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## Pay-TV exclusivity in apartment developments

### Guidance to residents

August 2009



**The Competition Authority**  
 An tÚdarás Iomáíochta

## **Purpose of this document**

The Competition Authority has received a large number of complaints from members of the public concerning pay-TV exclusivity in apartment developments. These complaints generally concern poor channel choice, poor customer care, the cost of service provision, and, in particular, the inability to switch to another service provider.

The Competition Authority has published an Enforcement Decision which details its findings and the reasoning underpinning its conclusions with respect to the applicability of the Competition Act 2002 to pay-TV in Ireland. Developers and pay-TV infrastructure providers need to ensure that any agreements they enter into avoid breaching either section 4 or section 5 of the Competition Act 2002.

This Guidance Note has been published as an aid to apartment residents and prospective apartment residents in understanding the legal situation surrounding pay-TV exclusivity. It details the Competition Authority's approach to exclusivity agreements under competition law and answers a number of frequently asked questions which we have encountered. Moreover, the guidance document gives advice on what you as a consumer can do to determine what, if any, restrictions are in place at your apartment development. It also outlines what the Competition Authority is doing to help change the current legal situation for the benefit of consumers.

## **What is at the root of the issue?**

The main concern apartment residents have in relation to pay-TV services is that when they decide they would like to switch away from their current provider – whether due to poor service quality, choice of channels or price – they can find that they are prevented from doing so.

Often, for example, the property developer or the property management company associated with the apartment development has signed a contract with the current supplier to the apartment development which gives them exclusivity over pay-TV services for a number of years. In such situations, consumers are unable to avail of the competition that exists between the different types of pay-TV service providers in Ireland.

## **What can be done under competition law?**

As the Authority's Enforcement Decision indicates, there are many different types of pay-TV arrangements in apartment developments and many pay-TV exclusivity agreements do not breach the Competition Act 2002.

Exclusivity agreements are not in themselves illegal. For example, exclusivity agreements of one or two years' duration are generally unlikely to breach section 4(1) of the Competition Act. This is because it is recognised in competition law that a certain period of exclusivity can be necessary in order to get a provider to invest substantial sums in creating the infrastructure for pay-TV service provision in the apartment development. Where an agreement has been made with a pay-TV service provider that gives them longer than 2 years exclusivity, competition law may be an effective remedy. Such agreements will be assessed by the Competition Authority on a case-by-case basis.

## **What should consumers know?**

One of the factors that has caused significant consumer dissatisfaction in this area is the lack of information available to residents. Consumers are usually unaware of the terms of the contract between the developer and the service provider. In the first instance, prospective apartment buyers should inform themselves about TV services at developments before they commit to purchasing an apartment. Residents should be informed by the management company or agent of their right to choose providers, and developers and service providers should disclose contract terms to the residents who are materially affected.

Residents, or prospective apartment buyers, concerned about TV service exclusivity at their development should assess the feasibility of alternative service provision by asking the following questions of their management company or management agent:

- Has exclusivity been granted to a specific service provider? If so, for how long?
- Has the provider been granted exclusivity only on its own infrastructure, or does it have exclusive rights to be the sole provider of pay-TV services at the development?
- Have spare ducts been installed?
- Is the management company vested in the residents? If not, when will it be?

Residents should be aware that the Department of the Environment, Heritage and Local Government's *Sustainable Urban Planning Guidelines* recommend the provision of communal satellite dishes at roof level on apartment blocks.

Consumers who become aware of agreements containing long periods of exclusivity are encouraged to contact the Competition Authority to report their concerns.

The *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* subject consumer contracts to a test of fairness. Apartment residents could seek legal advice as to whether their contract may contain an unfair term within the meaning of the 1995 Regulations.

## **What about bans on satellite dishes?**

In the vast majority of apartment developments examined by the Competition Authority, there were restrictions on the installation of satellite dishes on the balconies of apartments. These were imposed by the management company, or prohibited within developments as a condition of the resident's contract, and also in compliance with planning restrictions. This restriction is facilitated by virtue of the fact that the external walls of apartments are not owned by residents. Residents should familiarise themselves with the precise restrictions, and the source of the restrictions, in their apartment development.

As a matter of public policy, there is no blanket ban on the installation of satellite dishes in apartment developments. While there may be aesthetic grounds for preventing a proliferation of satellite dishes on apartment balconies, residents should be aware that Planning Guidelines facilitate, and

indeed encourage, the erection of communal satellite dishes in apartment developments.<sup>1</sup> The banning of communal dishes on apartment development rooftops by reference to planning restrictions by developers, management companies or management agents runs contrary to Departmental Guidelines.<sup>2</sup>

### **Can my Management Company help?**

The position of apartment residents will improve only if residents are in a position to themselves effect change. Management companies have an important role to play in this area. Management companies are supposed to be composed of apartment owners, and assuming that residents are unhappy with a particular provider, the management company should be in a position to obtain an alternative provider, following the expiry of the exclusivity period. However, this is often not the case.

In new developments, the management company is generally vested in the property developer or its agent until the last unit is sold, or the development is deemed to be completed. As the management company is not, therefore, vested in the apartment owners, it has no obligation to act on the instructions of the owners. This is a significant flaw in the current system of property management, not only in respect of TV provision, but also in respect of many other common or shared facilities, utilities and amenities. Reports issued recently by the National Consumer Agency,<sup>3</sup> the Office of the Director of Corporate Enforcement<sup>4</sup> and the Law Reform Commission<sup>5</sup> have all recommended changes to current legislation governing management companies. This issue is currently being addressed by the draft *Multi-Unit Developments Bill 2009* and the Competition Authority very much welcomes this legislation.

### **Digital Terrestrial Television (DTT)**

Subscription-based Digital Terrestrial Television (DTT) appears to be a viable future substitute to cable or 'Fibre to the Home' (FTTH) pay-TV services. DTT will replace the current analogue channels, with national rollout of a DTT service due to commence in Autumn 2009 for completion in 2012.

Consumers may avail of a free-to-air service provided by RTÉ, or a range of subscription-based packages provided by *OneVision*. *OneVision* has been

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<sup>1</sup> The *Planning and Development Regulations 2001* indicate that a satellite dish may be exempted from the requirement to have planning permission where it is: no greater than one metre in diameter; Erected below the top of the roof; and not located on, or forward of, the front wall. Planning permission is required in all other cases. The Department of the Environment, Heritage and Local Government has also recommended that – "to avoid subsequent demands for the installation of numerous individual satellite dishes on apartment complexes, developers should be encouraged to consider the potential for locating communal dishes as part of the overall design, e.g. at roof level."

<sup>2</sup> Department of the Environment, Heritage and Local Government, 2007. *Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities*, hereafter "Sustainable Urban Planning Guidelines", available online at <http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownload,15335,en.pdf>, at paragraph 3.10.

<sup>3</sup> National Consumer Agency, 2008. "Buying And Living in a Multi-Unit Development Property in Ireland". Available online at [http://www.consumerproperty.ie/downloads/guide\\_index.html](http://www.consumerproperty.ie/downloads/guide_index.html)

<sup>4</sup> Office of the Director of Corporate Enforcement, 2008. "Company Law Handbook on Residential Property Owners". Available online at [http://www.odce.ie/en/media\\_general\\_publications\\_article.aspx?article=3df9bf5d-21af-4ffe-8dd6-16566e833fab](http://www.odce.ie/en/media_general_publications_article.aspx?article=3df9bf5d-21af-4ffe-8dd6-16566e833fab)

<sup>5</sup> Law Reform Commission, 2008. "Report – Multi-Unit Developments". Available online at <http://www.lawreform.ie/publications/LRC%2090-2008.pdf>

offered three multiplex licenses, each of which is capable of carrying eight to ten "ordinary" channels or six High Definition channels.<sup>6</sup>

DTT has the potential to cause a significant shift in the market by providing an alternative to the need to agree terms on installation and ownership of shared infrastructure in apartment developments. DTT is received by means of a set-top box, initially decoding a signal transmitted from the Three Rock receiver in the Dublin Mountains. National rollout of a DTT signal will take a number of years. While, in theory, householders may access DTT by means of a set-top box alone, it is likely that, in some apartment developments, it will be necessary to install an external aerial or repeater. This would require the assent of the management company. Where this assent was not forthcoming, this might mean that apartment residents are not only unable to access pay DTT services, they would also be unable to access free-to-air DTT services. Consequently, for those developments which require the installation of a common aerial, the installation of DTT may face similar challenges to the installation of other forms of TV service delivery.

### **What can the Competition Authority do?**

In view of the foregoing, the Competition Authority intends to take the following courses of action:

#### **Advocacy Role**

The Competition Authority will continue to advocate in favour of reduced restrictions on competition to the benefit of apartment residents. The Competition Authority is advocating for:

- Timely vesting of management companies in residents; and
- Installation of spare ducting during construction as a matter of course.

Solutions with respect to management companies can also help. Specific consideration should be given, for instance as part of discussions on the *Multi-Unit Developments Bill 2009* to addressing how apartment owners can ensure that their management company can exercise effective control over contracts for pay-TV provision, for instance by ensuring that management companies are vested in residents after a specified period of time has elapsed, rather than when the last apartment is sold.

The publication of the *Multi-Unit Developments Bill 2009* and another bill, the *Property Services (Regulation) Bill 2009*, gives an excellent opportunity to regularise the position of management companies to the benefit of apartment residents. The Competition Authority will continue to advocate in favour of competition and consumer-oriented solutions in these pieces of legislation.

The Department of the Environment, Heritage and Local Government, with the assistance of the Building Regulations Advisory Body, regularly issues general building standards guidance and specific Technical Guidance Documents to ensure that buildings are constructed according to best practice. It might be beneficial to require, within upcoming guidance, that apartment developments should, as a matter of course, have spare ducting installed during the construction phase, in order to facilitate the installation by competing providers of alternative infrastructure.

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<sup>6</sup> *OneVision's* content plans are set out in submissions to the Broadcasting Commission of Ireland, available online at <http://www.bci.ie/DTT/licensing.html>

## Engage with ComReg and the NCA

Sectoral regulators, such as the Commission for Communications Regulation (*ComReg*), which regulates the telecommunications sector, and the National Consumer Agency (NCA), may have an important role to play in this area.

The Competition Authority will continue to work closely with both the NCA and ComReg. Many of the complaints received by the Competition Authority involve consumer protection rather than competition issues. The NCA has published helpful guidance on management companies, and has also placed information on pay-TV providers on its website, advising consumers on access to the Small Claims Court if necessary.<sup>7</sup>

The NCA stresses the importance for consumers of checking the terms and conditions of any contracts they sign, and this would be of particular relevance to prospective apartment residents. It has a dedicated website, [www.consumerproperty.ie](http://www.consumerproperty.ie), which consumers will find helpful, and it has published a number of reports and guidance documents giving useful information to consumers. Consumers should be aware, however, that legislation does not allow the NCA to require the provision of service by multiple providers to apartment developments.

ComReg can require a provider to “*share physical infrastructure with alternative providers*”.<sup>8</sup> This is a route which could be pursued by a service provider who has been refused access to a particular development by the existing exclusive provider and infrastructure owner.

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<sup>7</sup> [http://www.consumerconnect.ie/eng/Get\\_Your\\_Rights/Phones, Broadband + TV/](http://www.consumerconnect.ie/eng/Get_Your_Rights/Phones,_Broadband_+_TV/)

<sup>8</sup> Section 57 of the *Communications Regulation Act 2002*, as amended.

