



COMPETITION AUTHORITY

**DECLARATION IN RESPECT OF VERTICAL
AGREEMENTS AND CONCERTED PRACTICES**

Decision No. D/10/001

Date: 1 December 2010

Declaration In Respect of Vertical Agreements and Concerted Practices.

Whereas:

(i) Section 4(1) of the Competition Act 2002 ("the Act") prohibits all agreements between undertakings, decisions of 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 a part of the State,

and

(ii) Section 4(3) of the Act permits the Competition Authority ("the Authority") to declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with conditions set out in section 4(5), which are that the agreements, decisions or concerted practices, having regard to all relevant market conditions, contribute 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 do not (a) impose on the undertakings concerned terms which are not indispensable to the attainment of these objectives, (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question,

and

(iii) Section 4(2) of the Act provides that an agreement, decision or concerted practice shall not be prohibited if it falls within a category of agreements, decisions or concerted practices the subject of a declaration for the time being in force under section 4(3),

and

(iv) Section 4(3) further provides that any such declaration may be revoked by the Authority if it becomes of the opinion that the category no longer complies with those conditions,

PURSUANT TO SECTION 4(3) OF THE ACT, THE AUTHORITY HEREBY DECLARES AS FOLLOWS: -

Article 1

1. For the purposes of this Declaration:

- (a) "actual competitor" means an undertaking that is active on the same relevant market;

- (b) "buyer" includes an undertaking which, under an agreement falling within Section 4(1) of the Act, sells goods or services on behalf of another undertaking;
- (c) "competing undertaking" means an actual or potential competitor;
- (d) "connected undertakings" means:
 - (i) undertakings in which a party to the agreement, directly or indirectly:
 - has the power to exercise more than half the voting rights, or
 - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - has the right to manage the undertaking's affairs;
 - (ii) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (i);
 - (iii) undertakings in which an undertaking referred to in (ii) has, directly or indirectly, the rights or powers listed in (i);
 - (iv) undertakings in which a party to the agreement, together with one or more of the undertakings referred to in (i), (ii) or (ii), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (i);
 - (v) undertakings in which the rights or the powers listed in (a) are jointly held by:
 - parties to the agreement or their respective connected undertakings referred to in (i) to (iv), or
 - one or more of the parties to the agreement or one or more of their connected undertakings referred to in (i) to (iv) and one or more third parties.

- (e) "customer of the buyer" means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.
- (f) "intellectual property rights" includes industrial property rights, know-how, copyright and neighbouring rights;
- (g) "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (h) "non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell, or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;
- (i) "potential competitor" means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;
- (j) "selective distribution system" means a distribution system whereby the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

(k) "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

2. For the purposes of this Declaration, the terms "undertaking", "supplier" and "buyer" include their respective connected undertakings.

Article 2

1. In the Authority's opinion vertical agreements of the kind referred to in Article 3 of this Declaration comply with the conditions referred to in Section 4(5) of the Act.¹ to the extent that such agreements contain restrictions of competition which would otherwise be prohibited by Section 4(1) of the Act.

Article 3

1. This Declaration applies to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The Declaration applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object or effect as vertical restraints which are not covered by this Declaration.

2. This Declaration does not apply to vertical agreements entered into between competing undertakings, except where competing undertakings enter into a non-reciprocal vertical agreement and:

- (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or

¹ Those conditions are: that, having regard to all relevant market conditions, the agreements contribute 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 do not –

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

- (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

3. Subject to *paragraph 4* of this *Article*, this Declaration applies on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

4. For the purposes of paragraph 3, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

Article 4

1. This Declaration does not apply to vertical agreements the subject matter of which falls within the scope of any other Declaration made pursuant to Section 4(3) of the Act.

2. This Declaration does 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 its sale price. This does not affect the ability of suppliers to impose a maximum sale price or recommend a sale price, provided that 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, or of the customers to whom, a buyer party to the agreement, without prejudice to a supplier's ability to place restrictions on the buyer's place of establishment, may sell the contract goods or services, except:
 - (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the

- (ii) supplier to another buyer, where such a 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,
 - (iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and
 - (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would 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 unauthorised place of establishment;
- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- (e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell 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.

Article 5

1. This Declaration does not apply to the following obligations contained in vertical agreements:

- (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
- (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of paragraph (1)(a), a non- compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), 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 leased 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.

3. By way of derogation from paragraph 1(b), the Declaration shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

- (a) the obligation relates to goods or services which compete with the contract goods or services;
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
- (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) 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 and this Declaration will apply in such cases.

Article 6

1. For the purposes of applying the market share thresholds provided for in Article 3(3), the following rules shall apply:

- (a) the market share of the supplier shall be calculated on the basis of the market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;

- (c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;
- (d) if the market share is initially not more than 30% but subsequently rises above that level without exceeding 35%, this Declaration shall continue to apply for a period of two consecutive calendar years following the year in which the 30% market share threshold was first exceeded;
- (e) if a market share is initially not more than 30% but subsequently rises above 35%, this Declaration shall continue to apply for one calendar year following the year in which the level of 35% was first exceeded;
- (f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years.
- (g) the market share held by the undertakings referred to in Article 1(e)(v) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 1(e)(i).

Article 7

1. Existing agreements and concerted practices which:
 - (a) comply with the existing Declaration in Respect of Vertical Agreements and Concerted Practices (D/03/001); and
 - (b) were entered into prior to 1 December 2010;

shall continue to benefit from the said Declaration D/03/001 in respect of agreements between suppliers and resellers until 31 May 2011.

Article 8

1. The Authority may amend this Declaration from time to time, including in particular an amendment to exclude a particular category of goods or services, where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50% of a relevant market.

2. This Declaration shall enter into force on 1 December 2010, with a review after 6 years, and shall expire on 1 December 2020.

For the Competition Authority

A handwritten signature in black ink, appearing to read "Stanley Wong", written in a cursive style.

Dr Stanley Wong
Member & Director of Monopolies Division
Competition Authority

30 November 2010
