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Model Law on Competition (2020), revised chapter III*

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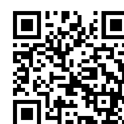

I. Outline of chapter III of the Model Law on Competition

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.

II. Commentaries on chapter III and alternative approaches in existing legislation

A. Introduction

1. Chapter III of the UNCTAD Model Law on Competition recommends the prohibition of restrictive agreements or arrangements. The articles were drafted based on section D, paragraph 3, of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 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 act 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;
>
> (g) Collective denial of access to an arrangement, or association, which is crucial to competition.

2. The current wording of chapter III, namely, "agreements between rival or potentially rival firms", suggests that the prohibition of anticompetitive agreements concerns only horizontal agreements. However, taking into account that many competition laws prohibit

both horizontal and vertical anticompetitive agreements, the commentaries on chapter III also deal with vertical agreements.

B. Agreements or arrangements

3. The prohibition of restrictive agreements is concerned with anticompetitive effects that result from collusion and/or cooperation between two or more independent companies, either horizontal or vertical, as opposed to single-firm conduct. 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 that used in civil law jurisdictions 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, explicit or tacit.[1] An agreement can even be reached with a knowing wink.[2] A number of competition laws are therefore drafted broadly in order to apply to all forms of agreements. In a similar vein, competition laws apply to any agreement, whether or not it is intended to be legally binding. Often, concerted practices and more informal understandings, can be covered by the prohibition of anticompetitive 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 example Malawi and the Republic of Korea, have separate provisions 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 prohibited. Firms under common ownership or control are considered to form a single economic entity that acts as one single-market player.[3] This concept is also reflected in section D, paragraph 3, of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which states that anticompetitive 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. The concept of tacit collusion, as opposed to anticompetitive agreements and concerted practices, may be found in some jurisdictions. The concept usually involves multiple firms but is intended to deal with oligopolistic behaviour, that is, parallel behaviour within an oligopoly,[4] which lacks any form of agreement or understanding.[5] With regard to tacit collusion, there is much debate as to whether it should be illegal, given that it creates the same economic outcome as collusion by agreement.[6] However, as a general consensus has not yet been reached, tacit collusion is still viewed as legitimate in nearly all jurisdictions (see table 1).

[1] United States of America Supreme Court Interstate Circuit v. United States, Case No. 306 US208, 1939; United States Court of Appeals for the Second Circuit, United States v. Apple, Case No. 791 F.3d 290, 2015.

[2] United States Court of Appeals for the Ninth Circuit, Esco v. United States, 340 F.2D 1000, 1965.

[3] United States Supreme Court, Texaco v. Dagher, Case No. 547 US1, 2006; European Court of Justice, Third Chamber, Akzo Nobel and Others v. Commission of the European Communities, Case No. C-97/08, 2009, para 58.

[4] R Whish and D Bailey, 2018, Competition Law, ninth edition (Oxford University Press, Oxford).

[5] United States Supreme Court, Theatre Enterprise v. Paramount Film Distributing, Case No. 346 US537, 1954.

[6] H Hovenkamp, 2016, Federal Antitrust Policy: The Law of Competition and Its Practice, fifth edition (West Academic Publishing, Saint Paul, United States).

Table 1
Alternative approaches in existing legislation: Notion of agreement

Jurisdiction	
China	Article 13 of the Antimonopoly Law states that monopoly agreements include "agreements, decisions and other concerted conducts designed to eliminate or restrict competition".
India	The Competition Act states that "'agreement' includes any arrangement or understanding or action in concert, (a) whether or not such arrangement, understanding or action is formal or in writing; or (b) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings".
Jamaica	The Fair Competition Act states that agreement "includes any agreement, arrangement or understanding whether oral or in writing or whether or not it is intended to be legally enforceable".
South Africa	Paragraph 4 (1) of the Competition Act refers to an agreement between, or concerted practice by, firms or a decision by an association of firms and paragraph 1 (1) (ii) and (vi) states that "'agreement', when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable" and that "'concerted practice' means cooperative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement".
European Union	Article 101 (1) of the Treaty on the Functioning of the European Union refers to "agreements between undertakings, decisions by associations of undertakings and concerted practices".

Distinction between horizontal and vertical agreements

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

9. Vertical agreements are those between enterprises at different functional levels of the production and/or 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.

10. While horizontal agreements, in particular ones to raise prices and restrict output, are harmful to competition in most cases, vertical agreements usually pose less of a 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.

C. Formulating the prohibition of anticompetitive agreements

11. While most competition laws prohibit both horizontal and vertical anticompetitive agreements, jurisdictions often take different approaches to formulating the prohibition. In many competition law regimes, a general provision of anticompetitive agreements covers both horizontal and vertical agreements. For example, in the United States, the Sherman Antitrust Act of 1890 contains a broad prohibition of anticompetitive agreements, so that

both horizontal and vertical agreements can be challenged under the same provision. Alternatively, some competition laws, for example in Costa Rica, Indonesia and South Africa, have separate provisions for horizontal and vertical agreements. Competition laws may contain general provisions that apply only to horizontal agreements, leaving vertical agreements to be covered by a number of individual provisions dealing with resale price maintenance, exclusive dealing, tying and bundling, etc. It should be noted that the prohibition of the 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 imposing anticompetitive terms and conditions.

12. 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 anticompetitive agreements. Some competition laws only contain a broad prohibition against anticompetitive agreements, leaving specific conduct prohibited by the law to be determined at the enforcement stage. While this approach allows for flexibility in enforcement, it may provide little guidance for the public and for competition authorities without a strong competition law capacity, in particular in young competition law regimes where public awareness about the unlawfulness of anticompetitive agreements is relatively low. An alternative is to include a list of examples of prohibited conduct in the relevant competition law provision. Many jurisdictions, such as Chile, China and the European Union, take an approach whereby a broad prohibition of anticompetitive agreements is followed by a non-exhaustive list of categories considered violations. This approach provides a great deal of flexibility, while also giving guidance on enforcement priorities (see table 2).

Table 2
Alternative approaches in existing legislation: Formulating the prohibition of anticompetitive agreements

Jurisdiction	
Australia	Section 45 of the Competition and Consumer Act contains a general provision that covers both horizontal and vertical agreements. The Act also contains provisions governing horizontal and vertical agreements separately, including the prohibition of making or giving effect to cartel provisions. Cartel provisions are provisions of a contract, arrangement or understanding between firms in a horizontal relationship, which has any of the purposes or effects enumerated in section 45AD of the Act. Other provisions apply to vertical agreements, such as section 47 on exclusive dealing and section 48 on resale price maintenance.
Canada	The Competition Act contains two prohibitions of horizontal anticompetitive agreements. Section 45 prohibits agreements between competitors to fix prices, allocate markets or restrict output. Section 90.1 prohibits other forms of horizontal agreements that are likely to substantially prevent or lessen competition. In addition, the Act contains several provisions that prohibit specific forms of vertical agreements, such as section 76 on resale price maintenance and section 77 on exclusive dealing, market restrictions and tying.
China	Article 13 of the Antimonopoly Law states as follows: “Competing undertakings are prohibited from concluding the following monopoly agreements: (a) On fixing or changing commodity prices; (b) On restricting the amount of commodities manufactured or marketed; (c) On allocating the sales market or the purchasing market for raw and semi-finished materials; (d) On restricting the purchase of new technologies or equipment or the development of new technologies or products; (e) On joint boycotting of transactions;

Jurisdiction	
	(f) Other monopoly agreements confirmed as such by the authority for enforcement of the Antimonopoly Law under the State Council." A similar provision in article 14 addresses vertical agreements.
Chile	Article 3 of Competition Act No. 211 states as follows: "Whosoever should execute or enter into, individually or collectively, any deed, act or agreement that impedes, restricts or thwarts competition, or tends to produce such effects, will be sanctioned with the measures established in article 26 of this law, notwithstanding the application of the preventive, corrective or restrictive measures ordered with respect to such deeds, acts or agreements in each particular case. Among others, the following deeds, acts or agreements will be deemed to impede, restrict or thwart competition, or deemed to tend to produce such effects: concerted agreements or practices among competitors, that consist of fixing sale or purchase prices, limiting output, assignment of market zones or quotas, affecting the outcome of tender processes, as well as concerted agreements that, conferring market power to the competitors, consist of the determination of marketing terms and conditions or the exclusion of current or potential competitors."
Republic of Korea	Article 19 (1) of the Monopoly Regulation and Fair Trade Act states as follows: "No enterpriser shall agree with other enterprisers by contract, agreement, resolution or any other means to jointly engage in an act, or let others do this kind of activity, falling under any of the following subparagraphs, that unfairly restricts competition (hereafter referred to as "improper concerted acts"): (1) An act fixing, maintaining or changing prices; (2) An act determining terms and conditions for transactions of goods or services, or payment of prices thereof; (3) An act restricting production, delivery, transportation or transaction of goods or services; (4) An act limiting the territory of trade or customers; (5) An act preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services; (6) An act restricting the types or specifications of goods or services in producing or transacting goods or services; (7) An act of jointly carrying out and managing the main parts of a business or establishing a company, etc. to jointly carry out and manage the main parts of a business; or (8) Any practice that substantially lessens competition in a particular business area by means, other than those under subparagraphs 1 to 7, of interfering with or restricting the activities or contents of business."
South Africa	Paragraph 4 (1) (b) of the Competition Act states as follows: "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 horizontal relationship and if... it involves any of the following restrictive horizontal practices: (a) Directly or indirectly fixing a purchase or selling price or any other trading condition; (b) Dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or

Jurisdiction	
	(c) Collusive tendering."
	Paragraph 5 (1) of the Competition Act states that an "agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market".
United States	The Sherman Antitrust Act states that "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 declared to be illegal".
European Union	Article 101 (1) of the Treaty on the Functioning of the European Union states as follows:
	"1. 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 as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular 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."

D. Horizontal anticompetitive agreements

13. Among horizontal agreements, a distinction between hard-core cartels and other types of horizontal agreements can be useful for setting enforcement priorities and standards of analysis. The agreements listed in chapter III of the Model Law of Competition constitute hard-core cartels, which have proven to be particularly harmful to competition. It is widely accepted that hard-core cartels are always anticompetitive and can reasonably be presumed to be illegal without further inquiry.[7] For this reason, a large number of competition law regimes prohibit them outright, as per se violations of the law or anticompetitive by object.

14. As opposed to hard-core cartels, other types of horizontal agreements may produce some benefits or procompetitive effects. For example, joint marketing that enables products to reach customers more quickly 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 the agreement and the market circumstances. Therefore, these types of potentially anticompetitive agreements require more careful treatment and are therefore commonly subject to the rule of reason approach under which competition authorities must demonstrate

[7] The United States Supreme Court has held that there are "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are 'illegal per se'" (United States Supreme Court, National Society of Professional Engineers v. United States, Case No. 435 US679, 1978). In addition, the United States Supreme Court has held that under the Sherman Antitrust Act "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se" (United States Supreme Court, United States v. Socony-Vacuum Oil, Case No. 310 US150, 1940).

the harmful effect of alleged cartel conduct.[8] 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 are punishable by imprisonment, while other types of horizontal agreements are subject to civil or administrative sanctions only.

E. Hard-core cartels

15. Hard-core cartels are anticompetitive agreements between competitors with no purpose or effect other than to raise prices or reduce output. Four types of agreements generally fall within the definition of hard-core cartels, namely, those related to price fixing, collusive tendering, market allocations and output restrictions. Group boycotts by businesses may also fall within an expanded list of hard-core cartels. Chapter III of the Model Law on Competition includes as hard-core cartels the subcategories of concerted refusals to purchase or supply (group boycotts); and collective denial of access to an arrangement or association, which is crucial to competition. The agreements listed in chapter III are generally considered hard-core cartels.

1. Agreements fixing prices or other terms of sale, including in international trading

16. Section D, paragraph 3, of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices states that enterprises should refrain from “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 a per se violation in many countries. Price fixing involves any agreement among competitors to raise, fix or otherwise maintain the price of a product or service. Price fixing can include agreements to establish a minimum price, eliminate discounts, adopt a standard formula for calculating prices, etc. It can also apply to situations in which buyers collude in order to determine the maximum prices 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 for consumers, such as shipping fees, warranties, discount programmes and financing rates.

2. Collusive tendering

17. Collusive tendering allows conspiring competitors to effectively raise prices in situations in which business contracts are awarded by means of soliciting competitive bids. Competitors agree in advance who will win the bid and at what price, thereby undermining the purpose of inviting tenders, which is to procure goods or services at the most favourable price. Collusive tendering may take many forms. Competitors may agree to take turns being the winning bidder, which is 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 subcontracting parts of the main contract to the losing bidders in exchange or making payments to the other members of the cartel. Collusive tendering is illegal in most countries. Even countries that do not have a relevant competition law often have special legislation on tenders. Most countries treat collusive tendering more severely than other horizontal agreements, because of its fraudulent

[8] “The true test of legality is whether the restraint is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition. To determine this question, the court must ordinarily consider the facts peculiar to the business, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable” (United States Supreme Court, Chicago Board of Trade v. United States, Case No. 246 US231, 1918).

aspects and its adverse effect on government purchases and public spending in particular (see table 3).[9]

Table 3
Alternative approaches in existing legislation: Collusive tendering

Country	
Botswana	Sections 25 and 26 of the Competition Act state that entering an agreement that involves bid-rigging is a criminal offence, unless the person requesting the bids is informed of the terms of the agreement before the bids are made. The offence is liable to a fine not exceeding P100,000 or to imprisonment for a term of up to five years or both.
Brazil	Article 36 of the antitrust law prohibits bid-rigging, which is also a violation under the clean company act. Violations are punishable by a fine, calculated as a percentage of the company's gross sales during the last fiscal year. Bid-rigging is also a criminal offence under the public procurement law, punishable by imprisonment for a term of up to five years.
Canada	Section 47 of the Competition Act states that bid-rigging is an indictable offence unless the arrangement is made known to the person calling for the bids. The offence is punishable by a fine or imprisonment for a term of up to 14 years or both.
China	There are no special provisions concerning collusive tendering in the Antimonopoly Law. However, bid-rigging is specifically prohibited under article 223 of the criminal law.
Germany	There are no special provisions concerning collusive tendering in the Act against Restraints of Competition. However, bid-rigging is specifically prohibited under paragraph 298 of the Criminal Code.
Kenya	Section 21 (9) of the Competition Act states that collusive tendering is considered a criminal offence punishable by imprisonment for a term of up to five years or a fine not exceeding K Sh10 million or both.
South Africa	Paragraph 4 (1) (b) (iii) of the Competition Act prohibits bid-rigging.

3. Market or customer allocation

18. Market and customer allocation agreements are those in which competitors divide markets among themselves. Such agreements are essentially agreements not to compete, stating in effect, "I will not sell in your part of the market if you do not sell in mine". In such schemes, competing firms may divide sales territories on a geographical basis or assign specific customers or types of customers to specific members of the cartel.[10] This kind of agreement may be more effective than price fixing from a cartel's point of view because the expense and difficulties of fixing common prices may be avoided. Policing of the agreement among the members is relatively simple, as the mere presence of a competitor's goods in another member's area reveals cheating.[11] Customer allocation arrangements can occur in both domestic and international trade; in the latter, they frequently involve international market divisions on a geographical basis, reflecting previously established supplier and buyer relationships. Firms engaged in such schemes often agree not to compete in each other's

[9] Chile Competition Court, National Economic Prosecutor Office v. Fresenius and Others, Case No. 165-2018, 2018.

[10] United States Supreme Court, United States v. Topco Associates, Case No. 405 US596, 1972; United States Supreme Court, Palmer v. BRG of Georgia, Case No. 498 US46, 1990.

[11] Whish and Bailey, 2018.

home markets.[12] Market 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.

4. Restraints on production or sales, including by quota

19. Restraints on production or sales, namely, output restrictions, aim to affect prices by artificially limiting supply. Output restrictions can involve agreements on production volumes, sales volumes or percentages of market growth. Such restrictions are often applied in sectors where there is surplus capacity and the parties to the collusion wish to raise prices.[13] 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 quota.[14] The effect of output-restricting agreements is similar to price fixing, namely, if output is reduced, prices will rise. Therefore, more efficient or innovative firms cannot expand and may not be able to fully exploit economies of scale. Competition is lessened and consumers pay higher prices.

5. Concerted refusals to purchase
6. Concerted refusal to supply

20. Concerted refusals to purchase or supply, sometimes described as group boycotts, are agreements between competing firms with a view to stopping or limiting their sales to particular customers or their purchases from particular suppliers. Group boycotts may be used to implement illegal anticompetitive behaviour. For example, in order to enforce agreements on price fixing, competing firms may agree not to do business with others except upon agreed terms. Moreover, group boycotts can be employed to prevent a firm from entering a market or to disadvantage an existing competitor or may target price discounters in order to enforce resale price maintenance arrangements. Sometimes, a 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. Group boycotts may be horizontal (competing firms may agree among themselves not to sell to or buy from targeted businesses or individuals)[15] or vertical (parties at different levels of the production or distribution chain may agree to refuse to deal with a third party, normally a competitor to the firms involved in the agreement).[16] Group boycotts are considered illegal in a number of countries, in particular when they are designed to enforce other arrangements or when they restrict competition and lack a business justification. Concerted refusals to purchase or supply are often regarded as per se offences in a number of countries (see table 4).

[12] European Commission, 2018, Case AT.40009: Maritime Car Carrier, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40009 (accessed 8 September 2020).

[13] Chile Supreme Court, National Economic Prosecutor Office v. Agricola Agrosuper and Others, Case No. 27.181-2014, 2015.

[14] Chile Competition Court, National Economic Prosecutor Office (Chile) v. CMPC Tissue and Another, Case No. 160-2017, 2017.

[15] United States Supreme Court, Allied Tube and Conduit v. Indian Head, Case No. 486 US492, 1988.

[16] United States Supreme Court, Klor’s v. Broadway-Hale Stores, Case No. 359 US207, 1959.

Table 4
Alternative approaches in existing legislation: Boycotts

Country	
China	Article 13 of the Antimonopoly Law prohibits competitors from concluding a horizontal agreement on boycotting.
Germany	The Act against Restraints of Competition, in addition to a general prohibition of anticompetitive agreements contains, in article 21, a prohibition of boycotts.
United States	Cases related to boycotts have generally been analysed by the courts under the per se approach. However, the Supreme Court has held that not all horizontal concerted refusals to deal warrant per se treatment.[17]

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

21. Membership in professional and commercial associations is common in the production and sale of goods and services. Such associations usually have rules of admittance and under normal circumstances those who meet the 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 may lessen or hamper competition.[18] Nevertheless, valid professional concerns, such as non-compliance with rules of professional conduct, can justify the exclusion of individuals from professional associations. Collective denial of access to an arrangement may also take the form of denying access to a facility that is necessary to compete effectively in the market.

F. Other types of horizontal agreements

22. Horizontal agreements other than hard-core cartels are often qualified as anticompetitive because of their effects or subject to the rule of reason. These types of agreements typically include joint marketing, joint purchasing, research and development joint ventures and, sometimes, information-sharing agreements. In many competition law regimes, these types of agreements are subject to the rule of reason, 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 also procompetitive. In addition, in some jurisdictions, competition authorities must be notified of such agreements before their implementation, in compliance with a merger and acquisitions control regime.[19] However, simply labelling an arrangement as a joint venture is not enough to avoid per se liability if participants use the joint venture as a device to raise prices or restrict output.

Joint marketing

23. Joint marketing may involve an agreement to jointly sell, distribute or promote goods or services. Such agreements can be procompetitive 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 an arrangement is a

[17] The defendant in one case, a purchasing cooperative, had expelled a member without providing either an explanation or a procedural means to challenge the expulsion. The Supreme Court found that such cooperatives were typically designed to increase economic efficiency and held that unless the cooperative possessed market power or exclusive access to an element essential for effective competition, the expulsion of the member should be judged under the rule of reason and therefore might well be lawful (United States Supreme Court, Northwest Wholesale Stationers v. Pacific Stationery and Printing, Case No. 472 US284, 1985).

[18] United States Supreme Court, Associated Press v. United States, Case No. 326 US1, 1945.

[19] For further information, see the commentaries on chapter V of the Model Law on Competition.

matter for the competition authority to decide in the light of the particular circumstances in each case.

Joint purchasing

24. Joint purchasing involves an agreement to jointly purchase necessary inputs. Such agreements are often procompetitive, since joint purchasing can allow participants to achieve greater discounts from suppliers, reflecting, for example, lower supply costs; or to save on delivery and distribution costs. However, such agreements can lessen competition if they facilitate collusion through the standardization of participants' costs. For example, in Germany, the Act against Restraints on Competition has been amended to allow for a general exemption for small and medium-sized enterprises and trade associations, for certain agreements that do not restrain competition and that improve the competitiveness of small and medium-sized enterprises.

Research and development joint ventures

25. Collaboration between competitors may involve agreements to jointly conduct research and development. Most joint research and development activities between competitors are procompetitive, producing significant benefits. For example, such collaboration can allow participants to combine complementary assets, technologies or know-how, leading to the development of new or improved products. However, joint research and development agreements can lessen competition if they impose upon participants restrictions on the exploitation of products developed through the cooperative activities.

Information-sharing agreements

26. Agreements may involve a considerable degree of information exchanges between competitors. While the sharing of information can be necessary to achieve procompetitive collaboration, it can sometimes increase the possibility of collusion. In particular, exchanging information on pricing, costs, transaction terms, marketing strategies or other significant competitive variables may raise competition-related concerns and is therefore considered per se anticompetitive in some jurisdictions. Competitors may facilitate collusion through the sharing of competitively sensitive information.[20]

G. Vertical agreements

27. Vertical agreements are those between firms at different levels of the production and/or distribution chain. Since the firms are often not in direct competition with one another, the balance of the effects of such agreements is more towards greater efficiency than substantially lessening competition. Chapter III of the Model Law of Competition does not refer to vertical agreements, yet some types of vertical agreements that may be anticompetitive are mentioned in chapter VI, which deals with the abuse of a dominant position. From a systematic perspective, it may be more appropriate to deal with vertical agreements under the prohibition of anticompetitive agreements.

28. There are two types of vertical restraints, namely, intrabrand and interbrand. Intrabrand restraints are agreements between firms at different levels of a production chain through which some kind of limitation is imposed on the distribution of a manufacturer's products, such as a minimum or maximum resale price maintenance or a territorial restraint. Interbrand restraints are agreements that impose limitations on or affect the distribution of a rival firm's products, for example, exclusive dealing or tying.

29. In many jurisdictions, vertical restraints are subject to the rule of reason, which reflects the fact that such restraints are not always harmful and may actually be beneficial in certain market structures. Competition authorities rarely oppose vertical restraints that are not related to price. Vertical agreements that typically raise competition concerns include those related to resale price maintenance, exclusive dealing, exclusive territory or territorial

[20] United States Supreme Court, American Column and Lumber v. United States, Case No. 257 US377, 1921.

(geographical) market restrictions on distributors and tying arrangements. The first has remained controversial among economists, while exclusivity practices raise fewer concerns.[21]

Resale price maintenance

30. Resale price maintenance may involve an agreement among a supplier and its distributors whereby the distributors must sell the supplier's products at certain prices or whereby they agree on a minimum or maximum price for consumers. Generally, resale price maintenance refers to the setting of retail prices by a supplier. Resale price maintenance limits intrabrand competition, with the retailers of the same brand unable to compete with one another on price. However, it may encourage interbrand competition as retailers endeavour to capture economies of scale and scope.[22] Both the manufacturer and retailers may see benefits for themselves in retail price maintenance and it may be argued that there are public benefits as well. Given that a minimum resale price maintenance restricts intrabrand competition, whereby only one brand is sold in the market, it is tantamount to minimum price fixing. This is often the situation in developing countries, where business concentration tends to be significantly higher than in developed countries because aggregate national income is lower and demand for branded goods correspondingly less, leaving room for only one or two major suppliers for each item. Given such circumstances, developing countries are likely to treat resale price maintenance as a per se offence, while the trend in developed countries is to authorize resale price maintenance when there are demonstrable public benefits.

Exclusive dealing

31. Exclusive dealing agreements are interbrand restraints through which a restriction is placed on a firm's choice of buyers or suppliers, that is, a buyer is required to purchase all of its 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 the least inputs characteristic of the brand, from anyone other than the franchisor. The competition-related concern with regard to exclusive dealing is that it may foreclose a market. For example, if a large fraction of the retailers of a particular type and quality in a geographical region have entered into an exclusive dealing agreement 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.

Exclusive territory or territorial market restrictions

32. Such restrictions occur in agreements through which a supplier restricts the selling territories of its distributors.

Tying arrangements and full-line forcing

33. A tying arrangement is 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 the least agrees not to purchase the product from any other supplier. In the extreme case of full-line forcing, a buyer is obliged to buy the entire range of goods produced by the firm in order to obtain the one or two that are needed. Tying arrangements can have an adverse effect on competition if a substantial part of the market is foreclosed and rivals are consequently forced to exit.

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[21] For further information on all four, see the commentaries on chapter IV of the Model Law on Competition.

[22] "Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" (United States Supreme Court, Continental TV v. GTE Sylvania, Case No. 433 US36, 1977); "The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition... This is important because the antitrust laws' 'primary purpose... is to protect interbrand competition' (United States Supreme Court, Leegin Creative Leather Products v. PSKS, Case No. 551 US877, 2007).

III. 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 a net public benefit

34. Virtually every jurisdiction contains exemptions from the prohibition of anticompetitive agreements. As various jurisdictions have different regimes, however, they have differing authorization and exemption systems. Chapter III of the Model Law on Competition provides for an authorization system whereby national competition authorities are granted discretionary powers to authorize notified agreements, while other legislation only provides for legal exemptions for specific types of agreements, without conferring upon the authorities a margin of discretion. For example, antitrust law in the United States does not envisage any possibility of authorization or exemption by the competition authority and therefore does not provide for a notification system for anticompetitive agreements. However, the Federal Trade Commission and United States Department of Justice, in 2000, issued antitrust guidelines for collaborations among competitors with the aim of certainty for those firms that purport to engage in some kind of horizontal cooperation and provide some safety zones given the nature of this kind of agreement.

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

Block and/or individual exemptions

36. Many jurisdictions provide systems for block and/or individual exemptions. Under a block exemption, 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 exemption. For example, under research and development exemptions and specialization block exemptions, the combination of complementary skills or assets can produce substantial efficiencies. An exemption may also be granted for individual cases of agreements. In order to obtain authorization, firms intending to enter into potentially anticompetitive agreements need to notify the competition authority of all of the relevant aspects of the agreement. Chapter V of the Model Law on Competition deals with the procedural aspects of a notification system, noting that a system of prior notification and administrative authorization may produce a significant backlog of notifications, unnecessarily consuming a great deal of the resources of the competition authority and failing to deliver legal certainty to the parties concerned. In this regard, for example, under European Union competition law, the notification system for potentially anticompetitive agreements has been discontinued.

Criteria for granting exemptions

37. A competition authority 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 law, preferably interpreted as an economic benefit or economic efficiency. In elaborating the criteria for granting exemptions, article 101 (3) of the Treaty on the Functioning of the European Union can provide a good baseline. The provision sets four conditions for an agreement to be authorized, as follows: the agreement needs to contribute to improving the production or distribution of goods or to promoting technical or economic progress; the agreement needs to allow consumers a fair share of the resulting benefit; the agreement must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives; and the agreement must not afford the undertakings the possibility of eliminating competition with regard to a substantial part of the products in question. Several countries follow this approach, for example, Switzerland. Many competition authorities, including that of the European Commission, are reticent to authorize agreements that fall within the category of hard-core cartels.

De minimis exemption or other forms of exemptions

38. Many competition authorities grant a de minimis exemption from the prohibition of anticompetitive agreements for firms whose combined market share does not exceed a certain share (typically 10–25 per cent) 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. In other instances, a de minimis exemption may be granted by law. For example, in Germany, article 3 of the Act against Restraints of Competition does not apply to cooperation between small and medium-sized enterprises if the subject matter is the rationalization of economic activities. In addition, some competition laws provide for the possibility of authorizing, under particular circumstances and for a limited period of time, agreements such as rationalization cartels and crisis cartels, sometimes referred to as depression cartels. For example, under the former anti-cartel regimes in Germany and Japan, rationalization and crisis cartels could be authorized by the competition authority upon application by the parties. These exemptions were abolished in 2005 and 1999, respectively. In other jurisdictions that maintain such provisions, in recent years, there have rarely been exemptions enforced. Some alternative approaches are detailed in table 5.

Table 5
Alternative approaches in existing legislation: Authorization or exemption

Country	
Australia	The Trade Practices Act specifies when the Australian Competition and Consumer Commission may grant an authorization. Broadly, conduct may be authorized if the public benefit outweighs any public detriment. The Act contains two different tests for authorizing different types of conduct. Under the first test, the Commission may not grant authorization for 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. Under the second test, the Commission 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 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.
China	Article 15 of the Antimonopoly Law states as follows: “The provisions of article 13 and 14 of this Law shall not be applicable to the agreements between undertakings which they can prove to be concluded for one of the following purposes: (1) Improving technologies, or engaging in research and development of new products; or (2) Improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production; (3) Increasing the efficiency and competitiveness of small and medium-sized undertakings; (4) Serving public interests in energy conservation, environmental protection and disaster relief; (5) Mitigating sharp decrease in sales volumes or obvious overproduction caused by economic depression; (6) Safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts; or

Country	
	(7) Other purposes as prescribed by law or the State Council. In the cases as specified in subparagraphs (1) through (5) of the preceding paragraph, where the provisions of articles 13 and 14 of this Law are not applicable, the undertakings shall, in addition, prove that the agreements reached will not substantially restrict competition in the relevant market and that they can enable the consumers to share the benefits derived therefrom.”
Kenya	Articles 25 and 26 of the Competition Act provide for the granting of 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 the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions in the Act. Article 26 (2) provides that the authority may grant an exemption for exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same ought to be excluded from the prohibitions contained in the Act. Article 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; (b) improving or preventing a 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.
Singapore	The Competition Act states that undertakings “entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly” may be excluded from the prohibition of anticompetitive agreements and that the minister may also exempt agreements for reasons of public policy. In addition, agreements that produce a net economic benefit are excluded from the prohibition of anticompetitive agreements.
South Africa	Paragraph 10 (3) of the Competition Act states that the Competition Commission may grant an exemption if an agreement is required to attain or contributes to “any of the following objectives: (a) maintenance or promotion of exports; (b) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; (c) change in productive capacity necessary to stop decline in an industry; or (d) the economic stability of any industry designated by the minister, after consulting the minister responsible for that industry”.

Country	
Viet Nam	Article 14 (1) of Competition Law No. 23/2018/QH14 states that anticompetitive agreements “shall be granted exemption for a definite term if they meet one of the following conditions and benefit consumers: a) Promoting technical and technological advances, raising the quality of goods, services; b) Increasing the competitiveness of Vietnamese enterprises on international market; c) Promoting the single application of quality standards and technical norms of product categories; d) Agreeing on conditions for contract performance, goods delivery and payment, which are not related to prices and price elements”.