



Competition Act, 2002

Decision of the Competition Authority
No. E/03/004

Agreements between The Irish Times Limited and newspaper retailers allegedly fixing the retail price of The Irish Times newspaper

24th July 2003
(Case COM/132/02A)

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, The Irish Times 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 resale price maintenance in the newspapers and periodicals industry, based on information it received from a Government department. The Competition Authority was concerned that The Irish Times Limited was enforcing resale price maintenance at various levels of its distribution chain.

In 1992, The Irish Times Limited notified the Competition Authority of its standard distribution agreement 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 1996, the Competition Authority issued a Statement of Objections to The Irish Times Limited contending that one of the clauses of the notified agreement constituted resale price maintenance in the retailing of its newspapers. In 1997, The Irish Times Limited offered to amend that clause. The Competition Authority was satisfied that the amended agreement was compatible with the Competition Act, 1991 and issued a certificate to The Irish Times Limited for the notified agreement as amended (Decision No. 477 of 11 March 1997).

In May 2003 the Authority outlined its concerns with respect to possible resale price maintenance by The Irish Times Limited in its agreements with retailers. The Irish Times Limited was helpful and co-operative to the Competition Authority throughout the conduct of its investigation in offering remedies to address the Competition Authority's concerns. In addition to amending its standard distribution agreement with newspaper retailers, The Irish Times Limited has agreed to amend its price increase notices circulated to newspaper retailers. This amendment ensures that The Irish Times Limited does not appear to encourage newspaper retailers in any way to raise the resale price of newspapers when The Irish Times Limited increases the cover prices of its newspapers. The Irish Times Limited has also undertaken to indicate on the front page of its newspapers that the prices quoted are recommended retail prices only. As a result of the assurances, the Competition Authority decided to discontinue its investigation as it relates to The Irish Times Limited for so long as The Irish Times 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 [...] “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”. Independent Newspapers (Ireland) Limited (“Independent”) is the subject of Decision Note E/03/003.³

The Parties

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

1.6. The Irish Times is a subsidiary of The Irish Times Trust Limited. The Group is involved in the publication and distribution of newspapers.⁴ As at 1 June 2003, The Irish Times published and/or supplied, *The Irish Times* and *The Irish Field*.⁵

2. ASSESSMENT⁶

Introduction

2.1. Section 4 of the Act applies when undertakings are engaged in arrangements,⁷ which have as their object or effect the prevention, restriction or distortion of 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

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

⁴ The information describing The Irish Times is taken from publicly available sources, such as its website.

⁵ The Authority was notified on 11 July 2003 of the Agricultural Trust’s proposed acquisition of The Irish Field. The Authority approved this transaction on 6 August 2003.

⁶ 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).

⁷ 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).

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.

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.⁸ 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 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

⁸ 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).

decisions, since until 1 July 2002, the Authority could grant exemptions under Section 4(5)⁹ to individual agreements, decisions or concerted practices.¹⁰ 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 the market in which The Irish Times competes is the market for Irish quality daily newspapers.¹¹ In considering the question of market definition in 1995,¹² the Authority identified seven separate markets on the basis of product differences (e.g., format, vis-à-vis tabloid or broadsheet, volume and depth of news coverage) and temporal factors (e.g., morning/evening and daily/Sunday).¹³ There are also likely to be differences based on the socio-economic characteristics of the readers. The Authority is of the view that these factors are still pertinent in defining the relevant market in this case.

2.9. The Authority recognises that an argument could be made for a broader market definition to include UK quality daily newspapers. In considering this issue in its 1995 report the Authority cited a number of factors in concluding that the relevant market was the market for Irish quality daily newspapers. For example, the Authority noted that there are qualitative differences between Irish and UK newspapers in terms

⁹ Under the Competition Act 1996 the equivalent provision was Section 4(3).

¹⁰ This note draws heavily from previous Authority's Decisions, especially, Decision No. 477.

¹¹ The Authority recognises that the issue of market definition would need to be revisited by it in any subsequent investigations.

¹² See Competition Authority, 1995, *Interim Report of the Study on the Newspaper Industry*, Dublin: Stationery Office, and Decision No 477.

¹³ These were: Irish quality daily newspapers; UK quality daily newspapers; tabloid daily newspapers; evening newspapers; Sunday tabloids; Irish quality Sundays; and, UK quality Sundays. The Authority 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 have Irish editions arguably removing the distinction between Irish and UK quality Sunday newspapers.

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 2.10 below.

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

2.11. Data are presented in Table 1 below for the market defined as both Irish quality newspapers and *all* quality 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*¹⁵) and five UK quality newspapers.¹⁶ Even with the growth in the market and the passage of time, the market shares of the leading newspapers have remained largely unchanged.

2.12. Table 1 indicates that regardless of which market definition is accepted for quality daily newspapers, the *Irish Independent* newspaper is the market leader with a market share of between 45 and 50%, followed by *The Irish Times* which accounts for

¹⁴ Competition Authority, 1995, *Interim Report of the Study on the Newspaper Industry*, supra note 12, paragraph 8.13.

¹⁵ Irish Examiner was formerly “Cork Examiner”, it became “Irish Examiner” in or around 12/04/2000.

¹⁶ This list of titles is consistent with those classified by the Audit Bureau of Circulation as competing in the “morning quality market”.

between 30 and 34% of the market.¹⁷ 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 2003.¹⁸

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	54,406	17.4	63,620	18.1	60,229	17.7
Totals	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)

¹⁷ 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.

¹⁸ '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.

2.13. The stable structure of the market and lack of successful new entrants in the Irish quality daily newspaper market 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,¹⁹ and the competitive advantages held by existing newspapers.²⁰ In the 1970's and 1980's 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.²¹ In general these policies appear to have had limited success.

Agreements, Decisions and Concerted Practices

2.14. 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.²² Agreements include legally binding agreements²³ 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.²⁴

¹⁹ 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.

²⁰ 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.

²¹ Robert G. Picard, 1985, *The Press and the Decline of Democracy: The Democratic Socialist Response in Public Policy*, Westport, Conn.: Greenwood Press.

²² For further discussion see Richard Whish, 2001, *Competition Law*, Fourth Edition, London, Butterworths. pp. 76-86.

²³ Of course, if such an agreement breaches Section 4 of the Act then the agreement is null and void.

²⁴ *ICI v Commission*, Case 48/69 etc [1972] ECR 619, [1972] CLMR 557, paragraph 64.

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.

2.15. In regard to the resale of *The Irish Times* newspaper, there were two standard distribution agreements with newspaper retailers considered by the Authority in 1997 in Decision No. 477:

- (a) the agreement notified to the Authority in 1992 (“the 1992 agreement”); and
- (b) the amended 1992 agreement (“the 1997 agreement”) in respect of which the Authority granted a certificate in Decision No. 477 of 11 March 1997.

It was the Authority’s understanding that the 1997 agreement would replace the 1992 agreement.

2.16. The 1992 agreement contains 18 clauses setting out *The Irish Times*’ terms and conditions of business with newspaper retailers. These are discussed in detail in Decision No. 477. The Authority interpreted one of these, clause (I), as constituting RPM. Clause (I) states that: “A recommended retail price, as indicated from time to time on the respective mastheads of each of the Newspapers, shall apply to all sales of the Newspapers by the Newsagent”.

2.17. *The Irish Times* agreed in a letter dated 5 February 1997 to amend its 1992 agreement in response to the Authority’s 19 December 1996 Statement of Objections. The Authority had indicated its intention to refuse to issue a certificate or grant a licence in respect of the 1992 agreement. The 1997 agreement was to contain all the clauses contained in the 1992 agreement, but with clause (I) amended to read,

The Irish Times shall have the power to recommend a price at which the newspapers are sold by the newsagent. However, the newsagent is free at all times to set its own price.

The Authority in Decision No. 477 was clearly under the impression that The Irish Times had amended its 1992 agreement in this manner.²⁵ As a result, other things being equal, in 2003 the Irish Times should have only one extant distribution agreement with newspaper retailers – the 1997 agreement.

2.18. The Authority has established, as part of this investigation, that in 2003, the distribution agreements between The Irish Times and newspaper retailers can be divided into two groups:

1. For those newspaper retailers with whom The Irish Times had distribution agreements at the time of Decision No. 477, no changes were made in the distribution agreements. The Authority is of the view therefore that the 1992 agreement effectively remained in force for those retailers as The Irish Times 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 over time. In June 2003, The Irish Times estimates that 40% of its distribution agreements were covered by the 1992 agreement; and
2. For those newspaper retailers with whom The Irish Times entered into distribution agreements after Decision No. 477, the distribution agreement certified by the Authority was never in fact used. Instead, The Irish Times amended the 1992 agreement by simply eliminating clause (I). This agreement does not appear to be incompatible with the Act. In June 2003, The Irish Times estimates that 60% of its distribution agreements adhere to this amended agreement.

²⁵ See Decision No. 477, paragraph 65.

2.19. Further, the Authority was provided with samples of The Irish Times' correspondence with newspaper retailers including "Cover Price Increase" letters which are issued to newspaper retailers when The Irish Times increases the cover price of its newspapers. The Authority is of the view that the "Cover Price Increase" letters form part of the business relationship between The Irish Times and newspaper retailers.

Object or Effect of Preventing, Restricting or Distorting Competition

2.20. 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.

2.21. 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 inducement to engage in RPM do not benefit from the licence.²⁶ 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:

²⁶ 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 the Authority issued a Notice in respect of Agreements between Suppliers and Resellers on 1 July 2002 to replace the 1998 category certificate.

- 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.

2.22. 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.²⁷

2.23. As stated in paragraph 2.16 above, clause (I) of The Irish Times' 1992 agreement provides that "A recommended retail price, as indicated from time to time on the respective mastheads of each of the Newspapers, shall apply to all sales of the Newspapers by the Newsagent." The Authority took the view in 1997 that the object or effect of including this clause in The Irish Times' distribution agreement was to prevent newspaper retailers from selling at the price they wish. Such a provision amounts to RPM.

²⁷ While the agreements identified under category 1 in paragraph 2.18 above were concluded prior to the 1998 Category Certificate/Licence in respect of Agreements between Suppliers and Resellers, and EC Regulation 2790/99, the practice of issuing price increase letters referred to paragraph 2.25 below has been a standard industry procedure over the period considered in this Decision Note. Therefore, the provisions of these "Block Exemptions" are relevant to the analysis of the findings of this investigation.

2.24. The Authority had considered the issue of RPM in a number of notifications prior to Decision No. 477.²⁸ 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).²⁹

Despite this generalisation, the Authority, in Decision No. 477, carefully considered all the arguments put forward by *The Irish Times* 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.³⁰

2.25. In its investigation into RPM in the resale of *The Irish Times*, the Authority identified two complementary mutually reinforcing arrangements involving *The Irish Times* that are consistent with RPM:

- (i) The continued existence of the 1992 agreements covering 40% of *The Irish Times*' newspaper retailers as at June 2003, and
- (ii) The circulation of "Cover Price Increases" letters to newspaper retailers which encourage them to sell *The Irish Times* newspaper at the price 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.

²⁸ Other Authority Decisions involving RPM include Decision Nos. 336, 348, 365, 366, and 482.

²⁹ Competition Authority Decision No. 336 of 10 June 1994, at paragraph 70.

³⁰ 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".

2.26. (i) Applying Standard Distribution Agreements that have the Object or Effect of Enforcing Resale Price Maintenance

As noted above, the Authority found that The Irish Times' 1992 distribution agreement had both the object and effect of RPM. The Authority also noted that a similar provision existed in Independent's distribution agreements.³¹ Together these two undertakings accounted for 82.6% of the Irish quality daily newspaper sales for the period January to June 1996.

2.27. The reasoning in Decision No. 477 is still valid. A significant proportion of The Irish Times' newspaper retailers are still covered by the 1992 agreement with its RPM clause, while Independent also continues to implement distribution agreements involving RPM.³² Together, *The Irish Times* and *Irish Independent* continue to account for between 78 and 82% of the market. 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 the newspapers should not be discounted, despite some reporting in relation to Decision No. 477 in the trade press. One of the witnesses examined under oath by the Authority said that in Scotland on occasion prices of newspapers were discounted. However, so far as the Authority is aware, there have been no reports of price discounting or cutting of newspaper prices in the State in recent years.³³

2.28. Although The Irish Times accepted that it was an undesirable situation that it failed to insert the amended clause (I) in its terms and conditions of business, it denied that it was enforcing any agreements that contained an RPM clause contrary to Section 4(1) of the Act. The Irish Times submitted that it regarded the objectionable clause as defunct and believed that newspaper retailers would have been aware that clause (I) was rendered null and void as a result of The Irish Times' publication of the findings of Decision No. 477. As a result, it contended that the industry perception of RPM is unwarranted. The Irish Times stated that it has made no attempts to ensure

³¹ However, the Authority was not in possession of the distribution agreements of the other leading newspapers at the time of making that decision to enable it to take a view with respect to the distribution agreements of those newspapers.

³² As noted in paragraph 1.4, the Authority is issuing a separate Decision Note concerning the Independent, E/03/003.

³³ See Authority Decision No. 482, paragraph 96.

that newspaper retailers sell at the masthead price. Notwithstanding these assertions, The Irish Times proposed to undertake measures to address the Authority's concerns and ensure compliance with the Act going forward.

2.29. The Authority is of the view that the situation whereby 40% of The Irish Times' newspaper retailers are party to a distribution agreement containing an RPM clause is consistent with enforcing RPM or at least has contributed to creating an industry perception that RPM applies to the retailing of *The Irish Times* newspaper. This provision therefore is incompatible with Section 4(1) of the Act. This view is strengthened by The Irish Times' practice of issuing cover price increase notices, an issue considered next.

2.30. **(ii) Encouraging Newspaper Retailers to Sell at Prices Recommended by The Irish Times Newspapers** As discussed above (paragraphs 2.20 to 2.22), 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', i.e., 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 and 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.

2.31. During its investigation, the Authority ascertained that The Irish Times 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:

Cover Price Increase

Dear newsagent,

The cover price of the Irish Times will be increased by 5 cent to **€1.45 per copy** with effect from **Monday 03 February 2003**.

Percentage discounts will continue at their present levels, so this is an opportunity to increase your profit from selling The Irish Times.

(Emphasis in original, Underlining added).

2.32. It is the Authority's view that the underscored statement in The Irish Times' sample notice encourages newspaper retailers to sell at the cover price increase suggested by The Irish Times due to the reference to the profit margins that can be earned by retailers at the new price. This practice, taken together with the discussion on the continued existence of the 1992 agreement, 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.³⁴ 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.³⁵ Costly, lengthy court 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.

³⁴ 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.

³⁵ This does not, of course, preclude the Authority from accepting a party's undertakings in the context of a court order.

3.3. However, in The Irish Times' case, no letter of initiation was sent, as The Irish Times expressed its willingness to address the Authority's competition concerns early in the investigation. The Irish Times was helpful and cooperative throughout the Authority's investigation 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. In June and July 2003, The Irish Times proposed to the Authority certain measures it would undertake to:

- (a) address the situation whereby 40% of its newspaper retailers adhered to the 1992 agreement;
- (b) address the competition issue relating to its "Cover 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. All of these measures have now been complied with. In addition, mechanisms have been put in place to ensure that The Irish Times complies with the undertakings it gives to the Authority.

3.5. The Irish Times proposed inserting into reprinted Standard Terms and Conditions the amended Clause (I) accepted by the Authority in Decision No. 477. A notice of the amended Clause (I) will be issued to all newspaper retailers by way of a message printed on the back of the address label. Where a printed Clause (I) (which The Irish Times asserts it has regarded as inoperative since February 1997) is contained in existing terms and conditions, The Irish Times has also undertaken to inform newspaper retailers to delete it and replace it with the amended Clause (I). The Irish Times also proposed issuing cover price increase notices to newspaper retailers that comply with the Act. The Irish Times has undertaken to amend its cover price increase notices to make it clear that newspaper retailers are free to sell The Irish Times newspapers at whatever price they wish. Further, The Irish Times has undertaken to print on the front page of its newspapers both the Irish and UK prices

stating that these are recommended prices only. The Irish Times has also undertaken to introduce a compliance and training programme with respect to the Act. Finally, The Irish Times 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 The Irish Times allows both newspaper retailers and customers to potentially benefit from price competition in the resale of *The Irish Times* newspaper. 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 The Irish Times, 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 The Irish Times is in compliance with the terms of the assurances made by it to the Authority, the Authority shall discontinue its investigation as it relates to the Irish Times 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

Box 1: Summary of Undertakings given by The Irish Times Limited to the Competition Authority in relation to its investigation into possible Resale Price Maintenance practices by The Irish Times in the Newspaper Industry

1. The Irish Times Limited has undertaken to immediately implement the following measures:
 - a. Clause I will be inserted into reprinted Standard Terms and Conditions. This Clause – which is the same as that accepted by the Authority in its Decision No. 477 of 11th March 1997 – will read as follows:

“The Irish Times shall have the power to recommend a price at which the Newspapers are sold by the Newsagent. However the Newsagent is free at all times to set its own price.”
 - b. Notice of the amended Clause I will be given to all newsagents receiving deliveries of The Irish Times by way of a message printed on the back of the address label. The notice will read as follows:

“Following discussions between The Irish Times Limited and the Competition Authority, you should note that a new Clause I is to be inserted into our Standard Terms and Conditions as follows:
“I. The Irish Times shall have the power to recommend a price at which the Newspapers are to be sold by the Newsagent. However, the Newsagent is free at all times to set its own price.”
Where a printed Clause I (which The Irish Times Limited has regarded as inoperative since February 1997) is contained in existing Terms and Conditions, it is to be struck out and replaced by the above Clause.”
 - c. The Irish Times Limited will make it clear in any notices on price increases that it circulates to its newsagents that the newsagent is free to sell the title at whatever price that newsagent wishes. 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.
 - d. The Irish Times Limited will state the price of The Irish Times together with a reference to the fact that this is a “recommended retail price” on the bottom of the front page of its newspapers.
2. The Irish Times Limited will send a copy of the amended standard terms and conditions as soon as these have been printed and the message printed on the back of the address label to the Competition Authority at the same time as these labels are sent to individual newsagents. The first notice on price increases circulated to newsagents will also be copied to the Competition Authority.
3. The Irish Times Limited will provide information to the Authority regarding what steps it will take to ensure that The Irish Times Limited, its directors, officers, servants and agents comply with the Act. This programme was implemented in September 2003.
4. The Irish Times will provide information, from time to time, as may reasonably be required by the Authority regarding compliance with its commitments going forward.