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Competition Authority Guidance Note:

Refusal to Supply

December 2005

The Competition Authority
An tÚdarás Iomaíochta

FOREWORD

Annually the Authority receives a large volume of refusal to supply complaints. In some instances the complainant has had their supply cut off; in other instances the attempt to start supply has been unsuccessful. Only a small proportion of these complaints merit investigation by the Authority since the vast majority do not raise concerns of anti-competitive behaviour.

The purpose of this booklet is threefold.

- *First*, to provide guidance to those making complaints so as to improve the quality of the complaints.
- *Second,* to assist businesses and others comply with competition law.
- *Third,* to ensure maximum transparency concerning the way in which the Authority conducts its business.

If these objectives are met then competition law will be more efficiently and effectively enforced in the State. Markets will work better for consumers.

This Note is intended only as a guide and is not legally binding. Under Section 14 of the Competition Act, 2002, any party aggrieved by anti-competitive behaviour has a right to take action in the courts to obtain an injunction, declaratory relief and/or damages, including exemplary damages. The Competition Authority cannot provide advice on such actions, and you should consult your own solicitor if you wish to consider such a course.

Dr. Paul K Gorecki
Member and Director
Monopolies Division
Competition Authority

INTRODUCTION

Each year the Competition Authority ("the Authority") receives numerous complaints about refusals to supply – approximately one in ten of all complaints fall under this heading. These complaints, however, usually merit little or no action. The refusal to supply in question may arise from a dispute between a seller and a buyer with no implications for competition. Even where competition is affected, the effect is often neutral or pro-competitive, rather than distorting competition and thus harming consumers.

This booklet gives guidance to Irish consumers and businesses so that they may better understand and evaluate when a refusal to supply is likely to raise concerns under the Competition Act, 2002 ("the Act"). It is intended to assist firms who may experience difficulties in obtaining supplies of products or services to decide whether or not they may have legitimate grounds to make a complaint to the Authority and to provide the relevant information that the Authority requires in order to assess such a complaint. It is also designed to give firms guidance on their obligations under the Act.

THE COMPETITION ACT, 2002

Two provisions in Irish competition law relate to refusal to supply:

- Section 4 of the Act prohibits arrangements between firms that have as their object or effect the prevention, restriction or distortion of competition; and,

- Section 5, by contrast, prohibits the abuse of a dominant position by a single firm.

Section 4 is concerned with co-ordinated behaviour by firms. Section 5 unilateral behaviour by firms. While the Act imposes obligations on businesses not to engage in such behaviour, it can also benefit businesses as it provides protection against such anti-competitive behaviour. Under the Act firms or businesses are referred to as "undertakings."[1]

The investigation and enforcement of Sections 4 and 5 in relation to refusal to supply can be public or private:

- The Authority is responsible for public enforcement of the provisions of the Act by investigating and, where appropriate, bringing court proceedings in respect of alleged breaches of competition law. The Act provides the Authority with various investigative powers, such as issuing summons to witnesses to appear before it and present specified documentation.

- The Act allows private enforcement by any person or business that is a victim of anti-competitive behaviour to seek an injunction or declaration and/or damages, including exemplary damages. Such an action must be brought either in the High Court or in the Circuit Court.

Articles 81 and 82 of the Treaty establishing the European Community – upon which Sections 4 and 5 of the Act are modelled – apply if a refusal to supply affects trade between Member States. EU law treats restrictions on passive sales particularly seriously. (Example #4 below provides an illustrative example and definition). Apart from this, EU law has little practical relevance at the stage of making a complaint to the Authority concerning a refusal to supply.

Annex 1 presents the complete text of Sections 4 and 5 of the Act. Annex 2 contains references to a number of Authority and Commission documents that provide additional guidance. For more information about the Act and the Authority, please see the Authority's website at www.tca.ie.

[1] The definition of an undertaking also refers to not for profit organisations such as charities as well as semi state bodies such as Vhi Healthcare.

IS REFUSAL TO SUPPLY MERELY A DISPUTE BETWEEN A SELLER AND A BUYER?

A refusal to supply does not necessarily constitute a breach of the Act. In general firms should be able to contract with parties of their choice; there is no compulsory requirement under law for a firm to supply.

The Authority frequently receives complaints of alleged breaches of the Act, which, on examination, are disputes between a seller and a buyer that do not raise competition concerns.

Firms may refuse to supply for all sorts of legitimate business reasons (e.g., non-payment for goods, unauthorised altering of goods, non-compliance with the firm's criteria for selective distribution, shortage of stocks, supply has been disrupted, etc.). In these situations, the refusal to supply may be a commercial dispute and, as such, would fall outside the remit of the Act.

Firms may also refuse to supply for other reasons that do not appear to have a commercial or business rationale (e.g., I would rather Steve handle my Dublin distribution than Mary because I was on the debating team with him). Again these refusals to sell reflecting the views/tastes of the supplier would likely fall outside the remit of the Act.

Consideration may, however, need to be given to whether or not the stated reason for refusal to supply may in fact be a ruse or an excuse. In other words, the underlying reason - e.g., to eliminate a retailer competing vigorously on price - may raise competition issues. If this is the case, then attention should be directed to determining whether Section 4 or Section 5 of the Act has been breached. In other words, the Authority is only concerned with whether or not the refusal to supply has an effect on competition.

EXAMPLE #1: Refusal to Supply—A Contractual Dispute

Pat Murphy who operates a small convenience store has been getting his supply of wrapping paper from the Acme Company. Unfortunately, Pat has not been paying his bills and the Acme Company refuses to provide any more wrapping paper to him until he pays his outstanding bill.

While the Acme Company's actions constitute a refusal to supply, it is unlikely that its actions are a violation of the Act because of Pat's failure to pay his bills. As such, because Acme Company actions would appear to represent only a contractual dispute with Pat's store, this matter would fall outside the ambit of the Act.

SECTION 4: AN AGREEMENT OR CONCERTED PRACTICE

In order for a refusal to supply to infringe Section 4(1) of the Act, the refusal must be based on an agreement or concerted practice between two or more entities (i.e., there must either be an agreement between the suppliers and/or the wholesalers/retailers of the products or services in question or between a supplier and at least one of its customers not to supply another party). Further, the agreement must prevent, restrict, or distort competition.

Suppose for example that competing manufacturers agree to fix the price at both the wholesale and the retail level of a particular product or service. However, one retailer decides to reduce the price to gain more business. The participants to the agreement fear such discounting may undermine the agreed-upon pricing structure and the manufacturer stops supply. The price cutter is made aware that it will receive no further supplies unless and until it agrees to restore the price level. In such an instance the agreement amongst competitors to refuse supply to the price cutter will be likely to breach Section 4(1) of the Act.

Alternatively, in a local retail market a retailer may reduce price as a competitive weapon. Other retailers experience a loss of business and profitability. Instead of meeting the competitive threat, these retailers meet and agree to bring "pressure" on the retailer that discounts its price by requesting that their common supplier no longer provide the good or service in question to the discounting retailer. The agreement amongst the retailers to request the refusal to supply would be likely to be a breach of Section 4(1) of the Act.

In both of the previous examples, each of the refusals to supply was a horizontal agreement among competing firms at the same level in the production/distribution chain – one at the manufacturing and one at the retail level. Refusals to sell may also be the result of vertical agreements between firms at different stages in this chain. For example, a manufacturer may have agreements with a series of distributors that support a restricted price structure and/or restricted sales terrorities. Should one of the distributors begin cutting price or selling in another distributor's territory, then the manufacturer may refuse to supply the "offending" distributor because that would violate the terms of the agreement. Such restrictions on price are more likely to breach the Act than the restrictions on terrorities. Vertical agreements are discussed further below.

In order to be able to prove that the effect of an agreement or concerted practice resulting in a refusal to supply a particular product or service is to prevent, restrict or distort competition, the Authority has to demonstrate in court that under Section 4(1):

- the product or service in question forms part of a separate or distinct market in a given geographical area;
- an agreement between "undertakings", decision by an "association of undertakings" (i.e., several undertakings), or a concerted practice exists; and
- the agreement prevents, restricts or distorts competition. It may distort competition by, for example, reducing price competition or discouraging a new entrant with an innovative product.

If the Authority is successful in demonstrating each of these points, then the parties to the agreement involving a refusal to supply bear the burden of showing that the agreement provides sufficient benefits to enable it to avail of the safe harbour of Section 4(5) of the Act, which is reproduced in Annex 1.

SECTION 5: ABUSE OF A DOMINANT POSITION

Generally, where a refusal to supply is based on a decision by a *single* firm, it is not in breach of Section 5 of the Act unless (a) the firm concerned can be shown to be "dominant" in the relevant market, (b) the refusal can be categorised as an abuse, and (c) there is no objective justification for the refusal.

Dominance occurs where a firm is able to raise price above the competitive level without losing sales to existing rivals and new entrants to make such conduct unprofitable. The Courts have taken the view that a high market share – at least 40% - usually signals "dominance" where it is combined with the absence of any significant competitors and conditions that make it difficult for new firms to enter the market. Under such conditions the Courts consider that a firm is likely to be able to prevent effective competition since it has the power to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers.

"Abuse" in this context means any anti-competitive business practices which the dominant firm may use in order to maintain or increase its dominant position. Competition law prohibits such behaviour as it damages competition between firms, exploits consumers and makes it unnecessary for the dominant firm to compete with other firms on merit. In more extreme situations, a dominant firm may have to justify any refusal to supply where it is the only source for the products/services or where it ceases to supply an existing customer.

EXAMPLE #2—A Refusal to Supply That is Likely to Breach the Act

Doet Chemical Company Ltd. is the sole supplier in Ireland of molykanium, an extremely rare chemical that is used to make an essential drug for sheep, *Tupper*. Ed, Martin, John and Doet Chemical each own a similar sized plant that manufactures the drug.

Doet Chemical decides to discontinue supplying molykanium to Ed, Martin and John. Doet Chemical anticipates declining future sales of its brand of *Tupper* because Ed and Martin are about to introduce a new dosage form (i.e. slow release as opposed to immediate release), while John is developing a new dosage method (i.e. liquid as opposed to tablet or capsule). Doet Chemical is also concerned that the increasing technical sophiscation of Ed, Martin and John might lead them to challenge its monopoly of molykanium.

Doet Chemical informs John, Ed and Martin that, effective immediately, it will no longer sell molykanium to them. Within weeks, John, Ed and Martin go out of business because they cannot make the sheep drug. Sheep farmers are concerned that the introduction of the innovations promised by Doet Chemical's rivals are likely to be delayed.

Could the Doet Chemical's conduct breach the Act? The answer is: "possibly". Although Doet Chemical's actions may appear to have a clear commercial rationale, it is important to note that Doet Chemical occupies a special place in the market because it is the sole supplier of a key ingredient of the sheep drug. It cannot refuse to supply the chemical merely to preserve its market share in a downstream market from more innovative competitors if it is the only supplier of molykanium.

Before a definitive assessment can be made, however, it is necessary to determine whether Doet Chemical is dominant in the market for molykanium. Since Doet Chemical is the only supplier of molykanium in the EU (including

Ireland), there are no close substitutes for molykanium and it is difficult for another undertaking to produce molykanium (e.g., it has patent protection), then Doet Chemical is almost certainly dominant.

Even if Doet Chemical is dominant and its refusal to supply molykanium leads to a significant reduction in competition and new technical development in the downstream market for sheep drugs, it may nevertheless be objectively justified in refusing to supply. However, since in the present case there appear to be no efficiencies to be gained from Doet Chemical's decision, there is unlikely to be any objective justification. If Doet Chemical has no objective justification and it is dominant then its action would be likely to constitute a breach of Section 5.

In a number of cases the European Court of Justice has decided that where a dominant firm refuses to supply an existing customer that may be a competitor in a downstream market, resulting in that customer being eliminated from the market, the refusal to supply will amount to an abuse of a dominant position if there is no objective justification. Example #2 above describes this situation, while Example #3 below provides an example where refusal to supply by a dominant firm is objectively justified.

EXAMPLE #3: A Refusal to Supply that is Objectively Justified

Ann Murphy runs a news agency on the main street in a town on the small island of Ballybeg. Her store is approximately one kilometre away from a branch of the Bank of Ballybeg, the only bank allowed to operate on the island by law. She has applied to the bank to install an automated teller machine, or ATM, in her store.

Bill, the president of the Bank of Ballybeg, reviews Ann's request. He looks at the bank's operations manual, which includes a section on where to place ATMs. Based on the written criteria set forth in the manual, he determines that the area around the bank branch is already sufficiently well serviced with ATMs. According to the criteria, which are based on internationally accepted norms, if an additional ATM were added to the local area, then the average volume of transactions would fall below that necessary to justify the investment. He then writes Ann a letter stating that the Bank of Ballybeg has rejected her request because of the bank's criteria on the location of ATMs.

It is unlikely that this is a violation of the Act. Bank of Ballybeg applies clear, transparent and internationally accepted criteria in a non-discriminatory manner to the placement of ATMs. Although it is the only supplier of ATMs on the island of Ballybeg, the bank's refusal to supply Ann's store with an ATM appears to be objectively justified.

Refusals to supply that result in a division of the EU market, especially along the borders of EU Member States, have been consistently prohibited by the Commission and the European Courts.[2] Example #4 describes such an instance.

EXAMPLE #4: A Refusal to Supply that Divides the EU Market

Heinrich Laser Surgical Equipment Ltd., a UK company that manufactures laser tools used for plastic surgery, has one distributor in Ireland, McCarthy's Medical Suppliers. In their distribution agreement, Heinrich Laser requires McCarthy's to restrict its sales only to medical doctors with their practice located in Ireland. Heinrich Laser has similar arrangements with all of its other distributors in the EU.

Dr. Ingquist, a plastic surgeon whose practice is located in Stockholm, Sweden, is visiting Galway during a medical conference and stops in McCarthy's Medical Suppliers. In the showroom, he sees a laser scalpel that he has been wanting for his office and decides to buy it because it is significantly cheaper at McCarthy's than at the Heinrich Laser distributor in Stockholm. However, when he gives his Stockholm address to the clerk at McCarthy's, she tells him "We can't sell to you! You don't live in Ireland. If we sell to you, the manufacturer is going to cut us off, just like they did last year."

Does Heinrich Laser's distribution agreement with McCarthy's violate the Act? It probably does violate EU competition law, which is based both on competition and single market concerns.[3] The distribution agreement appears to have the express aim of blocking sales outside of a distributor's country. Specifically, the agreement involves a restriction on "passive sales" (e.g., where a manufacturer prohibits its dealers from taking sales initiated by customers located outside the authorised region). Restrictions on "passive sales" are typically void under the Act and EU law.

Individual suppliers sometimes refuse to supply in retaliation against price discounting by a customer or seek to impose a requirement on resellers to adhere to a specific price or do not go below a minimum retail price as a condition of supply.[4] Such refusals may be illegal under the Act.

To prove that a supplier of a particular product or service has breached Section 5 of the Act, the Authority has to demonstrate in court that:

- the product or service in question forms part of a separate or distinct market in a given geographic area;
- The supplier is dominant with respect to the product or service.
- The supplier has abused its dominant position by refusing to supply the product or service.

The discussion above defined the terms "dominant" and "abuse".

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[2] Behaviour of this kind is also likely to be examined under Article 81 of the Treaty.

[3] Under the Act the only concerns would be competition concerns.

[4] While suppliers may recommend prices, they are prohibited to prevent resellers setting their own prices, a practice, which is referred to as "resale price maintenance." Indeed, by agreeing to adhere to a supplier's prices, a reseller may be party to an anti-competitive agreement.

If the Authority successfully demonstrates these conditions to the court's satisfaction, then the burden shifts to the supplier of the product or service to demonstrate that its conduct can be objectively justified.

VERTICAL RESTRAINTS

The term "vertical restraints" refers to agreements between a supplier, usually a manufacturer, and a retailer, that in some way restrict the ability of the retailer to compete (e.g., in the geographic area in which they can sell). Vertical agreements may also specify certain objective criteria on which retailers are selected by the supplier. Failure to abide by any such restraint or meet the criteria can result in the supplier ceasing to supply an existing retailer and/or refusing to supply a new retailer.

There are several grounds on which a vertical restraint in an agreement may be pro-competition and pro-consumer and thus not a breach of Sections 4 or 5. For example, if a supplier of a complex product or service – e.g., a camera or a computer - requires the provision of extensive consumer advice and information so that the consumer can make an informed choice, the supplier may decide to limit supply to a series of mutually exclusive territories in order to ensure that the necessary advice is provided. The alternative - supply to all - may result in under-provision of the necessary advice. Each retailer may rely on other retailers to provide the advice while, at the same time, lowering price. Consumers would get their information and advice from the higher-priced advice providing retailer, but purchase the good or service from the lower-priced non-advice providing retailer.

Extensive guidance on what is permissible under various categories of vertical agreements is set out in the EU and Irish documents (in Annex 2). In this section, two forms of vertical restraints (exclusive distribution and selective distribution) are discussed.

Exclusive Distribution. European and Irish competition law permit the exclusive distribution of goods or services for a specific use or for resale, provided certain conditions are met, on the grounds that the benefits of such agreements outweigh any anti-competitive features. The main feature of such agreements is that the manufacturer or supplier agrees to supply certain goods or services to only one party, the exclusive distributor, within a defined territory, and no other party will be supplied with the goods or services within that area by the supplier.

EXAMPLE #6: Refusal to Supply and Exclusive Distribution Agreements

A manufacturer of agricultural fencing with 30% of the Irish market has two authorised dealers to service Ireland: one dealer services the eastern half of the country whereas the other services the western half. The manufacturer's agreements with the two dealers stipulate that the dealers must sell only within their respective territories.

These agreements must be looked at carefully because the manufacturer's market share is higher than the 15% threshold. For example, if the manufacturer prohibits "passive sales" or restricts the retailer's ability to set the resale price independently, the exclusive distribution agreements may breach the Act.

The Authority's *Notice in Respect of Vertical Agreements and Concerted Practices*[5], Decision No. N/03/002 ("the Notice"), effective as of 1st January 2004, revises its previous approach to make it consistent with the EU approach. Specifically, the Notice states that exclusive distribution agreements do not generally contravene Section 4 of the Act provided that neither party to the agreement has a share in excess of 15% of the relevant market. Economic analysis suggests that, if the parties to the agreement have a large market share, such *non-price* vertical agreements are more likely to have anti-competitive effects and may therefore contravene Section 4 of the Act. However, each case must be considered on its merits.

Selective distribution. Selective distribution systems are also permitted in certain circumstances under both European and Irish competition law for similar reasons. Under such agreements suppliers may agree to supply only those distributors who satisfy certain criteria. Again the Notice states that where neither the supplier nor the distributor has more than 15% of the relevant market such arrangements are generally permitted.

EXAMPLE #7:Refusal to Supply and Selective Distribution

A camera manufacturer with an 11% market share in Ireland has "authorised dealers" at camera shops throughout the country. The camera manufacturer will supply only to shops that have authorised dealers who have attended a special course designed to educate salespeople about the intricacies of the camera so as to ensure an appropriate level of service to the consumer. Because neither the manufacturer nor the camera shops have a market share of 15%, there is unlikely to be a problem with such an arrangement under the Act.

[5] The Notice may be accessed on the Authority's website at http://www.tca.ie/notices.html.

THE AUTHORITY'S APPROACH TO REFUSAL TO SUPPLY COMPLAINTS

The purpose of the Act is to prevent harm to consumers by removing restrictions on competition. It is this standard or test that the Authority applies in assessing whether or not a refusal to supply breaches the Act.

The purpose is not therefore to shield firms from more efficient or innovative rivals. Nor is it designed to protect or promote the interests of certain groupings such as small and medium sized businesses. It is, in short, intended to ensure that markets work well for consumers.

In applying this approach the Authority examines whether or not there is evidence in the relevant market that buyers are or could be negatively affected. Several illustrative examples are presented above of ways in which refusal to supply can adversely affect the firm subject to the alleged refusal to supply and breach the Act. In several of these examples the refusal has raised prices. This is the strongest evidence of consumer harm. There may, of course, be non-price examples of consumer harm such as reduced innovation or less product variety. (See example #2 above).

Direct evidence of a price increase as a result of the refusal to sell may not always be readily available. Indirect evidence may have to be relied on to infer prices are likely to be higher than they otherwise would be because of the refusal to supply. In the discussion above, under 'Section 4: An Agreement or Concerted Practice', the examples of refusals to supply resulting from an agreement between competitors can be presumed to lead to a price increase.

In approaching a refusal to supply it is essential that there is a plausible and coherent theory of consumer harm that is consistent with the market facts. It is a little like a good detective novel – the theory solving the crime must be consistent with the facts at hand.

WHAT CAN YOU DO IF A SUPPLIER REFUSES TO SUPPLY PRODUCTS OR SERVICES?

As already stated a refusal to supply is not necessarily in breach of the Act. It may be that the refusal to supply is merely a dispute between a seller and a buyer in which the Authority has no role. Recourse to legal advice, the courts or some other form of dispute resolution is, in such circumstances, a more appropriate route to take. The Authority's function is to uphold the law, not to take sides in or serve as referee for commercial disputes. If, however, there are grounds for believing that the refusal to supply constitutes a breach of the Act then making a complaint to the Authority in respect of such behaviour may be appropriate.

If you make a complaint to the Authority, you should provide as much relevant information as possible regarding your complaint to assist the Authority in deciding whether there is a possible breach of the Act. In that regard, the following information would be helpful to include with your complaint:

- Name and address of firm which has refused to supply you.
- The product or service that has been refused.
- Name and titles of individuals in the company you have dealt with.
- Has the supplier/distributor previously supplied you with the products or services in question?
- Does the supplier/distributor supply you with any other products or services?
- Any reasons given for the refusal to supply the products or services. Please be as specific as possible in this regard. Give details of meetings or phone calls, if any. Please furnish copies of any correspondence.
- What have you done to try to remedy the problem yourself?
- Do you stock /sell competing brands?
- How important is the particular brand/product to your business? Do, for example, consumers ask for this brand by name? Do you heavily promote the brand through, for example, advertising?
- Has the supplier/distributor sought to make supply conditional on your agreeing to sell at a specific price?
- Details of other resellers in your locality who are being supplied,
- Is there an exclusive distribution arrangement in place for the particular products or services?
- Is there a selective distribution arrangement in place for the particular products or services?
- Is the supplier/distributor in question the only source for the products or

services in the Republic of Ireland?

- Also, are there other suppliers/distributors outside the Republic of Ireland, but within the EU, from whom suitable alternatives could be obtained?

- Details of any other resellers who have been refused supplies that you are aware of?

- If you already have an agreement with the supplier, please provide a copy of that agreement.

- Are you aware of the terms and/or conditions of supply by the supplier/distributor or do they supply only a particular number of retailers in a particular area?

WHAT HAPPENS AFTER THE COMPLAINT IS MADE? WHO IS TOLD WHAT, WHEN?

When a complaint is made it is natural that the complainant is interested in the progress and outcome of the complaint. In order to respond to such interest a series of questions and answers are presented below on the basis of frequently asked questions that the Authority receives.

1. How do I make a complaint? The procedure for registering a complaint with the Authority is easy. There are a number of options available, and with our new (optionally) anonymous online complaint form, it really couldn't be easier to register your complaint. You can also register a complaint by phone, fax, email or post.

Email: complaints@tca.ie

Phone: 1890 220 224 (intl.: +353-1-8045400)

Fax: +353-1-8045401

Written Complaints:

The Competition Authority,

Parnell House,

14 Parnell Square,

Dublin 1.

2. How does the Authority evaluate my complaint? The Authority has a three stage Complaints Screening System:

(i) Screening: - involves weekly screening of all complaints received. The object at this stage is to determine the validity or otherwise of the complaint, disposing directly of those that do not disclose a competition issue or an offence, and referring on to the next stage those that require further scrutiny.

(ii) Evaluation: - involves additional work to decide whether or not to progress to an investigation. Evaluation may involve background research, for example in the Companies Registration Office, taking formal statements from complainants and so on. The object is to identify cases suitable for investigation and efficiently close all others.

(iii) Investigation: - initiate an investigation, which could lead to court proceedings.

In 2003 of 200 complaints received, only 5 led to investigations. Moreover, 86% did not progress beyond the screening stage.

3. Does a complainant have a right to pursue a private action whether or not he/she has lodged a complaint to the Authority? Yes. Under Section 14 of the Act, there is provision for private action against what may be perceived as anti-competitive behaviour. You should consult a competition expert.

4. Will the Authority advise me as to my chance of success if I decide to take a private action? No. The Authority does not offer advice to complainants as to whether they have a cause of action under Section 14. You should not treat making a complaint to the Authority as a substitute for considering or pursuing any private remedies, which may be open to you.

5. Can I get information on the progress of a complaint? No. The Authority will not comment on either the progress of a complaint or indeed whether or not any complaint has been made. The Authority may or may not decide to pursue a particular complaint. The Authority will notify the complainant to acknowledge receipt of a complaint; and occasionally the Authority will contact the complainant to seek more information. The Authority will notify the complainant when the case is being closed. Any court proceedings taken by the Authority will be a matter of public record and will be freely accessible to the complainant.

6. When should I contact the Authority? You should contact the Competition Authority when you think you may have identified anti-competitive behaviour. An aggrieved party who has made a complaint to the Authority still has the right to take a private action under Section 14 of the Act if they wish. However, an aggrieved party should not treat making a complaint to the Authority as a substitute for considering or pursuing any private remedies, which may be open to them.

7. If someone makes a complaint against my firm/company will I be notified? No. The Authority does not comment on whether a complaint has been made. In the course of an investigation a firm is likely to learn it is being investigated. However, if the complaint is found to be without substance or the allegations are not anti-competitive there is a good chance a firm will never learn that a complaint was made against it.

8. How long will it take for the Authority to deal with my complaint? There is no way to determine in advance how long it will take before the Authority feels that it can conclude its examination into a complaint. If the Authority takes the view on foot of its assessment of your complaint that there is reason to believe that there has been a breach of the Act, then it will take longer to resolve the matter than where the Authority does not believe that there is any basis for your complaint under competition law.

9. What could I do to resolve the matter for myself? The Authority cannot give legal advice to members of the public. If the matter you are complaining about affects your commercial position, then you should seek independent expert advice in taking any decisions. You should not make your commercial decisions on the basis of what you believe the Authority may or may not do. The complainant retains at all times his/her own private right of action under the Act.

10. Will the Authority be able to get the result that I want? The Authority is charged with examining the details of any complaint received by it from the perspective of the Act and resolving a matter in the best interests of consumers as a whole. The Authority does not act on behalf of the complainant. It will determine the resolution that it feels is best - this will not always coincide with the remedy sought by a complainant. There are a number of resolution techniques at the Authority's disposal - the Authority will make its decision as to what technique to use and ultimately what resolution to seek in the interests of protecting the competitive process and consumers. Complainants should bear in mind that they retain at all times their own private right of action under the Act.

ANNEX 1: RELEVANT PROVISIONS OF THE COMPETITION ACT, 2002

Anti-competitive agreements, decisions and concerted practices

Section 4 (1):

Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which -

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

Section 4(2):

An agreement, decision or concerted practice shall not be prohibited under *subsection (1)* if it complies with the conditions referred to in *subsection (5)* or falls within a category of agreements, decisions or concerted practices the subject of a declaration for the time being in force under *subsection (3)*.

Section 4 (3):

The Authority may declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with the conditions referred to in subsection (5); such a declaration may be revoked by the Authority if it becomes of the opinion that the category no longer complies with these conditions.

Section 4 (4)

The Authority shall publish, in such manner as it thinks fit, notice of the making of a declaration under *subsection (3)*, any of any revocation by it of such declaration.

Section 4 (5)

The conditions mentioned in *subsections (2)* and *(3)* are that the agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not -

(i) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives;
(ii) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Abuse of a dominant position

Section 5 (1):

Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in a substantial part of the State is prohibited.

Section 5(2)

Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in-

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
b) limiting production, markets or technical development to the prejudice of consumers,
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
d) making the conclusion of contracts subject to the 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.

ANNEX 2: RELATED DOCUMENTS

This booklet should be read in conjunction with the following related documents:

- The Authority's Notice in Respect of Vertical Agreements and Concerted Practices, Decision No. N/03/002. (http://www.tca.ie/notices.html)
- Commission Guidelines on Vertical Restraints[6] OJ [2000] C291/1. (http://www.europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#iii_1)
- The Authority's Declaration in Respect of Vertical Agreements and Concerted Practices, Decision No. D/03/001. (www.tca.ie/declarations.html)
- Commission Regulation (EC) No. 2790/99 on the application of Article 81(3) of the Treaty to Vertical Agreements and Concerted Practices[7], OJ [1999], L336/21. (http://www.europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#iii_1)
- Commission Notice on the definition of the relevant market for the purpose of Community competition law (97/C 372/03, December 1997).

[6] Title II of the EU Guidelines sets out the types of vertical agreements that the Commission considers generally fall outside Article 81(1) EC. Title II of the EU Guidelines differs in some respects from the Authority's Notice. It should be remembered, however, that where variations or divergences occur the Notice should ultimately be relied upon for guidance.

[7] Regulation 2790/99 applies to those vertical agreements falling within the scope of application of Article 81(1) EC but which may benefit from exemption under Article 81(3).