triple Play, Broadband, Digital TV, Telephony
Sky in Your Apartment	Digital TV only
Digigate	TV only
Cablewatch	TV, Broadband
Broadworks	TV, Broadband
Magnet	Triple Play, Broadband, Digital TV, Telephony

1. Despite its name, Sky Conway has no affiliation to BSkyB.

Source: Competition Authority research.

The Parties

1.4 Five sets of parties are of relevance in these complaints: residents of apartment developments (consumers), property developers, pay-TV service and infrastructure providers, management agents and management companies. Figure 1 below illustrates the relationships between the five sets of parties.

Construction Phase

1.5 The property developer contracts with a TV service and infrastructure provider during construction, who will provide telecommunications services (TV, telephone or broadband, or a combination of all three) to residents, generally on an exclusive basis following installation. The property developer also establishes a management company, which is generally vested in the developer until the last unit is sold. The management company is eventually vested in the apartment owners, and the directors that were nominated by the developer resign. The management company may choose to appoint a professional management agent to carry out day-to-day responsibilities, such as maintenance of the common areas. The management company is also responsible for agreeing the installation of new or additional telecommunications infrastructure, such as ducting, cabling, head-ends and cabinets, which was not installed during the construction phase.

Post-Construction Phase

1.6 Following the construction of the development, or of the initial phase of the development, a management company is established by the developer.

1.7 Management companies are established for two key purposes:

- To manage and maintain common areas; and,
- To be the legal owner of the leaseholds of each unit and the common areas. While most houses are owned freehold (where the owner owns both the property and the land on which it is built), multi-unit development properties such as apartments are generally owned as leaseholds, whereby the owner owns the property, but not the land on which it is built.

1.8 Management companies are generally formed because they provide an efficient means of managing apartment developments. In addition, the rules of company law to which they must adhere offer an effective structure in terms of administration and ownership.[1] In theory, the management company should be vested in the residents of the development; however, significant delays in vesting occur with some frequency.[2]

1.9 Many developers and management companies employ professional firms known as managing agents to provide maintenance and other services in housing developments. The managing agent and the management company are different entities, with the managing agent working under the instructions of the management company.

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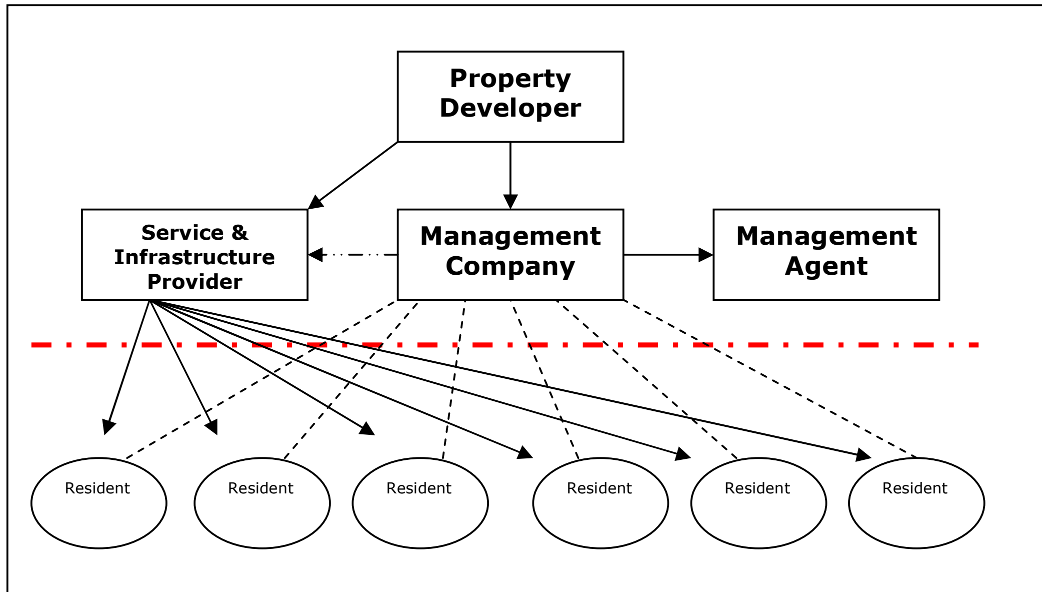
[1] This description is taken from the NCA website, www.consumerproperty.ie.

[2] This is considered in greater detail in Part 6 below. The recently-published Multi-Unit Developments Bill 2009 includes provisions which require the vesting of owners' management companies in a timely manner and in line with legislation.

Figure 1: Apartment Development Vertical Relationships



1.10 The horizontal dashed line in the diagram above indicates that a contractual barrier is created that prevents residents from switching to other telecommunications service providers as and when they choose. This barrier is, in numerous instances, maintained by the management company while vested in the property developer, or by the management agent, acting on the instructions of the management company.

1.11 Following the establishment of the management company and the appointment of a management agent, apartments are sold to residents, who then receive various services and utilities, such as pay-TV on an exclusive basis, following the conclusion of agreements between the developer and each provider for the supply of same to residents.

Structure of this Enforcement Decision

1.12 The structure of the remainder of this Enforcement Decision is as follows:

- Part 2 details the key competition law offences and explains the role of the Competition Authority in investigating and, if necessary, prosecuting any alleged breaches of the law;
- Part 3 defines the relevant market, which is a necessary first step to any assessment of competition in markets;
- Part 4 assesses the conduct of developers and service providers in the light of section 4 of the Competition Act 2002, which prohibits anticompetitive agreements;
- Part 5 assesses the conduct of developers and service providers in the light of section 5 of the Competition Act 2002, which prohibits the abuse of a dominant position; and,
- Part 6 constitutes the Competition Authority's decision in this matter.

1.13 This Enforcement Decision contains two appendices:

- Appendix A provides indications of the market shares of each of the providers of TV services to apartment developments that operate in the State; and

- Appendix B reproduces a number of recommendations from other statutory and non-statutory bodies which, in the Competition Authority's view, would benefit competition if implemented.

2. THE COMPETITION ACT 2002

Introduction

2.1 The Competition Act 2002 ("the Act") is the principal domestic legislation governing competition enforcement and advocacy in the State. The Act endows the Competition Authority with a range of statutory powers, including:

- Approval of mergers within the State;
- Enforcement of competition law; and,
- Promotion of competition.

2.2 The principal enforcement provisions are contained in sections 4 and 5 of the Act, which prohibit certain categories of anticompetitive coordinated and unilateral conduct. Irish competition law has been greatly influenced by European Community (EC) competition law, and sections 4 and 5 are closely modelled on, respectively, Articles 81 and 82 of the EC Treaty.

Section 4 of the Act

2.3 Section 4 of the Act applies when two or more undertakings are coordinating their activities in arrangements[3] which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State.

2.4 Section 4(1) of the Act reads:

"4.—(1) 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 the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts."

2.5 In order to establish that there is a breach of section 4(1) of the Act, it must be demonstrated that:

- There is an agreement, decision or concerted practice;

[3] The arrangements can be either horizontal (i.e. between competitors in the same market) or vertical (i.e. between undertakings at different stages in the production / distribution / retailing chain).

- The parties to that agreement, or concerted practice are undertakings, or the decision was made by an association of undertakings; and,

- The object or effect of the agreement, decision or concerted practice is to prevent, restrict or distort competition.

2.6 Section 4(2) of the Act provides that an anticompetitive agreement, decision or concerted practice that would otherwise be prohibited by section 4(1) can be exempted where it satisfied four cumulative criteria, which are set out in section 4(5) of the Act. The four criteria are as follows:

> "[the] agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not –
>
> (a) impose on the undertakings concerned terms 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."

2.7 All four of these conditions have to be satisfied for an anticompetitive agreement, decision or concerted practice to escape prohibition under section 4(1) of the Act. Determining whether or not the conditions set out in section 4(5) are satisfied requires a careful assessment of the economic context of the agreement, decision or concerted practice.

Section 5 of the Act

2.8 Conduct by an undertaking (or a group of undertakings) constituting the abuse of a dominant position in the market is addressed by section 5 of the Act. In order to establish a breach of section 5, it must be demonstrated that the undertaking:

- Holds a dominant position in a relevant market; and,

- Has abused that dominant position.

2.9 There is no statutory provision for exemption from the application of section 5, analogous to the exemption provided by section 4(2), whereby the conduct of a dominant undertaking can be permitted if it satisfies certain welfare enhancing criteria. To distinguish abusive conduct from legitimate behaviour, EC case-law has developed the concept of "objective justification", whereby otherwise abusive conduct is not prohibited if it can be objectively justified. In order to establish an objective justification, it must be demonstrated either that the conduct produces substantial efficiencies that outweigh any anticompetitive effects on consumers, or that it is objectively necessary and proportionate. Whether the latter requirement is satisfied must be determined on the basis of objective factors external to the parties involved, and in particular external to the dominant undertaking. Proportionality requires that the dominant undertaking select the means that are the least restrictive of competition to achieve the particular objective. The burden of proof for

establishing an objective justification is on the dominant undertaking relying upon it.[4]

2.10 It should be emphasised that the creation or existence of a dominant position does not, in and of itself, breach the Act; rather, it is the abuse of such a position that constitutes the breach.

Assessment under the Act

2.11 For the purposes of this Enforcement Decision, the Competition Authority has assessed certain behaviours with respect to both sections 4 and 5 of the Act:

- Whether the agreements between developers and pay-TV service providers constitute anticompetitive agreements in breach of section 4 of the Act; and
- Whether any of the service providers are in a dominant position, and whether the unilateral conduct of any of the service providers accordingly constitutes abuse of a dominant position in breach of section 5 of the Act.

[4] European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (2009/C 45/02), available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF, at paragraphs 27-30. See also European Commission, *DG Competition discussion paper on the application of Article 82 of the treaty to exclusionary abuses,* published December 2005, available online at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf, at paragraphs 77-92.

3. MARKET DEFINITION

Introduction

3.1 As a first step to any competition analysis, the relevant market must be defined. Market definition is a tool to identify and define the boundaries of competition between firms, thus establishing a framework within which competition law can be applied.[5] The relevant market is defined in terms of a product market and a geographic market.

Product Market Definition

3.2 A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.[6] Applying this definition, it appears that there are two product markets which fall for consideration in this analysis.

3.3 The first product market is the **provision of pay-TV infrastructure to apartment developments**, including cables, ducting and cabinets. During the construction phase of apartment complexes, developers contract for the provision of essential utilities infrastructure, such as gas, electricity, water, TV, telephone and broadband to the apartment development. These utilities all share the feature that they are provided to residents by means of a common infrastructure. At this stage, the developer is acting on behalf of the future residents in selecting products and services (TV, waste collection, bathroom fittings, white goods) which will later be sold as part of a bundle.

3.4 At the procurement stage, substitutes for pay-TV infrastructure are limited. The developer's demand for TV infrastructure to apartment developments is a derived demand which is based on the final demand of residents for TV services. Developers select between the variety of mechanisms by which TV services can be provided, namely, coaxial cable of various technical configurations, fiber optic cable, known as fiber-to-the-home (FTTH) and, in some cases, satellite. The infrastructure in question will be capable of providing services along a continuum, with the most basic cable infrastructure providing a limited range of analogue TV channels, up to, at the most sophisticated level, infrastructure capable of delivering telephone, low-contention broadband services, and a large number of digital TV channels.

3.5 The second product market is the **provision of pay-TV services to apartment developments**. Pay-TV services can be provided to consumers by means of various infrastructures in return for payment of a monthly subscription fee. Consumers can choose to subscribe to basic packages which offer general, news and specialist channels, and they may also upgrade their subscription to access premium sporting or film channels. While the same entity supplies both the pay-TV infrastructure and the service, the consumer of the service is the resident rather than the developer. Consumers may access pay-TV services by means of cable, FTTH or satellite, depending on the apartment development.

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[5] European Commission, 1997. *Notice on the definition of the relevant market for the purposes of Community competition law* (97/C 372/03), available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML, hereafter "Market Definition Notice", at paragraph 7.

[6] Market Definition Notice at paragraph 7.

3.6 The pay-TV services market differs from the infrastructure market. The buyer in the infrastructure market is the developer, while the buyer in the services market is the resident. This situation is different to standalone houses, where the resident is the purchaser of both the infrastructure and the service. The fact that there are two different product markets has important ramifications: the developer's decision regarding infrastructure may limit the options available to consumers on the service market, even in the absence of exclusive supply arrangements. If a developer has, for example, contracted for the installation of coaxial cable and has not installed spare ducts, then residents may be limited to those providers which are willing or able to offer services by means of coaxial cable.

3.7 While the products are initially purchased on different markets by different parties, it is impossible to provide one product (the service) without the provision of the other product (the infrastructure). The product and service are intrinsically linked, so it is appropriate in this instance that they be considered together to form a product market for pay-TV infrastructure and service provision.

3.8 Table 2 below details, based on the Competition Authority's research on data available in the public domain, the type of cabling infrastructure used by each provider to furnish TV services to apartment developments. Where different providers use similar cabling technologies, it is, in theory, open to one provider to lease the cabling of another provider once any exclusivity period has expired.

Table 2: Provider Infrastructure Details

Infrastructure	Provider	Service
Coax (various specs)	**Broadworks**	TV, Sky Sports, Broadband
	Cablewatch	TV, Broadband
	Digigate	Digital TV, Broadband
	Sky Conway	Digital TV, Broadband
	Sky In Your Apt.	Digital TV
Ethernet LAN **CAT- 5 cabling**	**Smart Telecom**	Triple Play
FTTH	**Magnet**	Triple Play
	Homevision	Triple Play
	UPC[1]	Triple Play

1. Currently upgrading network to FTTH.
Source: Competition Authority research.

3.9 In its 2005 *Chorus/ntl* merger determination, the Competition Authority noted that:

"The market investigation carried out by the Authority has established that freeview, which includes free-to-air and freesat, is clearly separate from pay-TV services and that the two cannot be combined to form a single retail multi-channel TV market. In

establishing the relevant markets, the Authority considered previous decisions, the views of third parties, including content suppliers, and the parties' internal documents."[7]

3.10 Freeview was therefore not included in the relevant product market on that occasion. Circumstances have not changed in the intervening years to warrant a differing finding with respect to the current analysis. The *Chorus/ntl* merger defined a retail pay-TV market which offered service to all types of premises. In this instance, the market is defined more narrowly to refer to services to apartment developments only, in order to take account of the different market conditions faced by apartment residents compared to house residents, such as the difference in the ability to switch, and the coordination issues which must be resolved in order to switch.

3.11 On the supply side, the scope for substitutability in service provision is increasing, although there is huge variation between apartment developments. Where competing firms tend to use the same forms of technical infrastructure, it is open to them, following the expiry of any exclusivity period, to agree commercial terms for the use of that infrastructure. Where competing firms use differing technologies, substitution may also be possible. Where spare ducting has been installed by the developer, alternative providers may install their own infrastructure to provide service to residents. In future, pay Digital Terrestrial Television may act as a supply substitute. This is discussed in greater detail below.

3.12 The Competition Authority's approach to product market definition in this instance is similar to that taken by the European Commission in its *Telecommunications Sector Notice*, in which the Commission took the view that "*in the telecommunications sector there are at least two types of relevant markets to consider – that of a* ***service*** *to be provided to end users and that of access to those* ***facilities*** *necessary to provide that service to end users (information, physical network etc.*"[8] [Emphasis added.] Given that the service cannot be provided in the absence of the infrastructure, it is appropriate in this instance to consider these two markets together in the assessment which follows.

Geographic Market Definition

3.13 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of and demand for 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.[9]

3.14 Fifty-seven percent of purpose-built apartment developments in the State are located in the Greater Dublin Area (Dublin, Kildare, Meath and Wicklow).[10] However, it is likely that the infrastructure and service markets are national rather than regional in scope. Apartment developments are not unique to the Greater Dublin Area, and census data indicates that forty-three percent of purpose-built apartments are located outside the Greater Dublin Area. Of this

[7] M/05/024 *UGC (Chorus)/ntl* - Determination of the Competition Authority, dated 4 November 2005, available online at: www.tca.ie, hereafter "*Chorus/ntl*", at paragraph 46.

[8] European Commission, 1998. *Notice on the application of the competition rules to access agreements in the telecommunications sector*, available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:265:0002:0028:EN:PDF, hereafter "*Telecommunications Sector Notice*", at paragraph 45.

[9] Market Definition Notice at paragraph 8.

[10] "Private Houses in each town with a population over 1,500 or more, classified by type of accommodation, 2006." http://beyond2020.cso.ie/Census/TableViewer/tableView.aspx

figure, almost one-third are located in the cities of Cork, Galway, Limerick and Waterford.[11] Moreover, pricing regimes for service provision are national, rather than regional or local.

3.15 With regard to pay-TV infrastructure, it is likely that the geographic market is no smaller than the State. During the development construction phase, the developer is, in effect, acting on behalf of the future residents by choosing a provider. Developers can choose from those providers willing and able to supply services to the development in question. Some providers may not wish to service developments which, for example, are too far away from the providers' pre-existing infrastructure, or present significant technical or geographical obstacles.

3.16 However, where providers do wish to service a development, competition arises on a number of fronts, in particular, with respect to the sophistication of the technology used to provide the service, the ownership of the ducting and cabling infrastructure, which party will carry out the installation of infrastructure, and which will bear the installation and infrastructure costs. Accordingly, the geographic extent of the market for **infrastructure** provision is **no smaller than the State**.

3.17 With respect to the provision of pay-TV service, from the demand side substitution possibilities are constrained in apartment developments due to (a) contract terms stipulating that only one service provider may provide pay-TV services to residents and, in certain developments, (b) technical constraints due to differences in the technical specifications of the infrastructure used within the apartment development to deliver services to residents. Accordingly, apartment residents cannot switch provider for the duration of the exclusivity contract. For this reason, the Law Reform Commission (LRC) has described apartment developments as "islands of monopoly"[12] although this description is valid only for the duration of the exclusivity. During the exclusivity period, the service provider enjoys market power.

3.18 The Competition Authority has assessed contracts provided to it by a number of developers and service providers. In the majority of cases, exclusivity at the apartment development level is time-bound according to the length of the contract.[13] Following the expiry of the exclusivity period, it is open to other providers to service the development in question. For a number of reasons, therefore, it is appropriate to define the geographic market widely.

3.19 More generally, exclusive agreements do not necessarily have the effect of defining local geographic markets. This is the case not only with respect to TV service provision, but also with respect to other services to apartment developments, such as waste collection, parking and clamping services, cleaning and general maintenance. While exclusive agreements may reserve a segment of a market to a particular supplier for a specified period of time, this does not necessarily equate to a separate geographic market. However, since residents are not mobile, they are not free to switch away from the exclusive provider. This raises particular difficulties for residents.

3.20 The selection of an infrastructure and service provider for an apartment development can best be thought of as competition *for* a segment of the

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[11] Ibid.

[12] Law Reform Commission, 2008. *"Report: Multi-unit Developments"*. p.157.

[13] Pursuant to an information request issued in Autumn 2006, responses were received from a number of developers. In 70% of cases, the exclusivity is either limited to the provider's own infrastructure or is limited in time to 2 years or less.

relevant product and geographic market, as opposed to competition *within* that segment. Take, for example, a dairy products firm with operations in Dublin, Wexford, Tipperary and Cork, which issues a tender for a 2-year facilities management contract for its four plants. In that instance, it would not be appropriate to define a separate geographic market for each of the manufacturing plants; rather, the tendering process is a means of allowing for competition for a segment of the market. While facilities management firms that were not successful in the tender will not have the opportunity to compete for that part of the market until the tender has expired, it is open to those firms to compete for the business of all other companies who wish to engage the services of a facilities management firm.

3.21 In assessing the extent of the geographic market, consideration is also given to whether the conditions of competition on the market are homogeneous, and whether similar constraints on pricing operate in different areas. These conditions can be assessed by reference to pricing and marketing decisions taken by firms.[14] Where there are different geographic markets, prices may differ in each market according to the conditions prevailing in that market. For example, it is unlikely that there is a national geographic market for petrol, as prices vary considerably at a local level. Advertised pricing regimes for pay-TV market participants tend to be uniform across the State, with no geographic variation, either on a regional or a development basis. Providers do not appear to charge different prices to different developments. Advertised prices on the Smart Telecom, UPC, Magnet, Broadworks and Homevision websites all indicate that uniform pricing regimes are applied, regardless of whether services are offered in exclusive access areas.

3.22 For the reasons given above, the Competition Authority takes the view that the geographic extent of the market for **pay-TV service provision is, in this instance, no smaller than the State**.

3.23 European caselaw has, in the past, held that geographic markets which correspond to a Member State may fall for consideration under both national competition law and EU competition law.[15] For this reason, and for the sake of completeness, the assessments below of allegedly anti-competitive agreements and of abuse of dominance are framed in terms of both sections 4 and 5 of the Competition Act 2002, and Articles 81 and 82 of the EC Treaty.

Conclusion on Market Definition

3.24 In summary, the Competition Authority has concluded that, for the purposes of this Enforcement Decision, there are two relevant markets, which fall to be considered together. These are:

- The market for the provision of pay-TV infrastructure to apartment developments in the State; and

- The market for the provision of pay-TV services to apartment developments in the State.

3.25 These markets can be considered together. In the infrastructure market, developers can choose between a number of providers using different

[14] This approach has been taken by both ComReg and Ofcom in their market reviews. See, in particular, ComReg's 2007 *Wholesale Call Origination and Transit Services* Market Analysis, available online at http://www.comreg.ie/_fileupload/publications/ComReg0702.pdf

[15] For example, merger decision COMP/M.1672 *Volvo/Scania* [2001] OJ L134/74; *Alcatel v Novasam SA*, Case 247/86 [1988] ECR 5987, [1990] 4 CMLR 434, and *British Telecommunications* OJ [1982] L 360/36 [1983] 1 CMLR 457.

infrastructural platforms to deliver service. The choice of infrastructure platform may limit the ability of residents to switch providers, even after the ending of any exclusive supply agreement: to the best of the Authority's knowledge, four providers offer cable TV by means of coaxial cable, one provider offers digital satellite TV, one provider utilises Ethernet CAT-5 cabling, two providers offer FTTH, and one provider is currently upgrading its network to FTTH.

4. SECTION 4/ARTICLE 81 ASSESSMENT

Introduction

4.1 As outlined in Part 2 above, section 4 of the Act, which is based on Article 81 of the EC Treaty, prohibits agreements, decisions and concerted practices which have an anticompetitive object or effect. Section 4(2) in conjunction with section 4(5) of the Act then provides a limited efficiency defence for otherwise anticompetitive agreements: if the arrangement satisfies each of four cumulative criteria laid out in section 4(5) of the Act, then pursuant to section 4(2) of the Act, it is exempted from the section 4(1) prohibition.[16]

4.2 This is a two-stage assessment: the section 4(1) step considers only the object or effect of the arrangement, whereas the section 4(5) step balances the anticompetitive aspects identified in the first step against any pro-competitive benefits produced by the arrangement.[17]

Section 4(1) of the Act

4.3 When applying section 4 of the Act, it is necessary to consider, first of all, whether section 4(1) of the Act may have been breached. The section 4(1) prohibition consists of a number of elements, each of which must be satisfied on the facts :

- Do each of the parties act as "undertakings", as defined by section 3(1) of the Act (or is there an association of undertakings)?;
- Is there an agreement, decision or concerted practice?; and,
- Is the object or effect of the agreement, decision or concerted practice to prevent, restrict or distort competition?

Is there an agreement between undertakings?

4.4 Section 3(1) of the Act 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 or distribution of goods or the provision of a service. Applying this definition, it is clear that developers and service providers are undertakings within the meaning of the Act.

4.5 Furthermore, given that EC jurisprudence has construed "agreements" widely to include both formal contracts and informal agreements such as "gentlemen's agreements" and oral agreements, it is clear that there are agreements between undertakings at issue in this instance.

Is the Object or Effect to prevent, restrict or distort competition?

4.6 Section 4(1) and Article 81(1) prohibit arrangements which have the object *or* the effect of restricting competition, meaning that it is necessary to establish either an anticompetitive object or anticompetitive effect, not both. While the Competition Authority has no evidence to suggest that the **object** of the agreements in the instant cases is to restrict competition, it appears that the

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[16] Or Article 81(1), taken with Article 81(3).

[17] European Commission Notice, *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08), hereafter "Article 81(3) Guidelines", available online at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=52004XC0427(07)&model=guicheti, at paragraph 11.

effect of some of the agreements may, in certain circumstances, be restrictive of competition.

4.7 For the purposes of section 4(1)/Article 81(1), the effect of an agreement has to be considered in the market context in which it will operate, in particular, in light of the factual or legal circumstances that may cause it to prevent, restrict or distort competition.[18] As part of the market context, it may be necessary to take account of other, similar agreements in place in the market.[19] To be prohibited by section 4(1)/Article 81(1), the agreement must have likely anticompetitive effects: it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.[20] The Commission poses the question thus: does the agreement restrict actual or potential competition that would have existed without the agreement or in the absence of the contractual restraint?[21]

4.8 By its very nature, a contract restricts the freedom of one or both parties, and thus section 4(1)/Article 81(1) catches only anticompetitive contractual restrictions. Traditionally, the focus in EC competition law has been on the impact of an agreement on the process of rivalry, whether between the parties to the agreement or third parties.[22] Self-evidently, an agreement that grants exclusivity to a certain service provider has the potential to affect the process of rivalry, insofar as it grants to that provider a quasi-monopoly in service provision to the development concerned for the period of the agreement.

4.9 Nevertheless, in a number of cases the EC courts have held that certain exclusivity clauses fall outside Article 81(1) (which is, as noted above, the EC equivalent of section 4(1)), where, without the clause, the relevant goods or services would not be supplied because of the commercial risks involved.[23] The logic of these cases is that Article 81(1) does not apply if, from an objective perspective, it is clear that undertakings could not, or would not, supply or enter the market in the absence of the restraint in question, given the risks involved.[24] Consequently, the agreement cannot be said to restrict actual or potential competition that would have existed without the agreement or contractual restraints, and so it is not prohibited by Article 81(1). It is submitted that this reasoning applies with equal force to the interpretation of section 4(1) of the Act.

4.10 It must be emphasised, however, that for the purposes of section 4(1)/Article 81(1), the concepts of "object or effect" remain objective in nature. Where an agreement, objectively speaking, has either the object or effect of restricting competition, any balancing exercise taking account of pro-competitive benefits stemming from the agreement should take place at the section 4(2) stage of the analysis. Indeed, Faull & Nikpay suggest that the "exclusivity necessary for supply" approach applies only in clear-cut cases; where there is ambiguity, the agreement will be caught by section 4(1)/Article 81(1), and the analysis moves on to consideration of whether it can be exempted under section 4(2)

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[18] Case 23/67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen* [1967] ECR 407 at p. 415.
[19] See Case 56/65 *Société Technique Miniere v Maschinenbau Ulm GmbH* [1996] ECR 235 at p. 250 and Case C-234/89 *Delimitis v Henninger AG* [1991] ECR I-935 at paragraph 14.
[20] Article 81(3) Guidelines at paragraph 24.
[21] Article 81(3) Guidelines at paragraph 18.
[22] Faull, J. and Nikpay, A. (eds.), 2007. *The EC Law of Competition*, 2nd ed. Oxford: Oxford University Press, hereafter "Faull & Nikpay", at 3.167-3.169.
[23] See, for example, Case 258/78 *Nungesser v Commission* [1982] ECR 2515 and Case T-328/03 *o2 (Germany) GmbH & Co. v Commission* [2006] ECR II-1231.
[24] Faull & Nikpay at 3.215.

or Article 81(3).[25] Whether or not an exclusivity agreement will be caught by section 4(1)/ Article 81(1) depends on the particular terms of the agreement and the factual circumstances in which it occurs.

4.11 It should be noted that, on the question of access agreements in the telecommunications sector, the Commission has taken the view that such arrangements may have significant pro-competitive effects, but it suggests that *"[e]xclusivity obligations in contracts providing access to one company are likely to restrict competition because they limit infrastructure for other companies"*.[26]

4.12 Also of note is the Competition Authority's *Notice in Respect of Vertical Agreements and Concerted Practices*, in which the Competition Authority has expressed its view that an exclusive purchasing agreement, meaning an agreement whereby the buyer agrees with the supplier to buy the contract goods or services only from the supplier, or another undertaking specified by the supplier, but leaving the buyer free to buy and sell competing products, will fall outside the scope of section 4(1) of the Act where the market share of the undertakings party to the agreement does not exceed 15%.[27]

Exclusivity varies from development to development

4.13 Based on information received from developers, providers and complainants, the Competition Authority is of the view that not all agreements between developers and providers raise competition concerns. An appreciable number of the existing agreements between developers and providers neither require nor guarantee exclusivity to a particular provider. These types of agreements are very unlikely to breach section 4(1)/Article 81(1), particularly where the market share of the undertakings that are party to the agreement is small.[28]

4.14 Exclusivity generally only refers to exclusive usage of the appointed provider's infrastructure in the new development for a certain period of time. In many cases, the exclusivity period is only for one or two years. However, in certain instances which remain under examination by the Competition Authority, this time period is longer, or is indeterminate; these cases are of interest to the Authority.

4.15 In a number of cases, while theoretically there is no exclusivity, the experience of residents seeking to access other service providers indicates that *de facto* exclusivity occurs regardless of the contract terms.

4.16 Where an exclusivity provision does not have the effect of restricting actual or potential competition that would have existed in its absence, it is unlikely to breach section 4(1)/Article 81(1). This might be the case if, for example, no provider would have been willing to provide service to the development in the absence of an exclusivity provision. In such a case, the exclusivity provision would still be subject to a test of proportionality, namely, the restriction would have to be both suitable and necessary to achieve the desired, legitimate

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[25] Faull & Nikpay at 3.222-3.224.

[26] *Telecommunications Sector Notice* at paragraph 132.

[27] Competition Authority Decision No. N/03/002 *Notice in Respect of Vertical Agreements and Concerted Practices*, published 5 December 2003, available online at http://www.tca.ie/AboutUs/Divisions/Monopolies/VerticalAgreementsandConcertedPractices/VerticalAgreementsandConcertedPractices.aspx, hereafter "Competition Authority *Verticals Notice*", at Articles 2(e) and 4.

[28] See also the Competition Authority *Verticals Notice*.

objective, and the disadvantages caused must not be disproportionate to the aims pursued.[29]

4.17 The most pertinent consideration for agreements of this nature is the length of time of the exclusivity period. The proportionate length will vary from development to development, but at the very maximum, it should be no longer than the time needed to recover the cost of the capital assets, that is, the dedicated cabling infrastructure. This point is addressed in greater detail at paragraphs 4.24 and 4.25 below. **Exclusivity agreements of one or two years' duration are therefore unlikely, all other things being equal, to breach section 4(1) of the Act or Article 81(1) of the Treaty.**

4.18 It is important to emphasise that where anticompetitive effects are identified, then under section 4(1) or Article 81(3), the assessment which takes place under section 4(1) of the Act does **not** permit the balancing of any pro-competitive benefits that result from the agreement against those anticompetitive effects. If an exclusivity provision, considered in its market context, has the effect of restricting actual or potential competition, it is likely to be caught by section 4(1) of the Act, and the enquiry then shifts to the section 4(2) exemption. It is only at this stage that it must be considered whether the benefits to consumers claimed by the developers outweigh the alleged harm to competition that arises from the exclusivity provisions.[30]

Does the conduct satisfy the criteria in section 4(5) of the Act or Article 81(3) of the Treaty?

4.19 As outlined above, section 4(2) and Article 81(3) provide that an agreement, decision or concerted practice that would otherwise be prohibited by section 4(1)/Article 81(1) shall not be so prohibited, if, having regard to all relevant market conditions, the agreement satisfies each of four cumulative criteria set out in section 4(5) or Article 81(3). These four criteria are that the agreement:

i. Contributes to improving the provision of services or to promoting technical or economic progress;

ii. Allows consumers a fair share of the resulting benefit;

iii. Does not impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives; and

iv. Does not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

4.20 The burden of proving that an agreement satisfies the exemption criteria lies with the parties to the agreement, not the Competition Authority. This principle is established with respect to Article 81(3) in EC Council Regulation 1/2003 (the Modernisation Regulation), which states that:

"Article 2: Burden of proof

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[29] Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health,* ex parte *Fedesa and others* [1900] ECR I-4023 at paragraph 13.

[30] It is important to be clear that the section 4(2) exemption only becomes relevant when an agreement between undertakings restricts competition within the meaning of section 4(1) of the Act. In the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement. See the Article 81(3) Guidelines at paragraph 40.

> In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."[31]

4.21 This principle has been upheld by the European Courts in a number of cases, notably *VBVB and VBBB v Commission* [1984], *Aalborg Portland v Commission* [2004], and *GlaxoSmithKline v Commission* [2006]. By analogy, the burden of proving that an agreement meets the section 4(5) criteria lies with the undertakings(s) claiming the benefit of the exemption.

Exclusivity periods

4.22 In relation to the proportionality of an exclusivity term, in the Competition Authority's view, an appropriate benchmark where the asset has significant residual value following the termination of the agreement is the length of time necessary to recoup the costs of capital asset (infrastructure) provision at the site in question, assuming that gold-plating has not occurred.

4.23 Where the exclusivity period is lengthy - a categorisation that will vary by development but could likely apply to agreements of, as an indicative benchmark, greater than two years' duration - it may raise concerns about the effects of the agreement on consumer welfare. Where the period of exclusivity is excessively long, or open-ended, competition problems are likely to arise, as service providers face little or no competitive constraint.

Concluding Comment

4.24 While it is clear that exclusivity agreements between developers and providers constitute agreements between undertakings regardless of whether formal contracts were signed and exchanged, it is not the case that every such agreement will breach section 4 of the Act. Instead, the effect of the restriction must be assessed by reference to a number of factors, including the context and proportionality of the agreement.

4.25 Where an agreement contains restrictions which are deemed to be proportionate, it is unlikely to breach section 4(1)/Article 81(1). As a general proposition, exclusivity agreements which do not exceed the time required to recover the cost of dedicated capital assets may be considered to be proportionate. In this case, the Competition Authority takes the view that those agreements which allow for two-year exclusivity do not breach section 4(1)/Article 81(1).

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[31] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF

5. SECTION 5/ ARTICLE 82 ASSESSMENT

Introduction

5.1 Section 5 of the Act and Article 82 of the Treaty prohibit the abuse of a dominant position in the market by one or more undertakings. It is the abuse of such dominance rather than the possession thereof that constitutes a breach of the Act.

Dominance

5.2 The Competition Authority took the view in Part 2 of this Enforcement Decision that there are two relevant markets, which fall to be considered together. These are:

- The market for the provision of **pay-TV infrastructure** to apartment developments in the island of Ireland; and

- The market for the provision of **pay-TV services** to apartment developments in the State.

5.3 The next step in any section 5 or Article 82 analysis is to determine whether the undertaking concerned holds a dominant position in the relevant market(s). Dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.[32] In order to determine whether the relevant undertaking possesses market power of this nature, account is taken of the following issues.

Market Share

5.4 A firm's market share is frequently used as a proxy for its power in the relevant market. Where a firm has held a market share of greater than 50% of the relevant market over a period of time, this effectively creates a presumption that it is dominant.[33] However, market shares are by no means determinative in assessing whether an undertaking holds a dominant position, and a presumption of dominance can be rebutted by other evidence to the contrary.

5.5 In the **infrastructure** and the **service** markets, there is little evidence to suggest that any provider is dominant. Of the nine providers, five appear to be comparatively minor and have limited geographical reach.[34] The remaining four providers have larger networks. However, the Competition Authority's research indicates that it is unlikely that any provider is dominant in the market. In particular, media reports indicate that UPC has recently been experiencing a drop in subscriber numbers,[35] while Sky is increasing its subscriber numbers.[36]

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[32] Case 27/76 *United Brands v Commission* [1978] ECR 207, hereafter "*United Brands*" at paragraph 65.
[33] Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359 at paragraph 60.
[34] See summary market share data at Appendix 1.
[35] Irish Times, 7 May 2009, *UPC revenues climb 3.7% in first quarter*, available online at http://www.irishtimes.com/newspaper/finance/2009/0507/1224246058127.html
[36] Irish Times, 7 August 2008, *UPC earnings up despite drop in TV subscribers*, available online at http://www.irishtimes.com/newspaper/finance/2008/0807/1218047756442.html.

Barriers to entry

5.6 A firm can exert significant market power only if potential or existing competitors are prevented from easily and profitably entering a market or expanding their share in it. Thus, the existence (or lack) of barriers to entry or expansion in a market is an important factor in determining whether an undertaking may hold a dominant position in that market.[37]

5.7 In the **infrastructure** market, there do not appear to be any strategic barriers to entry – developers appear willing to do business with any provider which meets their particular needs in respect of price or technology. There may be structural barriers to entry which are particular to specific developments. These would arise where technical characteristics render the provision of service to a development difficult and expensive, or where the development is not close to a provider's existing infrastructure, so it might not be economic to serve the development given the connection costs.

5.8 In the **service** market, there are clear strategic barriers to entry. During the initial stages, at least, contractual barriers to entry are raised. Moreover, planning barriers to entry (allegedly) prevent the erection of satellite dishes at any stage.[38] Even after a period of exclusivity has ended, *de facto* exclusivity may continue where residents are not in possession of clear information, or where the management company has not yet been vested in the residents.

Countervailing buyer power

5.9 In the **infrastructure** market, it is likely that developers are able to exercise some degree of countervailing buyer power; this is evidenced by the fact that some of the smaller providers will pay for and install ducting and cabling in developments. This buyer power derives from the developer's role as gatekeeper to a guaranteed revenue stream if an exclusive contract is subsequently agreed.

5.10 However, the degree of countervailing buyer power held by a developer may be eroded where the development poses difficult technical or engineering problems, or where it is not convenient to an existing hub or exchange. There are two reasons for this erosion:

5.11 Firstly, where a provider must incur extra expense compared to the cost of servicing a similar development not characterised by such difficulties, it will be less willing to incur the further costs of paying for and installing cabling and ducting; and

5.12 Secondly, in such circumstances, there may be only one service provider that is willing to install infrastructure in the first place. Where this occurs, the developer will have little or no bargaining power and will likely be obliged to deal with the sole service provider willing to do so.

5.13 In the **service** market, there is little or no countervailing buyer power. During the exclusivity period, residents have no alternative choice of supplier. Once the exclusivity period ends, residents may face difficulties in switching suppliers, caused by, for example, the role of the management company or the coordination difficulties inherent in switching provider *en masse*.[39] The role

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[37] Faull & Nikpay at 4.60.

[38] As detailed below, there has been some relaxation in this planning restriction.

[39] Sky In Your Apartment solves this coordination problem by assigning a unique numeric code on the flyer given to each resident, which can then be entered on the Sky website, without the need for residents to coordinate their behaviour with each other.

of the management company will be addressed in the Multi-Unit Developments Bill 2009. However, successful coordination by residents requires careful organisation and a means of avoiding the transaction costs associated with coordination.

Competitive Constraints

5.14 Potential competition can act as a competitive constraint on firms where the risk of potential entry by a firm not already in the market disciplines an existing firm's behaviour on a market. Potential competition is relevant to a discussion of dominance because it takes account not only of the static conditions prevailing on a market, but also of the dynamic changes which are characteristic of competitive markets.

5.15 Subscription-based Digital Terrestrial Television (DTT) appears to be a viable future substitute to cable or FTTH. DTT will replace the current analogue channels, with a national rollout of a DTT service due to commence in Autumn 2009, for completion in 2012. DTT uses a set-top box to decode a signal transmitted through the air and, depending on the local topography, may or may not require the installation of external receiving infrastructure.

5.16 Under the Broadcasting (Amendment) Act 2007 ("2007 Act"), national DTT multiplex contracts were to be awarded to RTÉ, which will operate the Irish free-to-air channels on the DTT service, with three national multiplex contracts to be operated on a commercial basis. In July 2008, the Broadcasting Commission of Ireland (BCI) announced that the commercial contracts for pay DTT had been awarded to Boxer, a joint venture between Boxer Sweden, BT and Communicorp.[40] Boxer subsequently announced in April 2009 that it would withdraw from the provision of pay DTT in the State. The pay DTT contracts have now been offered to OneVision, a consortium involving TV3, Setanta Sports and Eircom.[41] Full roll-out of DTT is linked to the cessation of the analogue TV service. As noted, this is currently scheduled for 2012, but may be changed by the Minister for Communications, Energy and Natural Resources under the terms of the 2007 Act.

5.17 Consumers may avail of a free-to-air service provided by RTÉ, or a range of subscription-based packages provided by OneVision. OneVision will be offered three multiplex licenses, each of which is capable of carrying eight to ten "ordinary" channels or six High Definition channels. OneVision's content plans are set out in its submissions to the BCI, available online at www.bci.ie.

5.18 DTT has the potential to cause a paradigm shift in the market by providing an alternative to the need to agree terms on installation and ownership of shared infrastructure. This could afford residents of apartment developments the opportunity to access TV services of comparable quality to FTTH, cable or satellite TV without the need to either use the service linked to the legacy infrastructure, or to overcome the coordination difficulties inherent in coming together with other residents to choose an alternative provider. However, in determining whether pay or free-to-air DTT is likely to be a viable future substitute for other forms of service delivery to apartment developments, the most important issues are (a) viewer infrastructural requirements and (b) whether there are obstacles to receipt of a transmission signal.

5.19 DTT is received by means of a set-top box decoding a signal transmitted from the Three Rock receiver in the Dublin Mountains. While, in theory,

[40] http://www.bci.ie/news_information/press195.html
[41] http://www.irishtimes.com/newspaper/finance/2009/0421/1224245068180.html

householders may access DTT by means of a set-top box alone, it is likely that, in some or many apartment developments, it will be necessary to install an external aerial or repeater. This would require the assent of the management company. Where this assent was not forthcoming, this might mean that apartment residents are not only unable to access pay DTT services, they would also be unable to access free-to-air DTT services.[42] Consequently, for those developments which require the installation of a common aerial, the installation of DTT would face similar challenges to the installation of other forms of TV service delivery.

5.20 Internet Protocol TV (IPTV) may, in future, offer a further platform for service delivery. IPTV is the transmission of TV signals over a broadband internet connection. Sky and Magnet have recently announced the introduction of new IPTV services. While Magnet's IPTV service is currently open only to existing Magnet subscribers, Sky's Sky Player service will be available to TV subscribers and non-subscribers alike. While the development of IPTV in still in its infancy, the initial success of platforms such as the BBC's iPlayer and RTÉ's Player suggests that, as technology improves, substitution across platforms may occur.

Conclusion on Market Power

5.21 On the basis of the Competition Authority's assessment, there is insufficient evidence to support a finding that any of the service providers in the instant investigation is dominant in the relevant market. Market share figures are not clearly indicative of dominance. Furthermore, while there are low barriers to entry and high countervailing buyer power in the infrastructure portion of the market, there are high barriers to entry and low countervailing buyer power in the services portion of the market.

5.22 Since there are low barriers to entry and high countervailing buyer power, it appears that, with respect to the infrastructure aspect of the market, no one participant can be said to hold a dominant market position. With respect to the service aspect of the market, low barriers to entry and low market share figures, given the market definition, also indicate that no one participant can be said to hold a dominant market position.

Abuse of Market Power

5.23 On the basis of the evidence available to it, the Competition Authority takes the view that it is unlikely that any TV infrastructure and services provider is dominant. Therefore, it follows logically that no section 5 or Article 82 abuse of dominance concerns can arise, as dominance is always the threshold issue in such cases. For completeness, however, some consideration will be given to the allegations of abuse of dominance in this instance. These allegations fall under three broad categories:

- Excessive pricing by providers;
- Poor quality of service; and
- Inability to switch providers.

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[42] http://www.digitaluk.co.uk/propertymanagers/your_options/communal_tv_systems2/matv_systems

Excessive Pricing by Providers

5.24 In theory, it can be abusive for an undertaking holding a dominant position in a relevant market to charge, without sufficient justification, a price that is "excessive", when viewed objectively. However, there have been few competition law cases in which a price charged by a dominant undertaking has been found to be truly excessive, as EC law has established a very high threshold for abusive excessive pricing. It must be demonstrated, on the basis of a detailed cost analysis, that (1) the difference between the costs actually incurred and the price actually charged for the service provided is excessive, and in addition, that (2) a price has been imposed which is either unfair in itself or when compared to competing products.[43] In practice, it has proven very difficult to satisfy both of these standards.

Table 3: TV Provider TV-only Package Costs[1]

Provider	TV channels	Cost per month	Cost per channel per month	Install Fee	Total cost per channel per month	Total cost per month
Digigate	14	€18	€1.29	-	**€1.29**	**€18**
HomeVision[2]	14	€35	€2.50	€99	**€2.70**	**€38**
Sky Conway	15	€15	€1.00	-	**€1.00**	**€15**
Smart Basic	15	€19	€1.27	€80	**€1.41**	**€21**
Smart Digital TV	100	€40	€0.40	€80	**€0.42**	**€42**
Cablewatch	18	€24	€1.33	--	**€1.33**	**€24**
UPC Go Digital Value	60	€20	€0.33	-	**€0.33**	**€20**
UPC Go Digital Select	100	€26	€0.26	-	**€0.26**	**€26**
UPC Go Digital Max	130	€32	€0.25	-	**€0.25**	**€32**
Broadworks	36	€23.50	€0.65	-	**€0.65**	**€24**
Magnet	70	€25.10	€0.36	€99	**€0.40**	**€28**
Sky in your Apartment	200	€20	€0.10	€45	**€0.11**	**€21**
OneVision Basic Pack[44]	33	€9.99	€0.30	-	**€0.30**	**€9.99**

1. One-off installation costs are averaged out over a notional 36-month period.

2. HomeVision is the only provider which does not provide a standalone TV package. The HomePlus and HomeMax packages include telephone and broadband services.

Source: Competition Authority research.

[43] *United Brands* at paragraph 252.

[44] As it has not yet commenced transmission, figures for Onevision are based on its submissions to the BCI.

5.25 Table 3 shows prices of the various pay-TV packages offered by providers. As the table indicates, there are significant differences in the prices charged by providers.

5.26 A straight cost-per-month comparison is only partially informative, as there are significant differences in channel choices as well as provision of digital capabilities. Nevertheless, six of the nine currently-active firms offer 14-18 channels on their basic package. According to market research carried out by Boxer:

> "The Irish market is highly geared with around 55% of viewing being won by the five main indigenous channels: RTÉ One, RTÉ Two, TV3, TG4 and Channel 6. The RTÉ channels alone capture nearly 40% of viewing. This contrasts with the UK where BBC 1 and BBC 2 take only about 30% of viewing combined. It is clear that Irish viewers highly value their national broadcasters and local content."[45]

5.27 Pricing can therefore be ranked for two different customer groupings (as shown in Table 4): those customers who value a wide range of channels and those customers who habitually view the free-to-air channels, as described in the quote above. According to market research conducted by AC Nielsen, the 5 Irish channels, together with BBC1, BBC2 and Channel 4, which can be received free-to-air in Ireland, hold a 67% viewership share between them.[46] For the first grouping, the Competition Authority has taken as a pricing benchmark the cost per channel. For the second grouping, an abundant range of niche channels may not prove attractive; accordingly, the Competition Authority has taken as a pricing benchmark the total cost per month. On the basis of these two pricing benchmarks, the ten providers (amounting to 13 offerings in total) can be ranked in terms of cost, with a ranking of "1" being given to the cheapest offering and "13" given to the most expensive offering, for each of the two customer groupings.

Table 4: Ranking of Apartment Complex Pay TV Service Providers by Cost

	Consumer group	
Provider	**I value a wide range of channels**	**I mostly only watch terrestrial channels**
Sky in your Apartment	1	Joint 5th
UPC Go Digital Max	2	11
UPC Go Digital Select	3	9
OneVision Basic	4	1
UPC Go Digital Value	5	4
Magnet	6	10
Smart Digital TV	7	13
Broadworks	8	Joint 7th
Sky Conway	9	2
Digigate	10	3

[45] See Boxer's *Application to BCI for DTT Multiplex Contracts, Licence C*, at 5.1.e, available online at the BCI's website at http://www.bci.ie/DTT/boxer/licencec_section5_acquistionofprog.pdf.
[46] *Application to BCI for DTT Multiplex Contracts, Licence C*, at 5.1.e

Cablewatch	11	Joint 7th
Smart Basic	12	Joint 5th
HomeVision	13	12

Source: Competition Authority research.

5.28 Consumers in either grouping may, subject to the quality of service provided, hold different opinions on the value of various packages. In addition, different groupings of customers may have very different views on what constitutes a "high" price. On the basis of the evidence in its possession, the Competition Authority does not have sufficient grounds for taking the view that the price charged by any provider is either excessive when compared to the costs incurred in providing the service, or unfair in itself or when compared to competing products.

5.29 It is of particular note that the two largest providers, UPC and Sky, are the two cheapest providers for customers who value channel choice, while Sky and UPC's basic offerings rank in the top five cheapest providers for habitual viewers of terrestrial channels. This strongly indicates that excessive pricing is not occurring as a form of abuse of dominance.

Poor Quality of Service

5.30 The second category of allegations relates to poor quality service. This might relate, for instance, to the number of channels provided, the quality of the channels themselves, transmission quality, customer service and billing.

5.31 While poor quality service is undoubtedly an annoyance and inconvenience to customers, to the extent that issues of service quality are not merely an aspect of a claim of excessive pricing, they do not fall within the remit of the Competition Authority. Issues of that nature are best addressed bilaterally with the service provider through the appropriate contract enforcement mechanisms. The National Consumer Agency (NCA) has provided helpful guidance in this regard.[47]

Inability to Switch Providers

5.32 The third category of allegations relates to the inability of residents to switch to service providers that could be considered adequate substitutes. Residents are precluded from switching for a period of time during which the incumbent provider has exclusivity rights. Restrictions are usually placed on the erection of satellite dishes by management companies, and alternative service providers cannot, or seem reluctant to, provide services to residents.

5.33 The exclusivity period is generally detailed in a contract between the developer and service provider, although in a number of instances no contracts have been signed and it appears that some form of "gentlemen's agreement" is in place. Whether an exclusivity period could be abusive depends greatly on the circumstances of the particular case. In many cases, a relatively short period of exclusivity during which no switching is permitted

[47] See the NCA's website at http://www.consumerconnect.ie/eng/Hot_Topics/Guides-to-Consumer-Law/Services/intro.html.

would be justified in order to allow the service provider to recoup the costs it has incurred in installing infrastructure and providing service to a development. This is detailed in the following paragraphs.[48]

Is there an objective justification for exclusivity?

5.34 In the course of its investigation, the Competition Authority received correspondence and information from a number of developers relating to this issue. The developers typically maintained that the initial decision to give exclusivity to a particular provider benefited rather than harmed the consumer:

- Exclusivity is an efficient mechanism by which a developer can secure a service at the new development, as many providers may be unable or unwilling to service areas due to technical or geographical constraints;

- Very often, the provider will cover installation costs, reducing costs to residents – although this argument presupposes that such cost savings are passed onto consumers; and

- Such agreements promote competition where they secure business for new entrants and minor players in the market.

5.35 In order to justify the significant investment required to commence provision of service to an apartment development, a service provider will seek to be assured of a certain yield. A service provider is unlikely to incur the costs of infrastructure provision unless a certain amount of residents per block are either likely or guaranteed to sign up to the service, thus ensuring that the provider recoups its investment costs. Therefore, a "reasonable" period of exclusivity may be warranted to guarantee service provision.[49]

5.36 The question of what constitutes a "reasonable" period of exclusivity is not clear-cut. Where exclusivity refers only to a provider's own infrastructure, and where there are no contractual or technical barriers to other providers offering services in the development, it is not clear that any limits on exclusivity are necessary. These circumstances appear to be rare in practice. Where *de facto* or *de jure* exclusivity has the practical effect of preventing other providers from servicing the development it is appropriate to assess the duration of exclusivity.

5.37 Exclusivity should not be of such duration that it (a) prevents residents from switching in the long term and (b) insulates providers from the risks which all businesses face in competitive environments. If potential new entrants are willing to accept the risks associated with sunk costs, then so should incumbent providers. Exclusivity terms should reflect costs incurred, so that providers are assured a return on their investment. For a small development that is located close to existing infrastructure and which poses no particular technical difficulties, there may be no need for exclusivity, or one-year exclusivity may suffice. For larger sites which are distant from existing

[48] The Competition Authority is aware of one large development on a greenfield site, where, due to the relative isolation of the site and its problematic location, the developer had tried and failed to contract with a number of service providers. Had no contract been concluded with the eventual provider, there would have been no TV service to residents upon moving in.
[49] A number of contracts seen by the Authority signed by one provider allow for exclusivity of no more than two years' duration.

infrastructure and which pose difficult technical problems, a longer period of exclusivity may be warranted.[50]

5.38 Occasionally, physical and technical characteristics may make it difficult for alternative providers to provide services to residents. For example, cables may not be of a sufficient technical standard, or spare ducting may not have been installed during the construction phase. Where this happens, it may be difficult for new infrastructure to be installed. While a number of developers have informed the Competition Authority that they install spare ducts during construction, this issue is likely to be of considerable importance, given that the ownership of cables and ducting tends to be vested in the service provider rather than the developer.

5.39 Accordingly, the Competition Authority considers that in the cases under investigation:

- Where exclusivity extends only to the provider's own infrastructure, and other providers may install alternative infrastructure on-site, it is not clear that any limit on exclusivity is warranted;

- Where exclusivity extends to an entire development such that other providers are denied access, a more appropriate exclusivity benchmark may be the length of time necessary to recoup the costs of capital asset (infrastructure) provision at the site in question.

5.40 Where exclusivity is limited in duration and alternative service provision is feasible following the conclusion of the exclusivity period, it is unlikely that there would be an abuse contrary to section 5 of the Act, were dominance in question, as the exclusivity could be objectively justified.

Foreclosure is not a widespread phenomenon

5.41 In addition to establishing dominance, abuse and absence of objective justification, the Commission takes the view that, at least in relation to exclusionary abuses intended to damage competition in the market, it is necessary to establish a likelihood of anticompetitive foreclosure of the market as a result of the allegedly abusive conduct.[51] Foreclosure occurs when competitors are prevented from entering a market and offering their goods or services to consumers.

5.42 Data from the NCA indicate that there were approximately 4,600 multi-unit developments in Ireland in 2006;[52] complaints have been received relating to approximately 75 of these developments, or less than 2% of all multi-unit

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[50] Analogy may be drawn to the Vertical Block Exemption, pursuant to which, in the context of Article 81, a non-compete obligation for the period of depreciation of the relationship-specific aspect of the investment will generally be compatible with competition law. See European Commission, *Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*, available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:336:0021:0025:EN:PDF at paragraphs 116 (point 4) and 155.

[51] European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (2009/C 45/02), available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF, at paragraph 19.

[52] National Consumer Agency, 2006. *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings*, available online at http://www.nca.ie/eng/Research_Zone/Reports/Property_management_report.pdf, at p.ii.

developments. The market is unlikely to be foreclosed for a number of reasons:

- Contract exclusivity generally only applies for a short period of time, usually two years or less; [53]

- No provider is dominant;[54] and

- Providers have opportunities to sell to other customers, both by tendering for other multi-unit developments and by competing for service provision to standalone buildings which do not require shared infrastructure.

5.43 The evidence in the Competition Authority's possession indicates that these criteria apply to most, though not all, of the agreements under consideration. For this reason, competing for a segment of the market by securing short-term exclusivity is unlikely to raise serious foreclosure concerns in the context of section 5 of the Act.

Concluding Comment

5.44 Based on the information gathered by the Competition Authority, it appears that, in the cases under investigation, none of the parties is dominant and even if that were not the case, the exclusivity of the agreements would not, in most cases, amount to an abuse.

- In certain situations, exclusive agreements may be an efficient method for the developer to secure a telecommunications service in the first place at the new development;

- Exclusive agreements are generally time-bound, although residents may not be aware of this fact.

[53] Generally of 2 years or less, although this is discussed in further detail at paragraphs 2.60-2.62
[54] Market share data are available in Appendix 1.

6. DECISION

6.1 For the reasons set out above, the Competition Authority takes the view that the exclusivity agreements between the following developers and service providers are unlikely to prevent, restrict or distort competition in the market for the provision of pay-TV infrastructure and service to apartment developments in the State within the meaning of section 4 of the Act:

- Ballymore Construction Projects Ltd. and Cablewatch (Royal Canal Park);
- Castlethorn Construction and Cablewatch (The Village, Ashtown);
- Harcourt Developments and Smart Telecom (Park West Point);
- Rhatigan Developments and Magnet (Castle Way);
- Shannon Homes and Magnet (Rockview);
- Mennolly Homes and Magnet (Dunboyne Castle); and
- Gannon Homes and Magnet (The Grange, Clongriffin).

6.2 Furthermore, it appears that no provider of pay-TV infrastructure and service to apartment developments could be said to hold a dominant position in any relevant market in the State. Establishing dominance is the threshold issue for the application of section 5 of the Act; in the absence of dominance, in the Competition Authority's view, there can be no breach of section 5 on the facts.

6.3 In light of the foregoing, the Competition Authority has decided to close the file on the current investigation in so far as the undertakings named at paragraph 6.1 above are concerned. The Competition Authority's decision to do so in no way affects the rights of private parties to take an action under section 14 of the Act, and the views of the Competition Authority expressed above are subject to any finding to the contrary made by a court.

6.4 While the Competition Authority has found no breach of the Act on the facts in relation to the undertakings named at 6.1 above, it will continue to advocate in favour of choice for apartment dwellers.

For the Competition Authority

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William Prasifka
Chairman and Director Monopolies Division
14th August 2009

A. MARKET SHARE DATA

A.1 In the **infrastructure** and the **service** markets, there is little evidence that any provider holds significant market power. Of the nine providers currently active in the market, five appear to be comparatively minor and have limited geographical reach (Broadworks, Cablewatch, Sky Conway, Digigate and Homevision). Some providers service both apartment developments and standalone houses. For this reason, the best proxy for market share is the number of apartment developments serviced, rather than the number of customers, as customer numbers may not necessarily be split out between house and apartment residents. This is, for instance, the case with UPC. Of the nine firms in question, only two (UPC and Sky) appear to actively seek custom from developments which are not part of pre-wired multi-unit developments or housing estates.

- **Broadworks** - provides services to 13 developments in Dublin.
- **Cablewatch** – Provides services to a small number of developments in Dublin, principally in Dublin 15 (Royal Canal Park and The Village @ Ashtown).
- **Sky Conway** – Provides services to at least nine multi-unit developments in Dublin and Meath.
- **Digigate** – Only provides services to developments built by the Hanly Group.
- **Homevision** – TV service appears to be limited to Dublin 3.

A.2 The remaining four providers (UPC, Sky In Your Apartment, Smart and Magnet) have larger telecommunications networks. However, **Magnet** only services 30 developments, (25 in Dublin, two in Meath and three in Laois)[55] while **Smart** only services seven developments in Dublin (Park West, Smithfield Market, Prospect Hill, Earlswood Rathbourne, Sandford Lodge, Cathedral Court, Abberley Court).[56] **Sky In Your Apartment** is currently available only in developments which are already serviced by a cable or FTTH provider. This leaves only **UPC** as a potentially holding significant market power, given the market definition. Publicly-available data on UPC customer numbers are not broken down between houses and apartments, and such data has not been requested from UPC. As emphasised in Part 5 of the Enforcement Decision, however, market share is simply one of a variety of actors that must be considered when determining whether an undertaking holds a dominant position in a relevant market.

A.3 Furthermore, it is of note that only 20 of over 200 complaints refer to UPC. Even if UPC had significant market power, a contention which is unproven given current data limitations, over 90% of complaints would refer to firms who are unlikely to have significant market power, and who therefore fall outside of section 5 of the Act.

[55] http://www.magnetentertainment.ie/working_home/index.htm
[56] http://www.smarttelecom.ie/smartvision_order.html

B. RECOMMENDATIONS WITH RESPECT TO MANAGEMENT COMPANIES

As indicated at paragraph 1.13, these recommendations are made by bodies other than the Competition Authority.

The Irish Property and Facilities Management Association

B.1 Recommendation 1.5 of the IPFMA's *Position paper on residential multi-unit development and management* states:

> "We recommend reform of the legal framework of multi-unit developments in relation to the transfer of the common areas so as to include:
>
> (i) A compellable handover date from the developer to the management company.
>
> (i) A requirement for prior notice to the owners of such transfer"[57]

The Irish Home Builders Association

B.2 The IHBA recommends in its *Code of Practice for Management Companies in respect of Multi-Unit Developments* that its members undertake to:

> "Document and make available on request to purchasers the circumstances and indicative timeframe under which it is envisaged that control of the Management Company will be transferred to the Unit Owners. For large scale developments where phased completion is envisaged, set out the intended schedule of transfer of control of each phase to the Unit Owners."[58]

The National Consumer Agency

B.3 The NCA, at Recommendation 13 of its guide, *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings*, states as follows:

> "While recognising that during the construction phase of the development the developer will necessarily require to control the management company, it is important that the transfer of control to the owners from the developer happens as quickly as possible. Subject to recommendation 12 being workable in practice, the developer's solicitor should (at no cost) transfer ownership of the building to the owners within three months of the completion certificate being issued. On transfer to the owners, they will elect their own Board of Directors to manage the complex and will regulate the voting rights attaching to shares, including subscriber shares in the management company. (The original subscriber members are required to resign 60 days after the last unit is sold - a provision which should be provided for in the management company agreement with the developer). If the owners have not taken control of the management company from the developer within the specified three month period, the matter should be referred to the NPSRA."[59]

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[57] IPFMA, 2008. *Position paper on residential multi-unit development and management*

[58] IHBA, 2008. *Code of Practice for Management Companies in respect of Multi-Unit Developments.*

[59] NCA, 2006. *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings.*

The Law Reform Commission

B.4 The Law Reform Commission's *Report on Multi-Unit Developments*, [60] published in June 2008, recommends, *inter alia*, that:

- "The Commission recommends that the developer must incorporate an owners' management company before the conveyance of any unit in a multiunit development is completed."[61]

- "The Commission recommends that, following incorporation, the legal title to the development will vest in the owners' management company and will become compulsorily registrable with the Land Registry, with the developer retaining the beneficial interest in each unit."[62]

- "The Commission recommends that "completion" should be defined by law as compliance with planning conditions and the statutory building code, as certified by a professional person in accordance with the Building Control Acts 2000 and 2007."[63]

- "The Commission recommends that, during the development stage, the objects of an owners' management company shall be to convey the legal title of a unit in the multi-unit development to each unit purchaser and that it shall not prevent or frustrate any such conveyance, and that it shall ensure, to the extent required during that stage, the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company. The Commission also recommends that, after the development stage, the objects of an owners' management company shall be to ensure the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company."[64]

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[60] Law Reform Commission, op. cit.
[61] At paragraph 8.07.
[62] At paragraph 8.08.
[63] At paragraph 8.10.
[64] At paragraph 8.20.