

Declaration in Respect of Vertical Agreements and Concerted Practices

Decision No. D/23/001

Date: 1 March 2023



Comisiún um
Iomparáid agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

Declaration in Respect of Vertical Agreements and Concerted Practices

Whereas:

- (i) Section 4(1) of the Competition Act 2002, as amended, (the “Act”) prohibits 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;
- (ii) Section 4(3) of the Act permits the Competition and Consumer Protection Commission (the “CCPC”) to declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with the conditions referred to in section 4(5) of the Act;
- (iii) The conditions referred to in section 4(5) of the Act are that the agreements, decisions or concerted practices, having regard to all relevant market conditions, contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and do not
 - (a) impose on the undertakings concerned terms which are not indispensable to the attainment of these objectives,
 - (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question;
- (iv) Section 4(2) of the Act provides that an agreement, decision or concerted practice shall not be prohibited under section 4(1) of the Act if it falls within a category of agreements, decisions or concerted practices the subject of a declaration for the time being in force under section 4(3) of the Act; and

- (v) Section 4(3) of the Act further provides that any such declaration may be revoked by the CCPC if it later forms the opinion that the category no longer complies with those conditions.

PURSUANT TO SECTION 4(3) OF THE COMPETITION ACT 2002, AS AMENDED, THE COMPETITION AND CONSUMER PROTECTION COMMISSION HEREBY DECLARES:

Article 1

1. For the purposes of this Declaration:
 - (a) The “Act” means the Competition Act 2002, as amended;
 - (b) “actual competitor” means an undertaking that is active on the same relevant market;
 - (c) “active sales” means actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established;
 - (d) “buyer” includes an undertaking which, under an agreement falling within section 4(1) of the Act, sells goods or services on behalf of another undertaking;
 - (e) “CCPC” means the Competition and Consumer Protection Commission and its successors;
 - (f) “competing undertaking” means an actual competitor or potential competitor;
 - (g) “connected undertakings” means:
 - (i) undertakings in which a party to the agreement, directly or indirectly:

- has the power to exercise more than half the voting rights, or
 - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - has the right to manage the undertaking's affairs;
- (ii) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (i); or
- (iii) undertakings in which an undertaking referred to in (ii) has, directly or indirectly, the rights or powers listed in (i); or
- (iv) undertakings in which a party to the agreement, together with one or more of the undertakings referred to in (i), (ii) or (iii), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (i); or
- (v) undertakings in which the rights or the powers listed in (i) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (i) to (iv), or
 - one or more of the parties to the agreement or one or more of their connected undertakings referred to in (i) to (iv) and one or more third parties.
- (h) “customer of the buyer” means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.
- (i) “exclusive distribution system” means a distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group;

- (j) “intellectual property rights” includes industrial property rights, know-how, copyright and neighbouring rights;
- (k) “know-how” means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, ‘secret’ means that the know-how is not generally known or easily accessible; ‘substantial’ means that the knowhow is significant and useful to the buyer for the use, sale or resale of the contract goods or services; ‘identified’ means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (l) “non-compete obligation” means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell, or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;
- (m) “online intermediation services” means information society services within the meaning of Article 1(1), point (b), of Directive (EU) 2015/1535 of the European Parliament and of the Council¹ which allow undertakings to offer goods or services:
 - i to other undertakings, with a view to facilitating the initiating of direct transactions between those undertakings; or

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241/1.

- ii to final consumers, with a view to facilitating the initiating of direct transactions between those undertakings, and final consumers irrespective of whether and where the transactions are ultimately concluded.
- (n) “passive sales” means sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender;
- (o) “potential competitor” means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility be likely, within a short period of time, to make the necessary additional investments or incur other necessary costs to enter the relevant market;
- (p) “selective distribution system” means a distribution system whereby the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;
- (q) “supplier” includes an undertaking that provides online intermediation services;
- (r) “vertical agreement” means an agreement or concerted practice between two or more undertakings each of which operates, for the purposes of the agreement or concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(s) “vertical restraint” means a restriction of competition in a vertical agreement falling within the scope of section 4 of the Act;

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

Article 2

In the CCPC’s opinion, vertical agreements of the kind referred to in Article 3 of this Declaration comply with the conditions referred to in section 4(5) of the Act to the extent that such agreements contain vertical restraints which would otherwise be prohibited by section 4(1) of the Act.

Article 3

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

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

(a) the supplier is active at an upstream level as a manufacturer, importer, or wholesaler and at a downstream level as an importer, wholesaler or retailer of goods, while the buyer is an importer, wholesaler, or retailer at the downstream level and not a competing undertaking at the upstream level where it buys the contract goods; or

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

3. The exceptions set out in paragraph 2(a) and (b) shall not apply to the exchange of information between the supplier and the buyer that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions.

4. The exceptions set out in paragraph 2(a) and (b), shall not apply to vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is a competing undertaking on the relevant market for the sale of intermediated goods and services.

5. Subject to paragraph 2, this Declaration applies on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

6. For the purposes of paragraph 5, where in a multi-party agreement an undertaking buys the contract goods or services from one undertaking that is a party to the agreement and sells the contract goods or services to another undertaking that is a party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for this Declaration to apply.

Article 4

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

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

- (a) the restriction of the buyer's ability to determine its sale price. This does not affect the ability of suppliers to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) where the supplier operates an exclusive distribution system, the restriction of the territory into which, or of the customers to whom, the exclusive distributor may actively or passively sell the contract goods or services, except:
 - (i) the restriction of active sales by the exclusive distributor and its direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors;
 - (ii) the restriction of active or passive sales by the exclusive distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services;
 - (iii) the restriction of the exclusive distributor's place of establishment;
 - (iv) the restriction of active or passive sales to end users by an exclusive distributor operating at the wholesale level of trade;
 - (v) the restriction of the exclusive distributor's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) where the supplier operates a selective distribution system:

- (i) restriction of the territory into which, or of the customers to whom, the members of the selective distribution system may actively or the passively sell the contract goods or services, except:
 - 1 the restriction of active sales by the members of the selective distribution system and their direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors;
 - 2 the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised distributors located within the territory where the selective distribution system is operated;
 - 3 the restriction of the place of establishment of the members of the selective distribution system;
 - 4 the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level of trade;
 - 5 the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (ii) the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade;
- (iii) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, without prejudice to points (c)(i)(1) and (3);

- (d) where the supplier operates neither an exclusive distribution system nor a selective distribution system, the restriction of the territory into which, or of the customers to whom, the buyer may actively or passively sell the contract goods or services, except:
 - (i) the restriction of active sales by the buyer and its direct customers into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors;
 - (ii) the restriction of active or passive sales by the buyer and its customers to unauthorised distributors located in the territory where the supplier operates a selective distribution system for the contract goods or services;
 - (iii) the restriction of the buyer's place of establishment;
 - (iv) the restriction of active or passive sales to end users by a buyer operating at the wholesale level of trade;
 - (v) the restriction of the buyer's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (e) the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customer to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer:
 - (i) other restrictions of online sales; or
 - (ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel;

- (f) the restriction, agreed between the supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end users or to repairers, wholesalers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5

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

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

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

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

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

Paragraph 1(b) shall be without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain and this Declaration will apply in such cases.

Article 6

1. The CCPC may withdraw the benefit of the Declaration where it finds in any particular case that a vertical agreement to which the exemption provided for in Article 3 of this Declaration applies nevertheless has effects which are incompatible with section 4(3) of the Act. Such effects may occur, for example, where the relevant market for the supply of online intermediation services is highly concentrated and competition between the providers of such services is restricted by the cumulative effect of parallel networks of similar agreements that restrict buyers of the online intermediation services from offering, selling or reselling goods or services to end users under more favourable conditions on their direct sales channels.

2. For the purposes of applying the market share thresholds provided for in Article 3(5), the following rules shall apply:

- (a) the market share of the supplier shall be calculated on the basis of the market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other

reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;

- (b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;
- (c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;
- (d) if the market share is initially not more than 30% but subsequently rises above that level, this Declaration shall continue to apply for a period of two consecutive calendar years following the year in which the 30% threshold was first exceeded;
- (e) the market share held by the undertakings referred to in Article 2(3), second subparagraph, point (e) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph.

Article 7

Existing agreements and concerted practices which:

- (a) comply with the CCPC's Declaration in Respect of Vertical Agreements and Concerted Practices (Decision No. D/10/001 dated 1 December 2010 and amended 30 November 2022, the "2010 Declaration")¹; and
- (b) were entered into prior to 1 March 2023;

shall continue to benefit from the 2010 Declaration in respect of agreements between suppliers and resellers until 31 May 2023.

¹ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/11/Extended-Declaration.pdf>

Article 8

1. The CCPC may amend this Declaration from time to time, including in particular by excluding a particular category of goods or services from its scope, where in the CCPC's opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50% of a relevant market.
2. This Declaration shall enter into force on 1 March 2023, and shall expire on 31 December 2034.

For the Competition and Consumer Protection Commission



Brian McHugh
Member
Competition and Consumer Protection Commission

1 March 2023

