



The Competition Authority
An tÚdarás Iomaíochta

DECLARATION (NO. D/05/001)

Competition Act 2002

Declaration of The Competition Authority (NO. D/05/001)

**Declaration in respect of Exclusive Purchasing Agreements for
Cylinder Liquefied Petroleum Gas**

8th March 2005; amended on 31st March 2005

Article 1

1.1 For the purposes of this Declaration:

- (a) "the Act" means the Competition Act, 2002;
- (b) "competing undertakings" means actual or potential suppliers of cylinder liquefied petroleum gas ("LPG");
- (c) "non-compete obligation" means any direct or indirect obligation prohibiting the reseller from manufacturing, purchasing, selling, or reselling competing brands of cylinder LPG;
- (d) "exclusive purchasing agreement" in the context of this Declaration means an agreement whereby the reseller agrees with the supplier to buy cylinder LPG only from the supplier, or another undertaking specified by the supplier;
- (e) "intellectual property rights" includes industrial property rights, copyright and neighbouring rights;
- (f) "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, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the reseller for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (g) "reseller" includes an undertaking which, under an agreement falling within Section 4(1) of the Act, sells cylinder LPG on behalf of another undertaking;
- (h) "cylinder service agreement" in the context of this Declaration means an agreement supplied by the supplier to the reseller for signature by a new customer before or on delivery of the first cylinder of LPG to that customer by the reseller.

Article 2

- 2.1 Pursuant to Section 4(3) of the Act, it is hereby declared that in the Authority's opinion exclusive purchasing agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, to purchase only from the supplier, or from another undertaking entrusted by the supplier with the distribution of cylinder liquefied petroleum gas (LPG) for resale, comply with the conditions referred to in Section 4(5) of the Act, viz., that, having regard to all relevant market conditions, they 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.

This Declaration applies to the extent that such exclusive purchasing agreements contain restrictions of competition falling within the scope of Section 4(1) of the Act ("vertical restraints").

- 2.2 This Declaration applies to exclusive purchasing agreements containing provisions which relate to the assignment to the reseller or use by the reseller 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 cylinder LPG by the reseller or its customers. This Declaration applies on condition that, in relation to cylinder LPG, those provisions do not contain restrictions of competition having the same object or effect as vertical restraints which are not covered by this Declaration.
- 2.3 This Declaration does not apply to exclusive purchasing agreements entered into between competing undertakings; however, it does apply where competing undertakings enter into a non-reciprocal exclusive dealer agreement and the supplier is a manufacturer and a distributor of cylinder LPG, while the reseller is a distributor not manufacturing cylinder LPG.

Article 3

- 3.1 Apart from the obligation referred to in Article 2(1), no restriction on competition shall be imposed on the reseller other than the obligation not to sell cylinder LPG which is supplied by other undertakings in the premises designated in the agreement while the agreement is in force.
- 3.2 This Declaration shall apply notwithstanding that the reseller undertakes any or all of the following obligations:
- (a) to purchase minimum quantities, or to take minimum deliveries, of goods which are subject to the exclusive purchasing agreement;
 - (b) to sell the contract goods under trademarks, or only in cylinders owned by the supplier;
 - (c) to take measures for the promotion of sales, in particular:
 - i. to advertise;
 - ii. to maintain a stock of LPG cylinders and regulators and, where relevant, of LPG appliances;
 - iii. to provide customer services;
 - iv. to provide display space for appliance.
 - (d) to sell only from the premises specified in the agreement;
 - (e) to meet safety standards, and to comply with statutory safety provisions, specified standards, and regulations laid down by the supplier;
 - (f) to provide suitable storage, and to allow access by the supplier;
 - (g) not to prejudice the promotion and sale of the goods;
 - (h) not to permit any other person to deal in the goods;
 - (i) to ensure that cylinders are not filled by unauthorised persons;
 - (j) to maintain adequate insurance;

- (k) to supply only customers who have signed a Cylinder Service Agreement with the supplier;
- (l) to maintain a list of names and addresses of customers, for inspection by the supplier;
- (m) to sell only recognised appliances and not to sell unsuitable appliances; and
- (n) to permit LPG cylinders to be used only in recognised appliances.

Article 4

4.1 This Declaration shall not apply where:

- (a) the exclusive purchasing agreement is concluded for a period of more than two years;
- (b) the supplier agrees with resellers to limit the number of resellers selected for reasons other than those related to objective grounds of safety, and in particular where resellers are selected on the basis of quantitative, subjective or discriminatory criteria;
- (c) the supplier imposes on the reseller exclusive purchasing obligations for goods other than cylinder LPG, or for services;
- (d) the supplier imposes any restriction on the reseller after the date of expiry of the exclusive purchasing agreement, and in particular imposes an obligation:
 - i. to conclude a further exclusive purchasing agreement for a fixed or indefinite period, or
 - ii. not to engage in the purchase and resale of competing brands of cylinder LPG.
- (e) the supplier obliges the reseller to display a list of resale prices notified by the supplier;
- (f) the supplier does not give the reseller due warning of the expiry date of the contract at least three months prior to that date.

Article 5

5.1 This Declaration does not apply to exclusive purchasing agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object or effect:

- (a) the restriction of the reseller's ability to determine its sale price. Suppliers may, however, impose a maximum resale price. Nevertheless, suppliers may not bring any pressure to bear or create any incentives for resellers such that this maximum price amounts to a fixed or minimum sale price;
- (b) the restriction of the territory into which, or of the customers to whom, the reseller may sell cylinder LPG, 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 supplier to another reseller, where such a restriction does not limit sales by the customers of the reseller,
 - ii. the restriction of sales to end users by a reseller operating at the wholesale level of trade,
 - iii. the restriction of sales to unauthorised distributors,
 - iv. the restriction of the reseller'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 cross-supplies between resellers, including between resellers operating at different level of trade;
- (d) the restriction agreed between a supplier of components and a reseller who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the reseller with the repair or servicing of its goods.

Article 6

6.1 This Declaration does not apply to exclusive purchasing agreements which contain any of the following obligations:

- (a) any direct or indirect non-compete obligation, the duration of which exceeds two years;
- (b) any direct or indirect obligation prohibiting the reseller, after termination of the agreement, from manufacturing, purchasing, selling or reselling competing brands of cylinder LPG, unless such obligation is indispensable to protect know-how transferred by the supplier to the reseller and provided that the duration of such non-compete obligation is limited to a period of one-year after termination of the agreement; this obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain;

Article 7

7.1 The Authority may amend this Declaration from time to time 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.

Article 8

8.1 Suppliers who take advantage of this Declaration are required, every year before the end of March, to send a report to the Competition Authority in respect of the following:

- (a) The total volume of cylinder butane LPG and cylinder propane LPG sold by them during the preceding calendar year including volumes sold through dealerships and volumes sold directly to customers (Tons of Oil Equivalent);
- (b) The total volume of cylinder butane LPG sold by them during the preceding calendar year including volumes sold through dealerships and volumes sold directly to customers (Tons of Oil Equivalent);

- (c) The total volume of cylinder propane LPG sold by them during the preceding calendar year including volumes sold through dealerships and volumes sold directly to customers (Tons of Oil Equivalent);
- (d) The total volume of cylinder butane LPG and cylinder propane LPG sold by them through dealerships during the preceding calendar year (Tons of Oil Equivalent);
- (e) The total volume of cylinder butane LPG sold by them through dealerships during the preceding calendar year (Tons of Oil Equivalent);
- (f) The total volume of cylinder propane LPG sold by them through dealerships during the preceding calendar year (Tons of Oil Equivalent);
- (g) The total number of dealer LPG agreements to which they were party in operation at 1st January of the preceding calendar year;
- (h) The total number of dealer LPG agreements to which they were party in operation at 31st December of the preceding calendar year;
- (i) The total number of new dealer agreements entered into by them during the preceding year. The Authority defines the term "new dealer agreements" to mean all exclusive dealer agreements entered into with a new dealer with whom the supplier has not previously contracted.
- (j) The total number of dealer LPG agreements to which they were party that came up for renewal during the preceding calendar year.
- (k) The total number of dealers that did not renew their exclusive dealer agreement with them during the preceding calendar year. This should be broken down into dealers that (a) switched to another supplier of LPG, (b) ceased to sell cylinder LPG, or (c) ceased trading.
- (l) The total number of dealer LPG agreements to which they were party that terminated during the preceding calendar year and that did not come up for renewal in that year.
- (m) Information concerning any notices indicating price changes sent to resellers during the preceding calendar year.

To assist suppliers in their response, a table providing a summary of the volume figures required by the Authority in letters (a)-(f) above is available on the Authority's website at www.tca.ie/lpg_submissions/article_8_table.doc. The first of these reports shall be submitted before the end of March 2006.

Article 9

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

9.2 "Connected undertakings" are:

(a) undertakings in which a party to the agreement, directly or indirectly:

- i. has the power to exercise more than half the voting rights, or
- ii. has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
- iii. has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement, together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

- i. parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
- ii. one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

Article 10

10.1 Existing exclusive purchasing agreements which were entered into prior to 15th April 2005 will be allowed a six-month period of transition until 14th October 2005.

Article 11

11.1 This Declaration shall enter into force on 15th April 2005, with a review after 5 years, and shall expire on 14th April 2015.

For The Competition Authority



Dr. Paul Gorecki
Member, Competition Authority
8 March 2005; amended on 31 March 2005.