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**Model Law on Competition (2017) –  
Revised chapter II\***

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\* This is a draft for discussion of the Model Law on Competition (2017), revised chapter II, which is a revision of document TD/RBP/CONF.7/L.2. This document has not been formally edited.



## Model Law on Competition (2017) – Chapter II

### Definitions and scope of application

#### I. Definitions

(a) “Enterprises” means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

(b) “Dominant position of market power” refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

(c) “Mergers and acquisitions” refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.

(d) “Relevant market” refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

#### II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

## Commentaries on Chapter II and alternative approaches in existing legislation

### I. Definitions

#### Introduction

1. Most competition laws include a definitional section. Some include a preliminary catalogue of definitions, which lists a number of terms used in the legislation; others include a definition of a term only in the section of the legislation where it is actually used. In the latter case, the question arises whether the definition applies to the respective section only, or whether it has also to be used for the reading of the remainder of the law. This question is to be answered according to the rules governing interpretation in a given legal system.

2. Definitions shall make the reading of the law easier, and prevent confusion or ambiguity. For this purpose, they stipulate those elements that are essential for the application of terms which in ordinary usage may have uncertain or multiple meanings. They may also attribute a meaning to a term that is different from its common usage, e.g. by broadening or restricting the term's signification within the meaning of the law.

3. When designing a competition law, the legislature should take into account that definitions ensure that the enforcement agency applies the law according to the will of the legislature. However, too many or too strict definitions can also restrict an authority's flexibility and power to expand or limit the reach of the legislation as prevailing social or economic circumstances require. Also, there is a risk that defining a concept will create an exception or exemption by implication (or default).

4. A frequent technique to formulate legal definitions uses definitions that result from established decisional practice and are therefore without ambiguity and will not give rise to troublesome variations in case law that subverts the intent of the legislation as a whole. Adhering to widely accepted principles means that the definitions have been tested over time and will most likely stand up to challenge in a court of law. Also, it is more likely that, if a definition has been tried and tested – that is, it has withstood challenges in the case law of more mature competition regimes – then younger competition law regimes are more willing to adopt it.

5. In this respect, younger competition law systems can benefit from definitions elaborated in more established competition law systems, which have proved useful over time. For example, as between Barbados and Jamaica, Jamaica would be viewed as the more mature, and certainly the older, competition regime and the definition of “enterprise” in Jamaican legislation excludes from the ambit of the legislation a person who “works under a contract of employment; or holds office as director or secretary of a company and in either case is acting in that capacity [...]”. So too in the case of Barbados we see the legislation defining enterprise in a way which excludes an “employee” or “officer” of a body from the purview of the legislation.<sup>1</sup>

6. Against this background, it is also not surprising that young competition law systems such as Barbados, India, Jamaica and Nigeria appear to have defined more terms than the more mature agencies such as the United Kingdom of Great Britain and Northern Ireland, the United States of America and the European Union, since they could access definitions emanating from the decisional practice in these countries.

7. Furthermore, given international efforts aiming at conversion and development of best practices in competition law enforcement (e.g. by the International Competition Network), as well as the exchange of experience facilitated by international organizations,

<sup>1</sup> See the definition of “enterprise” in the Preliminary section of the Jamaica Fair Competition Act, Act 9 of 1993 and the Barbados Fair Competition Act, 2002-19, CAP.326C.

such as UNCTAD and the Organization for Economic Cooperation and Development, it is also no coincidence that definitions proffered by various legislation tend to resemble each other.

8. In jurisdictions where legal reforms tend to be a cumbersome and lengthy process, definitions of competition law concepts and terms might not be included in the law that has to be formally enacted. Instead, they might be published in agency guidelines, notices and discussion papers. For example, amendments of European competition law contained in the Lisbon Treaty<sup>2</sup> require consent of all European Union member States and amendments of competition provisions contained in and Council regulations require a qualified majority, which can involve a highly political and lengthy process. As a consequence, a great number of definitions and competition law concepts are laid out in regulations and notices by the European Commission.

9. Publishing definitions and competition law concepts in guidelines and discussion papers first may also be a way to test them prior to proceeding to legal reforms. However, it should be noted that defining terms in guidelines, notices, etc. does not have the authority of terms defined in legislation.

### **Definitions provided for by the Model Law on Competition**

10. Chapter II (1) of the Model Law on Competition provides several definitions typically contained in competition legislation. However, it needs to be emphasized that this list is not exhaustive. On the contrary, casual observation will likely lead the reader to wonder why, in comparison to the typical competition legislation, there are so few definitions in the Model Law. The definition section in the Model Law leaves out many of the definitions that are commonly found in various competition laws worldwide: for example, the terms “subsidiary” or “affiliated company” and also “agreement”.

11. The rather limited selection of definitions provided for by the Model Law can be explained by the fact that it was drafted by agreement. Nothing is included in the Model Law that would have been objected to by even one of the many member States. There is a certain commonality in the terms that are defined. For example, those that have been listed in the Model Law are those that have been agreed upon by the various competition law agencies; and one can point to a typical term that will be defined in almost all the competition legislation – whether or not the same word is used, we can identify that the same concepts are addressed. For example, in almost all of the legislation surveyed, we see a definition that directs the substantive provisions of the legislation to govern entities engaged in economic activity and sometimes State action.

(a) “Enterprises” means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

12. Competition laws generally apply to the entire range of different business actors described in Chapter (II) (1) a) of the Model Law. In order not to repeat the entire description in the substantive provisions of the law, an underlying definition/understanding of its addressees is crucial. Defining the addressees of competition law requires particular caution, since it limits the subjective scope of application of the law.

13. Different approaches can be observed. As already mentioned, certain competition law systems do not provide for a statutory definition of the law’s addressees, but rely upon the decisional practice of the enforcement bodies to establish an appropriate definition over time, see example from the European Union below.

<sup>2</sup> Treaty on the Functioning of the European Union (TFEU).

14. When the legislature opts for a statutory definition of the addressees of competition law, the following consideration should be taken into account. A mere listing of all forms of business actors subject to the application of the competition law does not allow for a flexible application of the law to new forms of economic entities, which might not have been known when the static definition was adopted. Therefore, it appears useful to allow for some flexibility when defining the addressees of a competition law, by stipulating the essential characteristics, which determine the competition law's addressees. This approach was chosen by the Model Law on Competition, which focuses on the engagement in commercial activities when defining enterprises as its addressees.

### **Alternative approaches in existing legislation – Definition of the law's addressees**

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#### **Competition law without a statutory definition of the law's addressees**

European Union	<p>Addressees of European Union competition law are “undertakings”. See for instance Articles 101 and 102 of TFEU, which prohibit anticompetitive agreements, decisions and concerted practices between “undertakings” and the abuse of its position by a dominant “undertaking”. However, European Union competition law does not provide for a statutory definition of the term “undertaking”.</p> <p>Over time, a functional understanding of the concept of undertaking has been established by European case law. Accordingly, “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”<sup>3</sup> is considered as an undertaking subject to European Union competition law.</p>
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#### **Competition law providing for a statutory definition of the law's addressees**

Brazil	<p>The competition law of Brazil states that the “law applies to individuals or legal entities of public or private law, as well as to any association of entities or individuals, whether de facto or de jure, even temporarily, incorporated or unincorporated, even if engaged in business under the legal monopoly system.”<sup>4</sup></p>
Peru	<p>In Peru, the competition law “is applicable to natural or legal persons, business associations, autonomous properties or other companies whether public or private, State or not, profitable or non-profitable, that in the market supply or demand good or services or whose affiliates, associates or members perform such activities. It is also applicable to those who perform the administration, management or representation of the above-mentioned entities, provided that these have participated during the planning, performing or execution of the administrative offense.”<sup>5</sup></p>
Indonesia	<p>Addressees of the competition law of Indonesia are all business actors, which are defined as “any individual or business entity, either incorporated as legal entity, established and domiciled or conducting activities within</p>

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<sup>3</sup> Case of the Court of Justice of the European Union, C-41/90 *Höfner and Elser v. Macrotron GmbH* [1991] E.C.R. I-1979.

<sup>4</sup> Law No. 12.529, 30 November 2011, Article 31.

<sup>5</sup> Legislative Decree approving the Repression of Anti-competitive Conducts Law, Legislative Decree No. 1034, 2008, Article 2.

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	the jurisdiction of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the field of economy.” <sup>6</sup>
India	The Indian Competition Act 2002 defines “enterprise” as “a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by departments of the Central Government dealing with atomic energy, currency, defence and space.” <sup>7</sup>
Ukraine	In Ukraine, an economic entity is defined as denoting such a legal person irrespective of its organization and legal form, its form of ownership or such a natural person that is engaged in the production, sale or purchase of products and in other economic activities, including a person who exercises control over another legal or natural person; a group of economic entities if one or several of them exercise control over the others. Bodies of State power, bodies of local self-government, bodies of administrative and economic management and control shall also be considered as economic entities in terms of their activities in the production, sale, and purchase of products or in terms of their other economic activities. <sup>8</sup>
Armenia	The competition law of Armenia states that the “Law shall apply to such actions or conduct of economic entities, state bodies, as well as their officials that lead or may lead to restriction, prevention, prohibition of economic competition, or act of unfair competition, except for cases provided for by law, as well as may prejudice the rights of consumers.”; see Article 2(1) of the Law of the Republic of Armenia on the Protection of Economic Competition of 2000, as amended by Law <i>HO-137-N of 12 April 2011</i> .
Republic of Korea	The scope of the competition law of the Republic of Korea extends to all enterprises. This includes employees, officers or agents who act in the interest of the “enterpriser”. Exceptions extended to agriculture, fishery, forestry and mining, were abolished in the revision of the Law (Article 2-1). <sup>9</sup>
Zambia	The competition law of Zambia applies to all economic

<sup>6</sup> Law of the Republic of Indonesia, No. 5, 1999, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, Article 1(5).

<sup>7</sup> The Competition Act of India, 2002, No.12 of 2003, Section 2.

<sup>8</sup> Law of Ukraine on the Protection of Economic Competition, 11 January 2001, No. 2210-III, Article 1.

<sup>9</sup> Monopoly Regulation and Fair Trade Act (Republic of Korea), Law No.3320, 31 December 1980, Article 2.1.

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activity within, or having an effect within, Zambia, except as otherwise provided for in the law.<sup>10</sup> It “binds the State insofar as the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market that is open to participation by other enterprises.<sup>11</sup> In Section 2(1), the competition law of Zambia defines “enterprise” as “a firm, partnership, joint- venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them.”

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(b) “Dominant position of market power” refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

15. The definition of “dominant position of market power” is based on section B (i) (2) of the Set of Principles and Rules. Note that most competition laws today either refer to a dominant position/dominance or to substantial market power. Both terms, which tend to be used interchangeably, can be defined as economic strength enjoyed by an undertaking, which enables it to prevent effective competition on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. In such a situation, the company in question has the ability to raise prices consistently and profitably above competitive levels. For further explanation regarding this issue, see the commentaries on Chapter IV of the Model Law on Competition.

16. Defining the type of transactions that shall be subject to control by a competition authority is crucial for the scope of a competition law’s merger control provisions. The Model Law chose to define “mergers and acquisitions” as those transactions that will be subject to merger control. Note, however, that the terminology used for the purpose of merger control varies significantly between the various competition law regimes. For further detail, see the commentaries on Chapter VI of the Model Law on Competition.

(c) “Mergers and acquisitions” refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.

(d) “Relevant market” refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

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<sup>10</sup> The Competition and Consumer Protection Act, 2010, No. 24 of 2010, Section 3(1).

<sup>11</sup> The Zambia Competition and Consumer Protection Act, 2010, No. 24 of 2010, Section 3(2).

## Rationale of market definition

17. One of the key preoccupations of competition law is market power. Market power can tell an assessor any number of things about a firm, including its ability to increase prices and limit choices and productive output, thereby adversely affecting consumer welfare. Market power also places a firm in a position to exclude its rivals from the market, thereby affecting the level of competition in that market. Therefore, as it is necessary to establish market power to test the ability of a firm to act unconstrained on the market, a natural precursor to that objective has to be to understand what is the market, who are its players – buyers, sellers, end customers – and what are the goods and substitutes products that are made available to consumers in that market. Identifying the relevant market or, in competition law speak, defining the relevant market helps an assessor to “define the boundaries of competition between firms”<sup>12</sup> and “identifies an arena of competition and enables the identification of market participants and the measurement of market shares and market concentration”.<sup>13</sup>

18. A key point to discern from the various efforts of agencies in defining market power is that defining the relevant market is not the end game; it is a key to unlocking other competition law tools used to test the level of competition on a market. For example, in the case of a merger, defining the relevant market is a precursor to testing the level of competition that the post-merger market is likely to face. In an abuse of dominance case, it is done as precursor to assess the ability of a firm to act unconstrained in the market; and in the case of an anticompetitive agreement case, it is used as precursor to testing whether the agreement has the ability to restrict competition. Therefore, defining the relevant market leads an assessor to unlock concepts such as “market power”, the “area of effective competition”, the “market’s size”, the “product market”, “the geographic boundaries of the market” and the “degree of concentration”.

## Market definition technique

19. As mentioned above, the relevant market frames the environment in which competition actually takes place. For the purpose of defining the relevant market, Chapter II (1) (d) of the UNCTAD Model Law on Competition requires a determination of the specific products of the relevant competitive activities, as well as of the geographic territory where such activities take place. This distinction between the relevant product market and the relevant geographic market is commonly accepted. The criteria for establishing both dimensions of the relevant market are based on the concept of demand-side substitutability.

## The relevant product market

20. In order to determine the relevant product market, it is therefore necessary to establish whether the products in question are substitutable from the demand side perspective. In practice, two closely related and complementary tests have been applied in the identification of the relevant product/service market, namely the reasonable interchangeability of use and the cross elasticity of demand. In the application of the first criterion, two factors are generally taken into account, namely, whether or not the end use of the product and its substitutes are essentially the same, or whether the physical characteristics (or technical qualities) are similar enough to allow customers to switch easily from one to another. In the application of the cross elasticity test, the price factor is central. It involves inquiry into the proportionate amount of increase in the quantities demand of one commodity as a result of a proportionate increase in the price of another commodity. In a highly cross elastic market, a slight increase in the price of one product

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<sup>12</sup> European Commission’s Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, O.J. 1997 C372/5, [1998] 4 CMLR 177.

<sup>13</sup> United States of America, Federal Trade Commission and Department of Justice, Joint Draft Revised Horizontal Merger Guidelines, Released for Public Comment on 20 April 2010. Available at <http://www.ftc.gov/os/2010/04/100420hmg.pdf>.



will prompt customers to switch to the other, thus indicating that the products in question compete in the same market, while a low cross elasticity would indicate the contrary, i.e. that the products have separate markets.

21. In other words, the pertinent question is whether the consumers of a specific product would switch to readily available substitutes in response to a hypothetical small (in the range of 5 to 10 per cent), but permanent relative price increase in the products and areas being considered. This test is called the hypothetical monopoly test or the SSNIP test (Small but Significant Non-transitory Increase in Price).

22. To determine, for instance, whether apples and pears belong to the same relevant product market, a competition authority would have to assess whether customers would switch from buying apples to buying pears if the price for apples rose 5 per cent on a permanent basis. If it came to the conclusion that customers would indeed switch to buying pears, apples and pears would belong to the same relevant product market. If, however, it found that customers would continue buying apples despite the price increase, only apples would form the relevant product market.

23. Although demand-side substitutability is the paramount criteria for defining the relevant market, a competition authority may also have to assess supply-side substitutability under certain circumstances. Supply-side substitutability is given when consumers do not consider certain products as substitutes, but when producers could easily switch the production of these goods to substitutable products. For instance, consumers may not consider sparkling and flat bottled water as substitutes. However, producers can switch their production easily from one product to the other according to changes in demand or price. Therefore, it is appropriate to define the relevant market as the market for bottled water that includes both sparkling and flat water.

### **The relevant geographic market**

24. The geographic market is the second element that must be taken into account for determining the relevant market. It may be described broadly as the area in which sellers of a particular product or service operate. It can also be defined as one in which sellers of a particular product or service can operate without serious hindrance.<sup>14</sup> The relevant geographical market may be regional, national or international in scope. On the regional level, it is possible to consider single towns or even certain parts of them, as well as a cluster of towns, a province or federal state, or a region consisting of a number of provinces/federal states.

25. The definition of the relevant geographic market is based on demand-side considerations as well. The relevant geographic market is the area in which the reasonable consumer or buyer usually covers his demand. The relevant question to define the geographic scope for the retail grocery markets, for instance, would be: will consumers switch from the supermarket near by to a supermarket in another area of town, if the nearby supermarket increases its prices 5 per cent on a permanent basis?

26. A number of factors are involved in determining the relevant geographic market, including price disadvantages arising from transportation costs, degree of inconvenience in obtaining goods or services, choices available to consumers, and the functional level at which enterprises operate.

### **Alternative approaches in existing legislation – Definition of relevant market**

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<sup>14</sup> Producers might, by anti-competitive agreement, avoid operating in particular areas and that would not be a reason for defining a geographical market narrowly (comment transmitted by the Government of the United Kingdom).

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China	<p>In China, according to Article 12 of the Anti-Monopoly Law of the People’s Republic of China, relevant market “refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services”.</p> <p>In addition, according to Article 3 of “Guidelines Regarding the Definition of Relevant Market” issued by the Antimonopoly Committee, “relevant market” also considers time or innovation, when involving intellectual property.</p>
India	<p>In the Indian Competition Act, 2002, Section 2 (r, s, and t), relevant market is defined as follows:</p> <p>(r) “relevant market” means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;</p> <p>(s) “relevant geographic market” means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas;</p> <p>(t) “relevant product market” means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason or characteristics of the products or services, their prices and intended use [...]. As regards “relevant product market”, the Indian Competition Act considers the following factors (Sec. 19 (7)):</p> <ul style="list-style-type: none"> <li>a. physical characteristics or end-use of goods;</li> <li>b. price of goods or services;</li> <li>c. consumer preferences;</li> <li>d. exclusion of in-house production;</li> <li>e. existence of specialized producers;</li> <li>f. classification of industrial products.</li> </ul> <p>For determining the “relevant geographic market”, the Indian Competition Act considers the following factors (Sec. 19 (6)):</p> <ul style="list-style-type: none"> <li>a. regulatory trade barriers;</li> <li>b. local specification requirements;</li> <li>c. national procurement policies;</li> <li>d. adequate distribution facilities;</li> <li>e. transport costs;</li> <li>f. language;</li> <li>g. consumers preferences;</li> <li>h. need for secure or regular supplies or rapid after-sales services.</li> </ul>
Kazakhstan	<p>Law of the Republic of Kazakhstan on Competition, 25 December 2008, No. 112-IV, Article 6(14) states that “goods market” means “the scope of transaction of goods or interchangeable goods, determined on the basis of</p>

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economic, territorial and technological opportunities of the consumer to purchase the good.”

Moreover, Article 6(3) provides that interchangeable goods means “a group of goods, which may be compared by their functional purpose, application, quality and technical characteristics, price, as well as of other parameters in such a way that the consumer interchanges them with each other in the process of consumption (production).”

Ukraine

Law of Ukraine on the Protection of Economic Competition, 11 January 2001, No. 2210-III, Article 1.

“Market of a product (product market)” denoting the sphere of turnover of a product (intersubstitutable products) for which there is demand and supply for a certain time and within a certain territory.

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## II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.

(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.

(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

## Introduction

27. Giving guidance for best practice in competition law design, the Model Law on Competition suggests that the law should have general applicability – to all industries, agreements and entities engaged in the commercial exchange of goods and services. However, it is true that there may be economic, legal and sometimes political reasons for limiting the general applicability of a competition law and it is these types of rationale, which dictate the scope of competition legislation.

28. The scope of competition law is typically the product of policy, based in historical and cultural circumstances, and economic objectives as defined by governments (sometimes under influence of the interest groups or other policy shapers). It develops over time as challenges are encountered while enforcing the law. The issues discussed below may determine the scope of competition legislation:

29. The approach taken by policymakers and legislatures to the rules that govern a certain sector of the economy are driven by political ideals held about the proper functioning of a system of government. For example, it has been observed that the need to ensure plurality and diversity of views, which is the hallmark of a well-functioning democracy, is one of the chief results of the antitrust stance of the United States on undue concentration in the media industry.<sup>15</sup> Thus, the Newspaper Preservation Act was passed in the 1970s when many “two-market newspaper towns” faced the danger of losing their

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<sup>15</sup> The same consideration influences the design of the competition law of Germany and the United Kingdom.

second voice. That law was passed to exempt certain joint operations of newspapers from antitrust scrutiny in order to preserve small town newspapers in economic distress.<sup>16</sup>

30. For many regions, it is a mix of the geography, economics, demography and politics which influences, guides and shapes the competition law and policy for that region.

31. The Revised Treaty of Chaguaramas, which is the treaty governing competition law for the Caribbean Community (CARICOM) region, may serve as an example in this respect. Respecting that the Caribbean Community is a “Community of Sovereign States”, its provisions are drafted to allow each member State to limit or delimit the scope of competition law for certain classes of economic activity as warranted by the level of economic development of each of the member States.<sup>17</sup>

32. A general observation of competition laws when they are first enacted suggests that they are drafted broadly and then, as the laws are tested in specific areas of the economy, they are clarified by the judiciary or amended by the lawmaker to respond to lobbying efforts of special interest groups or business people. For example, in the 1970s the competition laws of Canada did not apply to the service sectors, commercial banks, professional bodies or airlines. In the United States, too, in the 1970s, at least 16 different areas of law were exempted from the purview of antitrust law of the United States, including insurance, transportation, energy and professional baseball. In Europe, until recently, the insurance sector enjoyed, first, two individual exemptions and, later, a very broadly crafted block exemption, both of which were designed in the 1990s to allow for the “enhanced need for cooperation” created by the “special” nature of the insurance sector.<sup>18</sup> As a matter of general process, legislatures typically engage in heavy consultation with stakeholders in the sectors to be affected by the law, and also consumer protection groups, before crafting exemptions. Further, while lobbying may move legislatures or policymakers to review and narrow the law, it is also true that lobbyists and counter lobbyists, responding to ever-changing economic conditions, are responsible for moving lawmakers to review the scope of exemptions that are granted for sectors and types of economic activity.

33. Many competition law regimes are adopted with no way of knowing how they will subsequently develop. In most cases, the law develops when case law illustrates the many challenges posed by the law and the legislature reacts to correct any errors or misjudgments made when drafting the legislation. Sometimes, the system initially used to apply and enforce the law in a certain way is later viewed as outdated by many stakeholders; many errors in judgment become manifest only as time passes.

34. For example, for 40 years the European Commission applied a system of notification and authorization for agreements that fell within then Article 81(1) of the EC Treaty.<sup>19</sup> Under a system set up by secondary legislation in 1962, an agreement entered into by parties that fell within the former Article 81(1) of the EC Treaty would be void and not enforceable in a court of law, unless it was notified to the European Commission and granted an exemption pursuant to former Article 81(3) of the EC Treaty. The Commission had the sole and exclusive power to grant exemptions and, owing to the vulnerable economic position that firms found themselves in – not knowing whether their agreement would be enforceable or not – exorbitant numbers of agreements were filed with the Commission. In the period between 1962 and 1968, over 36,000 agreements were filed with the Commission, placing a tremendous burden on its resources and skewing its monitoring and enforcement priorities in a way which left many pernicious offenses to escape the notice of the European Commission. Still, the system saw some advantages in that it brought uniformity, certainty and a “culture of competition” to the European Community. Nevertheless, in 1999 the Commission adopted a White Paper on the modernization of the European Community competition law rules, which illustrated the many problems posed by

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<sup>16</sup> See UNCTAD (2002). Application of Competition Law: Exemptions and Exceptions. UNCTAD/DITC/CLP/Misc.25.

<sup>17</sup> See Chapter VIII of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy.

<sup>18</sup> [http://ec.europa.eu/competition/sectors/financial\\_services/insurance.html](http://ec.europa.eu/competition/sectors/financial_services/insurance.html)

<sup>19</sup> Now Article 101 of TFEU.

a notification and authorization system that gave sole and exclusive power to the Commission to enforce the former Article 81 of the EC Treaty. The paper also highlighted the changes and corrections that should be made to the system. The Modernization Regulation of the European Union, which abandoned individual authorizations by the Commission, was born of the views formed in the White Paper.<sup>20</sup> The decentralized enforcement regime and legal exception system for Article 81 agreements that now exist in the European Union can be said to have come as a result of 40 years of trial and error.

35. The scope of application also determines the extent to which competition laws reach anti-competitive acts and measures by States. The role of the State in the market has a significant impact on the way competition functions. Naturally, there are legitimate reasons for state intervention, such as achieving important public goals (e.g. setting labour and environmental standards or ensuring universal access to public goods and services) and correcting market failures. Nevertheless, in most developed countries as well as in many transitional and developing countries, there is a growing awareness of potential negative effects of unjustified or excessive state restraints. Particularly in developing and transitional countries, state restraints, rather than private restraints, can be the most significant competition challenges faced.<sup>21</sup>

### **Different dimensions of the scope of application**

36. Different dimensions that define a competition law's scope of application include the following aspects: Who are the addressees of the law (subjective scope of application)? What is the subject matter of the law, e.g. commercial activity as opposed to non-profit activity and sovereign acts of States (objective scope of application)? Where does the law apply (territorial scope of application)? When does the law apply (temporal scope of application)? In case of regional competition law regimes, an additional question relating to the jurisdictional interface between regional and national competition law arises.

#### **Subjective scope of application**

37. As mentioned previously, the subjective scope of application of a competition law depends on the definition of its addressees. The unifying theme among the legislation in many countries appears to be the effect the activity has in the marketplace, and *not* whether the actor is a legal entity, a public body or a natural person. Hence, it is a question of identifying whether the actor is engaged in "economic activity", "commercial exchange of goods and services" or "profit-making" activities, rather than its legal status, ownership or financing. This is particularly important where activities of unincorporated businesses is economically important, e.g. in the informal sector.

38. Furthermore, the Model Law on Competition suggests that a competition law shall apply "to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law." The same approach is taken by European competition law, according to which natural persons may be classified as undertakings without being incorporated as a personal corporation if they are independent economic actors on markets for goods or services.<sup>22</sup> On this basis, lawyers, doctors and architects were classified as undertakings within the meaning of European competition law.

39. The scope of application has also been clarified to exclude the sovereign acts of local governments, to whom the power to regulate has been delegated, and to protect the acts of private persons when their conduct is compelled or supervised by governments. It should be mentioned, however, that in section B (7) of the Set of Principles and Rules and

<sup>20</sup> White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, COM(99) 101 final, 28 April 1999.

<sup>21</sup> See Fox E & Healey D, 'When the State Harms Competition – The Role for Competition Law' (2014) 79 Antitrust L. J. 769.

<sup>22</sup> See, for example, as regards customs agents of Italy Case of the Court of Justice of the European Union C-35/96 *Commission v Italy* [1998] E.C.R. I-3851.

in most countries having modern competition legislation, the law covers State-owned enterprises in the same way as private firms. The provisions of the United Nations Set of Principles and Rules on Competition (UN Set on Competition) apply to all enterprises regardless of the parties involved in the transactions, acts or behavior.<sup>23</sup> The UN Set on Competition defines “enterprises” in Section B(i)3, as “firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them”. Most competition laws today cover the economic activities of State-owned enterprises (SOEs).<sup>24</sup> As indicated in the UN Set on Competition, the major determinant of coverage is whether the enterprise, private or State-owned, is engaged in commercial activities. The competition laws of Brazil and Peru explicitly state that they are applicable to all persons or entities, public or private. The OECD Guidelines establish that: “Due to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises.”<sup>25</sup> However, there may be certain circumstances where SOEs are exempt from competition rules. That may be the case where they provide general public services or are in strategic sectors (e.g. postal services, energy, health care etc.). In the European Union, for example, defense and air traffic control are excluded. For instance, in Kenya, section 5(1) of the Competition Act of Kenya applies to “all persons including the Government, state corporations and local authorities in so far as they engage in trade”.<sup>26</sup> In Spain, Article 4(2) of the Competition Act provides for its full application with respect to situations of restricted competition which are derived from the exercise of administrative powers or which are caused by the actions of the public authorities or State-owned companies, unless the conduct in question results from the application of a law. In Algeria, the competition law’s scope of application extends to the acts of governmental authorities when they are not acting in the exercise of the prerogatives arising from their official powers or for the fulfillment of public service objectives.

40. However, even when competition laws apply, SOEs that compete with private enterprises have competitive advantages because of their government links, leading to pricing which does not fully reflect the cost of resources. On the other hand, SOEs may be in a disadvantaged position vis-à-vis private enterprises because of e.g. greater accountability obligations, public service obligations and reduced managerial autonomy. To ensure a level playing field for public and private enterprises, a growing number of countries, including some developing countries, have adopted the principle of competitive neutrality.<sup>27</sup> “Competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages.”<sup>28</sup> Effective governance, improving independence in decision-making, accountability and disclosure, as well as applying competition laws equally to all enterprises are some of the ways to ensure a level playing field for public and private enterprises. In Australia, there are guidelines at the national and sub-national level to assist managers in enforcing a financial and governance framework of competitive neutrality. The Australian Government Competitive Neutrality Complaints Office administers a complaints mechanism to receive complaints,

<sup>23</sup> See UNCTAD (2000). The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. Section B(7). TD/RBP/CONF/10/Rev.2.

<sup>24</sup> See UNCTAD (2015). Competition Law and the State: Competition laws’ prohibitions of anti-competitive State acts and measures (Vol. 2). UNCTAD/DITC/CLP/2015/6.

<sup>25</sup> OECD (2009). Policy Roundtable on State Owned Enterprises and the Principle of Competitive Neutrality. DAF/COMP(2009)37: 9.

<sup>26</sup> See Competition Act No. 12 of 2010.

<sup>27</sup> See UNCTAD (2014). Competitive neutrality and its application in selected developing countries. UNCTAD/DITC/CLP/2014/Misc.1.

<sup>28</sup> OECD (2012). Competitive Neutrality: Maintaining a level playing field between public and private business:15.

undertake investigations and advise the government on the application of competitive neutrality to government businesses.<sup>29</sup>

### Objective scope of application

41. The competition rules are intended to protect against harmful business practices that can affect a range of economic activities irrespective of the sector or industry in which they are undertaken. Therefore, a range of activities including sports, broadcasting, international wire transfers, software development and marketing, access to telecommunications networks and mail delivery in the postal service are subject to competition laws, for example. In respect of these economic activities and across all sectors, competition laws are designed to prevent anti-competitive agreements, abusive behavior by monopolists, anti-competitive mergers and even public or State restrictions of competition.<sup>30</sup>

42. As far as State restrictions of competition are concerned, there are legitimate reasons for market intervention by States. As mentioned above, States need the ability to regulate in the public interest. Accordingly, the Model Law on Competition suggests that a competition law shall “not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.”

43. Indeed, several competition laws provide for State action defense to be asserted by market actors who act anti-competitively and contend that the State has triggered or blessed their conduct. This enables a State to enlist private parties to carry out public service missions. In Serbia and Turkey, for example, the defense applies when the state merely encourages the conduct. By contrast, in other, more mature jurisdictions, the defense is narrower. Of course, a narrow defense favours the market over the State. In the European Union, a state action defense is accorded if the conduct is required by national law, but State encouragement of anti-competitive acts is no defense if the private party had autonomy to act competitively.<sup>31</sup> In the United States, the defense is available if the State has articulated a clear policy to allow the anti-competitive conduct and the State provides active supervision of the anti-competitive conduct.<sup>32</sup>

44. Acts by a government (State or local) itself that distort competition have often been treated as legislative and political matters, not covered by competition law. For instance, in India, Section 2 of the Competition Act expressly excludes the sovereign functions of government. However, the running of a railroad by the Government of India was held to be carrying on of a business rather than a sovereign function of government.<sup>33</sup> Some jurisdictions, most notably the European Union, rely on ex-post remedies to deal with anti-competitive State measures, for example to require public sector businesses to cease actions that have a detrimental impact on competition.<sup>34</sup> Moreover, a critical number of younger competition law regimes, such as China and the Russian Federation, have designed their competition laws to move into an even broader space of anti-competitive State measures. A wide array of State measures – such as granting certain entities exclusive rights or privileges, distortive legislation or regulation, free market of goods and arbitrary public procurement and other abuses of administrative power – are now among the focus of competition legislations of several countries. This goes back to the aforementioned growing awareness in world of the role that the State plays in the market.

<sup>29</sup> OECD (2014). *Competitive Neutrality: National Practices in Partner and Accession Countries*. DAF/CA/SOPP92013)1/FINAL: 10.

<sup>30</sup> Whish R & Bailey D (2015). *Competition Law*. Oxford University Press (8th ed.): 3.

<sup>31</sup> Case T-513/93, Consiglio Nazionale degli Spedizionieri Doganali v. Commission [2000] E.C.R II-01807.

<sup>32</sup> See e.g. *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

<sup>33</sup> *Union of India v. Competition Commission of India*, W.P.(C) No. 993/2011 (2012), para. 27.

<sup>34</sup> See Article 106 of TFEU.

## Alternative approaches in existing legislation – Prohibition on anti-competitive state measures<sup>35</sup>

### *Granting special or exclusive rights or privileges to public enterprises*

European Union	<p>In terms of public undertakings, the member States of the European Union may not adopt any measure contrary to the competition provisions of the Treaty.</p> <p>Specifically, according to TEFU Article 106(1), in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101-109 (the non-discrimination and the competition rules).</p>
Lithuania	<p>Republic of Lithuania Law on Competition, 23 March 1999 No. VIII-1099, as amended on 22 March 2012 No. XI-1937, Article 4(2), prohibits actions by entities of public administration that grant privileges to or discriminate against any individual economic entities or their groups:</p> <p>“Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual economic entities or their groups and which give or may give rise to differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition may not be avoided when meeting the requirements of the laws of the Republic of Lithuania.”</p>

### **Public Procurement**

Russian Federation	<p>Federal Law on Protection of Competition, No. 135-FZ of 26 July 2006 (as amended in 2011), Article 17, prohibits anti-competitive practices and processes regarding requests for and granting of tenders:</p> <p>“1. The actions that lead can lead to prevention, restriction or elimination of competition in the course of tender, requests for price quotations for the goods (further on referred to as a request for quotations) are prohibited, including:</p> <p>[...]</p> <p>2) creation of preferential conditions for participation in the tender, a request for quotations to one or several participants, including by means of access to information, unless is determined otherwise by the Federal Law;</p> <p>[...]</p> <p>3. [...] it is forbidden to restrict competition by means of including in the tenders’ lots structure of production (goods, works, services) which technologically and functionally are not connected with goods, works, services which provision, execution, rendering are the subject of the tender, request for quotations.”</p>
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### **Free Movement of Goods**

<sup>35</sup> See UNCTAD (2015) (Footnote 24).



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China	<p>The Anti-Monopoly Law of China explicitly prohibits administrative and other public bodies from limiting entry of goods or discriminating against goods from other provinces.</p> <p>Specifically, Article 33 stipulates that administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to impede the free flow of commodities between different regions by any of the following means:</p> <ol style="list-style-type: none"> <li>(1) setting discriminatory charging items, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities;</li> <li>(2) imposing technical specifications or test standards on non-local commodities, which are different from those on local commodities of similar types, or taking discriminatory technical measures, such as repeated test and repeated certification, against non-local commodities, for the purpose of restricting the access of non-local commodities to the local market;</li> <li>(3) adopting a special practice of administrative licensing for non-local commodities, for the purpose of restricting the access of non-local commodities to the local market;</li> <li>(4) erecting barriers or adopting other means to prevent non-local commodities from coming in or local commodities from going out; or</li> <li>(5) other means designed to impede the free flow of commodities between regions.</li> </ol> <p>Article 30 of The Anti-Price Monopoly Regulations (2011, National Development and Reform Commission) enacted in pursuit of the Anti-Monopoly Law also emphasizes such prohibitions.</p>
Kazakhstan	<p>The competition law of Kazakhstan identifies "free flow of goods and free economic activity" as one of its purposes, and it prohibits State action obstructing trade:</p> <p>"The purposes of this Law are to protect the competition, create conditions for efficient functioning of commodity markets, ensure unity of economic space, free flow of goods and free economic activity in the Republic of Kazakhstan."</p> <p>(Article 1(2))</p> <p>Furthermore, Article 33 states the following:</p> <p>"Anti-competitive actions by State authorities such as the adoption of acts or decisions, written or verbal instructions, conclusion of agreements or other actions that resulted or may result in restriction or elimination of competition or infringement on consumers' lawful rights, unless such actions are envisaged in the laws of the Republic of Kazakhstan, shall be prohibited and deemed fully or partially invalid in accordance with the procedure established in the legislation of the Republic of Kazakhstan.</p> <p>[...]</p>

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2. The following shall be deemed to be anti-competitive actions of the State authorities, including:

[...]

3) setting bans or restrictions with regard to free movement of goods, other restrictions of the rights of a market entity for sale of goods;

[...]

8) limitation of entry to the commodity market, exit or removal of market entities from the commodity market.”

### **Abuse of Government Power**

#### **China**

The Anti-Monopoly Law of China prohibits any administrative organ or organization empowered by a law or administrative regulation from engaging in anti-competitive practices. It should be noted that the competition authorities of China do not have the power to enforce this law; they may make recommendations to the superior agencies of the offenders, who may request that the behavior be changed. The relevant language reads as follows:

“Article 32. Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to require, or require in disguised form, units or individuals to deal in, purchase or use only the commodities supplied by the undertakings designated by them.

Article 34. Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to exclude non-local undertakings from participating, or restrict their participation, in local invitation and tendering by imposing discriminatory qualification requirements or assessment standards, or by refusing to publish information according to law.

Article 35. Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to exclude non-local undertakings from making investment or restrict their investment locally or exclude them from establishing branch offices locally or restrict their establishment of such offices, by treating them unequally as compared with the local undertakings, or by other means.

Article 36. Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to compel undertakings to engage in monopolistic conducts that are prohibited by this Law.

Article 37. Administrative organs may not abuse their administrative power to formulate regulations with the contents of eliminating or restricting competition.”

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Ukraine	<p>The competition law of Ukraine prohibits States and local and administrative bodies from engaging in certain practices that might have the effect of prevention, elimination, restriction or distortion of competition.</p> <p>Article 15 states the following:</p> <p>“1. The issue of any acts (decisions, orders, directions, enactments, etc.), the making of written or verbal instructions, the conclusion of agreements or any actions or inactivity of bodies of State power, bodies of local self-government, bodies of administrative and economic management and control (a collegiate body or an official) which resulted or can result in the prevention, elimination, restriction or distortion of competition shall be considered as anti-competitive actions of bodies of State power, bodies of local self-government, bodies of administrative and economic management and control.</p> <p>2. In particular, the following actions of bodies of State power, bodies of local self-government, bodies of administrative and economic management and control shall be considered as anti-competitive ones:</p> <ul style="list-style-type: none"> <li>• prohibition against or the prevention from establishing new enterprises or performing entrepreneurship in other organization forms in any sphere of activities and the placing of restrictions on performing certain activities, on the production, purchase or sale of certain types of products; [...]</li> </ul> <p>Article 17 states the following:</p> <p>“Such actions or inactivity of bodies of State power, bodies of local self-government, bodies of administrative and economic management and control (a collegiate body or an official) that induce economic entities, bodies of State power, bodies of local self-government, bodies of administrative and economic management and control to violate the laws on protection of economic competition or that create conditions for committing violations of that sort or for legalising them shall be prohibited.”</p>
Lithuania	<p>Article 4 of the competition law of Lithuania imposes an obligation on entities of public administration to ensure freedom of fair competition when they carry out tasks related to the regulation of economic activities.</p>
<b>Power of competition authorities to challenge State anti-competitive acts and measures</b>	
Spain	<p>Under the competition law of Spain, the National Competition Commission is empowered to file a request asking the administrative body to correct its behaviour, and, if the administrative body does not respond satisfactorily, to bring a judicial action against it.</p> <p>Competition Act 15/2007, 3 July 2007 (Official State Gazette No. 159, of 4 July 2007), Article 12(3) provides that:</p> <p>“The National Competition Commission is legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived.”</p>

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Mexico

The Competition Commission in Mexico may issue non-binding opinions regarding programs and policies of public authorities. Article 12 of the Federal Economic Competition Law of 2014 states that:

“The commission shall have the following powers:

[...]

XII. Issue an opinion when deemed appropriate or upon request of the Federal Executive Branch, either directly or through the secretariat, or upon request of an interested party, regarding adjustments to programs and policies carried out by public authorities, in the event they can have adverse effects on the free competition process and the economic competition in accordance with applicable law, without these opinions having binding affects. The cited opinions must be published;

[...]”

45. As stated previously, the general proposition is that competition should be applicable in a uniform and non-discriminatory manner to all entities engaged in commercial activity and to all industry sectors. This should be the case for two principal reasons. First, consistency and predictability in the application of the law are fostered and the citizenry develops trust in the institutions charged with implementing the law because of the confidence and accountability that predictability engenders when the law is applied in a uniform, fair and nondiscriminatory manner. Second, the interdependent nature of economic activities will ensure that the prevailing competitive dynamic in one market will affect prices or output, for example, in another market, either because the goods or services being offered are substitutes or complements to each other or the good or service forms the productive input for another market. Even where there is no obvious link between the resources of one market and another, the distortions of one market can create a ripple effect such that many sectors of the economy are affected, for example by their differing abilities to compete for labour or capital. Uniform application will likely engender a balanced outcome in terms of the economic impact the law makes.<sup>36</sup>

46. Nevertheless, it shall be the case that legislatures have a set of priorities that may conflict with the goals of competition law, whether they be economic development objectives, import controls, special economic preferences carved out for the local agricultural sector or investment policy restrictions governing foreign firms. Some of these priorities often lead a legislature to carve out exceptions or exemptions in competition law legislation. Generally speaking, two techniques to limit the objective scope of application of a competition law can be distinguished from one another.

47. By way of illustration, certain types of business practices/agreements may be exempted from competition law. For instance, a number of jurisdictions exempt export cartels from the application of the law given that they do not harm the domestic economy from a short-term perspective. However, it should be noted that export cartels may negatively impact on the domestic industry’s competitiveness in the long run and certainly they are undesirable from a global perspective. Specific types of agreements may not only be exempted by law, but also by secondary legislation adopted by a competition authority, such as block exemptions under European competition law. Furthermore, several competition laws have provided specific provisions to govern intellectual property. However, virtually all antitrust laws treat licences of technology as “agreements” and scrutinize them for restrictions or abuses like any other agreement, except that the legal

<sup>36</sup> See UNCTAD (2002). *Application of Competition Law: Exemptions and Exceptions*. UNCTAD/DITC/CLP/Misc.25: 5.

exclusivity granted by the State to inventors may justify some restrictions that would not be acceptable in other contexts.

48. In several countries, the exploitation of intellectual property rights has given rise to competition problems. In view of the competition problems arising from the exercise of copyright, patents and trademark rights, Spain, the United Kingdom and the European Union have considered it necessary to draw up specific regulations dealing with intellectual property rights in relation to competition. The United States has also adopted guidelines intended to assist those who need to predict whether the enforcement agencies will challenge a practice as anti-competitive. Some of the wording used to design the interface between intellectual property and competition law is illustrated in the table below.

### **Alternative approaches in existing legislation – The interface between competition law and intellectual property**

<i>Country</i>	
Canada	In Section 79(5) of the Competition Act of Canada, it is stated that “for the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.”
China	Article 55 of the Anti-Monopoly Law of China states that the law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, the law shall be applicable to the undertakings who eliminate or restrict market competition by abusing their intellectual property rights.
Jamaica	In Section 3c of the Jamaica Fair Competition Act, it is stated that nothing in the Act shall apply to “the entering into of an agreement in so far as it contains a provision relating to the use, license or assignment of rights under or existing by virtue of any copyright, patent or trade mark”.
India	In Section 3(5) of the Competition Amendment Act 2007 of India, it is stated that – with regard to the sections outlining the prohibitions governing agreements, abuse of dominance and combinations – nothing in those sections shall restrict a person’s right to restrain an infringement or impose conditions to protect rights accruing to them conferred on them by: <ul style="list-style-type: none"> <li>(a) the Copyright Act, 1957 (14 of 1957);</li> <li>(b) the Patents Act, 1970 (39 of 1970);</li> <li>(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);</li> <li>(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000);</li> <li>(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000).</li> </ul>

<i>Country</i>	
Israel	<p>In the Restrictive Trade Practices Law 1988 of Israel, certain intellectual property agreements are deemed not to be restrictive. The language reads (Section 3):</p> <p>“An arrangement involving restraints, all of which relate to the right to use any of the following assets: patents, service marks, trademarks, copyrights, performers’ rights or developers’ rights, provided that the following two conditions are met:</p> <p>“(a) The arrangement is entered into by the holder of the above asset and the party receiving the right to use the above asset;</p> <p>“(b) If the above asset is subject to registration by law – it is so registered.”</p>
Ukraine	<p>In the Law of Ukraine on the Protection of Economic Competition, special exemptions are made for concerted actions relating to intellectual property: Article 9 states:</p> <p>“The provisions of Article 6 of the present Law shall not be applied to agreements on the transfer of intellectual property rights or on granting the right to use the intellectual property to the extent of the limitation, by the agreements, of economic activities of the agreement party to whom the right is transferred unless these limitations exceed the limits of the legitimate rights of the intellectual property entity.</p> <p>“2. It shall be considered that limitations relating to the volume of transferred rights, the period and territory of validity of the permission to use the intellectual property object, those relating to the type of activities, the sphere of use, the minimal volume of production do not exceed the limits of the rights mentioned in Part 1 of the present Article.”</p>

49. Secondly, specific industry sectors may be exempted. Very frequently, the agricultural sector is exempted from the application of competition law. Sectors where certain types of economic activities are exempted from antitrust scrutiny include the labour and transportation sector. Furthermore, industry sectors that are subject to specific regulation may be exempted from the application of the general competition law. Network industries – such as energy, water, and telecommunications – fall within this category. However, it should be noted that, whereas some countries exempt regulated industry entirely from the application of competition law, others make competition law subsidiary to sector-specific regulation. The commentaries on Chapter VII of the UNCTAD Model Law provide more information on the relationship between competition law and sector regulation.

### **Alternative approaches in existing legislation – Exempted industry sectors**

<i>Country</i>	
China	<p>According to Article 56 the Anti-Monopoly Law of the People’s Republic of China, this law shall not apply to alliances or concerted actions of agricultural producers and rural economic organizations when engaging in economic activities such as production, processing, sales, transportation and storage of agricultural products.</p>

<i>Country</i>	
Jamaica and Barbados	<p>As regards labour policy, in Jamaica and Barbados, the present law exempts “collective bargaining done on behalf of employees to fix terms and conditions of employment” from the purview of the competition laws;<sup>37</sup></p> <p>Another key point to note about both pieces of legislation is the non-static nature of the exemption section, which appears to create room for exemptions and exceptions to be created over time for “such other business or activity declared by the Minister by order subject to affirmative resolution.” (See sections 3(h) of the respective legislation.</p>
Israel	<p>As regards agriculture and transportation, exemptions are made in the Restrictive Trade Practices Law of Israel for:</p> <ul style="list-style-type: none"> <li>-Agreements involving restrictions which relate to domestic agricultural produce including fruits, vegetables, field crops, milk, eggs, poultry, cattle, fish and honey (see section 3(4)).</li> <li>- Agreements involving restrictions international air or sea transportation, or a combination of sea, air and ground transportation provided that all parties are sea or air carriers or an international association of sea or air carriers approved by the Minister of Transportation (see section 7).</li> </ul>
Canada	<p>As regards the financial sector and transportation, Article 90.1(9) of the Competition Act of Canada states that:</p> <p>“The Tribunal shall not make an order under subsection (1)<sup>38</sup> in respect of</p> <ul style="list-style-type: none"> <li>(a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner (i) the names of the parties to the agreement or arrangement, and (ii) the Minister of Finance’s request for or approval of the agreement or arrangement for the purposes of financial policy;</li> <li>(b) an agreement or arrangement that constitutes a merger or proposed merger under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act in respect of which the Minister of Finance has certified to the Commissioner (i) the names of the parties to the agreement or arrangement, and (ii) the Minister of Finance’s opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or</li> <li>(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of</li> </ul>

<sup>37</sup> Jamaica Fair Competition Act, Act 9 of 1993, Section 3, and the Barbados Fair Competition Act, 2002-19, CAP.326C, Section 3.

<sup>38</sup> Article 90.1(1) states that “if, on application by the Commissioner, the Tribunal finds that an agreement or arrangement - whether existing or proposed - between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order (a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or (b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.”

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Country

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the Canada Transportation Act in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.”

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### **Territorial scope of application**

50. As much as the legislature enjoys legislative discretion with respect to the design of the contents of a law, the latter’s territorial scope of application needs to respect the limits of public international law. Under the principles of public international law, it is generally acceptable for a State to exercise subject matter jurisdiction to regulate (a) conduct that is within its territory (the territoriality principle); or (b) conduct of its citizenry, which includes the activities of corporations domiciled or registered under their company/corporate laws (the principle of nationality). However, in the area of competition law, it is accepted today that the principle of territoriality does not prevent a State from having subject matter jurisdiction over acts that originate in foreign countries but which produce effects within the State’s territory (extraterritorial application of competition law). This means that a State may apply its competition law to foreign-to-foreign mergers, as well as to cartels that were concluded outside its territory, but which impact on the level of prices of the respective products domestically.

51. Outside of these rules of public international law (and regional competition law principles enumerated in community competition regimes like that of the European Union), no internationally agreed rules of prescriptive jurisdiction exist. The extent to which a State can apply competition law over conduct that occurs abroad is therefore solely a question of domestic law limited by the principles of public international law. This means that States may also decide not to apply their competition laws extraterritorially.

### **Alternative approaches in existing legislation – Territorial scope of application**

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Country

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United States

The United States was the first to apply its antitrust law extraterritorially when it formulated the “effects” doctrine in *United States v. Aluminum Co. of America*.<sup>39</sup> This doctrine was later tempered by the Foreign Trade Antitrust Improvement Act, legislation which applies to export trade and which is key to establishing extraterritorial application of the Sherman Act subject matter jurisdiction. Under that legislation, a United States court will have subject matter jurisdiction over export commerce if there is a “direct, substantial and reasonably foreseeable effect” on either:

- (a) domestic commerce, say for example in a situation where the extraterritorial activity or the foreign agreement in question raises prices in the United States; or
  - (b) export trade or commerce of a United States company, say for example in a situation where the activity or the agreement restricts access of United States exports to a given market (see 15 U.S.C section 6a).
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<sup>39</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, p. 443-45 (2d Cir. 1945).



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 Country
 

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European Union	<p>In respect of the European Union, there is no regulatory instrument which addresses the extraterritorial application European Union competition law to non-European Union companies. However, the extraterritorial application of European competition law is not in doubt, as a body of case law has developed showing how the laws can be applied to non-European Union activities or companies. In the European Union, three separate principles appears to have developed:</p> <p>(a) The “economic entity” doctrine allows for subjectmatter jurisdiction over a non-European Union parent company that controls the conduct of its European Union subsidiary.<sup>40</sup></p> <p>(b) The “implementation” doctrine allows for agreements that are formed outside of the European Union to be subject to European Union jurisdiction if the agreement is implemented in the European Union and it affects trade between the member States.<sup>41</sup></p> <p>(c) The “effects” doctrine, though not an established doctrine at the level of the Court of Justice of the European Union, is a doctrine that has apparently become common usage at the Commission level.<sup>42</sup> This doctrine gives the European Community subject matter jurisdiction over extraterritorial activities whose effects are felt within the European Union.</p>
Germany	<p>According to its Section 130 (2), the Act against Restraints of Competition of Germany shall apply to all restraints of competition having an effect within the scope of application of the Act, also if they were caused outside the scope of application of the Act.</p>
Singapore	<p>Singapore is one country that has explicitly articulated the extraterritorial nature of its competition law in its legislation.</p> <p>Section 33(1) of the Singapore Competition Act 2004 extends the applicability of the competition laws to agreements entered into or conduct engaged in outside Singapore or by parties who are outside Singapore.</p>

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<sup>40</sup> Case of the Court of Justice of the European Union 48/69 *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619, para. 64.; Case of the Court of Justice of the European Union 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] E.C.R. 219, para. 15.

<sup>41</sup> Joined Cases of the Court of Justice of the European Union 89, 104, 114, 116, 117 and 125 to 129/85 “*Woodpulp*” *A. Ahlström Osakeyhtiö and others v. Commission* [1988] E.C.R. 5193, paras. 16-18.

<sup>42</sup> See, for example, dicta in Commission decision of 24 July 1969, *Dyestuffs*, O.J. 1969 L195/11, para.28. Also see para.100 of the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. 2004 C101/81.

<i>Country</i>	
India	Section 32 of the India Competition Act 2002 addresses conduct taking place outside India which has an effect on competition in India. The Monopolies and Restrictive Trade Practices Commission (MRTPC) has the power to inquire into, and issue orders in respect of, agreements or combinations entered into abroad and parties associated therewith, as well as enterprises abusing their dominant positions abroad. The power exists if the agreement, dominant position or combination has or is likely to have an appreciable adverse effect on competition in the relevant market in India.
Malaysia	According to Article 3(1) of the Competition Act 2010, the Act applies to any commercial activity, both within and subject to subsection (2), outside Malaysia.  Subsection (2) stipulates that in relation to the application of the Act outside Malaysia, it applies to any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia.

### **Temporal scope of application**

52. The temporal scope of a law is defined as the period during which the law is applicable. From a policy perspective, the central issue with respect to the temporal application of competition law is the entry into force of a new regime. Depending on the broader government initiatives, it will be important to assess whether the legislation should come into force immediately or whether a period of preparation, education and general transition has to be undertaken before the law comes into force. This transition period allows the general citizenry and businesses in particular to become familiar with the legal regime and to learn how it will affect their economic activities. Generally, legislative drafting techniques that can be used to phase-in the law include transitional provisions, savings clauses, repeals, “sunset” provisions and other tools that limit or delay the general applicability of the law or various provisions in the law.

53. For example, Chapter VIII of the Revised Treaty of Chaguaramas which enumerates the CARICOM law on Competition Policy and Consumer Protection contains a clear recognition that a phase of preparation and rule transition in the wider legislative landscape for each Member State will have to take place in order to ensure consistency and compliance with the Revised Treaty. Article 170(1)(b) of the Treaty is one of a number of provisions that directs member States to take implementation measures. It states that the member States shall:

“Take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct; “Provide for the dissemination of relevant information to facilitate consumer choice;

“Institute and maintain institutional arrangements and administrative procedures to enforce competition law; and

“Take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.”

54. In other respects, prior to the adoption of competition law, a general audit and review of the existing regulatory regimes and the prospective ones that are on the horizon should be assessed in order to judge how these rules contradict or complement the competition law regime.

### Jurisdictional interface between regional and national competition law

55. Several regional and supranational organizations have adopted competition rules in addition to the national competition laws of their member States. Hence, the question arises: Which type of situation is governed by regional competition rules and which type of situation is governed by national competition laws? Furthermore, the respective enforcement competences of regional and national competition authorities need to be clearly defined in order to prevent jurisdictional conflicts.

56. Approaches with respect to these two questions vary between regional organizations.

### Alternative approaches in existing legislation – scope of application of regional and national competition rules

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#### *Regional organization*

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European Union	<p>Substantive provisions of European competition law apply directly in all European Union member States when the conduct in question may affect trade between member States, see e.g. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.</p> <p>The criterion of “European Union dimension” is also decisive for the competence of the European Commission, as enforcement body of European competition law. If anti-competitive conduct does not have an European Union dimension, it falls within the competence of national competition authorities. If it has an European Union dimension, the European Commission and national competition authorities have parallel competences. The Commission Notice on cooperation within the Network of Competition Authorities sets out principles for the exercise of jurisdiction in this event. In the field of merger control, the European Commission has exclusive jurisdiction over concentrations that have European Union dimension.</p>
Economic and Monetary Community of Central Africa (CEMAC) <sup>43</sup>	<p>Similar to the European Union model, CEMAC competition law applies to anti-competitive practices affecting trade between member States. The Competition Monitoring Body, which includes the Executive Secretariat and the Regional Competition Council, monitors the implementation of the community law.</p>
Common Market for Eastern and Southern Africa (COMESA) <sup>44</sup>	<p>The COMESA Council of Ministers adopted Competition Regulations and Rules (Regulations) in December 2004.</p> <p>COMESA encourages its member States to enact domestic competition laws. The regional law addresses cross-border competition issues affecting the common market. In this respect, the COMESA competition regime is similar to that of the European Union. COMESA Regulations cover mergers and acquisitions, and anti-competitive business practices, including abuse of dominance. They also cover consumer protection, which is a deviation from the</p>

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<sup>43</sup> See report by the UNCTAD secretariat “The attribution of competence to community and national competition authorities in the application of competition rules”, 23 May 2008 TD/B/COM.2/CLP/69.

<sup>44</sup> Ibid.

*Regional organization*

common formulation of regional/community competition rules.

COMESA Regulations provide for the creation of two institutions for enforcement of the provisions, the COMESA Competition Commission and the Board of Commissioners.

On competence sharing, the commission has a supranational position vis-à-vis the national competition authorities in competition cases. When the commission receives an investigation request concerning an anti-competitive conduct taking place in a member State, it can resolve the case in various ways. It can order the enterprise concerned to take a specific course of action. The commission may apply to the relevant national court for an appropriate order if the enterprise fails to comply within a specific time period.

Andean Community<sup>45</sup>

The Andean Community approved decision 608 on Rules for the Protection and Promotion of Competition in the Community in March 2005, which applies to anticompetitive practices and abuse of dominance. Article 5 of decision 608 covers:

(a) Anti-competitive practices occurring and having effects within the territory of one or more member States, except those which originate from and affect only one country; and

(b) Anti-competitive practices originating from a noncommunity country and affecting two or more community members.

This implies that the community law can only be applied in cases where two or more countries are involved. National competition authorities have jurisdiction over all other cases.

The Andean Community secretariat is the investigative arm of the community. Investigations are carried out jointly by regional and designated national authorities under the supervision of the Andean Community. The Committee on the Protection of Free Competition is the adjudicative arm of the Andean Community, and is composed of high-level representatives from member States. The judicial arm of the community is the Andean Community Tribunal of Justice.

On competence allocation, both national and community institutions have responsibilities. In member States where there is no competition law, the designated authority assumes jurisdiction on the enforcement of community law. In the Plurinational State of Bolivia and Ecuador, where there is no competition law, decision 608 applies. The Ministry of Trade and Exports of the Plurinational State of Bolivia and the Ministry of Industry and Competitiveness in Ecuador are the designated authorities.

<sup>45</sup> Ibid.