



Competition Act, 2002

Decision of the Competition Authority
No. E/03/003

Agreements between Independent Newspapers (Ireland) Limited and newspaper retailers allegedly fixing the retail price of Independent newspaper titles.

10th November 2003
(Case COM/132/02B)

SUMMARY

During the conduct of an investigation initiated by the Competition Authority into its contracts with retailers, and before the Authority could take a decision to issue a letter of initiation, Independent Newspapers (Ireland) Limited undertook to amend its terms and conditions of business and standard distribution agreement with newspaper retailers.

In the autumn of 2002, the Competition Authority initiated its own investigation into possible resale price maintenance in the newspapers and periodicals industry, based on information it received from a Government department. The Competition Authority was concerned that Independent Newspapers (Ireland) Limited was enforcing resale price maintenance at various levels of its distribution chain.

In 1992, Independent Newspapers (Ireland) Limited notified the Competition Authority of its standard distribution agreements with newspaper retailers and requested a certificate under section 4(4) of the Competition Act, 1991, or, in the event of a refusal, a license under section 4(2) of the Competition Act, 1991. In 1997, the Authority refused to either issue a certificate or grant a licence for the notified agreements on the basis that those agreements included resale price maintenance clauses that offended against Section 4(1) of the Act (Decision No. 482 of 15 April 1997).

In June 2003, the Competition Authority became aware that just under 22% of Independent Newspapers (Ireland) Limited's distribution agreements incorporated clauses providing for resale price maintenance. Independent Newspapers (Ireland) Limited has undertaken to ensure that its distribution agreements are henceforth compliant with the Competition Act, 2002. In one instance a change was made immediately the matter was brought to the attention of Independent Newspapers (Ireland) Limited by the Competition Authority. In addition, Independent Newspapers (Ireland) Limited has agreed to amend its price increase notices circulated to newspaper retailers. This amendment ensures that Independent Newspapers (Ireland) Limited does not appear to encourage newspaper retailers in any way to raise the resale price of newspapers when Independent Newspapers (Ireland) Limited increases the cover prices of its newspapers. Independent Newspapers (Ireland) Limited has also undertaken to indicate on the front page of its newspapers that the prices quoted are recommended retail prices. As a result of the assurances, the Competition Authority decided to discontinue its investigation as it relates to Independent Newspapers (Ireland) Limited and refrain from taking enforcement action for so long as Independent Newspapers (Ireland) Limited complies with the terms of those assurances.

1. THE ISSUES

Initiation of Investigation

1.1. The Competition Authority (“the Authority”) initiated its own investigation into possible resale price maintenance (“RPM”)¹ in the newspapers and periodicals industry in October 2002, based on information the Authority received from a Government department. This information revealed that in the summer of 2002, that Government department conducted a selective tender for the supply of newspapers and periodicals to its offices. The “invitation to tender” documentation stated:

You are invited to tender a percentage discount (or addition for delivery if necessary) to the recommended retail prices, prior to the application of VAT in respect of this supply contract.

1.2. Four newspaper retailers, including the Managing Director of [...] (“XYZ News”),² were invited to tender to supply newspapers and periodicals. XYZ News was the only newsagent that responded to the invitation and therefore the contract was awarded to XYZ News. The Managing Director of XYZ News responded to that invitation by letter dated 1 July 2002, stating, “We are not allowed by the newspaper companies to discount the price of their newspapers or magazines. ”

1.3. On the basis that the Government department did not wish to pursue a formal complaint but was willing to confirm the tender process and authenticate the source of the documentation, the Authority initiated its own investigation under Section 30(1)(b) of the Competition Act, 2002 (“the Act”) into RPM in the newspapers and periodicals industry.

¹ RPM describes a practice whereby a supplier agrees to supply retailers on condition that they sell the goods at a price specified by the supplier. Such arrangements restrict the ability of retailers to determine their own prices. They also eliminate price competition between retailers for the suppliers' products, assuming that the supplier applies such arrangements to all retailers handling its products.

² The newsagent is not named in this Decision Note for reasons of confidentiality and on the basis that the Authority is of the view that its identity is not relevant to the analysis of the findings of the investigation. The name XYZ News is used throughout this document instead of the actual name of the undertaking.

1.4. As part of its investigation, the Authority interviewed the Managing Director of XYZ News. In clarifying whether The Irish Times Limited (“The Irish Times”) permits discounts, the Managing Director claimed, “They don’t allow you to discount their papers. Nor do the Independent”. The Irish Times is the subject of Decision Note E/03/004.³

The Parties

1.5. For reasons of confidentiality the identity of the Government department is not stated.

1.6. Independent Newspapers (Ireland) Limited⁴ (“Independent”) publishes three titles: *Irish Independent*, Sunday Independent, and Evening Herald. Independent itself undertakes the distribution of some Evening Herald newspapers. Another company within the Independent News & Media Group, Independent Newspapers Marketing Limited, is responsible for the distribution of the aforementioned titles (although actual distribution is carried out by third parties pursuant to a services agreement with that company) and the supply of newspapers to around 6,000 newsagents.

2. ASSESSMENT⁵

Introduction

2.1. Section 4 of the Act applies when undertakings are engaged in arrangements,⁶ which have as their object or effect the prevention, restriction or distortion of

³ Throughout this Decision Note “Independent” is used to denote the company, Independent Newspapers (Ireland) Limited, while “*Irish Independent*” is used to refer to the newspaper publication. Similarly, “The Irish Times” is used to denote the company, The Irish Times Limited, whereas “*The Irish Times*” is used to denote the newspaper publication.

⁴ Information describing Independent Newspapers (Ireland) Limited is extracted from a submission to the Authority.

competition in trade in any goods or services in the State. Section 4(1) reads as follows:

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 are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which -

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

Section 3(1) 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.”

2.2. In order to establish that there is a breach of Section 4(1) of Act, the Authority must demonstrate in court that:

- there is an agreement, decision or concerted practice,
- the parties to that agreement, decision or concerted practice are undertakings, or that the decision was made by an “association of undertakings”, and,
- the object or effect of the agreement, decision or concerted practices is to prevent, restrict or distort competition.

⁵ Although some of the arrangements discussed herein arose prior to the enactment of the Act, the analysis would be essentially identical under the predecessor statutes, on the basis that the substantive provisions of the Act are identical to those in the Competition Act, 1991 (as amended).

⁶ The arrangement 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).

2.3. Section 4(1) of the Act is based on Article 81(1) of the Treaty establishing the European Community. In applying Section 4(1) the Authority would have regard to its interpretation by Irish courts, but also that of Article 81(1) by the European Commission (“EC”), the Court of First Instance (“CFI”) and the European Court of Justice (“ECJ”).

2.4. Section 4(5) of the Act insulates any agreement, decision or concerted practice that

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.

All of these conditions have to be satisfied in order that an agreement, decision or concerted practice is not prohibited under Section 4(1) of the Act.⁷ The burden of proof is on the parties to an agreement, decision, or concerted practice to demonstrate to the satisfaction of the court in any legal proceedings that it meets each of the criteria set out in Section 4(5) of the Act.

2.5. Determining whether or not the conditions in Section 4(5) are satisfied requires an assessment of the economic context of the agreement, decision or concerted practice. For example, the relevant market needs to be defined. In some circumstances, the market share of the parties to the agreement, decision or concerted practice, together with the importance of barriers to entry into the market needs to be established. A judgment is also necessary as to whether there are terms or conditions

⁷ Section 4(5) and Section 4(1) are related through Section 4(2) which reads as follows: “[A]n agreement, decision or concerted practice shall not be prohibited under *subsection (1)* if it complies with the conditions referred to in *subsection (5)* ...” (emphasis in original).

of the agreement, decision or concerted practice that are not essential for the attainment of its objectives.

2.6. Section 4(5) is analogous to Article 81(3) of the Treaty establishing the European Community. In considering Section 4(5) the Authority has regard to its implementation by the Irish courts, but also to the implementation of Article 81(3) by the EC, CFI and ECJ. However, the Authority also has regard to its own previous decisions, since until 1 July 2002, the Authority could grant exemptions under Section 4(5)⁸ to individual agreements, decisions or concerted practices.⁹ From that date the Irish courts applied the section directly.

2.7. In sum, it would be for the Authority to demonstrate in any legal proceedings that the agreement, decision or concerted practice breached Section 4(1) of the Act. The onus would then be on the parties to the agreement, decision, or concerted practice to show that it qualified for exemption under Section 4(2) of the Act by satisfying each one of the conditions set out in Section 4(5) of the Act.

The relevant market

2.8. The Authority is of the view for the purposes of this investigation that there are three separate and distinguishable markets in which Independent competes which are relevant to an analysis of its behaviour:¹⁰

- (i) Irish quality daily newspapers;
- (ii) Irish evening newspapers; and
- (iii) Irish quality Sunday newspapers.

Independent vigorously disagrees with the Authority's views on market definition as represented herein.

⁸ Under the Competition Act 1996 the equivalent provision was Section 4(3).

⁹ This note draws heavily from previous Authority's Decisions, especially, Decision No. 482 (and Decision No. 477).

¹⁰ The Authority recognises that the issue of market definition would need to be revisited by it in any subsequent investigations.

2.9. In considering the question of market definition in 1995,¹¹ the Authority identified seven separate markets on the basis of product differences (e.g., tabloids vis-à-vis quality of content) and temporal factors (e.g., morning/evening and daily/Sunday). There are also likely to be differences based on the socio-economic characteristics of the readers. The relevant markets identified by the Authority in 1995 were: Irish quality daily newspapers; UK quality daily newspapers; tabloid daily newspapers; evening newspapers; Sunday tabloids; Irish quality Sundays; and, UK quality Sundays.¹² The Authority is of the view that the same factors are still pertinent in defining the relevant markets in this case.

2.10. The Authority recognises that an argument could be made for broader market definition to include UK newspapers. The Authority also recognises that changes have taken place since these categories were first identified so that they may not be as distinct today. For example, some UK newspapers, such as the Sunday Times, have Irish editions arguably blurring the distinction between Irish and UK quality Sunday newspapers. In considering this issue in its 1995 report, the Authority cited a number of factors in concluding that there are separate Irish newspaper markets in these segments. Nevertheless, this issue was re-examined in the current investigation. For example, the Authority noted that there are qualitative differences between Irish and UK newspapers in terms of their news coverage. UK quality daily newspapers are largely UK oriented in their content whereas the Irish quality daily newspapers are oriented towards readers resident in the State. UK quality daily newspapers are further differentiated from their Irish competitors by reason of branding, particularly in relation to title. There is also evidence of a price differential between UK and Irish quality daily newspapers which is discussed further in paragraph 2.12 below. The conclusion drawn by the Authority is that whether or not a distinction is made between the market for UK and Irish daily/Sunday newspapers, Independent appears to have substantial market shares in the markets in which it operates. This analysis is outlined further below.

¹¹ See Competition Authority, 1995, *Interim Report of the Study on the Newspaper Industry*, Dublin: Stationery Office, and Decision No 477.

¹² In identifying the competitors in each of the relevant markets defined for the purposes of this analysis the Authority has relied upon the classification of newspapers which used is by the Audit Bureau of Circulation in its publication of statistics.

2.11. **The market for Irish Quality Daily Newspapers** Data are presented in Table 1 for the market defined as both Irish quality daily newspapers and *all* quality daily newspapers. Table 1 shows that in 1996, as well as 2001 and 2003 there were three Irish quality daily newspapers (*The Irish Times*, *Irish Independent*, and *Irish Examiner*¹³) and five UK quality newspapers. Even with the growth in the market and the passage of time, the market shares of the leading newspapers have remained largely unchanged.

Table 1
Market Shares for Alternative Definitions of the Market for Quality Daily Newspapers in the State, Selected Periods, 1996-2003

Title	Jan-Jun 1996	Percentage	Jan-Jun 2001	Percentage	Jan-Jun 2003	Percentage
Irish Quality Daily Newspapers						
<i>Irish Independent</i>	157,393	50.3	168,253	47.9	162,463	47.8
<i>The Irish Times</i>	101,223	32.3	119,252	34.0	117,565	34.5
Subtotal	258,616	82.6	287,505	81.9	280,028	82.3
Irish Examiner ^a	54,406	17.4	63,620	18.1	60,229	17.7
Total	313,022	100	351,125	100	340,257	100
All Quality Daily Newspapers						
<i>Irish Independent</i>	157,393	47.0	168,253	45.3	162,463	45.3
<i>The Irish Times</i>	101,223	30.3	119,252	32.1	117,565	32.8
Subtotal	258,616	77.2	287,505	77.5	280,028	78.1
Irish Examiner	54,406	16.3	63,620	17.1	60,229	16.8
UK Titles ^a	21,628	6.5	20,029	5.4	18,186	5.1
Total	334,650	100	371,154	100	358,443	100

Note: ^a The UK titles are Guardian (less than 1%), Daily Telegraph (0.9-1.9%), The Independent (0.5-1%), Financial Times (0.9-1.6%) and The Times (1.4-1.6%).

Source: Audit Bureau of Circulation (ABC)

2.12. As indicated in Table 1, circulation of the UK quality daily newspapers has remained relatively low and stable when compared to that of Irish ones. The Authority

¹³ Irish Examiner was formerly "Cork Examiner", it became "Irish Examiner" in or around 12/04/2000.

observed a similar pattern in 1995, noting that UK titles had been unable to make “any significant inroads in terms of sales in Ireland” despite the fact that “Irish newspaper prices have risen much faster than those of UK newspapers and are now much more expensive”.¹⁴ The Authority then concluded that there was no evidence to suggest that Irish and UK quality daily newspapers were in the same market. In the Authority’s view the circulation figures indicate that this circumstance prevails and that the degree of substitution between Irish and UK quality daily newspapers remains weak.

2.13. Table 1 indicates that regardless of which market definition is accepted for quality daily newspapers, *Irish Independent* is the market leader with a market share of between 45 and 50%, followed by *The Irish Times* which accounts for between 30 and 34% of the market.¹⁵ The market remains highly concentrated, with the cumulative market shares of *Irish Independent* and *The Irish Times* accounting for between 78 and 82%, while the market shares of the UK titles are approximately 5%. There has been little or no successful new entry in the market over the period 1996 to 2003.¹⁶

2.14. The stable structure of the market and lack of successful new entry is typical of daily newspaper markets in Europe. Studies have recognised that new entrants into markets that are already served by daily newspapers face significant entry costs, such as, capital requirements, high fixed costs, and economies of scale,¹⁷ and the competitive advantages held by existing newspapers.¹⁸ In the 1970’s and 1980’s,

¹⁴ Competition Authority, 1995, *Interim Report of the Study on the Newspaper Industry*, supra note 11, paragraph 8.13.

¹⁵ When the Authority considers all Irish dailies over the same period (i.e., including circulation figures for Irish Daily Star, Irish Daily Record, Irish Daily Mirror, and Irish Sun), *Irish Independent* and *The Irish Times* account for between 44 and 49 % of the Irish daily newspapers market.

¹⁶ ‘New entry’ denotes the entry of a new national newspaper that is not affiliated in any way with any of the existing newspapers into a market to create competition. The Authority considers that for the purposes of this analysis ‘successful entry’ denotes the entry of a new title that gains sufficient market penetration to ensure its commercial survival and continued existence on the market. The Dublin Daily title is not considered by the Authority as a successful entrant since it entered the market in March 2003, renamed itself the Dublin Evening in June 2003, and exited shortly thereafter in July 2003.

¹⁷ John C. Busterna, 1988, “Concentration and the Industrial Organization Model”, in Picard, et al. *Press Concentration and Monopoly: New Perspective on Newspaper Ownership and Operations*. Norwood, N.J.: Ablex Publishing, pp. 44-45; Stephen Lacy and Todd F. Simon, 1993, *The Economics and Regulation of U.S. Newspapers*, Norwood, N.J.: Ablex Publishing Co.

¹⁸ Stephen Lacy and Robert G. Picard, 1990, “Interactive Monopoly Power in the Daily Newspaper Industry”, *Journal of Media Economics*, Vol.3 No. 2, pp 27-38.

several European governments introduced policies to overcome such costs of entering the newspaper market in order to prevent newspaper failure, promote new entry, competition and diversity.¹⁹ In general these policies appear to have had limited success.

2.15. **The market for Irish evening newspapers** In 1996 there were two domestically produced evening newspapers; Evening Herald and Evening Echo. These two newspapers are still the only two domestically produced evening newspapers. Evening Herald is a national newspaper while the Evening Echo is circulated primarily in Cork and Limerick.²⁰ Therefore, there is limited competition between Evening Herald and Evening Echo.

2.16. **The market for Irish Quality Sunday newspapers** Data are presented in Table 2 for the market defined as both Irish quality Sunday newspapers and *all* quality Sunday newspapers. Table 2 shows that in 1996, as well as 2001 and 2003 there were four Irish quality Sunday newspapers (Sunday Independent, Sunday Tribune, Sunday Business Post, and The Sunday Times²¹) and three UK quality Sunday newspapers. While Sunday Independent's market share has remained significant over the period, it has experienced a substantial drop in market share of almost 20 percentage points from 64% in 1996 to 42% in 2003. Much of this appears to be explained by the growth in popularity of Ireland on Sunday in the Sunday quality market since it was launched in its current form in 1997.²²

¹⁹ Robert G. Picard, 1985, *The Press and the Decline of Democracy: The Democratic Socialist Response in Public Policy*, Westport, Conn.: Greenwood Press.

²⁰ A review of the Evening Echo's website, www.eveningecho.ie shows that the newspaper still has an exclusively Cork and Limerick focus.

²¹ The Sunday Times is a UK newspaper that publishes an Irish edition.

²² In its discussion of market segments in the *Interim Report of the Study on the Newspaper Industry*, (supra note 11) para 2.29, the Authority acknowledged that the distinction between broadsheet newspapers, generally referred to as "quality" newspapers, and tabloid newspapers was not always clear. This is particularly true in the case of Sunday newspapers. Although Ireland on Sunday, owned by Associated Newspapers Ireland Limited, is produced in tabloid format it is classified by the UK Audit Bureau of Circulation as competing in the "Sunday quality market". Inclusion of Ireland on Sunday in any consideration of the Sunday market in which Independent competes is further supported by the fact that Ireland on Sunday targets the marketing of its product at Sunday Independent readers, both of which heavily target ABC1 categories. The Authority has therefore adopted this ABC classification of Sunday quality market and included Ireland on Sunday in its consideration of the Sunday market in which Independent competes.

Table 2
Market Shares for Alternative Definitions of the Market for Quality Sunday
Newspapers in the State, Selected Periods, 1996-2003

Title	Jan-Jun 1996	Percentage	Jan-Jun 2001	Percentage	Jan-Jun 2003	Percentage
Irish Quality Sunday Newspapers						
Sunday Independent	336,849	64.0	310,590	51.6	294,739	42.3
Sunday Tribune	79,180	15.1	90,019	15.0	80,095	11.5
Sunday Business Post	37,074	7.0	55,080	9.2	51,613	7.4
Ireland on Sunday ^a	-	-	53,053	8.8	167,996	24.1
Sunday Times	72,901	13.9	93,072	14.9	102,494	14.7
Total	526,004	100	601,814	100	696,937	100
All Quality Sunday Newspapers						
Sunday Independent	336,849	60.5	310,590	49.6	294,739	41.2
Sunday Tribune	79,180	14.2	90,019	14.4	80,095	11.2
Sunday Business Post	37,074	6.7	55,080	8.8	51,613	7.2
Ireland on Sunday	-	-	53,053	8.5	167,996	23.5
Sunday Times	72,901	13.1	93,072	14.9	102,494	14.3
UK Titles	31,044	5.6	24,847	4.0	18,400	2.6
Total	557,048	100	626,661	100	715,337	100

Note: a: Ireland on Sunday launched onto the market in its current form in 1997

b: UK titles are, Independent on Sunday (1.6-2.4%), The Observer (1.7-1.8%), and Sunday Telegraph (0.7-1.4%). Some of these contain Irish Content

Source: Audit Bureau of Circulation (ABC)

2.17. Table 2 indicates that although the market has changed substantially since 1996, regardless of which market definition is accepted for quality Sunday newspapers, the market remains highly concentrated. Sunday Independent is still the market leader with approximately 42% of the Irish quality Sunday market in 2003 with Ireland on Sunday accounting for 24%, Sunday Times accounting for 14%, and Sunday Tribune accounting for 11%. The market shares of the UK titles remain largely insignificant and have fallen three percentage points from 5.6% in 1996 to 2.6% in 2003. Clearly the most notable change in the market has been the entry of Ireland on Sunday which has gained a significant share of the market since its launch

in 1997. The introduction in 1995 of an Irish edition by Sunday Times in place of its UK edition in the State may also be considered to constitute new entry over the period since the Authority's *Interim Report of the Study on the Newspaper Industry*.

Agreements, Decisions and Concerted Practices

2.18. The legislation does not define the terms “agreements”, “decisions” and “concerted practices”. Reference must be made to the interpretation of these terms by the Courts.²³ Agreements include legally binding agreements²⁴ as well as informal ones, and they may be written or not. The latter would include, for example, so-called “Gentlemen’s Agreements”. A concerted practice is at the opposite end of the spectrum from a legally binding agreement. It has been defined as follows in EU precedent:

a form of coordination between undertakings, which without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.²⁵

The test in determining whether a decision is a decision by an association of undertakings is whether the decision can be regarded as the expression of the will of the association to co-ordinate the behaviour of its members. Although such co-ordination may, in any event, be caught by the terms “agreement” or “concerted practice”, the provision prohibiting decisions of associations of undertakings which restrict competition may, in certain circumstances, facilitate the proof of such anti-competitive behaviour.

2.19. In regard to the resale of Independents’ newspaper titles, the Authority was aware at the time of Decision No. 482 in 1997, that Independent had three categories of standard distribution agreements with newspaper retailers:

²³ For further discussion see Richard Whish, 2001 *Competition Law*, Fourth Edition, London, Butterworths. pp. 76-86.

²⁴ Of course, if such an agreement breaches Section 4 of the Act then the agreement is null and void.

²⁵ *ICI v Commission*, Case 48/69 etc [1972] ECR 619, [1972] CLMR 557, paragraph 64.

- (a) agreement with respect to existing newsagents;
- (b) agreement with respect to agency transfer; and
- (c) agreement with respect to new newsagents.

Except for some additional contractual conditions that newspaper retailers in categories (b) and (c) had to fulfill, the terms and conditions of supply of Independent newspaper titles to newspaper retailers were the same in all three categories of agreements (referred to collectively herein as “the 1992 agreement”). In 1997, the Authority refused to issue certificates or grant licences to the 1992 agreement.

2.20. The 1992 agreement contains 22 clauses setting out Independent’s terms and conditions of business with newspaper retailers. These are discussed in detail in Decision No. 482. However, two of the clauses of the Independent’s terms and conditions of business with newspaper retailers specifically deal with the retail price of Independent’s newspapers. Those clauses read as follows:

Clause (j) states that:

Our publications must be sold at the cover price only and may not be sold to a third party for re-sale except by prior agreement in writing with Independent Marketing Ltd., should any Newsagent become aware that any third parties are re-selling supplies he shall immediately inform a representative of Independent Newspapers Marketing Ltd. in writing, a Newsagent who sells to a third party for re-selling supplies as aforesaid shall be in material breach of these terms and conditions of business and the Newsagent shall be terminated forthwith.

(Emphasis added).

Clause (s) provides that:

The retail price of the supplies and titles in the Independent Newspaper Group of companies remain solely within the discretion of the Independent Newspapers Group of Companies.

2.21. In 1996 the Authority issued a Statement of Objections to Independent whereby it indicated its intention to refuse to issue a certificate or grant a licence in respect of the notified agreements. In its response, Independent undertook to amend a number of clauses but maintained that it should have the ability to set the cover price of its newspapers.²⁶ Independent argued that the pricing restrictions should either be found not to be anti-competitive or licensed and did not make any offer to amend its terms and conditions of business with respect to the RPM clauses. In 1997, the Authority took the view that the object or effect of including those clauses in Independent's distribution agreements was to prevent newspaper retailers from selling at the price they wished. Therefore, such provisions amount to RPM.

2.22. In 2003, the Authority established, as part of this investigation, that the distribution agreements between Independent and newspaper retailers can be divided into three categories:

- (i) A significant number of newspaper retailers with whom Independent had distribution agreements at the time of Decision No. 482, continue to be covered by the 1992 agreements incorporating, among other things, RPM clauses. The Authority is of the view therefore that the 1992 agreement effectively remained in force for those retailers as Independent took no positive action to revoke or amend those agreements. Not surprisingly given the turnover of newspaper retailers, the number of extant 1992 agreements has fallen through time. Independent estimates that in June 2003 approximately 15% of its distribution agreements were covered by the 1992 agreement;
- (ii) For those newspaper retailers with whom Independent entered into distribution agreements after the publication of Decision No. 482, Independent issued the majority of them with the amended 1992 agreement, with clause (j) and clause (s) amended appropriately. This agreement does not appear to be incompatible with the Act; and

²⁶ Independent offered to drop the restriction in the 1992 agreement on retailers reselling to other retailers along with the requirement that previous owners debts be paid in full before a request for transfer of agency would be approved by Independent (Decision No. 482, paragraphs 56 & 58).

- (iii) As at June 2003, Independent estimates that about 400, i.e., approximately 6.7%, of its newspaper retailers were issued with and signed a version of the 1992 agreement which contained a clause (r), equivalent to clause (s) of the 1992 agreement.²⁷ This agreement is referred to as “the 1998 agreement”. Independent confirmed that this agreement was circulated on a number of discrete occasions over the last four years.²⁸

2.23. Further, the Authority was provided with samples of Independent’s correspondence with newspaper retailers including “Price Increase” letters which are issued to newspaper retailers when Independent increases the cover price of its newspapers. The Authority expressed the view that the Independent’s “Price Increase” letters form part of the business relationship between Independent and newspaper retailers. However, a senior official of Independent disputed this view in his testimony under oath.

Object or Effect of Preventing, Restricting or Distorting Competition

2.24. Agreements, decisions and concerted practices breach Section 4(1) of the Act if they have the object **OR** effect of preventing, restricting or distorting competition. In paragraphs (a) to (e) of Section 4(1) examples are provided – e.g., price fixing – of the type of agreements that would breach the Act. However, even if the agreement, decision or concerted practice breaches Section 4(1), it could be exempt if it met the conditions – e.g. promotes economic progress - set out in Section 4(5). In some circumstances, of course, the agreement, decision or concerted practice may not be prohibited by the Act at all.

2.25. The Authority and the Commission have respectively issued guidance concerning the application of Section 4 of the Act and Article 81 of the EC Treaty to RPM. Article 3(a) of the Authority’s 1998 Category Licence in respect of Agreements between Suppliers and Resellers provides that agreements involving RPM or an

²⁷ The full text of this clause is reproduced at paragraph 2.21 above.

²⁸ As discussed further at paras 2.29 to 2.34 below, Independent states that this was due to an administrative error and newspaper retailers would have subsequently received the correct terms and conditions on their acceptance as Independent retailers.

inducement to engage in RPM do not benefit from the licence.²⁹ The text of these articles is identical and states that the Category Certificate/Licence does not apply to any agreement, which involves: -

(a) any restriction on the freedom of the reseller to determine his own resale prices. However, suppliers may recommend resale prices, provided:

- i) such recommendations indicate that the reseller is free to set his own resale prices;
- ii) the recommendation makes no references to margins arising from applying the recommended price;
- iii) there is no requirement to display the recommended price; and
- iv) no inducements are offered to secure compliance with the recommended price.

2.26. Article 4(a) of EC Regulation 2790/99 on the application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices states that agreements involving RPM do not benefit from block exemption. The text of Article 4(a) stipulates that the block exemption will not be available where the object of the agreement is:

the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending 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.

Thus, both the Commission and Authority adopt a similar position with respect to RPM.

²⁹ Under the Competition Act, 2002, Schedule 2, Clause 3, all certificates and individual licences granted under the Competition Act, 1991 (as amended) were revoked as and from 1 July 2002 while every category licence continued in being "as if it were a declaration" made under Section 4(3) of the Competition Act 2002. Thus, the category licence in respect of agreements between suppliers and resellers remained in force as a declaration and

2.27. The Authority had considered the issue of RPM in a number of notifications prior to Decision No. 482.³⁰ For example, in considering the issue of RPM with respect to books, the Authority stated that:

The Authority considers that the weight of evidence indicates that RPM is generally restrictive of competition. Consequently, in its view, agreements involving RPM will generally offend against Section 4(1).³¹

Despite this generalisation, the Authority, in Decision No. 482, carefully considered all the arguments put forward by Independent to justify RPM in assessing the notified agreements. However, the Authority did not accept that the criteria in Section 4(5) were satisfied. The Authority's view is consistent with an ECJ decision in *Binon/AMP* concerning RPM in newspapers.³²

2.28. In its investigation into possible RPM in the resale of Independent's newspapers, the Authority identified two complementary mutually reinforcing arrangements involving Independent that are consistent with RPM:

- (i) Two sets of standard distribution agreements that have the object or effect of enforcing resale price maintenance;
 - (a) The continued existence of the 1992 agreement covering at least 15% of Independent's newspaper retailers, as at June 2003; and
 - (b) The existence of the 1998 agreement covering about 400 of Independent's newspaper retailers, as at June 2003.
- (ii) Circulation of "Price Increases" letters to newspaper retailers which encourage such retailers to sell Independent's newspapers at the prices

the Authority issued a Notice in respect of Agreements between Suppliers and Resellers on 1 July 2002 to replace the 1998 category certificate.

³⁰ Other Authority Decisions involving RPM include Decision Nos. 336, 348, 365, 366, 477, and E.03.002.

³¹ Competition Authority Decision No. 336 of 10 June 1994, at paragraph 70.

³² In *Binon & Cie SA v Agence et Messageries de la Presse SA*: 243/83 (1985), ECJ, the ECJ held that, "The requirement in the framework of a selective distribution system for newspapers and periodicals which affects trade between Member States, that fixed prices must be respected renders that system incompatible with Article 85(1) of the Treaty".

stipulated on the cover page of its newspapers by their reference to the profit margins that can be earned by retailers at the new price.

Each of these arrangements is considered in turn.

2.29. (i) Applying Standard Distribution Agreements that have the Object or Effect of Enforcing Resale Price Maintenance As noted above, the Authority found in 1997 that Independent's 1992 agreement had both the object and effect of RPM. The Authority also noted that a similar provision existed in The Irish Times' 1992 distribution agreement.³³ As indicated in Table 1, together these two undertakings accounted for 82.6% of the Irish quality daily newspaper sales over the period January to June 1996. As indicated in Table 2, Sunday Independent lead the Irish quality Sunday newspaper market in 1996 with a market share of approximately 64%.

2.30. The reasoning in Decision No. 482 is still valid. In the Authority's opinion a significant proportion of Independent's newspaper retailers, approximately 15%, are still covered by the 1992 agreement with its RPM clauses. And, as at June 2003, Independent continued to implement distribution agreements containing an RPM clause, the 1998 agreement, in respect of 400 of its newspaper retailers. Based on factors such as the testimony of longstanding distributors, two of the directors of XYZ News, it appears that there is a perception in the retail trade that the cover price of newspapers should not be discounted, despite some coverage in the press of Decision No. 477 in respect of The Irish Times. So far as the Authority is aware, there have been no reports of newspaper price discounting or cutting in the State. This view is supported by the testimony under oath of a senior official of Independent who stated that Independent was not aware of any reports of newspaper price discounting or cutting in the State either.

2.31. Although, Independent accepts that it has circulated distribution agreements containing restrictions on the resale price of its newspapers, it maintains that this occurred as a result of an administrative error. Independent submits that:

due to unfortunate administrative errors, a small proportion of newsagents received copies of outdated Terms and Conditions in existence prior to Competition Authority Decision no. 482 of 15 April 1997 (i.e., with resale price restriction) after that date. However, each of the newsagents who mistakenly received an outdated copy of Independent's Terms and Conditions on commencing business with us also received a copy of Independent's *actual* Terms and Conditions (i.e., without a resale price restriction) on its formal acceptance as an Independent newsagent a few days later.³⁴

(Emphasis in original)

2.32. Independent states that this situation arose as a result of a combination of the similarity of its terms and conditions of business and clerical error, stating that "somebody photocopied or reprinted the incorrect one". Independent also states that the fact that the 400 newspaper retailers would have received copies of the '*actual*' terms and conditions upon their acceptance as resellers by Independent means that they should have been aware of the correct terms and conditions of business. Regardless of the circumstances in which these agreements were issued by Independent staff, the Authority is concerned that approximately 400 newspaper retailers received and signed contracts containing these outdated terms and conditions.

2.33. Independent has consistently denied that it has engaged in an activity that breaches the Act. Independent also denies that its conduct may have led to an industry perception that RPM applies to the resale of its newspapers. Notwithstanding these denials, Independent proposed to undertake certain measures to address the Authority's concerns and ensure compliance with the Act going forward.

2.34. The Authority is of the view that the situation whereby a significant proportion of Independent's newspaper retailers are party to a distribution agreement containing (an) RPM clause(s) is consistent with enforcing RPM or at least has contributed to creating an industry perception that RPM applies to the retailing of Independent's newspapers. This provision therefore is incompatible with Section 4(1) of the Act.

³³ However, the Authority was not in possession of the distribution agreements of the other leading newspapers to enable it to take a view with respect to the distribution agreements of those newspapers.

³⁴ Source: letter to the Authority, 26 May 2003.

As in The Irish Times' case, this view is strengthened by Independent's practice of issuing cover price increase notices, an issue considered next.

2.35. **(ii) Encouraging Newspaper Retailers to Sell at Prices Recommended by Independent** As discussed above (paragraphs 2.25 to 2.27), the Act and EC competition law prohibit suppliers from engaging in practices that require retailers to sell their products at a fixed price or encourage them to engage in RPM. The latter may be considered an indirect method of enforcing RPM by for example, fixing the distributors' and/or newspaper retailers' margin. This is particularly so, when such requirement is considered in light of Article 5(a) of the Authority's 1998 Category Certificate/Licence in respect of Agreements between Suppliers and Resellers, and Article 4(a) of the EC Regulation 2790/99, which require that suppliers do not encourage retailers to sell at a fixed price or engage in RPM.

2.36. During its investigation, the Authority ascertained that Independent provides notices to newspaper retailers by which it notifies them of increases in the cover price of its newspapers. An extract from a sample of such notices is as follows:

13th December 2002

Dear Retailer

Please note that from Saturday December 21st - the date of the 96 page bumper edition of the Weekend Magazine - the Irish Independent Saturday Edition will have a cover price of €1.50.

Your normal margins, the highest in the marketplace, will apply.

Separately, and as a result of the VAT increasing from 12.5% to 13.5% together with increasing costs, from January 01st the Irish Independent Monday to Friday will increase to €1.45 and the Sunday Independent will increase to €1.75.

The Wholesale prices are:- From January 01st

Please note that the Irish Independent barcode, Monday to Friday and the Sunday Independent barcode will not change, ***you must adjust your system for the above rates.***

(Underscore in original, emphasis added)

2.37. Independent submits that the purpose of this letter is to advise newspaper retailers that the wholesale price of its publication is to change and alert them of a change in the cover price. According to Independent, this letter is also used to alert newspaper retailers that the barcode of the publication does not change.

2.38. It is the Authority's view that the reference made to margins in these notices and the inclusion of the statement "you must adjust your system for the above rates" are not necessary for achieving the purpose of the letter, as claimed by Independent. The Authority is of the view that such notices amount to encouragement or instruction to newspaper retailers to apply the price rise fixed by Independent. This practice, taken together with the discussion on the continued existence of the 1992 agreement and the 1998 agreement by Independent, is in the Authority's opinion contrary to Section 4(1) of the Act.

3. ENFORCEMENT ACTION

3.1. The Authority does not have the power, under the Act, to impose remedies directly when it believes that undertakings have breached the Act. Instead it must convince the Court that there has been a breach of the Act and then seek to persuade the Court as to the appropriate remedy.³⁵ This then becomes an order of the Court, a breach of which can result in fines and/or imprisonment. However, prior to going to Court the Authority usually sends a letter of initiation to the parties allegedly in breach of the Act, depending on the circumstances of the case.

3.2. This letter of initiation sets out the basis of the Authority's case, together with a set of demands that constitutes the remedial action that the Authority would seek in civil proceedings. If a party accedes to the Authority's demands, or through negotiation an arrangement satisfactory to the Authority is reached, then the Authority does not institute legal proceedings, provided of course the terms and conditions of the negotiated arrangement are adhered to by the parties.³⁶ Costly, lengthy court

³⁵ Under the Act, the remedies are confined in civil cases to declaratory and injunctive relief where the Authority brings the case. Private parties that take a case can also seek damages.

³⁶ This does not, of course, preclude the Authority from accepting a party's undertakings in the context of a court order.

action with an uncertain outcome is thus avoided, and Authority resources can be deployed in other enforcement actions. If the Authority's demands are not met then unless parties allegedly in breach of the Act refute the case set out in the letter of initiation the Authority will commence proceedings.

3.3. However, in Independent's case, no letter of initiation was sent, as Independent expressed its willingness to address the Authority's competition concerns before a decision to issue a letter of initiation was made. Independent was cooperative in providing information to move this investigation forward and in suggesting measures to address the Authority's competition concerns. This enabled the Authority to bring its investigation to a timely and satisfactory conclusion.

3.4. Between June and November 2003, Independent proposed to the Authority certain measures it would undertake to:

- (a) address the situation created by its circulation of the 1992 agreement and the 1998 agreement;
- (b) address the competition issue relating to its "Price Increase" letters;
- (c) address the Authority's concern with respect to an industry perception of RPM; and
- (d) ensure competition compliance going forward.

The proposed measures are presented in Box 1 below. A number of these measures have already been implemented by Independent. In June 2003, once the matter was brought to its attention through the Authority's investigation, Independent notified the 400 newspaper retailers that had received the outdated terms and conditions through administrative error on discrete occasions between 1998 and 2003 rectifying that error. In addition, mechanisms have been put in place to ensure that Independent complies with the undertakings it gives to the Authority.

Box 1: Summary of Undertakings given by Independent Newspapers (Ireland) Limited to the Competition Authority in relation to its investigation into possible Resale Price Maintenance practices by Independent in the Newspaper Industry

1. Independent has undertaken to implement the following measures:
 - a. Within 3 months Independent will provide all of its agents with a new contract specifically identifying the fact that Independent merely recommends a particular price and explicitly stating that all agents are free to set their own price. Independent also intends to draw attention to this point in the covering letter to agents clearly explaining the implications.

Independent envisages that the covering letter will contain wording along the following lines:

“We wish to draw your attention to the fact that Independent Newspapers Marketing Limited has introduced a new clause into the Agreement/Terms and Conditions. Clause [X] now provides that:

‘Independent Newspapers Marketing Limited shall have the power to recommend a price at which its newspapers are sold by the Newsagent (i.e. a Recommended Retail Price, RRP). However, the Newsagent remains free to set its own price.’

While you have always been free to sell Independent's newspapers at any price you wish, Clause [X] has now been inserted into the Agreement/Terms and Conditions and is specifically drawn to your attention to avoid any doubt about the matter.”
 - b. Independent has agreed to amend the wording of any notices on price increases that it circulates to its newsagents. Independent is willing to ensure that all price increase letters issued by it in future will use the following language:

“The change to the wholesale price does not involve a change to the barcode. Therefore, if you use an EPOS system, an alteration would need to be made to your system.”

These notices will not - whether by reference to newsagent’s margins or otherwise - suggest that any increase in the retail price should follow an increase in the wholesale price. All subsequent price increase letters issued by Independent will refrain from making any explicit reference to margins.
 - c. Independent will print the words “the Recommended Retail Price of this newspaper in the Republic of Ireland is €[.]” on the bottom front page of its newspapers within three months.
2. Independent envisages putting in place internal procedures to ensure that no printing or administrative error occurs in respect of its pricing strategies.
3. Independent will provide information to the Authority regarding what steps it will take to ensure that Independent, its directors, officers, servants and agents comply with the Act.
4. Independent will provide information, from time to time, as may reasonably be required by the Authority regarding compliance with its commitments going forward.

3.5. Independent proposed issuing a new agreement/terms and conditions containing a new Clause [X], which will clearly states that Independent only recommends the cover price. Newspaper retailers are free to set their own price. Independent have also agreed to indicate on the front cover of their newspapers that the cover price is the recommended retail price. A notice of the new agreement containing amended Clause [X] will be issued to all newspaper retailers by way of a covering letter to inform them of the introduction of the new Clause [X] and its implications. Independent proposed issuing price increase letters to newspaper retailers that refrain from referring to margins and that comply with the Act. Independent has undertaken to amend its price increase letters to make it clear that newspaper retailers are free to sell Independent's newspapers at whatever price they wish. Any reference to the EPOS system in those letters will refrain from explicitly referring to margins and will not require newspaper retailers to adjust their systems according to the new rates. Independent proposed to complete implementing these undertakings within three months. Independent proposed to put in place internal procedures to ensure compliance with the Act going forward. In ensuring compliance with the Act, Independent proposed that it will draw up and implement a competition compliance programme and circulate it to each member of Independent's managerial and customer services staff within three months, and take steps to actively manage and control the circulation and issuing of their contracts and terms and conditions of business. Finally, Independent has acknowledged that the Authority will take a serious view of any departure from any commitments it makes to the Authority.

3.6 In sum, the Authority is of the view that the assurances given to the Authority by Independent allows both newspaper retailers and customers to potentially benefit from price competition in the resale of Independent's newspapers. Newspaper retailers would be in position to set their own price for newspapers and in particular, customers, especially those purchasing multiple copies such as the Government department that occasioned this investigation, would be able to negotiate better deals with newspaper retailers and distributors. The Authority therefore believes that the assurances given to it by Independent, combined with the compliance measures, will ensure that newspaper retailers are aware that they are free to sell at their own prices and that this will encourage discounting of newspapers to occur at the retail level in Ireland.

4. DECISION

4.1. On the basis of the facts in its possession and for the reasons set out above, the Authority has decided that for so long as Independent is in compliance with the terms of the assurances made by it to the Authority, the Authority shall discontinue its investigation and refrain from instituting proceedings against Independent Newspapers (Ireland) Limited.

4.2. This decision of the Authority does not affect the rights of private parties to take action under the Act.

For the Competition Authority

Dr Paul K Gorecki

Member and Director of the Monopolies Division

13th December 2003