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**Consultations and discussions regarding peer reviews
on competition law and policy, review of the Model Law,
and studies related to the provisions of the Set
of Principles and Rules**

**Model Law on Competition (2012)
Revised chapter III¹**

¹ This is a revision of document TD/RBP/CONF.7/L.3.

Restrictive agreements or arrangements

I. Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal:

- (a) Agreements fixing prices or other terms of sale, including in international trade;*
- (b) Collusive tendering;*
- (c) Market or customer allocation;*
- (d) Restraints on production or sale, including by quota;*
- (e) Concerted refusals to purchase;*
- (f) Concerted refusal to supply;*
- (g) Collective denial of access to an arrangement, or association, which is crucial to competition.*

II. Authorization or exemption

Practices falling within paragraph I, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit.

Commentaries on Chapter III and alternative approaches in existing legislations

Introduction

1. Chapter III of the Model Law on Competition recommends the prohibition of “restrictive agreements or arrangements.” The article has been drafted based upon Section D, paragraph 3, of The United Nations Set of Principles and Rules on Competition, which reads as follows:

“Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) Agreements fixing prices, including as to exports and imports;*
- (b) Collusive tendering;*
- (c) Market or customer allocation arrangements;*
- (d) Allocation by quota as to sales and production;*
- (e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;*
- (f) Concerted refusal of supplies to potential importers;*

Collective denial of access to an arrangement, or association, which is crucial to competition.”

2. The current wording of Chapter III “agreements between rival or potentially rival firms”, suggests that the prohibition of anti-competitive agreements concerns only horizontal agreements. However, taking into account that many competition legislations prohibit both anti-competitive horizontal and vertical agreements, the commentaries on Chapter III will also deal with vertical agreements.

Agreements or arrangements

3. As opposed to single firm conduct, the prohibition of anti-competitive agreements is concerned with competitive harm which results from collusion or cooperation of two or more independent companies. The interaction between companies is reflected by the notion of an agreement or arrangement. The concept of “agreement” in competition legislation is not necessarily the same as used by the civil law of a country and the term is usually interpreted in a broad way to include all kinds of relevant behaviour.

4. An agreement can take many forms. It can be written or oral, formal or informal. Even with a knowing wink, an agreement can be reached.² A number of competition laws are, therefore, drafted broadly to apply to all forms of agreements. In a similar vein,

² *Esco Corp. v. United States*, 340 F.2D 1000, 1007 (9th Cir. 1965).

competition laws apply to any agreement whether or not it is intended to be legally binding. Often, concerted practices, more informal understandings, can be covered by the prohibition of anti-competitive agreements.

5. Reflecting the fact that trade associations can play a crucial role in forming and maintaining agreements, many competition laws include decisions by trade associations in the definition of an agreement. Alternatively some jurisdictions, for instance the Republic of South Korea and Malawi, have a separate provision to deal with unlawful behaviour conducted by trade associations.

6. It should be noted that an agreement between firms under common ownership or control is generally not covered by the prohibition of anti-competitive agreement. Firms under common ownership or control are considered to form a single economic entity that acts as one single market player. This concept is also reflected in section D, paragraph 3, of the United Nations Set of Principles and Rules on Competition, which states that anti-competitive agreements between enterprises are prohibited, “*except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other*”.

7. As opposed to anti-competitive agreements and concerted practices, the concept of collective or joint dominance may be found in some jurisdictions. The concept involves multiple firms but is intended to deal with oligopolistic behaviour, i.e., parallel behaviour within an oligopoly,³ which lacks any form of agreement or understanding.

Alternative approaches in existing legislation – Notion of Agreement

Country

European Union	“Agreements between undertakings, decisions by associations of undertakings, and concerted practices” (Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)).
India	“Agreement” includes any arrangement or understanding or action in concert, (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable” (Competition Act 2002, Section 2).
Jamaica	“Any agreement, arrangement or understanding whether oral or in writing or whether or not it is intended to be legally enforceable (The Fair Commission Act, Article 2).
South Africa	“An agreement between, concerted practice by, firms or a decision by an association of firms” where an agreement includes “a contract, arrangement or understanding, whether or not legally enforceable” and a concerted practice means “co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement”. (The Competition Act, Article 1).

Source: UNCTAD Handbook on Competition Legislation.

³ Whish, Richard (2009), Competition Law, 6th ed., Oxford University Press.

Distinction between horizontal and vertical agreements

8. Agreements among enterprises are basically of two types, horizontal and vertical. Horizontal agreements are those concluded between competitors, where the term competitor means firms operating at the same functional level of the production or distribution chain to compete for the same customers. An agreement between potentially competing firms can also form a horizontal agreement. Potential competitors are firms that are capable and likely to enter the relevant market and which can put competitive constraints on actual competitors.

9. Vertical agreements are those between enterprises at different functional levels of the production or/and distribution chain. In other words, they are agreements between suppliers and their customers, such as, between manufacturers of components and manufacturers of products incorporating those components, between producers and wholesalers, or between wholesalers and retailers. Particular agreements can have both horizontal and vertical aspects.

10. The main distinction between these two types of agreement is that, while horizontal agreements, specially ones to raise prices and restrict output, are harmful to competition in most cases, vertical agreements usually pose less threat to competition, and may often be beneficial from an efficiency perspective. Based on this finding, many jurisdictions apply different legal standards to the assessment of horizontal and vertical agreements, generally treating horizontal agreements more strictly.

Formulating the prohibition of anti-competitive agreements

11. While most competition laws prohibit both anti-competitive horizontal and vertical agreements, jurisdictions often take different approaches in formulating the prohibition. In many competition law systems, a general provision of anti-competitive agreements covers both horizontal and vertical agreements. For instance in the United States, the competition law contains a broad prohibition of anticompetitive agreements, so that both horizontal and vertical agreements can be challenged under the same prohibition.

12. Alternatively, some competition laws, e.g. in Costa Rica, Indonesia and South Africa, have separate provisions for vertical and horizontal agreements. Furthermore, competition laws can contain general provisions concerning only anticompetitive horizontal agreements, leaving vertical agreements to be covered by a number of individual provisions dealing, for example, with resale price maintenance, exclusive dealing, tying and bundling, etc. It should be noted that, the prohibition of an abuse of dominance can also apply to vertical agreements when one party to the vertical agreement holds a dominant position, and abuses this position by anti-competitive terms and conditions.

13. A related issue is whether to explicitly specify types of prohibited conduct in the law or to draft a broad prohibition covering various forms of anti-competitive agreements. As noted above, some competition laws only contain a broad prohibition against anticompetitive agreements, leaving specific conduct prohibited by the law to be determined through the enforcement practice. While this approach allows for flexibility in the enforcement, it may lack guidance for the public and for competition agencies without strong competition law capacity, especially in young competition regimes where public awareness about the unlawfulness of anticompetitive agreements is relatively low.

14. An alternative is to include a list of examples of prohibited conduct in the prohibition of anticompetitive agreements. Many jurisdictions take an approach where a broad prohibition of anticompetitive agreements is followed by a non-exhaustive list of categories considered as violations. This approach provides a great deal of flexibility, while giving guidance as to enforcement priorities.

Alternative approaches in existing legislation – Formulating the prohibition of anti-competitive agreements

Country

United States	“Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” (The Sherman Act. Section 1)
European Union	<p>“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and which have their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:</p> <p>(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;</p> <p>(b) Limit or control production, markets, technical development, or investment;</p> <p>(c) Share markets or sources of supply;</p> <p>(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;</p> <p>(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.” (Article 101(1) of the Treaty on the Functioning of the European Union (TFEU))</p>
South Africa	<p>“An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a <i>horizontal relationship</i> and if –</p> <p>(b) It involves any of the following restrictive horizontal practices :</p> <p>(i) Directly or indirectly fixing a purchase or selling price or any other trading condition;</p> <p>(ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or</p> <p>(iii) Collusive tendering”</p> <p>“An agreement between parties in a <i>vertical relationship</i> is prohibited if it has the effect of substantially preventing or lessening competition in a market” (Competition Act. Article 4 & 5)</p>
Canada	The Competition Act contains two prohibitions of anti-competitive horizontal agreements: Section 45 specifically prohibits agreements between competitors to fix prices, allocate markets or restrict output which constitute straight-forward restraints of competition, while Section 90.1

Country

prohibits other forms of horizontal agreements where they are likely to substantially prevent or lessen competition.

In addition, the Act contains several provisions that prohibit specific forms of vertical agreements, e.g. resale price maintenance (Section 76), exclusive dealing, tying and market restriction (Section 77).

Source: UNCTAD Handbook on Competition Legislation.

Horizontal anticompetitive agreements

15. Among horizontal agreements, a distinction between so called hard-core cartels and other types of anticompetitive agreements can be useful for setting enforcement priorities and standards of analysis.

16. The agreements which are listed in Chapter III of the UNCTAD Model Law of Competition, constitute so-called hard-core cartels, which have proven to be particularly harmful to competition. It is widely accepted that hard-core cartels are always anticompetitive and that they could be reasonably presumed to be illegal without further inquiry.⁴ For this reason, a large number of competition law regimes prohibit them outright, as *per se* violations of the law or anti-competitive by object.

17. As opposed to hard-core cartels, other types of agreements between competitors may produce some benefits. For example, joint marketing that enables products to reach customers more quickly and efficiently can produce some efficiency gains. However, these types of agreements may also harm competition by reducing the ability or incentive of participating firms to compete independently or by entailing or facilitating anticompetitive agreements between them. The overall effect on competition varies case by case, depending on the nature of agreements and the market circumstances. Therefore these types of potentially anticompetitive agreements require more careful treatment, commonly subject to the rule of reason test under which competition authorities must demonstrate the harmful effect of alleged cartel conduct.

18. Given the recent trend of criminalization of hard-core cartels, the distinction between the two types of horizontal agreements becomes even more important. In some jurisdictions, hard-core cartels are considered to be a criminal offence and punishable by imprisonment, while other types of collaborations between competitors are subject to civil or administrative sanctions.

Hard-core cartels

19. As mentioned earlier, hard-core cartels are anticompetitive agreements between competitors with no other purpose or effect than to raise prices or reduce output. Four types of agreements are generally falling within the definition of hard-core cartels: pricing fixing, output restriction, market allocation and bid rigging.

⁴ The United States Supreme Court has held that “*there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have cause or the business excuse for this use*” (*Northern Pacific Railway Co. v. United States*, 356 US 1 (1958)).

20. Group boycotts by businesses may also fall within an expanded list of hard-core cartels. Chapter III of the Model Law on Competition includes a subcategory of group boycotts as hard-core cartels; concerted refusals to purchase or supply, and collective denial of access to an arrangement, or association, which is crucial to competition.⁵

21. As mentioned earlier, the agreements listed in Chapter III of the Model Law are generally considered as hard-core cartels.

(a) Agreements fixing prices or other terms of sale, including in international trading

22. The Set of Principles and Rules, in paragraph D.3 (a) calls for the prohibition of “agreements fixing prices, including as to exports and imports.” Price fixing is among the most common forms of “hard core” cartel conduct and, is considered as a *per se* violation in many countries.

23. Price fixing involves any agreement among competitors to raise, fix or otherwise maintain the price for a product or service. Price fixing can include agreements to establish a minimum price, to eliminate discounts, or to adopt a standard formula for calculating prices, etc. It also applies to situations where buyers collude in order to determine the maximum prices that they are prepared to pay for primary and intermediate products. Price fixing applies not only to prices, but also to other terms of sale that affect prices to consumers, such as shipping fees, warranties, discount programs, or financing rates.

(b) Collusive tendering

24. Collusive tendering is the way that conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids. Essentially, it relates to a situation where competitors agree in advance who will win the bid and at what price, undermining the very purpose of inviting tenders which is to procure goods or services on the most favourable prices and conditions.

25. Collusive tendering may take many forms. Competitors may agree to take turns being the winning bidder referred to as bid rotation. Some competitors may agree to submit unacceptable bids to cover up a bid-rigging scheme. In other cases, competitors may simply agree to refrain from bidding or withdraw a submitted bid. In addition to the bid submission or non-submission itself, a bid-rigging scheme must also have some way to compensate the apparent losers. Such agreements may involve sub-contracting parts of the main contract to the losing bidders in exchange, or making payments to the other members of the cartel.

26. Collusive tendering is illegal in most countries. Even countries that do not have a competition law often have special legislation on tenders. Most countries treat collusive tendering more severely than other horizontal agreements, because of its fraudulent aspects and particularly its adverse effect on government purchases and public spending.

Alternative approaches in existing legislation – Collusive tendering

Country

China

According to Article 15 Law of the People’s Republic of China’s Law for Countering Unfair Competition, tenderers

⁵ Typically consumer boycotts could not be caught by such prohibitions.

Country

	shall not submit tenders in collusion with one another to force the tender price up or down. Furthermore, a tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition.
Germany	There are no special provisions concerning collusive tendering in the competition law. However, bid-rigging is specifically prohibited by German criminal law, see paragraph 298 Criminal Code.
Kenya	Collusive tendering is considered a criminal offence punishable by up to 5 years imprisonment or to a fine not exceeding one million shillings, or both. See Section 21(9) of the Competition Act ,Cap 504

Source: UNCTAD Handbook on Competition Legislation.

(c) Market or customer allocation

CTAD Handbook on Competition Legislation.

27. Market and customer allocation agreements are agreements in which competitors divide markets among themselves. These agreements are essentially agreements not to compete; “I won’t sell in your part of the market if you don’t sell in mine”. In such scheme, competing firms may divide sales territories on a geographic basis or assign specific customers or types of customers to specific members of the cartel. Geographical market-sharing agreements may be more effective than price-fixing from a cartel’s point of view, because the expense and difficulties of fixing common prices are avoided. Policing the agreement amongst the members is relatively simple, because the mere presence of a competitor’s goods in one’s own “patch” reveals cheating.⁶

28. Customer allocation arrangements can occur both in domestic and international trade; in the latter case they frequently involve international market divisions on a geographical basis, reflecting previously established supplier-buyer relationships. Firms engaged in such schemes often agree not to compete in each other’s home market.

29. Market allocation and customer allocation agreements undermine competition by limiting the scope of the more efficient producers within the group to sell beyond their geographical boundaries or to take on customers whom they have not previously supplied. This type of restriction is therefore likely to make it more difficult for firms to lower their unit costs of production through the exploitation of economies of scale.

(d) Restraints on production or sales, including by quota;

30. Restraints on production or sales, so-called output restrictions, aim to affect prices by artificially limiting supply.

31. Output restrictions can involve agreements on production volumes, sales volumes, or percentages of market growth. Such restrictions are often applied in sectors where there

⁶ Whish R (2009), Competition Law, Oxford University Press, 6th Ed.

is surplus capacity and the parties to the collusion want to raise prices. In order to enforce this scheme, a pooling arrangement is often created whereby firms selling in excess of their quota are required to make payments to the pool to compensate those selling below their quotas.

32. The effect of output-restricting agreements is similar to price fixing, if output is reduced, prices will rise. Therefore, more efficient or innovative firms cannot expand; firms may not be able to fully exploit economies of scale. Competition is lessened and consumers pay higher prices.

- (e) *Concerted refusals to purchase;*
- (f) *Concerted refusal to supply;*

33. Concerted refusals to purchase or to supply, or sometimes described as group boycotts, are agreements between competing firms where they collude with a view to stopping or limiting their sales to particular customers or alternatively stopping or limiting their purchases from particular suppliers. Group boycotts may be used to implement an illegal anticompetitive behaviour. For instance, in order to enforce price fixing agreements, competing firms may agree not to do business with others except upon agreed terms. In other instances, group boycotts can be employed to prevent a firm from entering a market or to disadvantage an existing competitor. Or they may target price discounters in order to enforce resale price maintenance arrangements. Sometimes, the boycott may not actually be put into effect, but the threat to do so may induce the “potential victim(s)” to take the course of action prescribed.

34. Group boycotts may be either horizontal (i.e. competing firms may agree among themselves not to sell to or buy from targeted businesses or individuals) or vertical (involving agreements between parties at different levels of the production or distribution chain, refusing to deal with a third party, normally a competitor to the firms involved in the agreement).

35. Group boycotts are considered illegal in a number of countries, particularly when they are designed to enforce other arrangements or when they restrict competition and lack a business justification. Accordingly, concerted refusals to supply or purchase are often regarded as *per se* offences in a number of countries.

Alternative approaches in existing legislation – Boycotts

<i>Country</i>	
Germany	In addition to a general prohibition of anti-competitive agreements, the Act against Restraints of Competition contains a specific prohibition of boycotts (Section 21).
United States	The Supreme Court held that not all concerted horizontal refusals to deal warrant <i>per se</i> treatment. The defendant, a purchasing cooperative, had expelled a member without providing either an explanation at that time or a procedural means to challenge the expulsion. The Court found that such cooperatives typically are designed to increase economic efficiency and held that unless the cooperative possessed market power or exclusive access to an element essential to effective competition, the expulsion of the member should be judged under the rule of reason and therefore might well be lawful. (<i>Northwest Wholesale Stationers, Inc. V. Pacific Stationary & Printing Co.</i> , 472

Country

U.S. 284 (1985)

In another case, the Supreme Court held that a group boycott designed to affect the price paid for the services of the group's members was per se unlawful without regard to the market power of the participants. (*FTC v Superior Court Trials Lawyers Ass'n*, 493 U.S. 411 (1990))

Source: UNCTAD Handbook on Competition Legislation.

(g) *Collective denial of access to an arrangement, or association, which is crucial to competition.*

36. Membership of professional and commercial associations is common in the production and sale of goods and services. Such associations usually have certain rules of admittance and under normal circumstance those who meet such requirements are allowed access. However, admittance rules can be drawn up in such a manner as to exclude certain potential competitors either by discriminating against them or acting as a closed shop, which might lessen or hamper competition. Nevertheless, valid professional concerns, such as non-compliance with rules of professional conduct, can justify exclusions of individuals from professional associations.

37. Collective denial of access to an arrangement may also take the form of denying access to a facility that is necessary in order to compete effectively in the market.

Other types of horizontal agreements

38. Horizontal agreements other than hard-core cartels are often qualified as anticompetitive by effect or subject to the rule of reason. These types of agreements typically include: joint marketing, joint purchasing, R&D joint venture, and sometimes information sharing agreements.

39. As mentioned above, in many jurisdictions, these types of agreements are subject to the rule of reason test, reflecting the fact that competitors sometimes need to collaborate or cooperate in strategic alliances or joint ventures, and that such collaboration can be not only benign but pro-competitive.

40. Nonetheless, it should be noted that just labelling an arrangement as a 'joint venture' is not enough to avoid per se liability where participants use the joint venture as a device to raise prices or restrict output.

Joint marketing

41. Joint marketing may involve agreements to jointly sell, distribute, or promote goods or services. Such agreements can be pro-competitive when a combination of complementary assets can generate cost savings and other efficiencies. However, marketing collaborations can involve agreements on price, output, or other competitively significant variables, resulting in competitive harm. Whether there will be a net public benefit from the arrangement will be a matter for the competition authority to decide in the light of the particular circumstances in each case.

Joint purchasing

42. A joint purchasing agreement is an agreement between firms to jointly purchase necessary inputs. Often joint purchasing agreements are pro-competitive, since joint purchasing can allow participants to achieve greater discounts from suppliers reflecting for example lower supply costs, or to save delivery and distribution costs. However, such agreements can lessen competition where they facilitate collusion through standardizing participants' costs. In Germany, the Act against Restraints on Competition has been amended to allow a special exemption for joint purchasing arrangements by small businesses or trade associations, provided individual firms are able to purchase independently should they wish to do so. The Federal Cartel Office would only intervene in the rare cases in which such an arrangement had a substantial adverse effect on competition.

R&D joint venture

43. Collaboration between competitors may involve agreements to jointly conduct research and development. Most joint R&D activities between competitors are pro-competitive, producing significant benefits. For instance, R&D collaboration can allow participants to combine complementary assets, technologies or knowhow, leading to the development of new or improved products. Joint R&D agreements can lessen or hamper competition when they impose upon participants restrictions on the exploitation of products developed through the cooperation.

Information sharing agreements

44. Agreements may involve a considerable degree of information exchange between competitors. While the sharing of information can be necessary to achieve pro-competitive collaboration, it can sometimes increase the possibility of collusion. In particular, exchanging pricing information, costs, transaction terms, marketing strategies or other significant competitive variables may raise competitive concern and is therefore considered as *per se* anti-competitive in some jurisdictions. With the sharing of competitively sensitive information, competitors may facilitate collusion.

Vertical Agreements

45. Vertical agreements are agreements between firms at different levels of the production or distribution chain, e.g. agreements between a producer and a distributor, between a wholesaler and a retailer. Since the firms are often not in direct competition with one another, the balance of the effects of these agreements is more towards greater efficiency than substantially lessen competition. While Chapter III of the Model Law of Competition does not refer to vertical agreements, some types of vertical agreements that may be anti-competitive are mentioned under Chapter VI of the Model Law, which deals with the abuse of a dominant position. From a systematic perspective, it appears, however, more appropriate to deal with vertical agreements under the prohibition of anti-competitive agreements.

46. In many jurisdictions, vertical restraints are subject to a rule of reason approach, which reflects the fact that such restraints are not always harmful and may, actually, be beneficial in particular market structure circumstances. Non-price vertical restraints are rarely opposed by competition authorities.

47. Vertical agreements that typically raise competition concerns include: resale price maintenance (RPM), exclusive dealing, exclusive territory or territorial (geographical) market restrictions on distributors and tying arrangements. While the first has remained highly controversial among economists, exclusivity practices raise fewer concerns.

Resale Price Maintenance

48. A resale price maintenance arrangement may be found in an agreement among a supplier and its distributors where the supplier makes its distributors sell its products at certain prices. Generally, a resale price maintenance practice refers to the setting of retail prices by the supplier. Resale price maintenance obviously stifles intra-brand competition, with the retailers of the same brand unable to compete with one another on price. However, it may encourage inter-brand competition as retailers endeavour to capture economies of scale and scope. Both the manufacturer and retailers may see benefit for themselves in having retail price maintenance and it can be argued there are public benefits as well. Given that minimum resale price maintenance restricts intra-brand competition, where only one brand is being sold in the market, then minimum resale price maintenance is tantamount to minimum price fixing. This is often the situation in developing countries. Business concentration tends to be significantly higher than it is in developed countries because aggregate national income is much smaller and demand for branded goods correspondingly less, leaving room for only one or two major suppliers for each item. Given these circumstances, developing countries are likely to treat resale price maintenance as a per se offence although the trend in developed countries is to authorise resale price maintenance when there are demonstrable public benefits.

49. For further information on different approaches to assess resale price maintenance see the commentaries on Chapter IV of the Model Law on Competition.

Exclusive dealing

50. Exclusive dealing arrangements may be found in an agreement where a restriction is placed on the firm's choice of buyers or suppliers, that is to say where a buyer is required to purchase all his requirements from only one seller, or a seller is required to sell its products to only one firm. Nearly all franchise agreements contain provisions of this nature, prohibiting franchisees from purchasing inputs, or at least inputs characteristic of the brand, from anyone other than the franchisor. The competition concern with exclusive dealing is that it may foreclose a market. For example, if in a geographic region a large fraction of the retailers of a particular type and quality are signed up to exclusive dealing agreements with one manufacturer, then another manufacturer may not have a sufficiently large distribution network available to sell in the market. Exclusive dealing is forbidden only if it substantially lessens competition in a market. For further information on the assessment of exclusive dealing agreements see commentaries on Chapter IV of the Model Law on Competition.

Exclusive territory or territorial market restrictions

51. This is found in an agreement by which a supplier restricts its distributors' selling territories. For further information on exclusive territorial agreements see the commentaries on Chapter IV of the Model Law on Competition.

Tying arrangements and full-line forcing

52. A tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees he will not purchase the product from any other supplier.⁷ In the extreme case of full-line forcing, a purchaser is obliged to buy the entire range of goods produced by the firms in order to obtain the one or two that are really needed. Tying arrangements can have

⁷ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

an adverse effect on competition, if a substantial part of the market is foreclosed as a result of the tying and the rivals are consequently forced to exit.

53. Further information on the assessment of tying agreements can be found in the commentaries on Chapter IV of the Model Law on Competition.

II. Authorization or exemption

Practices falling within paragraph I, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit.

54. Virtually every jurisdiction contains exemptions from anti-competitive agreement prohibition. As various jurisdictions have different forms of regimes, however, they have differing exemption and authorization systems. While Paragraph II of the present Chapter of the Model Law on Competition provides for an authorization system where national authorities are granted discretionary powers to authorize notified agreements, other legislations only provide for legal exemptions for specific types of agreements without conferring upon the competition authority a margin of discretion. For instance, US antitrust law does not envisage any possibility of exemption or authorization by the US competition authorities, and therefore does not provide for a notification system for anti-competitive agreements. However, there are numerous statutory and court made exemptions to the United States Antitrust laws.

55. The following remarks concern different forms of authorizations that may be granted by competition authorities as opposed to legal exemptions.

Block and individual exemptions

56. Many jurisdictions provide systems for block and/or individual exemptions. With a block exemption granted, a certain category of agreements benefits from an exemption without any individual assessment. Specified categories of agreements can be assumed to satisfy the criteria for exemptions. An example is the case of R&D and specialization block exemptions, where the combination of complementary skill or assets can produce substantial efficiencies.

57. On the other hand, an individual exemption can be granted for individual cases of agreements. In order to obtain authorization, firms intending to enter into potentially anti-competitive agreements would accordingly need to notify the competition authority of all the relevant facts of the agreement. Chapter V of the Model Law on Competition deals with the procedural aspects of such a notification system.

58. As explained in more detail in the commentaries on Chapter V of the Model Law on Competition, a system of prior notification and administrative authorization may produce significant backlog of notifications, unnecessarily consuming a great deal of antitrust authorities' resources and failing to deliver legal certainty to the parties concerned. This is why the notification system for potentially anti-competitive agreements was abolished under EU competition law.

Criteria for granting exemptions

59. Competition authorities may authorize firms to engage in certain conduct when the firms are subject to effective competition, and such practices produce a "net public benefit". The net public benefit needs to be aligned with the objectives or purposes of the competition laws, preferably interpreted as economic benefit or economic efficiency. In

elaborating the criteria for exemptions, Article 101 (3) TFEU can provide a good yard stick. The provision sets four conditions for an agreement to be authorized: (a) The agreement needs to contribute to improving the production or distribution of goods or to promoting technical or economic progress – so called efficiency gains (b) , while allowing consumers a fair share of the resulting benefit (c), and the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or (d) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Several countries follow this approach taken by the European Union, e.g. Switzerland.

60. Many competition authorities, including the European Commission, are reticent to authorize agreements that fall within the categories of hard-core cartels.

A de minimis exemption or other forms of exemptions

61. Many competition authorities grant a *de minimis* exemption from the prohibition of anti-competitive agreements for firms whose combined market share does not exceed a certain share (typically 10%–25%) of the relevant market or whose combined annual turnover is below a certain level. However, in general this type of exemption does not apply to hard-core cartels.

62. In other instance, for example, such *de minimis* exemption is granted by law. For example German competition law does not apply to cooperation between SMEs (small and medium sized enterprises) if the cooperation rationalizes economic process.

63. In addition, some competition laws provide for possibilities of authorizing under particular circumstances and for a limited period of time, such as crisis cartels (sometimes referred to as depression cartels) and rationalization cartels.

64. Examples are the old Japanese and German anti-cartel regime where crisis and rationalization cartels could be authorized by the competition authority upon application from the parties. The depression and rationalization cartel exemptions were abolished respectively in 1999 and 2005 in both countries. It should be noted that in other jurisdictions which still have such provisions, there are rarely exemptions in force in recent years.

Alternative approaches in existing legislation – Authorization or exemption

Country

Viet Nam	<p>Exemptions can be granted if an agreement satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers:</p> <ul style="list-style-type: none"> (a) It rationalizes an organizational structure or a business scale or increases business efficiency; (b) It promotes technical or technological progress or improves the quality of goods and services; (c) It promotes uniform applicability of quality standards and technical ratings of product types; (d) It unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors; (dd) It increases the competitiveness of medium and small sized enterprises;
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	(e) It increases the competitiveness of Vietnamese enterprises in the international market. (Law on competition. Article 10)
Japan	There were depression and rationalization cartel exemptions which could be granted under particular circumstance and for a limited period of time. During the deregulation in the late '90s, the exemptions were abolished.
European Union	<p>While Article 101 (1) TFEU prohibits anti-competitive agreements, Article 101 (3) states that the provisions of paragraph (1) may be declared inapplicable if such agreements or decisions contribute to “improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit,” with the provisions that they do not:</p> <p>“(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;</p> <p>(b) Afford such undertakings the possibility of eliminating competition in respect of substantial part of the products in question”.</p>
China	<p>According to Article 15 of the Anti-Monopoly Law of the PRC, where the business operators can prove that a monopoly agreement concluded by them falls under any of the following circumstances, the monopoly agreement shall be exempt from Articles 13 and 14 of this Law: (1) for the purpose of improving technologies, researching, and developing new products; (2) for the purpose of upgrading product quality, reducing costs, improving efficiency, unifying product specifications or standards, or carrying out professional labor division; (3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators; (4) for the purpose of realizing public interests such as conserving energy, protecting the environment and providing disaster relief, etc.; (5) for the purpose of mitigating the severe decrease of sales volume or obviously excessive production during economic recessions; (6) for the purpose of protecting the justifiable interests of the foreign trade or foreign economic cooperation; (7) other circumstances prescribed by the law or the State Council.</p> <p>Where a monopoly agreement falls under any of the circumstances prescribed in Items (1)–(5) and is exempt from Articles 13 and 14 of this Law, the business operators shall also prove that such an agreement does not substantially restrict competition in the relevant market and can enable the consumers to share the benefits from the agreement.</p>
Australia	The Trade Practices Act specifies when the Australian Competition and Consumer Commission (ACCC) may grant authorization. Broadly, conduct may be authorized if

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the public benefit outweighs any public detriment.

The Act contains different tests for authorizing different types of conduct. The two different tests are as follows:

- The ACCC may not grant authorization for the making or giving effect to proposed or existing contracts, arrangements or understandings that might contain cartel provisions, might substantially lessen competition or involve exclusive dealing (other than third line forcing) unless it is satisfied in all circumstances that the agreement or conduct is likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition (the first test).
- The ACCC may not grant authorization to proposed exclusionary provisions (primary boycotts), secondary boycotts, third line forcing and resale price maintenance unless it is satisfied in all the circumstances that the proposed provision or proposed conduct is likely to result in such a benefit to the public that the provision should be permitted to be made or the conduct should be allowed to take place (the second test).

Kenya

– Section 25 of the *Kenyan Competition Act, Cap 504* provides for granting exemptions from the restrictive agreements, practices and decisions and restrictive trade practices applicable to trade associations, if undertakings and/or associations of undertakings apply and submit the required information that the Authority will require. After considering the application, the Authority may

- (a) Grant the exemption;
- (b) Refuse to grant the exemption and notify the applicant accordingly; or
- (c) Issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions under the Act.

– Section 26 (2) provides that the Authority may grant an exemption for exceptional and compelling reasons of public policy as to why an agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in the Act.

– Section 26 (3) provides that in making a decision related to public policy the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in:

- (a) Maintaining or promoting exports;

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(b) Improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) Promoting technical or economic progress or stability in any industry;

(d) Obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Source: UNCTAD Handbook on Competition Legislation.
